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Juridical Convergence in International Dispute Resolution: Developing a Substantive Principle of Transparency and Transnational Evidence Gathering

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JURIDICAL CONVERGENCE IN INTERNATIONAL DISPUTE RESOLUTION: DEVELOPING A SUBSTANTIVE PRINCIPLE OF TRANSPARENCY AND TRANSNATIONAL EVIDENCE GATHERING

Pedro J. Martinez-Fraga†

I. Introduction .................................................. 38
II. Making a Case for Transparency as a Governing Norm in Cross-Border Evidence Gathering ........................................ 42
   A. The Privacy-Confidentiality Cloud Cloaking International Commercial Arbitration ........................................ 42
   B. The Privacy-Confidentiality Dichotomy that Arbitral Institutions Nurture: A “Conceptual Deficit” .................. 43
   C. The Award and “Black-Box” Deliberations ......................... 44
   D. Investor-State Arbitration Inherited a Culture of Privacy from International Commercial Arbitration ...................... 47
   E. Grounds for Disclosure: Yet Another “Privacy Vestige” ......... 49
   F. The “Privacy Vestige” in Award-Crafting .......................... 52
III. Investor-States’ Quest for Transparency but not a Transparency Norm .............................................. 52
   A. The ICSID Perspective ............................................. 53
   B. Revisiting Methanex and the Case for a Transparency Norm. ........................................................................... 55
IV. The Principle of Uncertainty in International Dispute Resolution and the Need for a Unifying Transparency Norm ............. 61
    A. Unsettled Structural Issues in Investor-State Arbitration .......... 61
V. A Substantive Transparency Norm and Evidence Gathering ....... 63
    A. In Search of a Principle of Transparency in International Law ........................................................................... 63
    B. Transparency in Select Sources of International Law ............ 66
    C. The Application of the Transparency Norm to International Evidence Gathering .............................................. 69
VI. Conclusion .......................................................... 71

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I. Introduction

The need for juridical convergence in public and private international law has never been greater. Significant paradigm shifts concerning traditional notions of sovereignty based upon national territory and geopolitical subdivisions, generally referred to as "Westphalian," have yielded to transnational, non-territorially premised, expansive views of this foundational norm. The modern conception of

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1 DANTÉ ALIGHIERI, DIVINE COMEDY 132-33 (John D. Sinclair, trans., rev. ed. 1961) (1472) (Canto X, The Inferno: “The people that lie within the sepulchres, may they be seen, for indeed all the covers are raised and no one keeps guard?”).

2 Id. at 162-3 (Canto XI, Paradiso: “Even as I reflect its beams, so, gazing into the Eternal Light, I perceive thy thoughts and the cause of them.”).

3 Westphalian sovereignty refers to the Peace Treaty between the Holy Roman Emperor and the King of France and their respective allies, October 24, 1648 (the "Treaty of Westphalia"). While the Treaty of Westphalia indeed brought an end to the Thirty-Year War, its most enduring legacy has been the treaty’s general discussion on the nature of sovereignty, which provided the foundations for a territorially based conception that accorded a virtual monopoly in international law to sovereign States. The writings of Grotius and Leibniz together with the treaty’s text provided a framework for a rigid and dogmatic conception of sovereignty that prevailed through the 20th century and is still accepted in some quarters today. See, e.g., J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 7-14 (9th ed. 1984). It is this very static understanding of sovereignty as the absolute exercise of political will over a geopolitical subdivision that in turn is defined by territorial boundaries that Black’s Law Dictionary defines as follows:

Sovereignty: the supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; paramount control of a constitution and frame of government; and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society or state, which is sovereign and independent.

BLACK’S LAW DICTIONARY 1396 (6th ed. 2009). Classical international law would thus concern the relationship between such “sovereign” states, always conducted with an understanding that such relationships could not impinge on the exercise of a political will within “sovereign” territorial boundaries.

sovereignty radically adjusts for the absolutist elements of its dogmatic predecessor in large measure by no longer viewing the territorial boundaries of States as coinciding with the limits of political authority over the economy and society.5

A broader doctrinal conception of sovereignty compels international law to engage in a revision of its most rudimentary principles. Here the suggestion is that international law, as the jurisprudence governing the relationship between nations—itself based on a paradigm of independence—requires a juridical convergence transcending national boundaries that would represent a model of interdependence6 rather than one of independence. Classical views of international law that find conceptual and analytical support in traditional Westphalian sovereignty are only concerned with the relationship between and among countries. They are proving to be incapable of addressing global problems pertaining to humanity, which far transcend the relationships between nations.7

The inability of international law to address the many shared crises of all citizens, such as: international terrorism, transnational security needs, global poverty, environmental threats that place in jeopardy the very survival of mankind and that likely shall lead to the displacement of millions of people, regional genocide, political corruption, unworkable judiciaries, sexual exploitation, the vertical and horizontal proliferation of nuclear weapons and similar armaments of mass destruction, and unprecedented food and water shortages—in short, human rights—brings the frailties and shortcomings of international law readily apparent. These common problems provide a normative foundation calling for a global law that addresses the needs of humanity that is configured as transnational and

Historically, sovereignty has been associated with four main characteristics: First, a sovereign state is one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, other governments recognize it as an independent entity entitled to freedom from external intervention. These components of sovereignty were never absolute, but together they offered a predictable foundation for world order. What is significant today is that each of these components—internal authority, border control, policy autonomy, and non-intervention—is being challenged in unprecedented ways.

Id. For related authority on this issue, see also JOHN AGNEW, GLOBALIZATION AND SOVEREIGNTY (2009); STEPHEN D. KRASNER, SOVEREIGNTY ORGANIZED HYPOCRISY (1999); JEAN BODIN, ON SOVEREIGNTY (Julian H. Franklin trans., 2007) (parenthetical).

5 The late Professor Louis Henkin aptly noted that "[f]or legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era." LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 10 (1995). Indeed, Professor Henkin opined that it would be best to get rid of "that 'S' word." See, e.g., Louis Henkin, That "S" Word: Sovereignty and, Globalization, and Human Rights, et cetera, 68 FORDHAM L. REV. 1 (1999).

6 The pre-eminence that the WTO, the WHO, the ILO, the World Bank, and the IMF acquired is indicative of non-nationally based institutions that have increasing relevance in the national affairs of state. Their development into NGOs and their ascendency exemplify the need to have institutions of relevant consequences beyond the Westphalian paradigm. In this same vein, the United Nation's standing as a "neutral forum" for the community of nations has never been more present. Therefore, so too has the exigency "to democratize" it become an imperative to its continued legitimacy.

7 See, e.g., RAFAEL DOMINGO, THE NEW GLOBAL LAW 65, 73 (Mortimer N. S. Sellers et. al. eds., 2010).
not inter-national.\textsuperscript{8} In addition to changes attendant to the doctrine of sovereignty, the need for juridical convergence has been underscored by economic and informational globalization.

The advent of unprecedented porous economic frameworks, product and service outsourcing, and a global economic standard of financial multilateralism has spawned a legal counterpart to economic globalization that is particularly evident in international trade law.\textsuperscript{9} The jurisprudence of international dispute resolution and international investment protection, however, have hardly fared as well in developing a multicultural rubric. It is in this context that international commercial arbitration ("ICA") and to a lesser extent, investor-state arbitration ("ISA"), have emerged as temporizing measures perhaps unbeknownst to the vast constituency in the world of commerce, law, and academia.\textsuperscript{10} ICA and ISA are serving as a bridge until a time comes when transnational courts of civil procedure vested with the authority to adjudicate private disputes arising from cross-border controversies are able to exercise jurisdiction over such conflicts. International arbitration, whether in the context of private international law or in the public international law investor-state matrix, shall serve as a Petri dish for the developing an ideal proportionality of different legal systems, which may ultimately create a confluence of legal cultures capable of satisfying the expectations of parties to transnational proceedings. It is to this new space, far beyond the ambit of a state's exercise of judicial sovereignty, that international dispute resolution must look to find its perfect workings.

Juridical convergence in international dispute resolution has perhaps met its most significant challenge in its efforts to reconcile civil law evidence gathering with U.S. common law discovery. The chasm dividing civil and common law traditions with respect to evidence gathering appears to be insurmountable and to some extent has proven that it may not be bridged. The most recent iteration of the International Bar Association Rules On The Taking Of Evidence in International Arbitration (the "IBA Rules") is emblematic of a significant effort to synthesize fundamental common and civil law concerns.\textsuperscript{11} The differences

\textsuperscript{8} For two divergent analyses as to normative underpinnings while calling for a transnational law rubric that may best address cross-border challenges that belong to humanity and to no single nation but rather a community of nations, compare RUT G. TEITEL, HUMANITY'S LAW (2011), with DOMINGO, supra note 7. As to Professor Domingo's work, see Pedro Martinez-Fraga, Rafael Domingo's The New Global Law, 56 McGill L.J. 767 (2011) (book review).


\textsuperscript{10} See, e.g., Hans Smit, The Future of International Commercial Arbitration: A Single Transnational Institution? 25 COLUM. J. TRANSNAT'L L. 9 (1986-87). Professor Smit notes that the increase in international commercial arbitrations has also caused the proliferation of new arbitral institutions, and adds:

The case for a new world-wide arbitration institution is overwhelming. On every count, its advantages far exceed those that can be offered by existing institutions. One might argue against a global institution on the ground that a similar case could be made for a world-wide judicial body, but that that body has found only very limited acceptance.

\textit{Id.} at 34. Professor Smit cites as authority for his latter observation the "light caseload" of the International Court of Justice, noting that it provides "a telling demonstration of the limited measure of acceptance that body has found." \textit{Id.} at n.135.

\textsuperscript{11} On May 29, 2010, the IBA published a new edition of its Rules that aspires "to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly
Juridical Convergence in International Dispute Resolution

separating these traditions compel the identification and development of legal norms, such as the IBA rules, capable of vesting efforts with greater substantive foundational grounding if they are to continue developing and satisfy competing expectations arising from disparate legal systems.12

This article aspires to constitute a modest half step towards the identification and development of international norms that are necessary if convergence in evidence gathering is to be taken seriously as an objective of international dispute resolution. It shall be asserted that a “privative transparency norm” would help to develop substantive definitions of key terms that are central to evidence gathering such as those found in the IBA Rules that cry for doctrinal development.13 Accordingly, the first section of this article focuses on making the case for why transparency (later to be termed “privative transparency norm”) is an appropriate norm that conceptually galvanizes convergence in cross-border evidence taking. As part of that undertaking, this section concentrates on articulating the privacy/confidentiality cloud that has historically shrouded ICA and, to a lesser extent, ISA proceedings.14 The second section examines the different applications and meanings that have been ascribed to transparency in international law documents, treaties, and select arbitral awards in order to limit the parameters of a future transparency norm and arrive at a single working understanding of the concept to be applied to evidence gathering. The third section identifies a “principle of uncertainty” endemic to the architecture and fundamental features of ICA and ISA. A fourth and final section of this writing applies a working transparency norm to foundational evidence gathering terms that form of part of the IBA Rules.

12 For present purposes, emphasis is placed on civil and common law legal traditions. If international dispute resolution is to be truly international, legal systems from the East and Middle East must be considered as part of the fashioning of transnational rules on evidence gathering.

13 In an earlier writing, Good Faith, Bad Faith, But Not Losing Faith: A Commentary on the 2010 IBA Rules on the Taking of Evidence in International Arbitration, I commented extensively on the IBA Rules and in so doing identified central terms on which the Rules’ rubric places considerable weight. Martina-Fraga, supra note 11, at 389. That contribution, however, merely suggested that transparency as a substantive norm was necessary, but did not elaborate on the suggestion as being outside the scope of its subject matter. See id. at 426-30.

14 It shall be asserted that a “privacy vestige” is eminently detectable in ISA as part of the structural legacy that international commercial arbitration bequeathed to it.
II. Making a Case for Transparency as a Governing Norm in Cross-Border Evidence Gathering

A. The Privacy-Confidentiality Cloud Cloaking International Commercial Arbitration

ICA has developed in a culture of privacy that is often misapprehended for absolute confidentiality and that has suffered in its acceptance based on the mercurial appetite and expectations of its consumers. The private nature of ICA arises from its distinct and unique space within private international law. In contrast with its judicial counterpart, ICA is wholly removed from judicial proceedings because it is not a manifestation of an exercise of sovereignty in furtherance of the purported equitable administration of justice. Private commercial dispute resolution, as a creature of contract, is exercised beyond the realm of the state’s adjudicative framework and therefore forecloses any actual or perceived public entitlement to access or disclosure. Indeed, it was this very administration of justice parallel to the state’s exercise of sovereignty, as an alternative to the state’s judicial system, that first spawned in both England and in the United States the judicial antagonism against arbitration that pervaded and delayed its development as a system of adjudication considered to be in pari materia with legal proceedings.

The privacy and attendant perception of confidentiality that attached to ICA remains a compelling feature for its evolving consumer base. Despite the absence of authority for the proposition that confidentiality, as opposed to privacy, constitutes a salient feature of ICA, the principle “is seen as implicit or a corollary to an agreement to resolve a dispute by way of arbitration.”

Private international arbitration institutions were created with private disputes in mind. These institutions deliberately enshrined lack of transparency or privacy,


17 In a 2010 survey of in-house counsel that the School of International Arbitration at Queen Mary University in London conducted, 84% of the persons surveyed expressed having elected arbitration, at minimum in part, “because of its 'confidentiality.’” Rémy Gerbay, Deputy Registrar, London Court of International Arbitration, Oral Presentation Given at the University of Warsaw: Confidentiality vs. Transparency in International Arbitration: The English Perspective, (Feb. 9, 2011), in 9 Transnat’l Disp. Mgmt. 1 (2012). In these thoughtful remarks the author explains how “if arbitration is by definition private, it is not necessarily confidential.” Id.

18 The privacy-confidentiality dichotomy in international dispute resolution finds its apogee in the developing practice and “jurisprudence” of investor-state arbitration by dint of the introduction of genuine public standing compelling challenges to basic privacy assumptions that were only legacy driven.

19 See, e.g., Fulvio Fracassi, Confidentiality and NAFTA Chapter 11 Arbitrations, 2 Chi. J. Int’l L. 213 (2001). It is not within the scope of this writing to address the confidentiality/privacy dichotomy in international commercial arbitration. On this point, suffice it to observe that generally any confidentiality is subordinated to the principle of party-autonomy, such that by agreement of the parties confidentiality under certain circumstances would never attach.
which in turn generated a "democratic deficit." They add that "[r]esearchers continuously lament about the difficulties in assembling information as a result of continued secrecy in international arbitration, and there remain concerns that insiders continue to enjoy unfair advantages because of the lack of transparency." The most recent iteration of the principal arbitral rules suggests that there is no requirement for institutional publication of any information whatsoever concerning the conduct of an arbitral proceeding absent an agreement by the parties to the contrary. Maupin observes "[t]hat not only the outcome but the very existence of an investor-state dispute may never be disclosed. Further, the confidentiality provisions of these rules prohibit tribunals from ordering the disclosure of the disputing parties’ pleadings and evidence without the parties’ consent." The very institutional rules that procedurally structure ICAs and administer the proceedings themselves underscore the privacy-confidentiality dichotomy together with the attendant "democratic deficit." The more emblematic pronouncements certainly compel review.

B. The Privacy-Confidentiality Dichotomy that Arbitral Institutions Nurture: A "Conceptual Deficit"

As a general matter and in stark contrast with judicial proceedings, most arbitral institutions state outwardly that hearings are private, subject to agreement by the parties or as otherwise provided by applicable mandatory law. The pre-

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22 See id. at 1325-26.


24 Maupin, supra note 23, at 15 (citing SCC Rules, art. 46).

25 See ICDR Rules, supra note 23, art. 4 (providing that "[t]he tribunal may require any witness or witnesses to retire during the testimony of other witnesses" and "[t]he tribunal may determine the manner in which witnesses are examined." Id. The 2012 iteration of the ICC Rules is
Juridical Convergence in International Dispute Resolution

sumption of privacy that attaches to ICA proceedings need not be stated in the various institutional rules because the very nature of the proceeding itself is private. Therefore, any statement concerning the private character of the process would be little more than aesthetic emphasis.  

None of the rules of the major arbitral institutions define "privacy" or "confidentiality." It is conceptually problematic that the two terms often appear to be used interchangeably. Confidentiality, however, is accorded greater deference and is mostly addressed in the context of what may be confidential pursuant to applicable substantive law. The paucity of any effort by these institutions to distinguish between privacy and confidentiality is disconcerting and further accentuates the culture of the ill-defined privacy-confidentiality status permeating ICA. The want of any attempt to define the terms beyond merely referring to confidentiality as a term of art to be given substance by applicable substantive law is equally unavailing. Thus, in addition to a democratic deficit, a normative conceptual deficit also appears to attach.

C. The Award and "Black-Box" Deliberations

The opaque culture defining the framework of ICA is also engrafted onto (i) the finding of facts and conclusions of law to be expected of any reasoned adjudication, (ii) the very publication of the award, and (iii) the deliberation process. The principal arbitral institutions shy away from classifying awards either as private or confidential. Instead, they emphasize non-disclosure or non-communication to third parties of material private terms. All "decisions"—a term nowhere silent on privacy but cognizant as to confidentiality. ICC Rules, supra note 23, art. 22(3). This article provides:

Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

Id. Here party-autonomy is accorded greater weight than a general presumption of confidentiality or even of privacy.

LCIA Rules, supra note 23, art. 19.4. This article, for example, flatly states that the hearings are private "unless the parties agree otherwise in writing or the arbitral tribunal directs otherwise." Id. (emphasis added).


ICDR Rules, supra note 23, art. 34. This article provides:

Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Except as provided in Art. 27, unless otherwise agreed by the parties, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.

Id. With no additional reference to the meaning of confidentiality other than to the use of the term, Art. 34 of the ICDR Rules explicitly addresses control and disclosure of confidential information:

Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Except as provided in Art. 27, unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.

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ICDR Rules, supra note 23, art. 34.

This non-disclosure is subordinated to party-autonomy (i.e., the agreement of the parties). See ICDR Rules, supra note 23, art. 27(2), stating "[t]he tribunal shall state the reasons upon which the award is based unless the parties have agreed that no reasons need be given." Id. (emphasis added). See ICDR Rules, supra note 23, art. 27(4) (providing that "an award may be made public only with the consent of all parties or as required by law."). Later still, the ICDR Rules, supra note 23, art. 27(6)
explained or defined by the arbitral rules—share the same fate as awards. Treated neither as confidential nor private, they simply are not to be disclosed without the consent of the parties.

Providing "reasons" upon which an award is premised is poles apart from the issuance of a reasoned and thorough award that frames issues, provides a comprehensive factual narrative of material facts, enunciates applicable law, and sets forth the application of law to fact. A mere regurgitation of reasons in support of a finding renders arbitral awards synoptic and therefore likely to disappoint party expectations. Neither the LCIA nor the ICDR require a provision of "reasons" underlying consent awards.

Privacy and confidentiality find their most robust pronouncement in ICA in the ambit of the arbitral tribunal's deliberations. The cultures of ICA and ISA accord considerable weight to a virtually unwritten doctrine of absolute deliberation confidentiality. The workings of deliberation confidentiality in international arbitration comports with the architecture of a dispute resolution methodology that emphasizes enforceability over accountability, or second-instance review.

requires that the filing or registration of the award also is to be kept private or confidential (it is unclear) depending on governing law "if the arbitration law of the country where the award is made requires the award to be filed or registered, the tribunal shall comply with such requirement." The ICDR Rules address the partial publication of awards in Art. 27(8):

Unless otherwise agreed by the parties, the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties or other identifying details or that have been made publicly available in the course of enforcement or otherwise.

ICDR Rules, supra note 23, art. 27(8) (emphasis added). See ICC Rules, supra note 23, art. 34(2) (prescribing under the section entitled Notification, Deposit and Enforceability of the Award, that "[a]dditional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.") (emphasis added). See also LCIA Rules, supra note 23, art. 26.1 that in part provides "[t]he Arbitral Tribunal shall make its award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which its award is based."

30 The term "decision" is commonly referred to in most arbitral institutional rules, but is never defined or even contextualized. See, e.g., ICC Rules, supra note 23, art. 6(6), 29(2), 35, 37.

31 See, e.g., ICC Rules, supra note 23, art. 11(4) ("The decisions of the Court as to the appointment, confirmation, challenges; or replacement of such an arbitrator shall be final, and the reasons for such decisions shall not be communicated.") (emphasis added). More expansive than its ICC Rules counterpart, LCIA Rules, supra note 23, art. 29.1 reads:

The Decisions of the LCIA courts with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal. Such decisions are to be treated as administrative in nature and the LCIA court shall not be required to give any reasons.

Id.

32 See LCIA Rules, supra note 23, art. 26.8. This article states:

In the event of a settlement of the parties' dispute the Arbitral Tribunal may render an award according to the settlement if the parties so request in writing (a "consent award"), provided always that such award contains an express statement that it is an award made by the parties' consent. A consent award need not contain reasons. . . .

Id. (emphasis added). Orders for costs also need not set forth underlying premises. See LCIA Rules, supra note 23, art. 28. See also ICDR Rules, supra note 23, art. 29(1) ("If the parties settle the dispute before an award is made, the tribunal shall terminate the arbitration, and, if requested by all parties, may record the settlement in the form of an award on agreed terms. The tribunal is not obliged to give reasons for such an award."). (emphasis added).
While considerable ink has been spilled regarding the confidentiality of tribunal deliberations, scant actual normative juridical authority exists on the subject.

In this sense arbitral decision-making remains an impenetrable “black box” process. Despite ably chronicled significant gains for transparency, deliberations remain obscured by design and practice in order to minimize the scope of judicial intervention at the enforcement stage. Much-vaunted market forces, including competition among arbitral institutions, a more vibrant competitive environment with respect to arbitrators, greater awareness among consumers of arbitral rules and services, and an increase in the proliferation of voluntarily published arbitral awards have not led to a restructuring of arbitral institutional frameworks so as to provide, by design or in praxis, greater transparency addressing the democratic deficit. To the extent that a discernable trend in disclosure can be documented, such descriptive-empirical analysis does not necessarily lead to the conclusion that transparency is being incorporated into the procedural rubric and juridical culture of ICA conceptually or, more particularly, as a norm of international law. The commentary that has been generated regarding the extent to which ICA suffers from want of transparency despite its formal private nature, has led to conclusions that may be supported by a phenomenology but that do not explain underlying principles responsible for the empirical data in the first instance.

Rather than concluding that ICA is reinventing itself based upon the systematic incorporation of principles that are conducive to greater transparency for present purposes of developing a privative transparency norm applicable to cross-border evidence gathering, this author asserts that the phenomenon is susceptible to a causal explanation that finds conceptual foundation in the very precepts that underlie ICA, and not in invisible market forces. Greater transparency in ICA has been achieved because the principle of party-autonomy has garnered greater structural and normative standing. This adjustment in the prominence of party-autonomy largely and most notably explains the proliferation of the publication

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34 The LCIA is one of the few arbitral institutions that directly addresses the issue of confidentiality in the deliberations of the arbitral tribunal instead of relying on amorphous but sacrosanct principles of international commercial arbitration. Article 30.2 states:

> The deliberations of the Arbitral Tribunal are likewise confidential to its members, save and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, and 26.


35 See, e.g., Rogers, supra note 21, at 1314-19 (arguing that multiple forces, including material increases in trade and trade-related disputes, have galvanized and improved the international commercial arbitration system, thus making possible meaningful advances towards transparency).

36 Id. at 1319, n.73 (citing Dora Marta Gruner, Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform, 41 COLUM. J. TRANSNAT'L L. 923, 959 (2003) (“Today, several arbitral institutions, as well as independent publishers, have started to regularly publish arbitral awards.”). But see Tom Ginsburg, The Culture of Arbitration, 36 VAND. J. TRANSNAT'L L. 1335, 1340 (2003) (“Although certain sources for arbitral decisions exist... they are but the tip of the iceberg of all the cases produced... and... the ICC awards are an explicitly biased sample as the ICC seeks to publish particularly interesting or unusual awards.”).
Juridical Convergence in International Dispute Resolution

of sanitized arbitral awards, greater disclosure of the grounds for arbitral challenges, and increased access to the reasons underlying arbitral decision-making generally.

While structural modifications to the rules certainly may be gleaned, they fall materially short from rising to the level of representing transformative modifications. ICA is private because of its very foundation—a private contractual agreement within the framework of private international law applying the substantive law of one jurisdiction and relating only to a microeconomic event that forecloses public access or standing.\(^\text{37}\) Even though the length of arbitral awards in this field has increased materially,\(^\text{38}\) a jurisprudence of such awards in private international law limited to persuasive authority has not developed, as is the case with ISAs. Rarely do ICA awards contain citation to other awards as authority or persuasive analytical grounding.

ICA can only shed its culture of privacy and confidentiality upon penalty of denaturalizing and transforming itself into an international dispute resolution methodology that as of yet does not exist and for which consumer demand cannot be meaningfully identified.\(^\text{39}\) A transparency norm can find resonance in ICA and in ISA but only if it is developed as a substantive norm of private and public international law, and its application is limited to discrete aspects of international dispute resolution, such as in evidence gathering. This selective application of a recognized norm can be substantively harmonized and reconciled with the structural private characteristics of international dispute resolution without denaturalizing it or otherwise engaging in the hyperbolization of minor rule amendments that are conducive to greater public access or disclosure as somehow transformative.

D. Investor-State Arbitration Inherited a Culture of Privacy from International Commercial Arbitration

Even though the system of ICA primarily adjudicates disputes between private individuals based upon private legal causes of action within a framework that is severed from any geopolitical rubric and generally administered by a private in-

\(^{37}\) See, e.g., Rogers, supra note 21, at 1308-09 (stating “At present, even cosmopolitan international legal theorists would have difficulty effectively arguing that the world’s citizens are interested parties in all of its proceedings.”). “Not surprisingly, therefore, ardent advocates of compulsory transparency reforms have conceded that transparency should not be insisted on in all cases because the public does not have an interest in all cases.” Id.

\(^{38}\) See generally Yearbook Commercial Arbitration Volume XXXVI 2011 (Albert. J. Van Den Berg ed., 2011) (and previous editions from 1992-2010) (displaying the growth in the average length of ICC arbitration awards). The average length of the awards published between 1992 and 2001 was 5,892 words. This nearly doubled to 10,881 words in the following decade (2002-2011). Id. It should be emphasized that this finding is limited by the selective publication of awards by the editors of the Yearbook Commercial Arbitration, in addition to the fact that some of the published awards are summarized. Id. Nevertheless, assuming other factors remained static, it is notable that the length of the published awards grew materially during that two-decade timeframe. Id.

\(^{39}\) McGraw & Amerasinghe, supra note 20, at 342 (“Indeed, one of the major draws of arbitration in the commercial field was (and still is) the lack of transparency due to the ability of the parties to decide most aspects of the process.”).
Juridical Convergence in International Dispute Resolution

stitution, it has engrafted its model on ISA. The standing configuration of the parties in ISA involves a private entity asserting claims against a sovereign. These treaty-based causes of action eminently fall within the domain of public international law. Claims arise from bilateral or multilateral investment treaties and normally concern the interests of an investor-state and a host state. Consequently, the subject matter of the dispute is paradigmatically public in nature, despite the prosecution of claims by a private party. ISA necessarily transcends the mere allocation of resources between private parties because, in part, it often entails challenging a sovereign’s exercise of sovereignty through the imposition of regulatory imperatives. Moreover, as it is common for ISAs to focus on specific economic industry sectors, these proceedings give rise both to micro and macroeconomic issues.

The international public policy addressing the protection accorded to investors among capital-exporting countries (industrialized states) and capital-importing countries (developing states) is directly formed and transformed by investor-state arbitral proceedings. ICA generally does not affect public economic or political policies. ISA has spawned a culture of award writing and publication. Because

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41 Even though the claims asserted are treaty-specific, ISAs generally concern claims arising out of alleged violations of (i) fair and equitable treatment, (ii) expropriation bereft of public purpose for which there was no prompt and adequate compensation, (iii) treatment insufficient to meet international minimum standards, (iv) actions undermining national treatment standard, (v) denial of justice, (vi) discriminatory and arbitrary conduct, (vii) substantive violations of principles made relevant to the dispute pursuant to a most favored nation (MFN) clause, and (viii) breach of compliance with obligations arising from other investments, which may be made relevant to a dispute pursuant to an “umbrella clause.”


43 It has been meaningfully asserted that unlike WTO proceedings resulting in policy, rule, or legislative change on a prospective basis typically concerning tariffs, ISA is limited to microeconomic model analysis. In furtherance of this proposition it is contended that because ISAs address a single specific investment with relevant material timeframes pertaining to pre-entry and post-entry investment status, as well as remedial measures limited to compensatory damages in connection with the investment at issue, the economic scope of these arbitrations is micro only. See generally Glen T. Schleyer, Power to the People: Allowing Private Parties to Raise Claims before the WTO Dispute Resolution System, 65 FORDHAM L. REV. 2275 (1996-97).

44 It is important to observe, however, that despite not being the norm, it is also not uncommon for private arbitral institutions to process investor claims against a sovereign within a framework of private international law rules that applies national and international law to substantive claims. Action based on the breach of contractual obligations allegedly attaching to concession statements do form part of the international arbitration firmament. In fact, it is not uncommon for such cases to entail choice of law disputes. Specifically, it is common for the parties to dispute the extent to which public international law takes precedence over the substantive law that the parties agreed to in the operative contract. See generally Gus Van Harten, The Public—Private Distinction in the International Arbitration of Individual Claims against the State, 56 INT’L & COMP. L.Q. 371 (2007) (discussing the “grey areas” in the public-private distinction in the international arbitration).

48 Loyola University Chicago International Law Review Volume 10, Issue 1
of the *ad hoc* nature of the short-lived tribunals\(^4\) and judicially segregated status of the process, these awards do not constitute binding precedent.\(^6\) The arbitral awards that ISAs generate are used as normative persuasive authority by tribunals, and quite frequently give rise to elaborate dissenting opinions.\(^7\) The culture of award writing is readily discernible and follows a structured configuration.\(^4\)

Notwithstanding the rather arresting differences and contrasts between ICA and ISA, even under a surface analysis, it is apparent ISA has adopted ICA’s privacy-confidentiality features. This structural influence is quite remarkable because of the public international law configuration that so defines ISA. In these proceedings public access and transparency are amply justified and even necessary in light of the very public nature of international investment law and the public policy consequences that immediately redound to the investor-state claimant, and often, to the regulatory sphere of the host state. Despite the prominence of these issues, however, privacy remains a point of contention from a structural perspective in ISA.

E. Grounds for Disclosure: Yet Another “Privacy Vestige”

Disclosure of facts that may lead to questions concerning an arbitrator’s impartiality and independence is one issue that has garnered particular attention.\(^4\) The standard governing arbitrator’s duty to disclose set forth in the IBA Guide-

\(^4\) Of course, the term “short-lived” is relative. A number of ISAs, under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), recorded arbitrations lasting in excess of five years. The expediency and efficiency components of international arbitration, both commercial and investor-state are becoming museum-quality relics. The fact remains, nonetheless, that arbitrators serve as such on an *ad hoc* matter-specific basis.

\(^6\) See Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 Fordham Int’l L. J. 1014, 1016 (2006-07) (“[A]lthough arbitrators in investment treaty arbitration are not formally bound by precedent in the same manner as common-law judges, there is an informal, but powerful, system of precedent that constrains arbitrators to account for prior published awards and to stabilize international investment law.”).


\(^4\) Considerable effort is expended in providing for a comprehensive factual and procedural narrative. Also, the principal material arguments, claims, counterclaims, defenses and avoidances are appropriately designated and “summarized.” The tribunal’s position on critical issues typically follows a narrative of the opposing parties’ respective positions. Despite the length of awards, often exceeding 200 pages, the legal analysis generally is not as comprehensive or rigorous as with second instance appellate opinions issued by U.S. appellate tribunals. As with their international commercial arbitration counterpart, ISA awards also are synoptic.

Juridical Convergence in International Dispute Resolution

lines on Conflicts of Interest in International Arbitration (the “IBA Guidelines”). The IBA Guidelines adopt a subjective test that frames the inquiry of impartiality from the vantage point of the parties and not the subject arbitrator’s personal subjective evaluation of whether particular facts indeed command disclosure: “Arbitrators shall disclose facts or circumstances which, in the eyes of the parties may give rise to doubts as to the arbitrator’s impartiality or independence, and ‘[a]ny doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.’”

The lingering issue concerning privacy and disclosure here addressed is to be found in the “vestiges of privacy” that close scrutiny of the unchallenged arbitrator’s opinions reflects in addressing challenges. The more helpful examples are those where, as in SGS v. Pakistan, the unchallenged arbitrators correctly decided the issue but regrettably failed to provide significant grounds in the opinion justifying their adjudication. This want of analysis can best be understood as an ICA privacy vestige that found repose and a sphere of influence in ISA.

In SGS v. Pakistan, the claimant challenged the decision on the ground that counsel for respondent had presided over another tribunal that had issued an award favorable to the respondent in Azinian v. United Mexican States. Moreover, one of the arbitrators in SGS had served as respondent’s counsel of record in Azinian as well. The proposition underlying claimant’s argument was that the challenged arbitrator would somehow encounter a moral imperative to reciprocate the favorable ruling that counsel in SGS v. Pakistan issued as a presiding member of the tribunal.

In rejecting the challenge pursuant to Articles 57 and 14(1) of the ICSID Convention, the unchallenged arbitrators observed that “[t]he party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made.” The core of the opinion’s analysis serves as a paradigmatic example of a privacy vestige:

It is commonplace knowledge that in the universe of international commercial arbitration, the community of active arbitrators and the community of active litigators are both small and that, not infrequently, the two communities may overlap, sequentially if not simultaneously. It is widely


51 See Bottini, supra note 49, at 347 (citing the IBA Guidelines, Explanation to General Standard 3, ¶ (a)-(b)).


53 Id. at 398. See also Robert Azinian v. United Mexican States, ICSID Case No. ARB/AF/97/2, Award (Nov. 1, 1999).

54 See Bottini, supra note 49, at 351.
accepted that such an overlap is not, by itself, sufficient ground for disqualifying an arbitrator.\textsuperscript{55}

Neither juridical rigor nor propriety of the actual finding is of consequence for purposes of this article. Rather, it is the quizzical opaque nature of so surface an analysis that compels scrutiny. The tribunal’s exegesis purports to find normative foundation on an amorphous and somewhat banal principle divined out of whole cloth. The very notion of “commonplace knowledge” is, at best, suspect. While the intellectual history of epistemology indeed explored precepts and norms of cognition, in part or in whole based on experience described as being common to all persons, it is highly unlikely that the tribunal’s reference attempted to seek conceptual support from these writings.\textsuperscript{56} The tribunal’s recourse to “commonplace knowledge” undermines its own legitimacy and grounds the conclusion on a hapless tour de force.

The reference to “the universe of ICA” is equally disconcerting. First, the proceeding \textit{sub judice} was an investor-state dispute based upon the bilateral investment treaty (“BIT”) executed between the Islamic Republic of Pakistan and Switzerland. Therefore, even within the tribunal’s flawed conceptual categories, the appropriate reference should have been to “the universe of ISA”—not ICA. This observation aside, placing a serious construction on the tribunal’s plain language, the cornerstone ruling is premised on little more than industry hearsay or, less technically stated, industry gossip. A rigorous canvassing of authority construing Articles 57 and 14 of the ICSID Convention would have been warranted worthy of an award that touches or concerns public policy and must satisfy public expectation beyond that of the parties. Reliance on the novel concept of “commonplace knowledge” pertaining to “the universe of international commercial arbitration” bespeaks privacy in referring to a universe that cannot be discerned, premised on an imputed knowledge base seemingly unworthy of an oral tradition, let alone written source materials. Worse still, even assuming that both “commonplace knowledge” and the “universe of ICA” existed with sufficient rigor and clarity from which cultural premises may be inferred and enshrined with the status of legal norms, the tribunal’s opinion does little more than state that the status quo of industry practice is more than reason enough to avoid sustained analysis.

\textsuperscript{55} \textit{See} Bottini, \textit{supra} note 49, at 351 (emphasis added).

\textsuperscript{56} In the \textit{Discourse on Method}, Rene Descartes discusses common sense (\textit{le bon sen}) somewhat ironically in his famous first sentence “Le bon sens est la chose du monde la mieux partagée” (“Good sense is the most evenly distributed thing in the world”). \textit{Rene DESCARTES, A DISCOURSE ON THE METHOD} 5 (Ian Maclean trans., 2006) (1637). \textit{IMMANUEL KANT, THE CRITIQUE OF PURE REASON} (J.M.D. Meiklejohn trans., 2010) (1781) (exploring whether an \textit{a priori} synthetic judgment is possible) (emphasis added). In so doing, Kant, to some extent universalizes some sort of “common knowledge” in a doctrinal pronouncement, asserting that “[w]hile not all knowledge comes from experience, without experience there can be no knowledge.” \textit{Id}. In a different but related vein, Blaise Pascal in his \textit{Pensées} fashions a distinction between intuition and cognitive syllogistic knowledge. \textit{Id}. Intuitive knowledge, according to Pascal, appears to be a form of common knowledge or a common cognitive instrument pursuant to which knowledge is attained without intermediary cognitive steps. \textit{Id}. It does not appear, however, that the tribunal had these theories in mind in fashioning a “common knowledge” arbitrator disclosure standard. \textit{Id}. 

\textbf{Volume 10, Issue 1} Loyola University Chicago International Law Review 51
F. The "Privacy Vestige" in Award-Crafting

Privacy in award crafting, as a legacy from ICA, refers to a reluctance to engage in a protracted juridical analysis upon which a conclusion is premised. Such approach is particularly unwelcome in the case of ISA, where public standing is obvious and the arbitral jurisprudence is frequently used as persuasive authority and a doctrinal repository of juridical positions that in turn may enhance the basic tenets upon which both ICA and ISA are premised: uniformity, predictability, transparency of standard, and party autonomy.

While it would be consonant with the formal mechanisms and structure of ICA for awards to be abbreviated, in part because of the institutionally contemplated limited merits review (accountability) for purposes of second instance recourse, the same cannot be said of ISA where public policy and public issues are paramount. The exportation of ICA's culture of privacy explains the abbreviated legal analyses and lack of juridical rigor as to the operation of public international law doctrines in support of the tribunal's conclusion, despite the proliferation of lengthy and often prolix awards engaging in factual narratives and recitations of the parties' position on different points.57

III. Investor-States' Quest for Transparency but not a Transparency Norm

ICA's privacy vestige is evident in ISA's efforts to incorporate different forms of transparency in addressing a gamut of issues including public access to proceedings,58 publication of awards,59 standing of amicus petitions,60 amicus participation61 and public access to work-product.62 ICSID faced the challenge of having to meet justified public demands for access and transparency. Meeting this demand was particularly arduous because of the low probability of amending the Convention. Moreover, in adopting policy, ICSID must maintain a level playing field between capital-exporting countries and their capital-importing counterparts. The adoption of rules, policies, and regulations by ICSID must strike a

57 The award is often written in a language that is not the primary language of its authors. Moreover, in the more successful proceedings, the award follows the model of a deliberation characterized as having considerable verve from the active participation of all tribunal members. Yet, the formal quality of written work-product by committee itself has been questioned and has fostered the adage, "a horse by committee is a camel." In this limited formal regard, the committee work may prove to be a hindrance.
58 See, e.g., Methanex Corporation v. United States of America, Decision of the Tribunal on Petition from Third Persons to Intervene as “Amici Curiae,” (Jan. 15, 2001) ¶ 23 [hereinafter Methanex v. United States] (explaining that the United States consented to the “open and public hearing of all hearings before the Tribunal”).
59 See, e.g., Id. ¶ 10 (explaining that Canada “supported public disclosure of arbitral submissions, orders and awards to the fullest extent possible”).
60 See, e.g., Id. ¶¶ 9–10 (explaining the differing approaches of Mexico and Canada with respect to the standing of amicus petitions under NAFTA).
61 Id.
62 See, e.g., Id. ¶ 10 (explaining that Canada “supported public disclosure of arbitral submissions, orders and awards to the fullest extent possible”).
balance that harmonizes the interests of prospective claimants while safeguarding classical sovereignty concerns that host states—mostly developing nations—have expressed.

A. The ICSID Perspective

The ICSID Secretariat’s Working Paper dated May 12, 2005 expresses that “[t]he Discussion Paper suggested changes concerned preliminary procedures, publication of awards, access by third parties to the proceedings, and disclosure requirements of arbitrators.” The underlying Discussion Paper on which the May 12, 2005 Working Paper of the ICSID Secretariat is premised was sent to the ICSID Administrative Council Business and Civil Society Groups from whom the Secretariat of the Centre sought comments from “arbitration experts and institutions around the world.” Of the six arbitration rules published in the Working Paper with suggested changes, four concerned transparency either in the form of observation—monitoring, disclosure, publication—or submissions of non-disputing parties. These four suggested rule changes were materially adopted and comport virtually verbatim with the current iteration of the corresponding rule.

While the Working Paper described that reactions to the suggested changes as “generally favorable,” it did note that the “suggestions regarding access of third parties in particular elicited some disagreement. Concerns were expressed that any provisions on access of third parties to proceedings should subject such access to appropriate conditions ensuring, for example, that the third parties do not by their participation unduly burden parties to the proceedings.” With one notable exception, none of the four transparency rules mention the words “confiden-
Only in the declaration that members of the constituted tribunal must execute does the word “confidential” appear with respect to knowledge secured from the proceedings or the contents of any award made by the tribunal. This latter subject matter to which confidentiality on the part of tribunal members attaches appears to enshrine the confidentiality attendant to the tribunal’s deliberation process.

Instead of casting the amendments in the language of “privacy,” “confidentiality,” “transparency,” or “public,” the principle of party-autonomy, whether by happenstance or design, pervades the framework. By way of example, ICSID Rule 32(2) applies party-autonomy in the first subordinate clause: “unless either party objects,”71 but the word “public” is not referenced. Alternatively, the concept of public access is addressed with the language, “the Tribunal, after consultation with the Secretary General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses, and experts during their testimony. . . .”72 Consequently, while greater public access,73 participation,74 and even clarity by dint of award publication subject to party agreement75 do indeed provide for greater transparency generally, the 2006 Amendments do not import a substantive principle of transparency gleaned from customary or conventional international law.76 The amendments do eloquently illustrate the propositions that even within the rubric of transparency reforms (i) it is party-autonomy and not a principle of transparency that is accorded conceptual prominence, (ii) despite legitimate public interest, the “non-disputing party rule” meaningfully qualifies

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70 See Int’l Ctr. for Settlement of Inv. Disputes, ICSID Convention, Regulations, and Rules: Rules on Procedure for Arbitration Proceedings, r. 6(2) [hereinafter ICSID Rules]. In part it states: Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form: I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal. Id. (emphasis added).

71 See id. at r. 32(2) (“Unless either party objects, the Tribunal . . . may allow other persons, besides the parties . . . to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.”).

72 Id. (emphasis added).

73 Id.

74 See id. at r. 37(2)(a)-(c) (discussing the circumstances for allowing a non-party to file a written submission with the Tribunal regarding a matter within the scope of the dispute).

75 Id. at r. 48(4).

76 One of the difficulties inherent in the task of defining transparency in terms of a substantive norm, or more generally identifying the principle in international law, arises from the many different, and commonly disparate, applications and uses of the term.
Juridical Convergence in International Dispute Resolution

such participation,77 and (iii) the revisions to the rules studiously omit structural pronouncements as to the framework as "public," "private," or "confidential."78

B. Revisiting Methanex and the Case for a Transparency Norm

The non-disputing party rule, to a considerable extent, is the progeny of the tribunal’s decision on petitions from non-party amici curiae issued in 2001 in Methanex Corp. v. United States of America79 and United Parcel Service of America Inc. v. Government of Canada.80 Both cases—particularly Methanex because it addressed public policy and health and safety regulatory issues in the context of environmental measures—gave rise to considerable literature.81

In seeking to make the development of a substantive norm of transparency to be incorporated into the very narrow field of international dispute resolution evidence gathering, it will suffice to study the analytical bases upon which Methanex was premised, which only once referenced transparency82 and

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77 ICSID Rules, supra note 70, r. 37(2). This rule reads:

After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Id. (emphasis added).


79 Methanex v. United States, supra note 58.


82 Methanex v. United States, supra note 58, ¶ 49.

There is an 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 interest 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.

Id.
actually minimized scrutiny of substantive norms of international law in favor of procedural rigor arising from textual language in applicable procedural rules. In fact, the tribunal in Methanex, when faced with claimant’s objection to the *amici curiae* petitions on the theory that it would disavow the *in camera* application of Article 25(4) of the UNCITRAL Arbitration Rules, found that the extent to which arbitration is confidential, the tribunal did not have to decide the point. But for discussion on this very singular and circumscribed issue that it did not decide and fleeting reference to a general benefit redounding to Chapter 11 arbitral processes from “more open or transparent” proceedings, the decision is brilliantly bereft of considerations of any substantive norms of international law that either would define international arbitration as “private” or “confidential” or have any effect on such a proceeding. The tribunal in Methanex decided that neither NAFTA nor the UNCITRAL Rules proscribed *amici curiae* participation. Despite not explicitly referencing it, the tribunal availed itself of the principle of party-autonomy in fashioning its ruling. A review of the panel’s reasoning is instructive.

The public nature of the Methanex case arising from the safety, healthcare, and environmental regulations underlying the operative claim commands a brief narrative in order to contextualize the Tribunal’s analysis of the *amici curiae* petitions, which raised a classical public-access concern. Methanex’s claim involved the production and sale of a methanol-based source of octane and oxygenate for gasoline that is known as methyl tertiary-butyl ether (“MTBE”). Specifically, Methanex averred that MTBE was a safe, effective, and economical component of gasoline and the oxygenate of choice in markets where free and fair trade is allowed. Methanex also alleged that MTBE generated environmental benefits and did not at all pose risk to human health or the environment. Central to Methanex’s position was the contention that firstly, no methanol production plants were located in California and secondly, during the period 1993-2001 only a fraction of the methanol directly consumed in California was produced anywhere in the United States (an average of 20.2 thousand metric tons out of a total consumption figure of 185.5 thousand metric tons).

The claims were brought under Article 116(1) NAFTA, based on breach by the USA of two provisions in Section A of Chapter 11 of NAFTA: Article

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83 The panel was initially constituted by William Rowley QC, Warren Christopher Esq, and V.V. Veefer QC (Chairman), and later was reconfigured when Warren Christopher resigned and was substituted by Professor W. Michael Reisman. See Methanex v. United States, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005), pt. II, ch. A, p. 5 [hereinafter Methanex Final Award].

84 The predecessor to the current Article 28(3) as revised in 2010 UNCITRAL Arbitration Rules.

85 Methanex v. United States, supra note 58, ¶ 46.

86 Id.


88 Methanex Final Award, supra note 83, at 1, pt. II, ch. D.

89 Id.

90 Id. at 2. In the proceeding it was uncontested that methanol is the essential oxygenating element of MTBE.
Juridical Convergence in International Dispute Resolution

1105(1) and Article 1110(1)—purportedly arising from losses caused by the State of California’s forthcoming ban on the sale and use of MTBE, which was scheduled to become effective on Dec. 31, 2002.91

Viewed as a possible landmark case with far-reaching policy implications the International Institute for Sustainable Development (the “Institute”) was the first of four NGOs to file a petition for amicus curiae status asserting an apology in favor of a host-state’s proper exercise of sovereignty through the enactment of regulatory measures in furtherance of the public welfare touching on health, safety, and environmental objectives, applied on a non-discriminatory basis.92 The NGOs further advanced that under no analysis can such regulations be construed as violating international law and that they properly pertain to a host-state’s prerogative within its regulatory space.93 Two additional precepts on which the Institute predicated its petition were that the interpretation of Chapter 11 of NAFTA should reflect legal principles underlying the concept of sustainable development and “that participation of an amicus would allay public disquiet as to the closed nature of arbitration proceedings under Chapter 11 of NAFTA.”94

At the outset of its opinion the tribunal did not articulate any general pronouncement concerning the confidential or private nature of arbitration. No rebuttable presumption of this kind, whether embedded in the cultural practice of international arbitration (commercial or investor-state) or discernible from international law, was stated. Instead, the tribunal opted for a very narrow construction of the issue without casting privacy or confidentiality as structural elements of the entire arbitral framework.

In its crisp point of departure, the tribunal observed that “there is nothing in either the UNCITRAL Rules or Chapter 11, Section B, that expressly confers upon the tribunal the power to accept amicus submissions or expressly provides that the tribunal shall have no such power.”95 In fact, the Tribunal distanced itself from Methanex’s argument that because former Article 25(4) of the UNCITRAL

91 Methanex Final Award, supra note 83, at 1, pt. I, Preface. Methanex ultimately challenged three legislative texts, (1) the 1999 California Executive Order certifying that “on balance, there is significant risk to the environment from using MTBE in gasoline in California,” (2) California Code of Regulations Title 13, §§2273 requiring gasoline pumps containing MTBE to be labeled in California as follows: “Contains MTBE. The State of California has determined that use of this chemical presents a significant risk to the environment.” §§2262.6 provided at sub-section (a)(1) that: “Starting December 31, 2002, no person shall sell, offer for sale, supply or offer for supply in California gasoline which has been produced with the use of methyl tertiary-butyl ether (MTBE),” and Amended California Regulations of May 2003, expressly banning the use of methanol as an oxygenate in California. Id. at 7, pt. II, ch. D.

92 Petitions eventually were filed by (i) the International Institute for Sustainable Development, (ii) Communities for a Better Environment, (iii) The Bluewater Network of Earth Island Institute, and (iv) The Center for International Environmental Law. Methanex Final Award, supra note 83, at 15, pt. II, ch. C.

93 See Methanex v. United States, Petitioner’s Final Submission Regarding the Petition of the International Institute for Sustainable Development to the Arbitral Tribunal for Amicus Curiae Status (Oct. 16, 2000), ¶¶ 10-18. See also Methanex v. United States, supra note 58, ¶ 5 (The Institute’s petition sought leave “(i) to file an amicus brief (preferably after reading the parties’ written pleadings), (ii) to make oral submissions, (iii) to observe status at oral hearings.”).

94 Methanex v. United States, supra note 58, ¶ 5.

95 Id. ¶ 24.
Arbitration Rules (current Art. 28(3)) provides that hearings are to be held in camera, confidentiality attaches to documents prepared in anticipation of hearings.96 Not having indulged in assumptions of privacy or confidentiality with respect to international arbitration or in drawing inferences from the specific in camera command in Article 28(3), the tribunal aptly sought normative foundation in the procedural principles vesting it with discretion found in former Article 15(1) (current Article 17) of the UNCITRAL Rules.97 Article 15(1) ascribes to the tribunal vast discretion in conducting the arbitration, subject to the controls deriving from "procedural equality and fairness towards the Disputing Parties."98

Having found recourse in a procedural principle, the tribunal was able to dispense with any petition that would have the effect of adding parties to the arbitration or engrafting substantive rights, status, or other privileges of a disputing party upon non-parties. The tribunal explained that "receipt of written submissions from a person other than Disputing Parties is not equivalent to adding that person as a party to the arbitration."99 This distinction is particularly true, where, as in that case, Methanex did not question the tribunal’s authority to receive amicus submissions, but rather asserted that the tribunal was to exercise its discretion by first determining that the papers at issue would contribute to the tribunal’s adjudication while not burdening the parties with otherwise unforeseeable submissions concerning a non-disputant party who cannot be cross-examined.100

Four fundamental findings were reached material to the Tribunal’s final order holding that Article 15(1) allowed it to receive the written submissions petitioned.101 Its treatment of these predicate sub-issues to the inquiry—concerning the extent to which former Article 15 vests a tribunal with discretion to accept

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96 Id. ¶ 12. Methanex also asserted that the Sept. 7, 2000 Consent Order, the parties’ had agreed that transcripts, written submissions, witness statements, reports, etc., were to be kept confidential. Id.

97 See id. at ¶ 25-34 (describing the scope and application of UNCITRAL rule 15(1)).

98 Id. ¶26.

99 Id. ¶30.

100 Methanex raised four fundamental arguments. First, as to jurisdiction, it contended that the tribunal lacked the jurisdiction to add a party to the proceedings absent agreement of the parties. On this point Methanex asserted that the tribunal lacked jurisdiction to engraft Chapter 11 NAFTA party status to petitioners and that any such exercise of discretion would be beyond the scope of Article 15 of the UNCITRAL Arbitration Rules. Second, claimant maintained that public interest concerns were amply protected by Article 1128 of NAFTA, which provided private interest groups with a methodology for conveying their information to the NAFTA Parties, who in turn had standing to intervene if indeed there was a NAFTA issue to be interpreted. In turn, the disputing parties had the ability to call petitioners as witnesses. If petitioners were to appear as amici curiae, the disputing parties would be foreclosed from cross-examination of the actual factual foundations underlying the operative submissions. Third, Methanex, as did Mexico as a NAFTA party, advanced that it was "inappropriate" to engraft the practice of the municipal courts that allowed for robust amici curiae participation onto international ISAs. While the U.S and Canada embrace amicus briefs as a routine aspect of their respective domestic laws, Mexico does not. Fourth and finally, claimant asked the tribunal to disregard WTO practice as irrelevant. It also added that even if WTO practice were to be adopted as analytically helpful, the WTO precedent on the issue revealed that the WTO Panel or Appellate Body Panel routinely ruled that such submissions were not to be considered and that the power arising from Article XIII of the Dispute Settlement Understanding to seek data from non-party sources had not been applied to these issues. Id. ¶¶ 14-5.

101 Specifically, four issues were framed and addressed:
(i) whether the Tribunal’s acceptance of amicus submissions fall within the general scope of the sub-paragraph numbered [2] of former Article 15(1);
submissions from third-party non-disputants—was comprehensive and technical but certainly did not reach out to international law in search of a substantive transparency norm. Instead, the Tribunal (i) traced the contours of the Iran-U.S. claims tribunal, the WTO, and ICJ practice in finding that it does not offend international arbitration practice to receive submissions from third-party non-disputants;\(^{102}\) (ii) observed that any burden arising from petitioners’ written submissions would be equally shared by both disputing parties and, therefore, cannot be regarded as necessarily excessive for either disputing party;\(^ {103}\) (iii) considered articles 1126(10), 1128, 1133, and 1137(4) of NAFTA and concluded that neither these articles nor any provision in Chapter 11 of NAFTA directly addressed a tribunal’s authority to accept *amicus* submissions;\(^ {104}\) and (iv) analyzed the scope of former Article 25(4) (now Article 28(3)) of the UNCITRAL Rules finding that the article is irrelevant as to receipt of submissions but pertinent to petitioners’ attendance at hearings and access to copies of materials provided to the tribunal.\(^ {105}\) It did not, however, seek recourse to international law for the proposition that international arbitrations are endemically private or confidential or that receipt of the submissions was compelled as a matter of international law or public policy. Further, despite a passing reference to the benefits of transparency, the

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\(^{102}\) *Id.* \(\S\) 27-8.

\(^{103}\) *Id.* \(\S\) 32-4. In that connection, the tribunal emphasized that, the ICJ’s practices reflect that “written submissions were received by the ICJ, unofficially, in *Case Concerning the Gabcikovo-Nagymaros Project*, ICJ Reports, 1997.” *Id.* \(\S\) 34. The Tribunal added:

> The ICJ’s practices provide little assistance to this case. Its jurisdiction in contentious cases is limited solely to disputes between states; its Statute provides for intervention by States; and it would be difficult in these circumstances to infer from its procedural powers a power to allow a non-state third person to intervene.

*Id.*

\(^{104}\) *Id.* \(\S\) 36. The Tribunal added:

> In theory, a difficulty could remain if a point was advanced by a Petitioner to which both Disputing Parties were opposed; but in practice, that risk appears small in this arbitration. In any case, it is not a risk the size or nature of which should swallow the general principle permitting written submissions from third persons.

*Id.* \(\S\) 37.

\(^{105}\) *Id.* \(\S\) 38-9. Specifically, it was observed that, “There is nothing relevant in these provisions for present purposes. As the tribunal has already concluded, there is no provision in Chapter 11 that expressly prohibits acceptance of *amicus* submissions but likewise nothing that expressly encourages them.” *Id.* \(\S\) 39.

*Id.* \(\S\) 40-2. The Tribunal underscored that it is unsettled whether former Article 25(4) of the UNCITRAL Arbitration Rules impose a duty of confidentiality, and in so doing can vest authority from the Swedish Supreme Court in *Bulgarian Foreign Trade Bank, Ltd.* v. A.I. Trade Finance Inc. (27.X.2000) suggesting that “a privacy rule in an arbitration agreement does not give rise under Swedish law to a separate duty of confidentiality, at least as regards the award.” It also underscored that the approach was, “supported by the decision of the High Court of Australia in *Esso/BHP v. Plowman* (1993) and 183 CLR 10, distinguishing between confidentiality and privacy, particularly as subsequently applied by the New South Wales court in *Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd.* (1995) 36 N.S.W.L.R. 662.” *Id.* \(\S\) 43.
tribunal did not rely on a principle or norm of transparency as conceptual support for its decision.106

Methanex rightly has been recognized for meaningfully contributing to a transparent dispute resolution regime.107 This distinction is well justified. The manifold richness of the opinion in addressing trilateral parties, deftly adjudicating the extent to which domestic regulations concerning public health, safety, and the environment may affect international law protecting foreign investors, exploring the conceptual role of amici curiae, and finally, addressing the privacy/confidentiality dichotomy, is noteworthy. Adding to the Award’s recognition, it was the beneficiary of the NAFTA Free Trade Commission’s (“FTC”) July 31, 2001 Notes of Interpretation of Certain Chapter 11 Provisions addressing access to documents, as well as considerable transparency related work that preceded it.108 Precisely because the Methanex decision embodies multiple facets of transparency, namely: public access, non-party submissions, non-party participation, non-party access to arbitral papers, and the incorporation of the FTC Interpretive Note, the case is of considerable assistance in helping emphasize the privacy vestige that ISA inherited from ICA. Additionally it exemplifies the structural corrections that public international law must undertake in adjusting for private international law contention legacies.

Both the 2006 Revisions to the ICSID Rules and the Methanex analysis contribute to the justification for the development of a substantive privative transparency norm that can be resorted to without any fundamental framework modification to the workings of private and public international law dispute resolution. The development of such a privative transparency norm would serve as a principle of convergence capable of bridging and harmonizing otherwise disparate juridical traditions. A transparency norm is particularly necessary in transnational evidence gathering and can provide for more vibrant participation, disclosure, accountability, and expediency without the need to fashion rules of

106 Id. ¶ 49.
108 The NAFTA Free Trade Commission’s Interpretive Note read:

The NAFTA Free Trade Commission’s Interpretive Note read:

Nothing in the NAFTA imposes a general duty of confidentiality under disputing parties to a Chapter 11 Arbitration [or] precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter 11 tribunal. Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter 11 tribunal, subject to redaction of: (a) confidential business information; (b) information which is privileged or otherwise protected from disclosure under the Party’s domestic law; and (c) information which the Party must withhold pursuant to the relevant Arbitral Rules, as applied.

Notes of Interpretation of Certain Chapter 11 Provisions of the NAFTA Free Trade Commission (July 31, 2001), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=eng&view=d. Methanex contended that the FTC’s Interpretive Note was an amendment and not a viable interpretation of Article 1105, and, therefore, not binding of the tribunal pursuant to Article 1131(2) NAFTA. The tribunal, in part, emphasized “Methanex cites no authority for its argument that far-reaching changes in a treaty must be accomplished only by formal amendment rather than by some form of agreement between all of the Parties.” Methanex Final Award, supra note 83, at 10, pt. IV, ch. C.
evidence gathering with substantive technical definitions that in turn would invite objections based upon lack of universality. The general transparency principles already adopted in international law documents would serve as necessary foundational conceptual premises.

IV. The Principle of Uncertainty in International Dispute Resolution and the Need for a Unifying Transparency Norm

A. Unsettled Structural Issues in Investor-State Arbitration

The privacy vestige is only one element of international dispute resolution suggestive of a need for a privative transparency norm. ISA, and to a lesser extent, ICA, structurally and substantively suffer from a want of a uniform framework. This absence gives rise to a “principle of uncertainty.”109 Moreover, critical aspects of ISA dispute resolution processes lack predictive value. ISA is constituted by a fragmented system of approximately 3,000 bilateral investment treaties that are not at all interconnected, conceptually organized, or containing monolithic material clauses.110 The universe of multilateral, regional, and bilateral investment treaties is completely devoid of structure, hierarchy, or of any comparable organizing principle.111

At a less formal and more substantive level, rudimentary precepts of ISA remain materially unsettled. By way of example, perhaps the cornerstone standard raised in ISA is the fair and equitable treatment standard (“FET”) of protection provided to foreign investors.112 Similarly, FET’s relationship to the International

109 This principle of uncertainty primarily pervades ISA, as shall be discussed. The principle, however, finds considerable resonance in international commercial arbitration because of the vast discretion accorded the arbitral tribunal, which is unprecedented in private international law. International commercial arbitration also presents uncertainties that concern structural features such as (i) the complete absence of an evidentiary framework that transfers this feature to virtually unbridled arbitral discretion, (ii) indefinite as to the extent to which cross-examination would be allowed, (iii) evidence-gathering that is too restrictive, (iv) equity-centric adjudication that displaces applicable substantive law, and (v) a general adversity towards non-contractually based causes of action. These components of international commercial arbitration do violence to the core principles upon which international arbitration purports to be founded and to further: party-autonomy, uniformity, transparency of standard, and predictability.

110 One commentator creatively has analogized the rubric as “a ‘spaghetti bowl’ of around 3,000 overlapping bilateral and regional treaties, tens of thousands of transnational contracts, and an unknown number of domestic statutes whose purported aim is to stimulate economic development by attracting and protecting foreign investments within the sovereign territories of individual host-states.” Maupin, supra note 23, at 2.

111 In this regard, international investment law stands in high relief with its international trade law counterpart, which has been duly endowed with a framework and multi-institutional standing, such as the WTO.

112 The fair and equitable treatment standard is perhaps the most malleable and, therefore, susceptible even to unintentional over-use by claimants seeking to assert multiple claims arising from the same or overlapping infractions. Commentators have criticized the standard as conducive to abuse by claimants seeking to engraft it on violations, which, according to these writings, are substantively distinct from the fair and equitable treatment claim. Olivia Chung, The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration, 47 VA. J. INT’L L. 953, 961 (2006-07) (citing Carlos G. Garcia, All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration, 16 FLA. J. INT’L L. 301, 306 (2004)) (“Fair and equitable treatment clauses ... have become ‘black holes of investment treaties’ that invite a flood of litigation not originally contemplated by developing countries.”).
Juridical Convergence in International Dispute Resolution

Minimum Standard ("IMS") has also galvanized a number of competing theories of practical consequences to international dispute resolution. Is IMS the same or different from FET? If substantively different, what is the difference? May the difference have any effect on damages quantum?

Whether an umbrella clause in an ISA shall be allowed to incorporate non-treaty based claims into the proceeding remains equally ill defined. The seminal cases on whether an umbrella clause indeed automatically accords treaty status to contractual claims remain hopelessly unsettled.

113 See, e.g., IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT (2011). The author cogently asserts that FET is separate and distinct from IMS and points, inter alia, to the aberrant development of the standard as being one that first was codified and only subsequently forming part of customary international law in contrast with the converse conceptual development pursuant to which customary international law principles are later codified, as part of the grounds that give rise to this confusion. Kläger in turn observes: It might well be that in some circumstances in which the international minimum standard is sufficiently elaborate and clear, the standard of fair and equitable treatment might be equated with it. But in other cases, it might as well be the opposite, so that the fair and equitable treatment standard will be more precise than its customary international law forefathers.

114 An umbrella clause is a provision present in many bilateral investment treaties that imposes a requirement on each contracting state to observe typically all investment obligations entered into with investors from the other contracting state. See Jarrod Wong, Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes, 14 Geo. Mason L. Rev. 137 (2006). The umbrella clause, for example, in the bilateral investment treaty (BIT) between United States and Romania, signed on May 28, 1992, in Article III(2)(C) states that “[e]ach [[p]arty shall observe any obligation it may have entered into with regard to investments.” Id. The BIT between the Netherlands and the Republic of Paraguay in Article III(4) is slightly more elaborate: “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.” Id. Finally, by way of illustration, the BIT between the Republic of Korea and Libya in Article X(3) adds the element of territoriality to the BIT: “Each Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by investors of the other Contracting Party.” Id.

115 Quite remarkably, the cases addressing this issue all have the same claimant. See SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Claimant’s Proposal to Disqualify Arbitrator (Dec. 19, 2002), 8 ICSID Rep. 398 (2005); SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004), 8 ICSID Rep. 518 (2005). The tribunal in SGS v. Pakistan deemed the adoption of claimant’s interpretation of the umbrella clause in Article 11 of the BIT between Switzerland and Pakistan so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, and so burdensome in their potential impact upon a Contracting Party that clear and convincing evidence must be adduced by the claimant that such was indeed the clear intent of the Contracting Parties. SGS v. Pakistan, 8 ICSID Rep. 518, ¶ 167. Accordingly, SGS v. Pakistan stems from the proposition that there is a strong presumption that umbrella clauses do not apply to obligations arising under investor-state contracts. In stark contrast, in SGS v. Philippines, the tribunal decided that the umbrella clause applies to all breaches of the relevant investor-state contract but ultimately declined
Fundamental inquiries concerning the scope and application of a Most-Favored Nation ("MFN") clause remain unsettled, if not altogether opaque. It is unclear whether an MFN clause only applies to substantive and not procedural terms of a treaty. Additional uncertainty arise as to the extent to which claimants abuse their rights when seeking to secure recovery from a State’s exercise of sovereignty in furtherance of public health and welfare pursuant to environmental decrees, or whether in the name of "public purpose" a sovereign’s exercise of its regulatory authority is exempt from international investment law. ISAs borrow considerable normative precepts for final awards from other similarly situated ad hoc tribunals whose awards lack binding authority as precedent.

The uncertainty principle in arbitration arises from the absence of predictive value that is endemic to procedural structural elements and substantive doctrines configuring ISA. This uncertainty principle, coupled with the privacy vestige, make the most persuasive and compelling case for the propriety of a transparency norm that is substantive in nature and more than just a general rule prescribing disclosure, monitoring, or access. Identifying elements of a substantive transparency norm in treaties, international law documents, and other sources authority, is a condition precedent to the application of such a norm to discreet aspects of international dispute resolution, such as evidence gathering, if in fact international dispute resolution is to redeem its promise to harmonize disparate juridical cultures and systems.

V. A Substantive Transparency Norm and Evidence Gathering

A. In Search of a Principle of Transparency in International Law

The foundational work necessary for the development of an overarching substantive principle of transparency in international law begins first as a search for principles. As a very general concept, transparency has garnered the attention of
commentators who have appreciated the need to communicate or render public structural features of international dispute resolution. More expansively, the term transparency has been identified as relevant to the development of international economic law, a fundamental principle of corporate governance applicable to multinational corporations, a central precept defining citizens' right to government information, and an organizing principle in the relations between institutions and regimes of international law and member States. Transparency as an undefined principle has found a voice and stature as a criteria by which to measure the legitimacy of purported democratic political processes and even as an essential element of human rights.

Despite the thoughtful proliferation of writings surrounding the term in virtually every major aspect of international law, transparency as a principle of international law remains elusive. The evasive nature of transparency is fundamentally connected to the word's own extraordinary aspiration of presenting what is actual and free from attributes that may detract from or alter that which is true. Thus, it is intimately connected at a fundamental conceptual level with the Attic Greek term for truth, “aletheia,” which in turn is derived from the verb “lanthanum,” and connected with the noun, “leithei.”

120 See, e.g., Fracassi, supra note 19 (discussing confidentiality in NAFTA-related arbitration); McGraw & Amerasinghe, supra note 20 (discussing transparency in investor-state arbitration); Rogers, supra note 21 (discussing transparency in commercial arbitration).


122 Rogers, supra note 21, at 1325, n.103 (citing Larry Catá Backer, Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law, 37 COLUM. HUM. RTS. L. REV. 287, 304 (2006)).


125 See, e.g., Larry Diamond, Democratic Rollback: The Resurgence of the Predatory State, 87 FOREIGN AFF. 36, 45-6 (2008) (“Poorly performing democracies need better, stronger, and more democratic institutions-political parties, parliaments, and local governments—linking citizens to one another and to the political process. . . . Reform requires the internal democratization of political parties through the improvement of their transparency and accessibility and the strengthening of other representative bodies.”).


129 Id. at 464-65.

130 Id. at 470-71.
Juridical Convergence in International Dispute Resolution

The verb *lanthanum* is etymologically connected to the noun *leithei*. Despite the wide range of meanings that can be legitimately ascribed to the verb *lanthanum*, all appear to single out one very common concept of “escaping notice”, and therefore, “of being forgotten”, or even “of causing something to be forgotten.”[^1] The noun *leithei* means “forgetting” or “forgetfulness”.[^2] The Attic Greek word for truth, *aletheia*, curiously has a privative etymological root meaning, i.e., “the absence of forgetfulness.”[^3] The meaning of *aletheia* expands to include—primarily the sense of the true as opposed to the false—the real in contrast to the apparent and the unconcealed as opposed to the hidden.[^4] Contrary to the modern use of the English word “truth”, the word “aletheia” is used of things as well as of statements of the unconcealed as opposed to the obscured, of the honest in contrast to the deceptive, and of the true statement as opposed to the false one.[^5] For present purposes, it is important to observe that the Attic Greek language for truth, *aletheia*, is not presented positively. Instead, *aletheia* presents the truth conceptually in the negative, as the absence of concealment.

The use of transparency in international law also is presented negatively, much like *aletheia*, in the sense of access or disclosure requiring affirmative undertaking on the part of the object. These uses of transparency are susceptible to being categorized rather comprehensively into nine sets: (1) openness/access to spectators,[^6] (2) openness/access to source materials,[^7] (3) openness/access to monitor,[^8] (4) openness/access to full participation,[^9] (5) disclosure manifested in an affirmative production of information,[^10] (6) openness/access to submit,[^11] (7) procedural openness facilitating process legitimacy,[^12] (8) political accountability,[^13] and (9) openness/access to corroborate parity and/or reciprocity compliance.[^14]

[^1]: Id. at 464-65.
[^2]: Id. at 470-71. The River “Lethe”, in Greek mythology, the “River of Forgetfulness” is referenced in Book X in Plato’s *The Republic*, where presumably the reincarnated souls have to cross the “plain of Lethe” and drink from the river before being born again so that all memory of their past life may be erased. *PLATO, THE REPUBLIC* 277 (Allan Bloom trans., 1968) (c. 380 BC).
[^3]: An *Intermediate Greek-English Lexicon*, supra note 128, at 34.
[^4]: Id.
[^5]: Id.
[^6]: See, e.g., *Methanex v. United States*, supra note 58, ¶ 23 (explaining that the United States consented to the “open and public hearing of all hearings before the Tribunal.”).
[^7]: See id. ¶ 10 (explaining that Canada “supported public disclosure of arbitral submissions, orders and awards to the fullest extent possible.”).
[^8]: See id. ¶ 23 (explaining that the United States consented to the “open and public hearing of all hearings before the Tribunal.”).
[^9]: Id.
[^10]: See id. ¶ 10 (explaining that Canada “supported public disclosure of arbitral submissions, orders and awards to the fullest extent possible.”).
[^11]: See id. ¶ 9-10 (explaining the differing approaches of Mexico and Canada with respect to the standing of amicus petitions under NAFTA).
[^12]: Id.
[^13]: Id.
[^14]: Id. ¶ 10, 23.
Juridical Convergence in International Dispute Resolution

Because of the multiple structural needs for some form or permutation of transparency requiring a corresponding act of "unconcealing" as to access or publication, the term lingers on without conceptual development. The multifarious environment in which transparency in some form finds space in international law comports with the nine above-referenced classifications.

B. Transparency in Select Sources of International Law

An emblematic treaty that embodies the post-Westphalian sovereignty model of interdependence—in contrast with independence—of nations is the Energy Charter Treaty (the "ECT"). The ECT explicitly references transparency in connection with the substantive international investment law principles of FET, non-discriminatory practice, and IMS. The ECT mentions transparency together with "stable, equitable, and favorable" as adjectives for the conditions that investors are to enjoy in each of the contracting States, which in turn would include the core of international investment law standards that host-states are committed to provide to foreign investors: FET, FPS, protection from unreasonable or discriminatory measures, and IMS.

The application of transparency to the broad gamut of conditions attendant to investments implicitly suggests that the form of transparency that the ECT contemplates as a predicate to application of the substantive standards of investment protection to foreign investors, must itself be privative, i.e., incorporating all nine categories of transparency identified herein. This view of transparency within the meaning of Article 10(1) of the ECT not only comports with the variety and manifoldness of investment conditions giving rise to FET and IMS, but also with the very nature of a treaty—the enforcement of which generally necessitates political and procedural transparency.

Although the term "transparency" does not appear in any form in Chapter 18 of the NAFTA, virtually all elements of what here has been identified as "privative transparency" are present. The NAFTA parties are charged with rigorous publication requirements concerning its laws, regulations, procedures, and administrative rulings as well as other matters that may be of interest to citizens of the NAFTA signatories. Also, proposed measures and access for participation


146 Id. at art. 10(1). This article explains:
Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable and transparent conditions for investors of other Contracting Parties to make Investments in its area. Such conditions shall include a commitment to accord at all times, to Investments, of Investors of other Contracting Parties fair and equitable treatment. Such Investments also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment, or disposal. In no case shall such Investments be accorded treatment less favorable than that required by international law, including treaty obligations.

Id. (emphasis added).

147 Instead of Full Protection and Security, the ECT mentions "constant protection and security." Id. at art. 10(1).

148 Supra Part V.A.

149 See NAFTA, supra note 87, art. 1802(1).
is additionally memorialized in this chapter.\textsuperscript{150} Actual participation in proceedings extended to non-NAFTA parties, along with “procedural transparency” are addressed.\textsuperscript{151} The absence of explicit reference to transparency in the NAFTA Chapter 18 does not diminish the compelling statement that central elements of a privative transparency norm pervade administrative and institutional provisions. An explicit reference to transparency is not necessary because of the Preamble’s declaration concerning the establishment of “clear and mutually advantageous rules governing [the trade of the NAFTA parties] [and to] ensure a predictable commercial framework for planning and investment.”\textsuperscript{152}

The United Nations Conference on Trade and Development (“UNCTAD”) comments on the gradual but “significant qualitative progress” that the principle of transparency has forged in bilateral investment treaties.\textsuperscript{153} UNCTAD’s summary on this specific issue merits reading and re-reading in its entirety:

A minority of BITs include transparency provisions. However, gradual, yet significant qualitative progress has been made with regard to the rationale and content of such rules. While there has been a trend towards viewing transparency as an obligation imposed on countries to exchange information, new approaches also deem it to constitute a reciprocal obligation involving host-countries and foreign investors. Transparency obligations are also no longer exclusively geared towards fostering exchange of information; rather they relate to transparency in the process of domestic rule-making aimed at enabling interested investors and other stakeholders to participate in that process.\textsuperscript{154}

UNCTAD’s observations attest to the development and ascendancy not only of the narrow issue of transparency in BITs, but more importantly the multiple spheres of the transparency principle referenced—if not systematically defined and adopted—by international law. Reference is also made to transparency as a principle that encompasses not only reciprocal disclosure obligations, but one that also occupies the space of domestic rule-making and the realm of process participation legitimacy.\textsuperscript{155}

\begin{footnotesize}
\begin{enumerate}
\item See id. art. 1802(2).
\item Id. art. 1804(a) & (b). This article reiterates that:
  \begin{enumerate}
  \item wherever possible, persons of another Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of any issues in controversy;
  \item such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding and the public interest permit . . . .
  \end{enumerate}
\item See NAFTA, supra note 87, pmbl.
\item Id. at (xiii) (emphasis added).
\item UNCTAD observes that
  \begin{enumerate}
  \item most other approaches used in its BITs, however, do not focus on transparency concerning investment opportunities, but rather on laws, regulations and administrative practices applicable
\end{enumerate}
\end{enumerate}
\end{footnotesize}
Juridical Convergence in International Dispute Resolution

Beyond the parameters of international investment law, transparency in general terms has been identified as a necessary principle. The United Nations has called for transparency on a wide range of issues from measures to be implemented in controlling and bringing an end to "illicit traffic in small arms and light weapons" to "development and poverty eradication." The United Nations reiterated the primacy of transparency as embodied in its Millennium Declaration in the Monterrey Consensus on Financing for Development. As part of an effort to fashion a global response to challenges confronting financing for development, the final text of agreements and commitments adopted at the International Conference on Financing for Development declares:

Recognizing that peace and development are mutually reinforcing, we are determined to pursue our shared vision for a better future, through our individual efforts combined, with vigorous multilateral action. Upholding the Charter of the United Nations and building upon the values of the Millennium Declaration, we commit ourselves to promoting national and global economic systems based on the principles of justice, equity, democracy, participation, transparency, accountability, and inclusion.

More specifically, the United Nations text on the Monterrey Consensus identified a need for a transparency principle in sectors such as the mobilization of public resources and the management of their use by governments, the enhancement of domestic markets pursuant to the development of sound banking systems, and foreign direct investments into developing countries. In this

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157 Id. at 4 ("Success in meeting these objectives depends, inter alia, on good governance within each country. It also depends on good governance at the international level and on transparency in the financial, monetary, and trading systems. We're committed to an open, equitable, rule-based, predictable, and non-discriminatory multilateral trading and financial system.") (emphasis added) Id.


159 Id. ¶ 9.

160 Id. ¶ 15.

161 Id. ¶ 17.

162 Id. ¶ 21

To attract and enhance in-flows of productive capital, countries need to continue their efforts to achieve a transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitably and with maximum development impact . . . .

Id.
same vein, the United Nations Security Council Report of the Secretary-General connects the rule of law with procedural and legal transparency.\textsuperscript{163}

C. The Application of the Transparency Norm to International Evidence Gathering

After reviewing select international law instruments, a general principle of transparency can be readily discerned. Much like the conceptual etymology of the term \textit{aletheia}, the principle as it appears suggests, if not altogether commands, an affirmative undertaking as its privative pronouncement calls for a universal absence of concealment. However, if a transparency principle is to develop and maximize its contribution to international law, it must be vested with particularity as to standard which it sets forth. Based on the multiple uses of transparency in international law, this particularity should comprise two parts, the first of which consists of nine elements.

The first conceptual category with which a privative transparency norm must be vested is an affirmative imperative of access and disclosure. The nine elements of this category have been gleaned from universally accepted sources of international law, and, as already referenced,\textsuperscript{164} consist of the following:

(i) Openness/access as to spectators,
(ii) Openness/access as to source materials,
(iii) Openness/access to monitor,
(iv) Openness/access to full participation,
(v) Disclosure as in an affirmative production of information,
(vi) Openness/access to submit,
(vii) Procedural openness leading to process legitimacy,
(viii) Political accountability, and
(ix) Openness/access to corroborate parity and/or reciprocity compliance.

The second category constituting the transparency norm is affirmative reciprocity/parity.

The theory underlying this first-step, embryonic framework is to provide a standard by which the transparency norm may find universal acceptance at a theoretical level, while preserving a practical aptitude. A non-value vested standard would be most conducive to juridical cultural convergence. By way of example, it would additionally provide transnational procedural rules concerning


The 'rule of law' is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, even independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

(emphasis added) \textit{Id.}

\textsuperscript{164} \textit{Supra} Part V. A.
Juridical Convergence in International Dispute Resolution

evidence gathering greater uniformity in their application, simultaneously introducing substantive content to critical terms.

The IBA Rules serve as an instructive functional model.\textsuperscript{165} Perhaps the most important standard that the IBA Rules articulate is the "relevant to the case and material to its outcome" pronouncement.\textsuperscript{166} That standard appears throughout the architecture of the Rules as a recurring criterion.\textsuperscript{167} The strategic and uniform use of the standard at the consultation, self-disclosure, and disclosure procedural junctures emphasizes its primacy. Yet, the standard, which is deemed to represent a synthesis fundamental to common and civil law concerns,\textsuperscript{168} nowhere defines the terms "relevant" or "material".

Similarly, the terms "evidence" and "expert" are not defined. While the term "expert report" is defined as "a written statement by a Tribunal-appointed Expert or a Party-appointed Expert," within the terms of the IBA Rules,\textsuperscript{169} there is no significant predicate from which to infer the significance of the term "expert" within the IBA Rules' own regime. The qualification of a witness as an expert is thus relegated to the arbitral tribunal's discretion.

Parallel in importance to the "relevant to the case and material to the outcome" standard is the introduction of a good faith requirement, which is new to the 2010 iteration of the IBA Rules.\textsuperscript{170} As with the terms "relevance," "material," and "expert witness," "good faith" is not defined.

Whether by happenstance or design, the absence of substantive definitions—either conceptual or by way of a standard—emphasizes the challenges that legitimate and actual juridical cultural convergence faces. Terms such as good faith or relevance vary greatly depending on the legal framework housing them. While not necessarily unachievable, arriving at substantive definitions or standards for these terms on a cross-cultural basis would be very difficult and finds little favor.

A more achievable aspiration would be a transparency norm that helps flesh out the parameters of applicability in relation to concepts such as materiality and relevance. The categorical standards that comprise the privative transparency norm that this writing proposes as a preliminary effort would allow a tribunal to test access and disclosure requirements. Similarly, considerations of reciprocity and parity may facilitate good faith analyses. It would redound to the best interest

\textsuperscript{165} It is not within the scope of this writing to comment extensively, let alone exhaustively on the IBA Rules. Instead, the objective is to highlight structural aspects of the Rules, merely as a model, where a transparency norm as here preliminarily defined may give rise to more comprehensive and universal application of the rules. It is not here asserted that the privative transparency norm conceptually should be limited to evidence gathering. Transnational evidence gathering, however, happens to combine a privacy vestige with an evidence gathering system that multiplies lack of juridical cultural convergence.

\textsuperscript{166} First encountered in IBA 2010 RULES, supra note 11, art. 2, ¶ 3(a) ("The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issue: (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome . . . .") (emphasis added).

\textsuperscript{167} IBA 2010 RULES, supra note 11, art. 3, ¶ 3(a)-(b), art. 3, ¶ 11, art. 4, ¶ 9; art. 8, ¶ 5, art. 2, ¶ 3(a).

\textsuperscript{168} Id. at pmbl., ¶ 1.

\textsuperscript{169} Id. ¶ 5 (defining "expert report").

\textsuperscript{170} The term "good faith" appears only twice in the IBA Rules—in the Preamble and again in the final paragraph—the symmetry in the placement of the term on these two occasions is important and suggestive. Id. at pmbl., ¶ 1, art. 9, ¶ 7.
of the international law community to fashion a privative transparency norm commanding affirmative undertakings which, in effect, arises from customary and conventional usage of transparency in international law. While the ad hoc use of the word devoid of any single particular meaning has served international law well, the benefits deriving from the multifarious application of the general term compel conceptualization in the form of a single norm.

VI. Conclusion

In light of economic and informational globalization, the demand for legal convergence among disparate juridical traditions has never been greater. Unlike its international trade law counterpart, international investment law, and more particularly the law of international dispute resolution, are yet to develop so as to keep pace with the needs of economic and informational globalization. Consequently, ICA and ISA remain as “weigh stations” until such time as transnational judicial tribunals may exercise jurisdiction over disputes arising in both private and public international contexts.

Perhaps the most pronounced chasm dividing common and civil law juridical cultures is to be found in the difference between evidence gathering and American-style discovery. Although meaningful efforts, such as the IBA Rules, seeking to accommodate both traditions represent material gains in the field, the divide lingers and continues to be polarizing. One approach in an attempt to harmonize competing conceptions is to incorporate a norm premised on transparency that in turn may help to reconcile these differences. A transparency-based norm appears to be particularly appropriate because of the privacy/confidentiality structural configuration of ICA, engrafted as a developmental legacy onto investor-state arbitration. The structural and substantive uncertainties endemic to both ICA and ISA also create a space for this norm. Moreover, numerous sources of international law concerning diverse fields—ranging from human rights to international investment protection—have adopted some form the concept of transparency, but have never elevated it to the stature of a norm or principle of international law. The privative transparency norm outlined purports to represent a first-step towards this effort by comprising two conceptual categories, both arising from the general ad hoc use of transparency as the term appears in international law sources. Arbitrators, judges, practitioners, and captains of industry would be able to accord greater uniformity and predictive value to international frameworks, such as those of the IBA Rules, that otherwise would leave undefined and untested central premises of practical consequences.

Ironically, the significance of the word “transparency” in international law is less than clear. Yet, its very ubiquitous nature compels its ascendance to theoretical normative standing in order to maximize transparency’s uniform and practical application.