

ARBITRATING IN THE AGE OF INVESTMENT TREATY DISPUTES

L YVES FORTIER*

International commercial arbitration has experienced immense success over the past decades as the preferred means of resolving transnational business disputes. Investment treaty arbitration, in which States are held accountable by private foreign investors for alleged breaches of their international obligations, has similarly flourished with the growth in bilateral and multilateral trade and investment treaties. Recourse to arbitration in this latter context has, however, produced tension between two of the pillars of the arbitral model of dispute resolution - privacy and confidentiality on the one hand, and the interest of the public in understanding both the process and outcome of these disputes insofar as they affect the public at large on the other.

This tension is, to some degree, a natural extension of a broader movement visible at the municipal level to make governments and regulatory structures more transparent and accountable to the citizens they serve.¹ As Karl-Heinz Böckstiegel has astutely observed, challenges which affect the world community have a correlative impact on international arbitration:

international arbitration reflects the international community as its political and economic environment, and international law as its legal environment. Their development and progress as well as their challenges have and should have an impact on the development and progress of the codification and practice of international arbitration. Good arbitration practice will have to take that into account.²

‘Good arbitration practice’ in this context requires that the international arbitration community reflect on and contribute to the development of meaningful responses capable of satisfying public concern over the use of international arbitration to resolve investor-state disputes.

* Chairman and senior partner, Ogilvy Renault LLP, Montreal, Canada. The author wishes to thank Alison FitzGerald, an associate at Ogilvy Renault LLP, for her invaluable contribution to the research and writing of this paper.

1 See Organisation for Economic Co-operation and Development (‘OECD’), *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, Statement by the OECD Investment Committee, June 2005, 4. See also Asha Kaushal, ‘Reconciling the Public Interest: Third-Party Participation, Confidentiality and Privacy in NAFTA Chapter 11 Arbitrations’ (2006) 9(6) *International Arbitration Law Review* 172, 183, attributing in part the demand for resolution of the tensions between privacy and confidentiality in arbitration on the one hand, and transparency of the arbitral process to the public on the other hand to the availability of and recourse to municipal access to information procedures.

2 Karl-Heinz Böckstiegel, ‘The Role of Arbitration within Today’s Challenges to the World Community and to International Law’ (2006) 22 *Arbitration International* 165.

This task effectively involves the reconciliation of ‘competing public interests’ – a challenge that Nigel Blackaby has aptly described as follows:

There is a risk of this new child in the world of international arbitration dying in infancy, delicate and overprotected by its parents from exposure to the outside world. The arbitration community should not take the role of the overprotective parents, suffocating its natural development and depriving it of survival skills in the outside world by reciting the mantra of confidentiality. Concrete steps can be taken to everyone’s advantage to ensure that investment treaty arbitration matures into a powerful tool for the effective protection of foreign investment and thereby a motor for international commerce, whilst at the same time balancing the legitimate concerns that have been expressed. To do that we need to understand and seek to reconcile competing public interests.³

A coherent response to the public interest in greater transparency in investment treaty arbitration therefore requires that a balance be struck between that ‘legitimate concern’ and the equally legitimate, traditional conception of arbitration as an inherently private and confidential mode of dispute resolution. The positioning of this balance is likely to depend upon perceptions surrounding the necessity of maintaining confidentiality and privacy in such proceedings in order to protect investors from unlawful interference with their investments and the potential harm that this may cause to the public.

It is beyond the scope of this paper to attempt to prescribe a cure-all for meeting this challenge – indeed, it is doubtful that any single prescription would suffice. Nevertheless, several observations can be made at this time.

I TOOLS OF THE TRADE: CONSENT, PARTICIPATION, AND PUBLICATION

Experience has shown that counsel and arbitrators involved in international commercial arbitration – whether in commercial or investment matters – are in general fully capable of arguing and adjudicating cases involving public law issues.⁴ This is not to say that disputes raising public law issues will not and do not pose a challenge for the arbitral process.⁵ Indeed, the concern is particularly acute in view of recent suggestions that a ‘global administrative law’ is emerging from the complex layers of governance and decision-making on public law matters at the local, regional and international levels.⁶ Nevertheless, several

3 Nigel Blackaby, ‘Public Interest and Investment Treaty Arbitration’ (Paper presented at the Swiss Arbitration Association Conference on Investment Treaties and Arbitration no 19, Zurich, 25 January 2002).

4 See Yves Fortier, ‘The Principle and Practice of Arbitrability: Do we have the Ability to Deal with the Consequences? International Economic Dispute: A Wider Perspective’ (Paper presented at the LCIA Colloquium, Cambridge, United Kingdom, 2004) 12.

5 See Donald Donovan, ‘International Commercial Arbitration and Public Policy’ (1995) 27 *New York University Journal of International Law and Politics* 645, 657, concerning potential implications of increasing reliance on international commercial arbitration to resolve disputes that have both a commercial and a public law dimension.

6 See Gus Van Harten and Martin Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’ (2006) 17 *European Journal of International Law* 121; Benedict Kingsbury, Nico Krisch, and Richard Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15.

procedural tools are available to and increasingly relied upon by parties, tribunals and arbitration institutions to ensure that public interest concerns are addressed. These include open hearings, the participation of public interest groups through the submission of written briefs (*amici curiae*), and the publication of awards and other decisions.

The Methanex arbitration, a North American Free Trade Agreement ('NAFTA') Chapter 11 case,⁷ marked a significant departure from the traditional closed model of arbitration and has influenced the manner in which other commercial disputes raising public law issues are conducted. Several public interest advocacy groups petitioned the tribunal, seeking status as *amici curiae* and observers. Methanex and Mexico, which itself was an intervener, opposed the petitions. Canada and the United States contended that although the tribunal had a limited power to receive written *amicus* submissions, it was inappropriate to accept such submissions in this case. The tribunal determined that Article 25(4) of the United Nations Commission on International Trade Law Arbitration Rules ('*UNCITRAL Rules*'), under which the arbitration was conducted, precluded it from granting the petitioners access to documents filed in the proceeding or the hearings absent the consent of the parties.⁸ However, the tribunal agreed with Canada and the United States that Article 15(1) of the *UNCITRAL Rules*, which permits a tribunal to 'conduct the arbitration in such manner as it considers appropriate', conferred a limited power on the tribunal to accept *amicus* submissions.⁹

The tribunal acknowledged that there were both substantive and procedural grounds to allow *amicus* submissions in the arbitration, reasoning as follows:

There is undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public importance than a dispute between private persons. The public interests in this arbitration arises from its subject matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm.¹⁰

7 See *Methanex Corporation v United States of America*, UNCITRAL (NAFTA), Final Award, 7 August 2005 ('*Methanex*').

8 *Methanex Corporation v United States of America*, UNCITRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as '*Amici Curiae*', 15 January 2001 ('*Methanex Amici Curiae Decision*'). Article 25(4) of the *UNCITRAL Rules* states: 'Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.'; *UNCITRAL Rules* (1976), General Assembly Resolution 31/98, adopted by the General Assembly on 15 December 1976.

9 *Methanex Amici Curiae Decision*, above n 8, [31], [47]. Article 15(1) of the *UNCITRAL Arbitration Rules* states: 'Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case'.

10 *Methanex Amici Curiae Decision*: *ibid* [49].

The issue arose again in the NAFTA Chapter 11 dispute between United Parcel Service of America Inc and Canada.¹¹ The Canadian Union of Postal Workers and the Council of Canadians petitioned the tribunal for standing as parties to the proceedings or, alternatively, for the right to intervene as amici curiae. They also requested disclosure of the pleadings and the right to make submissions concerning the place of arbitration and the tribunal's jurisdiction. The tribunal observed that the proceedings should not to be equated with the 'standard run of international commercial arbitration between private parties'.¹² Consistent with *Methanex*, the tribunal determined that although it had no authority to add parties to the dispute, Article 15(1) of the *UNCITRAL Rules* did confer upon it the power to receive amicus submissions for the purpose of facilitating the tribunal's 'process of inquiry into, understanding of, and resolving, that very dispute which has been submitted to it in accordance with the consent of the disputing parties.'¹³ The tribunal therefore allowed the petitioners to make submissions on the substance of the dispute (though not on the threshold issues), but denied them access to the documents filed in the proceedings.

In both *Methanex* and *UPS*, the parties agreed to conduct the hearings in public, with limited exceptions to ensure the confidentiality of proprietary information. In October 2003, the governments of the United States and Canada formally joined the trend by committing to open hearings in all Chapter 11 disputes within certain limitations necessary to ensure the protection of confidential information. Mexico followed in 2004, further to the issuance of a statement by the NAFTA Free Trade Commission ('FTC') on the participation of non-disputing parties in NAFTA Chapter 11 proceedings.¹⁴

In its statement, the FTC confirmed that NAFTA does not limit a tribunal's discretion to accept written submissions from non-disputing parties.¹⁵ It recommended, however, specific procedures to be adopted by tribunals in respect of amicus submissions, including the application of a three-tiered threshold to amicus petitions: (1) amicus submissions must be limited to matters within the scope of the existing dispute; (2) the petitioner must have a 'significant interest' in the arbitration; and (3) there must be a 'public interest' in the subject-matter of

11 See *UPS v Government of Canada*, UNCITRAL (NAFTA), Final Award, 24 May 2005 ('*UPS*'). The author of this paper was a member of this NAFTA tribunal.

12 *UPS v Government of Canada*, UNCITRAL (NAFTA), Decisions of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, [70].

13 Ibid [38]–[39], [60].

14 Canada, the United States and Mexico have since issued general statements consenting to open arbitral proceedings under Chapter 11, limited only to the extent necessary to 'ensure the protection of confidential information, including business confidential information'. FTC, *Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations* (2003) Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/open-hearing.aspx?lang=eng>> at 20 April 2008; Office of the United States Trade Representative, *Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations* (2003) <http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf> at 20 April 2008.

15 FTC, *Statement of the Free Trade Commission on Non-disputing Party Participation* (2004) <<http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/Nondisputing-en.pdf>> at 20 April 2008.

the arbitration.¹⁶ The FTC elected not to define ‘significant interest’ or ‘public interest’, preferring to leave it to tribunals to address these matters as they arise.

The Chapter 11 dispute between Glamis Gold Ltd and the United States is the first dispute in which the FTC’s statement was considered.¹⁷ *Glamis* involved the alleged breach by the United States of the minimum standard of treatment and expropriation provisions of Chapter 11 of the NAFTA with regard to operation of a gold mine in California on or near sacred tribal lands. The Quechuan Indian Nation successfully petitioned the tribunal to submit an amicus brief.¹⁸ Although neither ‘significant interest’ nor ‘public interest’ was explicitly addressed by the tribunal in its decision, the tribe had asserted that the manner in which the sacred areas in issue and the tribe’s interest in them were portrayed in the arbitration could potentially have a wide-ranging impact on similar proceedings worldwide. The tribe further argued that any decision requiring the United States to compensate Glamis could result in either revocation of environmental measures protecting those areas or increased cost to taxpayers of maintaining the measures.

Following the tribunal’s decision to accept submissions from the Quechuan Nation, several public interest advocacy groups, including Friends of the Earth and the National Mining Association, also successfully petitioned the tribunal to submit amicus briefs.¹⁹ Thus, the ‘public interest’ in that case encompassed not only the tribe’s direct interest in preservation of its relationship to the sacred lands implicated by the dispute, but also the broader interests respectively expressed by two advocacy groups in guarding against a chill on investment in US mining projects, and encumbrance of a government’s right to protect public health and the environment from the potentially significant impacts of large scale mining projects.

Tribunals constituted under the auspices of the International Centre for the Settlement of Investment Disputes (‘ICSID’) have also grappled with the issue of the public interest in investment treaty arbitrations. The first case in which this issue arose involved a dispute over the municipal water and sewerage concession in Cochabamba, Bolivia.²⁰ Over 300 persons filed a joint petition requesting, inter alia, standing as parties to the arbitration or, alternatively, the right to

16 Ibid B(3)(d), B(6)(b), B(6)(c), and B(6)(d).

17 *Glamis Gold Ltd v United States of America*, UNCITRAL (NAFTA), Notice of Arbitration, 9 December 2003 (‘*Glamis*’). The merits hearing in this arbitration took place in August and September of 2007. As of the date of writing, an award has not yet been issued.

18 See *Glamis Gold Ltd v United States of America*, UNCITRAL (NAFTA), Quechuan Indian Nation Application for Leave to File a Non-Party Submission and Submission, 19 August 2005. Courtney Coyle, *Quechuan Indian Nation Application for Leave to File a Non-Party Submission and Submission* (2005) NAFTA Claims <<http://www.naftaclaims.com/Disputes/USA/Glamis/Glamis-Amicus-Quechuan-01--19-08-05.pdf>> at 20 April 2008.

19 The Friends of the Earth submission touched not only on the merits of the dispute but also on the tribunal’s jurisdiction to hear the investor’s claim: see *Glamis Gold Ltd v United States of America*, *Amicus Curiae* Submissions of Friends of the Earth Canada and Friends of the Earth United States, 30 September 2005 <<http://www.naftaclaims.com/Disputes/USA/Glamis/Glamis-Amicus-FOE-01B--30-09-05.pdf>> at 20 April 2008, 4–14.

20 *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Jurisdiction, 21 October 2005 (‘*Aguas del Tunari*’). See also Andrew Tweeddale, ‘Confidentiality in Arbitration and the Public Interest Exception’ (2005) 21 *Arbitration International* 59, 64.

participate as amici curiae and open hearings. The tribunal determined that absent the consent of the parties, it did not have the power to join non-parties to the proceeding or to open the hearings to the public. The tribunal observed, nevertheless, that such a finding did not prejudice its authority under Article 44 of the *Washington Convention*,²¹ which provides that the tribunal has discretion to decide any question which is not covered by its Rules of Procedure for Arbitration Proceedings (*'Arbitration Rules'*), to call witnesses or receive information from non-parties on its own initiative.²²

In a case involving Vivendi Universal in 2005, an ICSID tribunal constituted to consider a dispute regarding a water and sewerage concession in Buenos Aires was also asked to rule on an amicus curiae petition.²³ As in *Aguas del Tunari*, the tribunal denied the petitioners' request to attend the hearing on the basis that the parties' consent was required.²⁴ Nevertheless, following the lead of the *Aguas del Tunari* and *Methanex* tribunals, the *Vivendi* tribunal determined that it had the authority to accept amicus briefs.²⁵

The tribunal observed that courts have traditionally accepted the intervention of amici in 'ostensibly private litigation because those cases have involved issues of public interest and because decisions in those cases have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case'.²⁶ It went on to note that virtually every investment treaty arbitration involves, by definition, matters of public interest because the international legal responsibility of the Respondent State is in issue. The tribunal's decision turned, however, on the existence of what it considered to be a 'particular public interest' in the subject matter of the dispute:

The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve.²⁷

21 'Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.'; *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, opened for signature 18 March 1965, art 44 (entered into force 14 October 1966) (*'Washington Convention'*).

22 *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No. ARB/02/3, Introductory Note (2002) <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListConcluded>> at 20 April 2008.

23 *Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, SA v The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005 (*'Vivendi Amicus Order I'*).

24 The tribunal also deferred the petitioners' request for access to documents filed in the dispute until such time as the tribunal was in a position to grant leave to a third party, to file an amicus brief: *ibid* [31].

25 *Ibid* [25].

26 *Ibid* [19].

27 *Ibid*.

Consistent with the *Methanex* tribunal's dicta, the *Vivendi* tribunal acknowledged that the acceptance of amicus submissions would engender desirable consequences, such as improving the transparency of investment treaty arbitration and strengthening public acceptance of 'the legitimacy of international arbitral processes' through increased openness and knowledge about how those processes function.²⁸ The tribunal therefore granted leave to the petitioners to make amicus submissions on the merits once the jurisdictional phase was completed.

At the merits phase of the proceedings, the petitioners renewed their requests both to file amicus submissions and for access to documents. This time, the tribunal took an arguably even broader approach to the 'public interest' grounds for accepting the submissions:

The Tribunal does not believe that the withdrawal of AASA and the end of the concession changes the nature of the subject matter of this case. Nor do they render such subject matter inappropriate for an *amicus* submission. Even if its decision is limited to ruling on a monetary claim, to make such a ruling the Tribunal will have to assess the international responsibility of Argentina. In this respect, it will have to consider matters involving the provision of "basic public services to millions of people". To do so, it may have to resolve "complex public and international law questions, including human rights considerations"... It is true that the forthcoming decision will not be binding on the current operator of the water and sewage system of Buenos Aires. It may nonetheless have an impact on how that system should and will be operated. More generally, because of the high stakes in this arbitration and the wide publicity of ICSID awards, one cannot rule out that the forthcoming decision may have some influence on how governments and foreign investor operators of the water industry approach concessions and interact when faced with difficulties.²⁹

In the Santa Fe arbitration, the same tribunal was constituted to hear claims against Argentina in relation to a water and sewerage concession in the province of Santa Fe. In that case, an environmental NGO and several individuals petitioned to present oral argument at the hearings of the case, to make amicus submissions, and for access to documents. Although the tribunal declined to grant the petition because the petitioners failed to provide adequate information and reasons to conclude that they qualified as amici curiae, the tribunal found that the case involved matters of public interest and left open the possibility that a new application could be made.³⁰

In view of these developments, ICSID amended its *Arbitration Rules* in 2006 to enhance the transparency and openness of all ICSID arbitrations. In so doing, it drew from arbitral practice and the NAFTA model expressed in the FTC's statement on non-disputing party participation. For example, Rules 32 and 37 of the ICSID *Arbitration Rules* were amended to confer greater discretion on

28 Ibid [22].

29 *Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v The Argentine Republic*, ICSID Case No ARB/03/19, Order in Response to a Petition by Five Non-Governmental organizations for Permission to Make an Amicus Curiae Submission, 12 February 2007, [18] (emphasis added).

30 *Aguas Provinciales de Santa Fe SA, Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006, [18]–[20].

tribunals to allow non-parties to attend and observe hearings and to file written submissions. Tribunals are only required to consult with the parties 'as far as possible' in respect of these matters.³¹ Rule 37, as amended, imposes constraints similar to those recommended by the FTC, such as confining submissions to the scope of the dispute as defined by the parties and requiring petitioners to meet a 'significant interest' test.³² Finally, Rule 48, which formerly prohibited publication of an arbitral award without the consent of the parties, now requires that the ICSID Secretariat promptly publish relevant excerpts of the tribunal's legal conclusions, irrespective of party agreement.

II RECONCILING COMPETING PUBLIC INTERESTS

As the above developments illustrate, over the past few years, significant efforts have been made within the international arbitration community, both at an ad hoc and at an institutional level, to address public concerns about the arbitral process in investor-state disputes. Rules and principles governing the manner in which matters of public interest are handled in investment treaty arbitrations have been developed and, in certain instances, codified. Nevertheless, it is apparent that concern remains as to the proper balance between the competing public interests in preserving the confidentiality and privacy of arbitral proceedings on the one hand, and in transparency and accountability on the other hand.

In order to achieve greater coherence in the approach taken to reconcile these competing interests, there must be a better shared understanding of these interests, as well as a consensus among the participants in investment treaty arbitration with respect to the extent of change desirable to the present dispute resolution framework. It is, of course, beyond the jurisdiction of an arbitral tribunal to unilaterally amend the rules agreed to by the parties to an arbitration.³³ The powers of a tribunal are inherently constrained by the agreement of the parties, and it is this agreement which provides the framework within which a dispute must be resolved. Nevertheless, *Methanex*, *UPS*, and *Vivendi*, among other cases, provide participants in the international arbitral system with the building blocks to develop a principled, transparent approach to these issues as they arise.

In simple terms, the public interest in preserving some measure of privacy and confidentiality in investment treaty arbitrations stems from early efforts to offer investors protection through an efficient, non-politicised dispute resolution mechanism. Historically, investors were forced to rely on their own governments to take up and pursue their claims on their behalf through diplomatic, as opposed

31 ICSID Secretariat, 'Suggested Changes to the ICSID Rules and Regulations' (Working Paper, ICSID, 2005), 10–1.

32 Ibid Draft Rule 37(2)(b) and (c).

33 This is explicit in article 42 of the Washington Convention. Article 42(1) provides: 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'.

to legal, channels.³⁴ This mode of dispute resolution, in its earliest form, typically resulted in a government sending a contingent of warships to moor off the coast of the offending state until reparation was paid, in a show of ‘gunboat diplomacy’.³⁵ The determination to vest in individual investors a right of direct recourse against states should therefore be considered in the light of the legitimate public interest of providing investors recourse to a meaningful and effective dispute resolution process, untainted by political motives. Privacy of the proceedings has served to ensure that this process is conducted efficiently and fairly. Although a return to the days of gunboat diplomacy is unlikely, care must be exercised to ensure that political considerations unrelated to the otherwise legitimate goals of transparency do not creep back in to the dispute resolution process.

As is evident in the decisions canvassed above, the public interest in greater transparency in the arbitral process today is generally anchored in the laudable objectives of good governance, with a view to discouraging arbitrariness in state conduct. These goals are not inconsistent with international arbitration. The question becomes how much transparency is needed to achieve these objectives. As an ICSID tribunal recently observed, a uniform rule in favour of disclosure when a matter of public interest is implicated by a dispute could exacerbate the dispute, or even affect the integrity of the arbitral procedure.³⁶ This suggests that a ‘public interest exception’³⁷ which would operate to remove any presumption of confidentiality in an arbitral proceeding is inconsistent with the core reasons for seeking dispute resolution through arbitration, and therefore inappropriate to balance the competing public interests in play. Indeed, a diversity of interests may and often do cluster under the banner of transparency – as illustrated in the *Glamis* case. Not all of these interests are necessarily on the same footing, nor are they in every circumstance sufficiently compelling to force the relinquishment of control over the arbitral procedure by the parties.

III CONCLUSION

Parties, arbitrators and arbitral institutions have begun to grapple with the tension between the traditional closed-door model of international commercial arbitration and the arbitration of disputes involving governments accountable to their citizens. This is evidenced by the growing body of arbitrations in which tribunals are striving to strike a balance between the parties’ rights to a fair and just resolution of the dispute between them and the legitimate public interest in the conduct and outcome of the dispute. The ground has certainly shifted toward

34 Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration* (4th ed, 2004) §11-01.

35 Ibid §11-01.

36 See *Biwater Gauff (Ranzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 3, 26 September 2006, [135]–[42].

37 See, eg, Andrew Tweeddale, above n 20; Joyiyoti Misra and Roman Jordans, ‘Confidentiality in International Arbitration: An Introspection on the Public Interest Exception’ (2007) 23 *Journal of International Arbitration* 39; Mabel Egonu, ‘Investor-State Arbitration Under ICSID: A Case for Presumption against Confidentiality?’ (2007) 24 *Journal of International Arbitration* 479.

greater transparency in investment treaty arbitration. The complexity of the challenge, however, posed by the need to balance the public's legitimate desire for greater transparency and accountability as against to the equally legitimate interest in ensuring that investor-state disputes are adjudicated fairly and effectively, must not be underestimated. As suggested above, both objectives are very much in the public interest.