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I. INTRODUCTION

Among the numerous criticisms leveled at investor-state arbitration over the years, it has almost become *de rigueur* to point out a lack of transparency. In this arena "transparency" refers to the extent to which the public may be aware of the existence of a dispute, have access to key arbitral documents, or attend oral hearings.[1]

The investment arbitration mechanism was modeled after commercial arbitration, where disputing parties were masters of the proceedings and generally favored confidentiality. Gradually, scholars, practitioners, and policymakers started to condemn the emulation of the private model, highlighting that investor-state arbitration is a distinct creature.[2] Investment disputes repeatedly touch upon sensitive socio-political concerns–which are normally absent from commercial arbitration.[3] Arbitral tribunals perform "a supranational review of state acts," scrutinizing the conduct of public entities against the standards of treatment prescribed in investment treaties.[4] The outcome of these proceedings may limit the state's future legislative and administrative freedom, thus affecting its ability to pursue public welfare policies.[5] Because the controversy is so deeply interconnected with national policies, its aftermath will inevitably have direct effects on the citizenry. At their core, investor-state disputes are a public affair; thus, conducting them away from communal scrutiny is unacceptable in democratic societies.

Concerns about a lack of transparency arise throughout the proceedings, from the initiation of the dispute to the final award, as final arbitral awards are not always

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1. *See* Katia Fach Gómez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 FORDHAM INT'L L.J. 510, 528 (2012).

2. *See, e.g.*, Jack J. Coe Jr., *Transparency in the Resolution of Investor-State Disputes - Adoption, Adaptation, and NAFTA* Leadership, 54 U. KAN. L. REV. 1339 (2006); Kyla Tienhaara, *What You Don't Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries*, 6 GLOBAL ENVTL. POL. 73 (2006).

3. *See* Ross Buckley & Paul Blyschak, *Guarding the Open Door: Non-Party Participation Before the International Centre for Settlement of Investment Disputes*, 22 BANKING & FIN. L. REV. 353, 354 (2007); Filip Balcerzak & Jarrod Hepburn, *Publication of Investment Treaty Awards: The Qualified Potential of Domestic Access to Information Laws*, 3 GRONINGEN J. OF INT'L L. 147, 148 (2015).

4. Nigel Blackaby & Caroline Richard, *Amicus Curiae: a Panacea for Legitimacy in Investment Arbitration?*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 253, 255 (Michael Waibel et al. eds., 2010).

5. KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 373 (2013).

made public. The decision to publish the final award was traditionally in the hands of the parties. However, this does not mean that arbitral awards are necessarily either confidential or public, rather there is sometimes a *tertium quid*—awards that are only available to some members of the investment arbitration "clan" but not to others.

This article argues that the existence of clandestine or semi-private awards undermine the transparency of investor-state arbitration but also undercut the principle of "equality of arms." In a nutshell, this principle "requires that there be a fair balance between the opportunities afforded the parties involved in litigation."[6] Be it at the domestic or international level, adjudication cannot be conceived without the key ingredients of "procedural fairness," "integrity of process," or "good administration of justice."[7] Thus, equality of arms is a quintessential principle in the investor-state arbitration procedure.[8] According to Wälde, this reflects a growing "juridification" of international judicial procedures and is part of a process by which "the material and procedural elements of the wider concept of the 'rule of law' find increasing acceptance in the evolving proto-constitutional regime in the global economy."[9]

Some of the implications of the inevitable link between international investment arbitration and the principle of equality of arms have received ample attention from scholars. It has been noted that states may abuse their dual role as both sovereigns and disputing parties, thereby impairing the required equality of arms.[10] Authors have also discussed the tense relationship between the standard of review to be applied by investment tribunals—which, some believe, should include a certain degree of deference to respondent states—and the need to ensure party equality.[11]

The existence of concealed arbitral awards that circulate among hand-picked arbitration practitioners prevents public access to important arbitral decisions. In addition, concealed awards further the existence of information asymmetries in the market for arbitration services, potentially affecting different stakeholders and undermining party equality. This feature of investment arbitration seems to be at odds with the requirements of the rule of law, which is that accountable institutions must make their decisions in a transparent manner, ensuring the predictability of their rulings and the equality of the parties.[12] While recent years have been marked by a

6. A Dictionary of Law (9th ed. 2018).

7. Thomas Wälde, *Procedural Challenges in Investment Arbitration Under the Shadow of the Dual Role of the State–Asymmetries and Tribunals' Duty to Ensure, Pro-actively, the Equality of Arms*, 26 ARB. INT'L 3, 11 (2010).

8. *Id*. at 38; Thomas Wälde, '*Equality of Arms' in Investment Arbitration: Procedural Challenges*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 161 (Katia Yannaca-Small ed., 2010); ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW: PROCEDURAL ASPECTS AND IMPLICATIONS 100 (2014).

9. Wälde, *supra* note 7, at 14.

10. *Id*.

11. *See* Stephan Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review*, 3 J. OF INT'L DISP. SETTLEMENT 577 (2012); Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT'L L. 545 (2014); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 55 (2013).

12. *See generally* Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 627 (Stephan Schill ed., 2010).

significant shift toward greater transparency, the existence of a considerable number of clandestine awards is remnant of the early days of investment arbitration, when this dispute settlement mechanism functioned as an almost carbon copy of, the typically confidential, commercial arbitration. Shining light on older and more recent awards that remain in this state of concealment should be part of any plea for an investment dispute settlement system in line with the fundamental tenets of the rule of law.

Section II of this article explains how the current legal regime allows for the existence of clandestine awards and discusses the negative consequences arising therefrom. Section III examines how different actors are particularly affected by this situation, from legal counsel to disputing parties and arbitrators. Section IV proposes ways to address the issues discussed in the earlier sections. Section V concludes by emphasizing that arbitration awards should be made equally available.

II. CLANDESTINE AWARDS

Most investment treaties contain no explicit legal obligation to make arbitral awards public.[13] This is the case with many older investment agreements. However, a younger generation of investment treaties provides for greater transparency throughout the various stages of the proceedings, including the publication of final arbitral awards and other key documents.[14] Traditionally arbitration rules were also silent in this regard, leaving the decision in the hands of the parties.

Pursuant to Article 48(5) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), "The Centre shall not publish the award without the consent of the parties."[15] This norm is restated in the Centre's Rules of Procedure for Arbitration Proceedings.[16] However, the same rule adds that "[t]he Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal."[17] As a result of these provisions, the publication of the entire text of ICSID arbitral awards is dependent upon the consent of the parties. When the Centre obtains such consent, it posts the award on its website[18] and reprints it in the ICSID Review–Foreign Investment Law

13. Balcerzak & Hepburn, *supra* note 3, at 150.

14. *See, e.g.*, Article 38 of the Canada 2004 Model Bilateral Investment Treaty, https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf (last visited Sep. 25, 2019) (awards shall be publicly available, subject to the deletion of confidential information); Article 17 of the Norway 2007 Draft Model Bilateral Investment Treaty, https://www.italaw.com/sites/default/files/archive/ita1031.pdf, (all awards and substantive decisions of the tribunal shall be made publicly available) (last visited Sep. 25, 2019); Article 29 (e) of the 2012 U.S. Model Bilateral Investment Treaty (mandates publication of all orders, awards and decisions of the tribunal, subject to essential security exceptions and to special procedures to protect confidential information–article 29) https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (last visited Sep. 25, 2019).

15. International Center for Settlement of Investment Disputes, *ICSID Convention Regulation and Rules* 25 (2006), https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf.

16. *Id.* at 122.

17. *Id*.

18. ISCID Database, ICSID, https://icsid.worldbank.org/cases (last visited Sep. 25, 2019).

Journal. To facilitate this result, ICSID frequently encourages disputing parties to assent to publication.[19]

While the publication of excerpts of the legal reasoning of the tribunal is better than nothing, such extracts only offer a piecemeal vision of the proceedings, preventing a clear analysis of the mechanics of the panel's decision-making process.[20] The underlying factual context and legal reasonings are frequently obscured by the fragmented selection of a few passages.[21] While the rules prevent ICSID from publishing the award without the parties' consent, they are silent regarding the actions of the disputing parties themselves. As a result, it is not clear whether the parties can disclose any documents, including the final award.[22] In this regard, the North American Free Trade Agreement has adopted a higher level of transparency, providing that states or the investor may unilaterally make the award public.[23]

The United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, in its original 1976 version, provided that the award could be made public "only with the consent of both parties."[24] The second version of the rules, released in 2010, introduced a slight variation, stating that the award might be made public "with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority."[25] The adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("UNCITRAL Rules on Transparency")[26] in 2014 was a game-changer. As a rule, all orders, decisions, and awards of the arbitral tribunal shall be made available to the public,[27] subject to some exceptions for the protection of confidential or protected information.[28] The new rules apply to disputes arising out of "future treaties," treaties concluded on or after the date the Rules–became effective, when investor-state arbitration is initiated under the UNCITRAL Arbitration Rules unless the parties agree otherwise.[29] However, they can also apply to treaties concluded before 2014, when parties to the relevant treaty, or disputing parties, agree to their application.[30] To incorporate the UNCITRAL Rules on Transparency into the

19. NIGEL BLACKABY, *Public Interest and Investment Treaty Arbitration*, *in* INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 355, 360-361 (Albert Jan van den Berg ed., 2003).

20. Eric Gottwald, *Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?* 22 AM. U. INT'T L. REV. 237, 257, n. 96 (2007).

21. Susan Franck, *The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future* 12 U.C. DAVIS J. OF INT'L L. & POL'Y 47, 88 (2005).

22. Christina Knahr & August Reinisch, *Transparency versus Confidentiality in International Investment Arbitration–The Biwater Gauff Compromise*, 6 L. & PRAC. INT'L CTS. & TRIBUNALS 97, 100 (2007).

23. North American Free Trade Agreement, Art. 1137 and Annex 1137.4, http://www.sice.oas.org/trade/nafta/chap-112.asp (last visited Sep. 25, 2019).

24. United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL Arbitration Rules* art. 32(5) (1976), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf.

25. *Id.* at art. 34(5).

26. United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (2014), http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf [hereinafter UNCITRAL Rules on Transparency].

27. *Id.* at art. 3(1).

28. *Id.* at art. 7.

29. *Id.* at art. 1(1).

30. *Id.* at art. 1(2).

UNCITRAL Arbitration Rules, a new provision was added to the latter set of rules and became effective April 1, 2014.[31] A catch-all way for States to make the UNCITRAL Rules on Transparency applicable to old investment treaties is by joining the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency").[32] However, states are not exactly rushing to do so; since the convention became effective on October 18, 2017, only five countries have ratified it: Mauritius, Canada, Switzerland, Cameroon, and Gambia.[33]

The UNCITRAL Rules on Transparency constitute the new golden standard of transparency in the field of investor-state arbitration. However, it remains to be seen to what extent disputing parties and contracting states will agree to submit their disputes to this amplified level of transparency, given the unrestricted publication of arbitral awards.

Moving from rules to practice, it is common for one of the disputing parties to submit an award for publication in a journal or relay related information to news media.[34] While institutional rules do not establish any sanction for such unilateral disclosure,[35] once an award falls into the public domain it is frequently disseminated in print and electronically. Although print-based sources are an important repository of arbitral awards,[36] internet databases are the main repository of arbitral decisions. These online repositories are maintained by arbitral institutions,[37] contracting states,[38] universities,[39] scholars,[40] practitioners,[41] or commercial companies.[42]

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31. *Id.* at art. 1(4) (For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency"), subject to article 1 of the Rules on Transparency).

32. United Nations Commission on International Trade Law (UNCITRAL*), United Nations Convention on Transparency*, *in Treaty-based Investor-State Arbitration* art. 7(2) (2015), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf.

33. United Nations Commission on International Trade Law (UNCITRAL), *Status: United Nations Convention on Transparency*, *in Treaty-based Investor-State Arbitration* (N.Y., 2014) (2021), https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status.

34. Buckley & Blyschak;*, supra* note 3 at 150; Amanda Norris & Katina Metzidakis, *Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water* War, 15 HARV. NEG. L. REV. 31, 48 (2010).

35. *See* Susan Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. REV 1, 19, n. 81 (2007).

36. Examples include *ICSID Reports*, the *Stockholm International Arbitration Review*, *International Legal Materials* and *NAFTA Arbitration Reports*.

37. *See supra* note 15, at 122; Permanent Court of Arbitration, *Cases* (2021), https://pca-cpa.org/en/cases.

38. *See*, Government of Canada, *The North American Free Trade Agreement (NAFTA) - Chapter 11– Investment* (April 5, 2019) http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta.aspx?lang=eng; United States Department of State, *NAFTA Investor-State Arbitrations* (2019), https://www.state.gov/s/l/c3439.htm; Franck, *supra* note 35, at 19 n. 82 (In countries that enacted statutes on freedom of information, governments are more likely to disclose an award or consent to its disclosure).

39. *See* Oxford University, *Investment Claims,* http://oxia.ouplaw.com (last visited Sep. 25, 2019).

40. *See* Italaw.com, *Investment Treaty Arbitration*, https://www.italaw.com (last visited Sep. 25, 2019).

41. *See, e.g.*, *Todd Weiler – Independent International Arbitrator*, NAFTA CLAIMS, http://www.naftaclaims.com (last visited Sep. 25, 2019) (recording NAFTA investment arbitration reports between 1999 and 2015, as maintained and updated by attorney Todd Grierson Weiler).

42. *See, e.g.*, KLUWER ARBITRATION, http://www.kluwerarbitration.com (last visited Sep. 25, 2019); INV. ARB. REP., https://www.iareporter.com (last visited Sep. 25, 2019).

The United Nations Conference on Trade and Development ("UNCTAD") manages the "Investment Policy Hub."[43] In April 2014, the UNCITRAL launched a Transparency Registry for investor-state arbitrations, which made a broad range of arbitral awards available.[44] While some of these internet resources are open to everyone, others require a subscription,[45] which may be a significant obstacle for scholars and practitioners with limited financial resources.

Beyond those cases where one or both parties voluntarily circulate the final award, the internet age also brought about new, informal gateways into information. Herrmann coined the concept of "transleakancy" to refer to "quasi-transparency via leaked documents."[46] News on arbitration cases and even final awards are sometimes leaked, for instance, by watchdogs. Details about the specifics of arbitral awards are also frequently discovered when successful investors seek to enforce them in national courts.[47]

Due to either voluntary or involuntary disclosure, a large number of arbitral awards are publicly available. However, this does not mean that the full text of awards are always accessible. Occasionally, awards circulate within the legal community without identifying information. While these sanitized awards provide useful substantive information, they offer no information about the parties' identities and the basic contours of the dispute.[48] This raises the question of whether the current state of affairs is consistent with the level of transparency required by the tenets of the rule of law. The investor-state arbitration system is more transparent than in its early days and awards are published more frequently.[49] From this perspective, the vast majority of investment awards are currently available to the

43. INVESTMENT POLICY HUB, UNCTAD, http://investmentpolicyhub.unctad.org (last visited Sep. 25, 2019) [hereinafter UNCTAD].

44. TRANSPARENCY REGISTRY, UNCITRAL, www.uncitral.org/transparency-registry (last visited Sep. 25, 2019).

45. *See, e.g.*, *Investment Claims*, *supra note* 39; KLUWER ARBITRATION, *supra note* 42; INV. ARB. REP., *supra note* 42.

46. Christoph Herrmann, *Transleakancy*, *in* TRADE POLICY BETWEEN LAW, DIPLOMACY AND SCHOLARSHIP 39, 40 (Christoph Herrmann et al. eds., 2015).

47. *See, e.g.*, Benjamin H. Tahyar, *Confidentiality in ICSID Arbitration after AMCO Asia Corp. v. Indonesia: Watchword or White Elephant?*, 10 FORDHAM INT'L L. J. 93, 113 (1986); *see also* Norris & Metzidakis, *supra note* 34, at 55.

48. Luke E. Peterson, *All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties*, *in* INTERNATIONAL INVESTMENT FOR SUSTAINABLE DEVELOPMENT: BALANCING RIGHTS AND REWARDS 123, 130 (Lyuba Zarsky ed., 2005).

49. Franck, *supra* note 21, at 87; Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1319 (2006); Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L. J. 341, 370 (2007); Gabrielle Kaufmann-Kohler & Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?: Analysis and Roadmap*,
CIDS–GENEVA CENTER FOR INT'L DISP. SETTLEMENT 15-16 (June 3, 2016), http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf (last visited Sep. 25, 2019); Daniel Magraw et al., *Ways and Means of Citizens' Participation in Trade and Investment Dispute Settlement Procedures*, SIEL INAUGURAL CONF., GENEVA 2008, Working Paper No. 53/08, at 17, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159770 (last visited Sep. 25, 2019).

public.[50] Many awards become available very quickly[51] and only a minority are not in the public domain.[52] However, the nonexistence of a single repository for investment awards[53] makes access to caselaw the most difficult task for those researching in this field.[54] Thus, there are still a significant number of decisions beyond the reach of the public;[55] publication of awards is not the rule but the exception.[56]

All in all, it can be said that while a lot of information is available, it is impossible to know how much is not.[57] In 2005, UNCTAD observed that the "total number of treaty-based investment arbitrations is impossible to measure" and the actual number of claims is "very likely larger than what is known."[58] This statement probably still holds true today, determining the percentage of arbitral awards that are publicly available depends on quantifying the total number of arbitrations that have reached the award stage, and that is practically impossible. The overall number of disputes cannot be measured with accuracy because there is no legal requirement that arbitral institutions maintain a registry of cases initiated. Of the major arbitral institutions, only ICSID maintains a public registry of claims.[59] In any case, it would be impossible to determine exactly how many proceedings take place *ad hoc*, without any administering institution.[60] Empirical data might be offered to substantiate claims on both sides of the discussion, but it can always be refuted as incomplete and fragmented, leaving analysts to rely on their gut feeling.

What is undeniable is that the investor-state arbitration system is incomparably more transparent than it used to be. In recent years, there has been an explosion in the number of investment disputes,[61] triggering a wave of public concern and academic curiosity for this branch of international law. There is now a large and well-established community of practitioners, academics, think-tanks, and non-governmental organizations closely monitoring every development in the law and practice

50. Franck, *supra note* 35, at 19 n. 84; DIEGO P. FERNÁNDEZ ARROYO, *Private Adjudication Without Precedent?*, *in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 119, 129 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014); Campbell McLachlan, *Investment Treaties and General International Law*, 57 INT'L & COMP. L.Q. 361, 379 (2008).

51. ARROYO, *supra note* 50, at 131; Stephan W. Schill, *International Investment Law and Comparative Public Law—An Introduction*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3, 18 (Stephan W. Schill ed., 2010).

52. Franck, *supra note* 35, at 19-20.

53. *Id*. at 18.

54. MARCI HOFFMAN & MARY RUMSEY, INTERNATIONAL AND FOREIGN LEGAL RESEARCH: A COURSEBOOK 287 (2d ed., 2012).

55. Balcerzak & Hepburn, *supra* note 3, at 148; Gottwald, *supra* note 20, at 257; James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77, 115 (2007); Luke E. Peterson, *Bilateral Investment Treaties and Development Policy-Making* 13, 26 (Int'l Inst. for Sustainable Dev., 2004).

56. HOFFMAN & RUMSEY, *supra* note 54, at 287; Blackaby, *supra* note 19, at 360; Gottwald, *supra* note 20, at 256.

57. Susan Karamanian, *The Place of Human Rights in Investor-State Arbitration* 17 LEWIS & CLARK L. REV. 423, 427 (2013).

58. UNCTAD, INVESTOR-STATE DISPUTES ARISING FROM INVESTMENT TREATIES: A REVIEW 5-6 (2005), https://unctad.org/system/files/official-document/iteiit20054_en.pdf (last visited Sep. 2019).

59. *See* ICSID Database, *supra* note 18.

60. That is why Investment Policy Hub keeps a record of so-called "known treaty-based investor-State arbitrations." *See* UNCTAD, *supra* note 43.

61. *See, e.g.*, UNCTAD's Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement (last visited Sep. 25, 2019) (listing 942 cases, 331 of which pending; however, this number was not totally accurate as it did not include the disputes initiated in 2019).

of investment law. To do so entails keeping abreast of the reasoning, mechanics, and minutiae employed by arbitral panels in each new case. What is more, it does not mean that older awards are being brought into the light either. Even if they lose some freshness over time, ground-breaking decisions frequently become landmarks, paving the way for consolidated doctrinal and jurisprudential streams. This is not a matter of legal archaeology, it is one of comprehensive and consistent analysis of jurisprudential flows. It is difficult to identify a landmark when it cannot be seen, just like it is challenging to take the right direction if road signs are hidden.

The current situation is problematic for a variety of reasons. First, this state of semi-transparency prevents a comprehensive analysis and accounting of investment treaty arbitrations,[62] damaging the legitimacy of the dispute settlement mechanism itself.[63] Second, the fact that some awards remain private may affect the quality of future decisions.[64] Precedent is much more important in investment arbitration than in commercial disputes.[65] Investment disputes normally revolve around a limited range of provisions pertaining to, *inter alia*, the meaning and scope of a short number of standards of treatment. Since fairly similar issues arise frequently, knowing prior decisions is even more important,[66] as new cases refine the issues.[67] While there is no formal system of binding precedent in investment arbitration, parties often invoke and tribunals frequently examine and cite prior decisions when facing similar issues of law or fact.[68] Hence, previous investment awards have a persuasive,[69] *de facto,*[70] maybe even exaggerated,[71] precedential value. Furthermore, having access to previous awards allows arbitral panels to avoid inconsistencies by taking into account the way previous tribunals dealt with similar questions.[72] This helps to enhance the efficiency, certainty, and predictability of the system, increasing the confidence in the investor-state dispute settlement mechanism.[73]

Third, arbitral awards also have a pedagogical effect. Because of their central role in the law and practice of international investment, investors, governments, and their counsels consider previous awards when planning and carrying out their investment strategies.[74] They serve as points of reference that shape expectations regarding future decisions, awards may even have a deterrent effect by preventing unnecessary disputes.[75] If investment awards are not accessible to anyone, they offer no assistance in increasing the predictability of the system.[76] From a broader

62. Peterson, *supra* note 55, at 13.
63. Norris & Metzidakis, *supra* note 34, at 62.
64. *Id*. at 61.
65. Franck, *supra* note 21, at 73-75.
66. David Gaukrodger, *Adjudicator Compensation Systems and Investor-State Dispute Settlement*, 5 OECD WORKING PAPERS ON INT'L INV. 28-29 (2017), https://www.oecd-ilibrary.org/docserver/c2890bd5-en.pdf?expires=1614159264&id=id&accname=guest&checksum=460C734517D7516A953ED358D000774B.
67. BLACKABY, *supra* note 19, at 360-61; Gottwald, *supra* note 20, at 256.
68. Gottwald, *supra* note 20, at 256; Roberts, *supra* note 11, at 53; ARROYO, *supra* note 50, at 128.
69. Peterson, *supra* note 55, at 27; Roberts, *supra* note 11, at 53; ARROYO, *supra* note 50, at 129.
70. Franck, *supra* note 21, at 73; ARROYO, *supra* note 50, at 129.
71. BLACKABY, *supra* note 19, at 360.
72. Franck, *supra* note 21, at 73-74, 87.
73. Knahr & Reinisch, *supra* note 22, at 111; Franck, *supra* note 21, at 89.
74. Franck, *supra* note 21, at 75, 87; *see also* Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1611-12 (2005).
75. Schill, *supra* note 51, at 18-19.
76. Norris & Metzidakis, *supra* note 34, at 60.

perspective, the unrestricted publication of awards will allow the community to be aware of the potentially negative consequences of arbitral decisions on national interests.[77] If awards are not available to the common citizen, the general public's right to scrutinize the impact of the decision is hampered.[78] This reason alone—the right of citizens in truly democratic societies to know about decisions that may affect them—should lead to a presumption of transparency, unless confidentiality can be justified, in whole or in part.[79]

The regular publication of arbitral awards is crucial for the proper functioning of the investor-state dispute resolution system. The current situation, where some awards are public, but others are not, or at least not to everyone, affects the legitimacy of the institution itself and is also detrimental to its stakeholders—arbitral tribunals, investors and governments, and the community at large. What is more, it also has a nefarious impact on the functioning of the market for investment arbitration services, potentially undermining the principle of equality of arms. Such peculiar negative consequences are discussed below.

III. Information Asymmetries and Equality of Arms

As discussed above, it is virtually impossible to determine the exact percentage of investment awards that are not public. While some believe that most awards are available to everyone, many others do not. However, things are not always black and white, there is a grey zone where only a privileged few have access to select arbitral awards. Like all shady businesses, it is difficult to offer empirical evidence on the extension of this furtive or clandestine traffic, how many people have access to how many of these secret awards is unknown. Still, several authors have provided anecdotal evidence of the existence of this underground market where arbitral awards circulate within a closed circle of well-connected arbitration professionals, or the "magic circle."[80] These practitioners may take advantage of such insider knowledge to promote their work and advance their careers.[81]

The fact that some awards are not available to all interested parties under equal conditions fosters the existence of an underground market for awards, undermining the equality of arms between different participants in the investment dispute settlement mechanism. Some stakeholders are not equipped with the same knowledge about some awards that may be relevant for their work, favoring those inside the magic circle and creating incentives to retain the status quo.

A. Legal Counsel

The existing information asymmetry in the arbitration market may affect different stakeholders. First, not all legal counsel are created equal, some have access

77. Franck, *supra* note 21, at 87.
78. Blackaby, *supra* note 19, at 360.
79. Bernardo Cremades & David Cairns, *The Brave New World of Global Arbitration*, 3 J. of World Inv. & Trade 173, 197 (2002).
80. Franck, *supra* note 21, at 87 n. 151; Peterson, *supra* note 55, at 13.
81. Franck, *supra* note 35, at 19 n. 81.

to unpublished awards while others do not.[82] This creates a division between those with inside knowledge, because they belong to a privileged professional network, and those who have to rely on materials of public knowledge. The former has the upper hand because they have access to a wider collection of authoritative case law to devise their strategies and support their arguments, and thus a greater probability of success.[83] They can cite the most eloquent and influential excerpts word for word, echoing the persuasive voice of previous tribunals. The latter see their right to present the best possible case for their clients confined to perusing the conventional case law that everyone else is familiar with.[84]

Inequities in legal representation are as old as the legal profession itself and can be explained by market dynamics. However, they are aggravated by the unusual existence of verdicts that are only within the reach of some, reinforcing the advantage of insiders over newcomers.[85] While initially there was a small, close-knit community of lawyers working on a few sporadic investment cases, the expansion of the caseload over the last decade attracted many new practitioners.[86] The existence of secluded groups building on the expertise accrued over years of "insider trading," reinforcing their advantage in such a technical, specialized field of the law, while hindering any expansion of the pool of legal counsel with sufficient *savoir-faire* to become a credible alternative.

Lawyers working for one of the magic circle law firms with specialty practices in investment treaty arbitration fortify their competitive advantage in various ways. First, they work more often in investment cases than their competitors, acquiring valuable experience and professional connections in the field.[87] Second, they work for firms that have built substantial institutional knowledge regarding previous arbitration awards and the whole habitat surrounding investor-state disputes.[88] Third, major law firms frequently have privileged information about investment disputes solved by a settlement agreement and may use this knowledge to persuade their adversaries to do the same.[89] Finally, some of the major international firms have lawyers who engage in "double hatting," serving as arbitrators in other cases. Naturally, wearing different hats provides these practitioners with a unique acumen of the inner workings of arbitration, namely of how fellow arbitrators reason and decide.[90]

"Magic circle" law firms, also referred to as "big law," spread in tandem with the expansion of transnational trade and investment and the globalization of the legal profession. They are the natural consequence of market dynamics, with legal work increasingly requiring specialized knowledge and cross-border expertise. However, the existence of clandestine awards may encourage the development of an underground market for unpublished awards, either through information leaks or

82. Franck, *supra* note 21, at 87 n. 151; Peterson, *supra* note 55, at 26; Luke Peterson, *BIT award against Russia being challenged in Swedish appeal court* (Oct. 27, 2004), https://www.iisd.org/itn/wp-content/uploads/2010/10/investment_investsd_oct27_2004.pdf; Gottwald, *supra* note 20, at 257.

83. BLACKABY, *supra* note 19, at 360-61; Rogers, *supra* note 49, at 357.

84. BLACKABY, *supra* note 19, at 360.

85. Rogers, *supra* note 49, at 357.

86. Stephan Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUROPEAN J. OF INT'L L. 875, 887-88 (2011).

87. Gottwald, *supra* note 20, at 252.

88. *Id.*

89. Peterson, *supra* note 55, at 16, 26; Gottwald, *supra* note 20, at 253.

90. Gottwald, *supra* note 20, at 253.

the emergence of private libraries for the benefit of a few well-established members of the legal profession.[91]

B. Disputing Parties

The current situation affects legal counsel that do not have access to unpublished awards but also, and perhaps more importantly, their clients, who are deprived of the best possible legal representation in highly specialized disputes, thereby creating a fundamental imbalance between disputing parties[92] This perpetuates an information asymmetry and a power imbalance between parties who can afford to hire one of the magic circle law firms and those who lack the necessary financial resources.[93] Disputing parties who are unable to retain highly sophisticated and seasoned counsel face an uphill battle.[94] This problem may affect responding states and investors alike. Poor, developing counties and small, inexperienced companies are especially vulnerable.[95]

Developed countries normally have adequate resources and legal expertise in-house to mount a capable defense in investment arbitration.[96] Developing countries' governmental departments, on the other hand, may lack the necessary knowledge and experience to defend their interests as vigorously.[97] Unable to afford the often stunning billable hours charged by outside counsel,[98] responding states may have no choice but to turn to government lawyers who are sometimes little more than apprentices in the field of investment law and arbitration. Such legal counsel may not be familiar with the relevant case law, let alone unpublished awards.[99] This has led to appalling inequality in the quality of legal representation between powerful multinational investors and low-income respondent states.[100] The only silver lining in this scenario is that some developing nations acquire considerable expertise in the process.[101] This expertise takes several years to build and may be costly if such lessons are learned through consecutive, expensive defeats.[102]

Fearing the potentially disastrous results of this "do it yourself" attitude, many developing nations retain outside counsel to defend investment treaty claims.[103] However, this option also has costs. In 2005, then Secretary-General of the ICSID, Roberto Dañino, noted that the growing costs of arbitration was a source of concern, adding that "[t]his is particularly true for the low-income countries, and for a few

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91. Elina Zlatanska, *To Publish, or Not to Publish Arbitral Awards: That is the Question…*, 81 INT'L J. OF ARB., MEDIATION & DISP. MGMT. 25, 26 (2015). Beyond the scope of this chapter is the question of how the handling of unpublished awards may constitute a breach of rules of professional conduct. A legal counsel may, for instance, fail to disclose an unpublished award which might adversely affect his case or be prohibited from disclosing an award that might positively impact his case because he is under an obligation to keep it confidential. *See* Franck, *supra* note 21, at 87, n. 151.
92. Franck, *supra* note 21, at 88.
93. Peterson, *supra* note 55, at 26.
94. *See* Wälde, *supra* note 7, at 179.
95. *Id.*
96. Gottwald, *supra* note 20, at 253.
97. Franck, *supra* note 21, at 92; Peterson, *supra* note 55, at 26; Gottwald, *supra* note 20, at 257-58.
98. Gottwald, *supra* note 20, at 254.
99. *Id.* at 260.
100. *See id.* at 255.
101. *Id.*
102. *See id.* at 257.
103. *Id.* at 253-54.

small companies, which cannot afford being represented by the most experienced and sophisticated law firms in the field, as claimants usually are."[104] If they turn to local law firms, governments are frequently faced with lawyers who also lack the necessary expertise and are strangers to the magic circle. They too will struggle to find relevant precedent and may ignore the precious precedential value of clandestine awards.[105]

Amicus curiae participation could assist respondent states in their defense by introducing legal arguments not addressed by the host state in its submissions.[106] However, most non-governmental organizations and civil society groups with adequate funding and technical expertise are based in developed countries.[107] Local amici may be unfamiliar with unpublished awards. The inability of some respondent states to access clandestine awards may even have negative effects that extend beyond the confines of a particular case. If states are unsure about how arbitral tribunals might apply standards of treatment in the future, their policy response could be limited or even frozen out of fear of future lawsuits.[108]

Claimants, or foreign investors, are not necessarily in a better position than responding states. It is true that in most disputes, foreign investors secure legal representation from one of the major international law firms,[109] thereby accessing the privileged information within the magic circle. This is the case with repeat players, multinational companies that, through multiple court appearances, amass substantial proficiency and experience in investor-state arbitration. However, small companies who are inexperienced with international arbitration may struggle to access clandestine awards. These problems are aggravated when the responding state is represented by a major law firm.[110]

Overall, it can be said that clandestine awards may affect investors and states alike, but this problem is especially acute for lower-income states, that have more to lose than investors[111] and risk the payment of hefty compensations without access to relevant authority to defend their case.

C. Arbitrators

As previously discussed, the nonpublic status of some awards may affect the work of arbitral panels, preventing them from finding guidance and inspiration in prior decisions and avoiding potential inconsistencies. However, the private

104. Roberto Dañino, *Opening remarks by Robert Dañino*, MAKING THE MOST OF INTERNATIONAL INVESTMENT AGREEMENTS: A COMMON AGENDA (2005) http://www.oecd.org/daf/inv/internationalinvestmentagreements/36053800.pdf (last visited May 9, 2020).

105. Gottwald, *supra* note 20, at 255-56.

106. *Id*. at 258; On the advantages and drawbacks of amicus curiae participation in investment arbitration, *see* Fernando Dias Simões, *Friends with Benefits? Amicus curiae in the TPP Investor-State Dispute Settlement Mechanism*, *in* PARADIGM SHIFT IN INTERNATIONAL ECONOMIC LAW RULE-MAKING: TPP AS A NEW MODEL FOR TRADE AGREEMENTS? 105 (Julien Chaisse et al. eds., 2017).

107. Gerard Clark & Alan Thomas, *Nongovernmental Organizations, Civil Society, and Development Governance*, *in* INTERNATIONAL DEVELOPMENT GOVERNANCE 415-6 (Ahmed Shafiqul Huque & Habib Zafarullah eds., 2006).

108. Fry, *supra* note 55, at 115; On the so-called 'regulatory chill', *see* Kyla Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 606 (Chester Brown & Kate Miles eds., 2011).

109. Gottwald, *supra* note 20, at 253; Norris & Metzidakis, *supra* note 34, at 66.

110. Fry, *supra* note 55, at 115.

111. *Id*.

circulation of these clandestine awards affects the work of arbitrators by inhibiting the development of their arbitration careers. Clandestine awards are not the exclusive possession of legal counsel–they also circulate informally among arbitrators.[112] This favors the creation or maintenance of another "magic circle," that of a few well-connected adjudicators.

Investment arbitrators are individuals who sell their services as adjudicators to disputing parties in the market.[113] They belong to an elite pool of legal professionals with diverse backgrounds. While the number of individuals working in investment arbitration is growing,[114] there is still a narrow pool of experts with sufficient expertise and experience.[115] This pool is manifestly insufficient to address the challenges of an astounding increase in the number of investment proceedings over the last few years. In addition, there is a sort of vicious circle in the arbitrator appointment process, where reputation attracts cases and cases build reputation. The following question arises: How can the renewal and enlargement of the pool of arbitrators be promoted by including younger practitioners and providing them with suitable opportunities to acquire experience and knowhow? Experience can only be accumulated through practice. However, if the system relies too much on experience, symbolized by prior appointments, it leads to a chicken and egg situation where newcomers are excluded from the possibility of arbitrating because they do not have enough experience, but they are never given the chance to acquire more experience. The system ends up reinforcing this vicious circle, narrowing down the pool of suitable candidates to a point where the individuals being appointed are always the same, increasing the demand for their services and reinforcing their position in the market.

Developing a solid reputation as an arbitrator depends on the perceived quality of the awards rendered. Awards are strong signals to the market for arbitration services.[116] Disputing parties and appointing institutions examine prior awards carefully when pondering potential appointments. Arbitrators know that what they say in each award not only produces an effect within the strict limits of that particular dispute but can also have an impact on future cases and prospective appointments.[117] This kind of strategic signaling is, to some extent, inevitable—arbitrators are aware that what they say can benefit or harm themselves. That is, of course, if their words are ever read, the existence of clandestine awards protects arbitrators and their work from public scrutiny.[118] Their work cannot be judged by the legal community at large, but only by a few arbitration insiders. This may have a chilling effect on up-and-coming arbitrators, preventing them from exposing their talent consistently and furthering their careers. In addition, parties are also deprived of

112. *See* Peterson, *supra* note 55, at 26; Gottwald, *supra* note 20, at 257.

113. Michael Goldhaber, *The Rise of Arbitral Power over Domestic Courts*, 1:2 STAN. J. OF COMPLEX LITIG. 373, 406-07 (2013).

114. Meg Kinnear, *ICSID and International Investment Treaty Arbitration: Progress and Prospects*, *in* CHINA AND INTERNATIONAL INVESTMENT LAW: TWENTY YEARS OF ICSID MEMBERSHIP 9, 21 (Wenhua Shan & Jinyuan Su eds., 2015).

115. Sergio Puig, *Emergence and Dynamism in International Organizations: ICSID, Investor-State Arbitration and International Investment Law*, 44 GEO. J. OF INT'L L. 531, 594 (2013).

116. Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 86 (2010).

117. Roberts, *supra* note 11, at 53.

118. Norris & Metzidakis, *supra* note 34, at 60.

important samples about the quality of potentially suitable alternative arbitrators.[119] Only a systematic publication of arbitral awards would provide a full picture of the arbitrators available in the market and enable a thorough assessment of their decision-making patterns.[120]

Finally, the existence of nonpublic awards inhibits the unique opportunity to train current and future arbitrators.[121] Aspiring and inexperienced arbitrators may struggle to build professional experience without the ability to rely on some of the most authoritative case law to support their arguments and decisions, instead they must rely on the conventional case law that is ordinarily available to all arbitrators. Just like in the case of legal counsel, this ends up reinforcing the magic circle phenomenon.

In addition, this problem reinforces the existence of so-called "private arbitration clubs" by diminishing the possibility that some legal counsel will also act as arbitrators. Functioning as an investment arbitrator does not require exclusivity, as investment arbitration is not functionally specialized.[122] As a result, many lawyers offer their services in the market for dispute resolution services in other capacities. There is a high degree of role reversibility; investment practitioners may appear in some proceedings as arbitrators, while in others they act as counsel.[123] This situation is recurrently described as the "double hat"[124] or "multiple hat" phenomenon.[125] Again, younger, inexperienced legal counsel may be prevented from advancing their professional careers and develop a consistent practice as an arbitrator.

IV. REDRESSING THE IMBALANCE

The previous section demonstrated that the existence of secret arbitral awards promotes the existence of information asymmetries in the market for arbitration services, potentially undermining the equality of arms between different participants in the investment dispute settlement mechanism. The fact that some stakeholders are not equipped with the same knowledge about certain awards that may be relevant for their work favors those inside the magic circle and creates incentives

119. *Id.*

120. Kapeliuk, *supra* note 116, at 52.

121. Alexis Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969, 1019 (2001); Francois Dessemontet, *Arbitration and Confidentiality*, 7 AM. REV. OF INT'L ARB. 299, 302 (1996); Norris & Metzidakis, *supra* note 34, at 61.

122. José Costa, *Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields*, 1 Oñati Socio-Legal Series, SOCIO-LEGAL ASPECTS OF ADJUDICATION OF INT'L ECON. DISP. 1, 22 (2011).

123. Malcolm Langford, Daniel Behn & Runar Hilleren Lie, *The Revolving Door in International Investment Arbitration*, 20 J. of Int'l Econ. L. 301 (2017); MUTHUCUMARASWAMY SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 58, n. 151 (2015); Muthucumaraswamy Sornarajah, *The Past, Present and Future of the International Law on Foreign Investment, in* CHINA AND INTERNATIONAL INVESTMENT LAW: TWENTY YEARS OF ICSID MEMBERSHIP (Wenhua Shan and Jinyuan Su eds., 2015).

124. Langford, Behn & Lie, *supra* note 123.

125. NATHALIE BERNASCONI-OSTERWALDER & DIANA ROSERT, INVESTMENT TREATY ARBITRATION: OPPORTUNITIES TO REFORM ARBITRAL RULES AND PROCESSES 13 (Int'l Inst. for Sustainable Dev., 2014).

to retain the status quo. In a time when there are so many calls for diversity in international adjudication,[126] this problem merits careful attention.

The past few years have brought about a fresh and much-needed wave of transparency in the realm of investor-state arbitration. In the future, more and more awards will become publicly available thanks to the operation of more modern investment treaties, arbitration rules, and the growing application of the UNCITRAL Transparency Rules. Still, many older investment treaties contain no explicit legal obligation to make arbitral awards public. Contracting States should strive to amend these instruments to enshrine a public right of access to information, subject only to strict limitations regarding genuinely sensitive information. Instead of doing this for every single treaty, states may simply ratify the Mauritius Convention on Transparency, making the rules applicable to all their investment treaties concluded before April 1, 2014, insofar as the other party or parties to the treaty have done the same.[127]

States can also address this problem by enacting domestic laws on freedom of information, requiring the public disclosure of arbitral awards—again, subject to the necessary safeguards for the protection of confidential business and governmental information. The same result can be achieved with investors through the conclusion of investment contracts that require the publication of any awards resulting from potential disputes. Finally, if the UNCITRAL Transparency Rules are not applicable already, respondent states should agree to their application in each new arbitration, but this consent would not bind the claimant.[128]

Arbitral institutions also have an important role to play. As indispensable stakeholders in the market for international arbitration services, they should consider amending their rules in a way that encourages disputing parties to consent to the public disclosure of final awards.[129] Not only does this enhance public perceptions about the transparency and accountability of arbitral institutions but it also allows them to showcase the quality and quantity of their caseload.

The ICSID, the leading provider of investor-state dispute settlement services, has been discussing the reform of its arbitration rules and regulations since 2016. One of the potential areas for amendment is the publication of arbitral awards. Presently the ICSID Convention does not authorize the Centre to publish the award without the consent of the parties.[130] A reform of the ICSID Convention is not on the table, and so the rule will be maintained.[131] Still, the Centre is discussing a potential amendment of article 48(4) of the Rules of Procedure for Arbitration Proceedings, which currently shadows the provisions of the convention.[132] The new

126. *See generally* Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?* 12 CHICAGO J. OF INT'L L. 647 (2012); Susan Franck et al., *The Diversity Challenge: Exploring the Invisible College of International Arbitration*, 53 COLUM. J. OF TRANSNAT'L L. 429 (2015); Cristina Florescu, *Report on the Diversity Roundtable at Vienna Arbitration Days 2018*, 8 L. REV. INT'L J. OF L. & JURIS. 42 (2018).

127. *See* UNCITRAL Rules on Transparency, supra note 26, at 5.

128. *See id*.

129. Franck, *supra* note 35, at n. 81; Franck, *supra* note 21, at 88.

130. ICSID, *supra* note 15, at 25.

131. ICSID, BACKGROUNDER ON PROPOSALS FOR AMENDMENT OF THE ICSID RULES (ICSID 2018).

132. ICSID, *supra* note 15, at 122.

rule 61, entitled "Publication of Awards and Decisions on Annulment," reads as follows:[133]

> (1) With consent of the parties, the Centre shall publish every Award, supplementary decision on an Award, rectification, interpretation, and revision of an Award, and decision on annulment.
> (2) The parties may consent to publication of the full text or to a jointly redacted text of the documents referred to in paragraph (1).
> (3) Consent to publish the documents referred to in paragraph (1) shall be deemed to have been given if no party objects in writing to such publication within 60 days after the dispatch of the document.
> (4) Absent consent of the parties in accordance with paragraphs (1)-(3), the Centre shall publish excerpts of the document. The following procedure shall apply to publication of excerpts:
> (a) the Secretary-General shall propose excerpts to the parties within 60 days after the date upon which a party declines consent to publication of the document;
> (b) the parties may send comments on the proposed excerpts to the Secretary- General within 60 days after their receipt; and
> (c) the Secretary-General shall consider any comments received on the proposed excerpts, and publish excerpts within 30 days after receipt of such comments.

The proposed rule reiterates that awards cannot be published without party consent, reflecting the current practice. However, the novel third paragraph deems the parties to have consented to publication of the award if they do not object, in writing, within 60 days after dispatch of the award. This means that parties can still object to publication, in which case the Centre will publish excerpts of the legal reasoning in the award, following a specific new procedure and timeline contained in the fourth paragraph. Only time will tell if the parties will consent, either expressly or impliedly to publication more frequently than before.

As the major institution administering investor-state disputes, it is only natural that ICSID approaches any drastic reform cautiously. While acknowledging that many submissions from stakeholders "supported greater transparency in principle," it also recognizes that some states "expressed a wide variety of positions on which documents should be public."[134] The Centre recalled that member states of the ICSID Convention have "various options . . . to calibrate the level of public access to documents in ICSID cases: they can ratify the Mauritius Convention, add specific transparency provisions to their investment instruments or endeavor to reach consensus on the level of transparency in individual cases."[135] ICSID also emphasized that disputes "arise out of investment contracts and laws, and not just treaties. The transparency regime adopted should be suitable to cases based on all of these different types of instrument."[136] All in all, ICSID believes that the current proposals

133. ICSID, *Proposals for Amendment of the ICSID Rules* 64, Int'l Centre for Settlement of Inv. Disputes, Working Paper No. 3 (2019).
134. ICSID, *Proposals for Amendment of the ICSID Rules* 870, Int'l Centre for Settlement of Inv. Disputes Secretariat, Working Paper (2018).
135. *Id*. at 872.
136. *Id*. at 873.

"ensure that the most important documents and information are made available to the public and that documents and information which are properly confidential or otherwise protected are not disclosed to the public."[137]

Another way of promoting public access to arbitral awards would be the creation of a legal assistance center specialized in investor-state arbitration. This idea has been floated for some time as a tool to promote equality of arms in investor-state arbitrations involving low-income nations.[138] In 2009, UNCTAD proposed the creation of an institution "that developing countries could draw on for support in investment law and investor-state disputes."[139] This legal assistance center could be modeled after the Advisory Centre on World Trade Organization ("WTO") Law,[140] which was created specifically to advise developing nations in trade disputes at the WTO.

A legal assistance center could help to diminish information asymmetries in the market for legal representation in investment arbitration[141] by serving as a repository for both published and unpublished tribunal awards.[142] Such a facility would also help to prepare domestic lawyers in developing countries to engage in investment law disputes, thus mitigating the current advantage of disputing parties that can retain the legal counsel of the magic circle.[143]

A market for legal services where some disputing parties, arbitrators, and legal counsel have access to unpublished awards while others do not seems to skew the playing field in favor of the former, tarnishing the basic idea that should preside over any form of adjudication, that there must be an equality of the parties. This creates a gap between insiders and outsiders, favoring the creation and maintenance of magic circles and private clubs. Investment arbitration may have its historical roots in commercial arbitration, but market dynamics are harder to explain and accept when they get in the way of healthy competition between legal professionals. Clandestine awards are a form of insider trading that gives some participants an unfair advantage in a highly technical and specialized field of law.

V. CONCLUSION

Access to arbitral awards should be equal to all, regardless of their experience, professional or informal connections. The full text of arbitral awards should be accessible to the public and the whole legal community, subject only to the necessary safeguards for the protection of confidential business and governmental information. This is possible in most cases and requires only certain exceptions to the

137. *Id.* at 347.

138. *See* IISD, IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT: NEGOTIATORS HANDBOOK 56 (Int'l Inst. For Sustainable Dev., 2005); Gottwald, *supra* note 20, at 264; Franck, *supra* note 21, at 93; Susan Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARVARD INT'L L. J. 435, 484 (2009); Susan Franck, *The ICSID Effect–Considering Potential Variations in Arbitration Awards*, 51 VIRGINIA J. OF INT'L L. 825, 911 (2011).

139. UNCTAD, LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT 12 (United Nations Conf. on Trade and Dev., 2009).

140. *See* Advisory Center on WTO Law, at http://www.acwl.ch; *see also* Kim van der Borght, *The Advisory Center on WTO Law: Advancing Fairness and Equality*, 2 J. OF INT'L ECON. L. 733 (1999).

141. Franck, *Development and Outcomes*, *supra* note 138, at 484.

142. Gottwald, *supra* note 20, at 269.

143. *See* Franck, *The ICSID Effect*, *supra* note 138, at 911.

rule, which may be accomplished by redacting parts of an award.[144] The publication of arbitral awards that omit the parties' name but contain the arbitrator's identification, the relevant facts, and the legal reasoning, would potentially contribute to the development of the investment arbitration services market and, more broadly, of investment law and practice.

144. Knahr & Reinisch, *supra* note 22, at 115.