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## Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration

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# ENDING BLIND SPOT JUSTICE: BROADENING THE TRANSPARENCY TREND IN INTERNATIONAL ARBITRATION

## INTRODUCTION

The debate regarding the importance of transparency versus privacy and confidentiality in international arbitration<sup>1</sup> is at a crossroads. On April 1, 2014, the “ground-breaking” Rules on Transparency in Treaty-Based Investor-State Arbitration (“Transparency Rules”), promulgated by the United Nations Commission on International Trade Law (“UNCITRAL”), took effect.<sup>2</sup> The title of the Transparency Rules is deliberately verbose and specific—it is intended to provide “prima facie clarity” that the rules apply to investor-state arbitration, but not international commercial arbitration.<sup>3</sup> Although there is a “blurred boundary” between these two systems of international arbitration,<sup>4</sup> their basic distinction relates to the identity of the disputants. That is, international commercial arbitration involves disputes between private “commercial” parties, whereas investor-state arbitration involves disputes between a private “investor”

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1. See generally, Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121 (2003).

2. Press release, U.N. Comm'n on Int'l Trade Law, UNCITRAL Adopts Transparency Rules for Treaty-Based Investor-State Arbitration and Amends the UNCITRAL Arbitration Rules, U.N. Press Release UNIS/L/186 (July 12, 2013) [hereinafter UNCITRAL Adopts Transparency Rules]. The United Nations General Assembly established UNCITRAL in 1966 with a mandate to “further the progressive harmonization and modernization of the law of international trade.” UNCITRAL, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law* 1 (Jan. 2013), available at <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>. UNCITRAL pursues its mandate by promoting the use and adoption, by states and arbitral institutions, of the model legislative and non-legislative instruments that it drafts. *Id.*

3. Rep. of the U.N. Comm'n on Int'l Trade Law, 46th Sess., July 8–26, 2013, U.N. Doc. A/68/17; GAOR, 68th Sess., Supp. No. 17 (July 8–26, 2013).

4. Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1306 (2006) (noting that precedents and procedures, as well as lawyers and arbitrators, continuously shuttle between the two systems of investor-state arbitration and international commercial arbitration).

and a state or state-owned entity.<sup>5</sup> The limited scope of the Transparency Rules leaves international commercial arbitration in the dark.

The Transparency Rules reverse the presumption of privacy in investor-state arbitration, while leaving the private nature of international commercial arbitration wholly intact.<sup>6</sup> International arbitration is usually private because arbitral hearings, as a rule, are closed to the public,<sup>7</sup> arbitral awards<sup>8</sup> are typically not published, and, when awards are published, their content is often “sanitized”<sup>9</sup> by redaction of party names and other identifying details.<sup>10</sup> Thus, commonly, no public record memorializes an arbitration unless the losing party actively challenges the award in court or passively refuses to pay damages, and the winning party consequently goes to court to enforce the award. Such enforcement proceedings effectively convert arbitral awards into civil court judgments and have the tertiary effect of publicly memorializing disputes by creating court records.<sup>11</sup> But most arbitrations end in settlement or voluntary award compliance.<sup>12</sup> In

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5. Although states, as in nations, and scholars may define the scope of what is “international” and “commercial” somewhat differently, the fundamental party-based distinction between the two systems remains accurate. See RICHARD GARNETT ET AL., *A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION* 7–9 (2000).

6. UNCITRAL Adopts Transparency Rules, *supra* note 2.

7. The Rules of Arbitration of the International Chamber of Commerce (“ICC”), for instance, state that “[s]ave with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted” to hearings. Int’l Chamber of Commerce, *ARBITRATION RULES*, § 26–3 (2012), available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>.

8. An arbitral award is the written document that sets forth the “final and binding” determination of the arbitrator. *RESTATEMENT (THIRD) U.S. LAW OF INT’L COMM. ARB.* § 1-1 (Tentative Draft No. 2, 2012).

9. Buys, *supra* note 1, at 125.

10. See KYRIAKI NOUSSIA, *CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION* 37–38 (2010).

11. See generally, Susan Wiens & Roger Haydock, *Confirming Arbitration Awards: Taking the Mystery out of a Summary Proceeding*, 33 WM. MITCHELL L. REV. 1293, 1294 (2007).

12. According to a recent survey of multinational corporations, 32 percent of international commercial arbitrations settle. Additionally, 49 percent of arbitrations end in voluntary award compliance, meaning that the losing party voluntarily pays damages, or otherwise satisfies the award, without challenging the award in court. See PRICEWATERHOUSECOOPERS & QUEEN MARY UNIVERSITY OF LONDON SCHOOL OF INTERNATIONAL ARBITRATION,

such cases, therefore, the dispute remains private. Under the Transparency Rules, however, arbitral hearings “shall be public” by default<sup>13</sup> and any document submitted to the arbitral tribunal by the disputants “shall be made available to the public.”<sup>14</sup> Such features are unprecedented in the transparency trend in international arbitration.<sup>15</sup>

The stated purpose of the Transparency Rules, and the transparency trend in general, is to protect public interests.<sup>16</sup> The public interests conceivably at stake in international arbitration are divisible into four categories: (1) democratic deficit concerns; (2) public purse and taxpayer concerns; (3) allegations of government misconduct; and (4) “profoundly important” public policy issues.<sup>17</sup> The transparency trend is based on the notion that the general public is a significant stakeholder in international arbitration. Since arbitrations can significantly impact public interests, people have a right, at least, to notice of disputes that affect them. For example, when a dispute concerns the “Tanzanian drinking water supply system,” Tanzanians have a right to know about the dispute.<sup>18</sup> Thus, “improving the rules on public notice” is among the “specific” goals of organizations that favor the Transparency Rules.<sup>19</sup> Surprisingly, however, the current reality is that “it is often impossible for the public . . . to know . . .

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INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 2008 10 (2008) [hereinafter CORPORATE ATTITUDES SURVEY 2008]; *see also* Xavier Favre-Bulle, *50 Years of the New York Convention on Enforcement of Awards*, in *NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2008*, at 61, 78 (Christoph Muller & Antonio Rigozzi eds., 2008).

13. UNCITRAL Res. 68/109, U.N. Doc. A/68/462, ¶ 6 (Dec. 16, 2013) [hereafter Transparency Rules].

14. *Id.* ¶ 3.

15. *See generally*, TRANSPARENCY IN INTERNATIONAL TRADE AND INVESTMENT DISPUTE SETTLEMENT (Junji Nakagawa ed., 2013) (including various articles tracing transparency trend developments).

16. Ctr. for Int'l Envtl. Law & Int'l Inst. for Sustainable Dev., *REVISING THE UNCITRAL ARBITRATION RULES TO ADDRESS INVESTOR-STATE ARBITRATIONS 5* (2007), *available at* [http://www.ciel.org/Publications/CIEL\\_IISD\\_RevisingUNCITRAL\\_Dec07.pdf](http://www.ciel.org/Publications/CIEL_IISD_RevisingUNCITRAL_Dec07.pdf) [hereinafter CIEL Report 2007].

17. Examples of important public policy issues are environmental protection, public safety and health, and market competition. *Id.* at 4.

18. *Id.*

19. *Id.* at 3.

that an arbitration has been filed . . . [or] what the ultimate [arbitral] decision is.”<sup>20</sup> Although disputants could theoretically agree to notify regulators or the media about an arbitration that impacts public interests, such voluntary public notice “rarely happen[s]” because at least one party normally desires to stay out of the figurative “sunshine” and avoid “public scrutiny.”<sup>21</sup> Proponents of the transparency trend in international arbitration recognize that a system in which parties resolve arbitrations that impact important public interests, without public notice, paints a grotesque portrait.<sup>22</sup> Thus, it is “now widely recognized” that remedial steps like the adoption of the Transparency Rules are necessary to protect public interests by increasing transparency in international arbitration—at least in the system of investor-state arbitration.<sup>23</sup>

The rationale for narrowing the scope of the Transparency Rules, and the transparency trend in general, thus far, to investor-state arbitration is that a “public interest difference” exists between investor-state arbitration and international commercial arbitration.<sup>24</sup> Arguably, the first three categories of public interests—democratic deficit concerns, public purse concerns,

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20. *Id.* at 5. The Transparency Rules will take time to significantly alter the treaty-based, investor-state arbitration landscape because, by default, the rules only apply to new treaties. Many bilateral investment treaties (“BITs”), however, already exist. See Transparency Rules, *supra* note 13, ¶ 3.1. Although parties to a BIT may mutually agree to apply the Transparency Rules retroactively, states have not signaled that such revisions are expected. BITs are intended to encourage and protect foreign direct investments; they generally include an arbitration regime that enables foreign investors to compel arbitration if a state or state-owned entity breaches its contractual obligations, or vice versa. *Bilateral Investment Treaties*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties> (last visited Jan. 13, 2014).

21. CIEL Report 2007, *supra* note 16, at 5.

22. *Id.*

23. *Id.*

24. *Id.* at 3–4; see also Carl-Sebastian Zoellner, *Third-Party Participation (NGO's and Private Persons) and Transparency in ICSID Proceedings*, in THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): TAKING STOCK AFTER 40 YEARS 179, 180 (Rainer Hofmann & Christian J. Tams eds., 2007); Julie Lee, Note, *UNCITRAL's Unclear Transparency Instrument: Fashioning the Form and Application of A Legal Standard Ensuring Greater Disclosure in Investor-State Arbitrations*, 33 NW. J. INT'L L. & BUS. 439, 446 (2013).

and allegations of government misconduct—are not directly implicated in disputes between private parties, and issues of public policy are not necessarily at stake in commercial disputes. In light of this difference, some scholars and institutions conclude that a lack of transparency is tolerable in international commercial arbitration, even though commercial disputes may impact profoundly important public policy issues.

This Note challenges the legitimacy and sufficiency of the “public interest difference” as a rationale to conclude that greater transparency is not required in international commercial arbitration. It also explores how the United States Supreme Court mistakenly opened the floodgates, allowing parties to use international commercial arbitration to privately resolve commercial disputes that affect public interests, in its watershed *Mitsubishi Motors* decision.<sup>25</sup> The holding of the Court greatly expanded subject matter arbitrability: post-*Mitsubishi*, even statutory claims that impact profoundly important issues of public policy, such as Sherman Act antitrust claims, are arbitrable.<sup>26</sup> Although collusion may not poison public water supplies, it does pick the public’s pocket.<sup>27</sup> The Supreme Court based its holding on the misguided presumption that the “award-enforcement stage”<sup>28</sup> would give courts the chance to minimally review the findings of tribunals<sup>29</sup> and ensure that tribunals “took cognizance [of] . . . and actually decided” claims sensitive to public policy.<sup>30</sup> Furthermore, the Court presumed that enforcement

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25. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

26. *Id.*

27. In a recently settled FBI and DOJ investigation of a vast price-fixing scheme involving a number of Japanese automotive part suppliers, a scheme at least a decade old, Mitsubishi Electric Corporation faces a fine of US\$190 million. Additionally, automotive parts worth over US\$5 billion and over 25 million cars sold in the United States alone were affected. According to an assistant director at the FBI, “[t]he scheme directly impacted your bank account.” Erick Ayapana, *21 Parts Suppliers Busted in Price-Fixing Scandal*, MOTOR TREND, January 2014, at 20.

28. *Mitsubishi*, 473 U.S. at 638.

29. The “tribunal” in arbitration is comparable to the “court” in litigation. See, e.g., Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2005).

30. *Mitsubishi*, 473 U.S. at 638.

proceedings would also serve the “policing function” of the Sherman Act by bringing the dispute to the attention of the general public and government authorities.<sup>31</sup> But hindsight reveals that enforcement proceedings frequently do not occur because most arbitrations end in settlement or voluntary award compliance.<sup>32</sup> In such instances, public notice therefore never occurs. Thus, the current system of international commercial arbitration permits disputes that impact profoundly important public policy interests to be resolved outside of the public’s view. Such blind spot justice must end.

Part I of this Note defines “privacy,” “confidentiality,” and “transparency” in the context of international arbitration. It also discusses how arbitral awards are readily enforced in the courts of most states under the widely acceded to Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).<sup>33</sup> Additionally, Part I traces the history of the transparency trend in international arbitration from its North American Free Trade Agreement (“NAFTA”) related origins to the adoption of the Transparency Rules. Part II challenges the “public interest difference” rationale for confining the transparency trend to the system of investor-state arbitration. Part III analyzes *Mitsubishi Motors* to epitomize the concept of blind spot justice, illustrating how international commercial arbitration imperils public interests. Part IV concludes by urging UNCITRAL, especially due to its connection to human rights and public interests as a subdivision of the United Nations, to adopt a rule applicable to international commercial arbitration that requires the publication of unsanitized arbitral awards, in an effort to protect public interests and promote the integrity of international commercial arbitration.<sup>34</sup>

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31. *Id.* at 635.

32. FAVRE-BULLE, *supra* note 12, at 78.

33. FAVRE-BULLE, *supra* note 12, at 61–62.

34. On new grounds, this Note revives scholarly calls for the publication of arbitral awards in international commercial arbitration. Prior scholarship is largely unconcerned with protecting public interests, but instead encompasses publishing awards for the following purposes: (1) to encourage the development of a “collective arbitral wisdom” akin to a consistent body of common law based on precedent, *see* Richard C. Reuben, *Constitutional Gravity: A Unity Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 U.C.L.A. L. REV. 949, 1085 (2000); (2) to help parties select suitable arbitrators, *id.* at 1056–59; (3) to help parties avoid future disputes, Buys, *supra* note 1, at 136–38; (4) to better promote awards as fair, which will make “implementation” of awards

## I. BACKGROUND

To understand blind spot justice, it is necessary to clearly define the terms of the international arbitration transparency debate, understand how the New York Convention has enabled international commercial arbitration to flourish, and appreciate the history of the transparency trend in international arbitration.

### A. Defining Key Terms

#### 1. Privacy

In the context of international arbitration, the term “privacy” is used to describe the aspects of a dispute that are unknown or inaccessible to the public.<sup>35</sup> Therefore, an arbitral dispute that is resolved from start to finish without any public notice of its occurrence may be characterized as occurring in absolute privacy. International commercial arbitration, which consists of disputes between private<sup>36</sup> parties, involves a high degree of privacy because arbitral hearings are customarily closed to the public. Additionally, arbitral awards are typically not published, and, in the limited instances where awards are published, their content is often “sanitized”<sup>37</sup> by redaction of party names and other identifying details.<sup>38</sup> Thus, commonly, no public record memorializes an arbitral dispute unless the losing party either actively challenges the award by seeking a court order of vacatur<sup>39</sup> or passively fails to comply with the award. An additional requirement in the latter scenario is that the winning party must

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easier, *id.*; (5) to “promote[] democratic principles,” which is a quasi-extension of the democratic deficit principle, *id.*; and (6) to give practitioners and academics the chance to analyze, critique, and improve the dispute resolution system. Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT’L L. REV. 969, 1018 (2001).

35. See, e.g., 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, 958 (2003).

36. Here, note a distinct second usage of “private,” meaning “[r]elating or belonging to an individual, as opposed to the . . . government.” BLACK’S LAW DICTIONARY 595 (4th ed. 2011).

37. Buys, *supra* note 1, at 125.

38. See NOUSSIA, *supra* note 10, at 38.

39. See generally, Restatement (Third) U.S. Law of Int’l Comm. Arb. § 1-1 TD No 2 (2012).



go to court and commence an enforcement proceeding, which effectively converts the arbitral award into a civil court judgment.<sup>40</sup> But most arbitrations end in settlement or voluntary award compliance and thus remain private.<sup>41</sup> According to a 2008 survey of major multinational corporations that utilize the system of international commercial arbitration, enforcement proceedings are required in only 11 percent of disputes; another 8 percent of disputes involve a supposed settlement or award, but are followed by litigation.<sup>42</sup> In international commercial arbitration, therefore, only 19 percent of disputes are estimated to result in the production of a public court record;<sup>43</sup> the remaining 81 percent enjoy absolute privacy.<sup>44</sup> Although similar statistics for investor-state arbitration are not available, when organizations note that “it is often impossible for the public or *other states* to know . . . that an arbitration has been filed . . . [or] what the ultimate [arbitral] decision is,” they are implicitly referring to investor-state arbitration.<sup>45</sup> Thus, investor-state arbitration also involves a high degree of privacy. The privacy aspects of arbitration, including the closed-door nature of hearings and the lack of public records and public notice of disputes, however, must not be confused with “confidentiality.”<sup>46</sup>

## 2. Confidentiality

Confidentiality in the context of international arbitration “goes further than privacy”<sup>47</sup> because it places secrecy restrictions on the players involved in the arbitration.<sup>48</sup> While the

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40. Wiens & Haydock, *supra* note 11, at 1294.

41. FAVRE-BULLE, *supra* note 12, at 78.

42. The survey found that international commercial arbitration outcomes parse out as follows: 32 percent of disputes settle; 49 percent of disputes end in voluntary award compliance; 11 percent of cases result in enforcement proceedings; and the remaining 8 percent of disputes involve litigation subsequent to a settlement or arbitral award. See CORPORATE ATTITUDES 2008, *supra* note 12, at 2, 10.

43. *Id.*

44. *Id.*

45. CIEL Report 2007, *supra* note 16, at 5.

46. See Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1213 (2006).

47. NOUSSIA, *supra* note 10, at 40.

48. In addition to the disputing parties, the cast of “players” who may be affected by confidentiality restrictions include the arbitral tribunal, meaning the arbitrator or panel of arbitrators, arbitral institutions, and sometimes even

issue of defining “confidentiality” and “privacy” in the context of international arbitration has spurred much scholarly debate and even confusion among practitioners,<sup>49</sup> an instructive way to distinguish the two terms is to focus on whom is restricted. “Privacy” considerations restrict the general public’s access to arbitral hearings and documents.<sup>50</sup> By contrast, “confidentiality” considerations restrict what the disputants, the tribunal, and the arbitral institution may disclose to others.<sup>51</sup> Conveniently, based upon common figures of speech, such a distinction is intuitive because speaking “in private” means no one else is around, while being told something “in confidence” means that the recipient of the information is expected to keep it secret.<sup>52</sup> Under the rules of arbitral institutions, such as the ICC, international arbitration is private by default, but not confidential. Although the tribunal and the institution are generally bound to keep the existence of a dispute and information related to it confidential, the disputants are not similarly restricted.<sup>53</sup>

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courts—where enforcement proceedings or other arbitration related litigation, such as a request for interim relief, occur. *Compare* NOUSSIA, *supra* note 10, at 165–66 (discussing that courts in some jurisdictions, including France, Germany, and England, may hold they are bound by an implied duty of confidentiality), *with* ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 52 (2005) (“provisional relief decisions [by courts] will generally not be confidential.”). Witnesses who testify during arbitral hearings are a notable exception from the cast of “players” and are normatively not bound by confidentiality restrictions. NOUSSIA, *supra* note 10, at 165–66.

49. *See* Schmitz, *supra* note 46, at 1212.

50. *Id.* at 1211 (“arbitration is private in that it is a closed process” and it does not “produce public opinions that courts infuse into public law.”).

51. *Id.*; NOUSSIA, *supra* note 10, at 37–41; *see also* BLACK’S LAW DICTIONARY 146 (4th ed. 2011) (“confidentiality” means “the state of having the dissemination of certain information restricted”).

52. Moreover, the dictionary definition of a “confidentiality agreement” is “a promise not to disclose . . . information learned in the course of the parties’ relationship.” BLACK’S LAW DICTIONARY 146 (4th ed. 2011).

53. For example, under the ICC Arbitration rules, the work of the International Court of Arbitration (“ICA”) is expressly confidential. *See* Arbitration Rules, *supra* note 7, Appendix 1, Article 6, at 44. Moreover, even if a third party learned about an arbitration and sought further information, copies of an arbitral award, under the ICC rules, “shall be made available upon request and at any time to the parties, *but to no one else.*” *Id.* The ICA was founded in 1923 as the arbitration body of the ICC. *Arbitration*, ICC, [iccwbo.org/products-and-services/arbitration-and-adr/arbitration/](http://iccwbo.org/products-and-services/arbitration-and-adr/arbitration/) (last visited Oct. 30, 2014). Its name is a misnomer, however, as it is a supervisory organization, and not an actual tribunal that conducts hearings. The ICA appoints arbitrators, monitors the

Yet arbitration is a “creature of contract.”<sup>54</sup> During contract negotiations, the parties may easily modify a standard arbitration clause to effectively include a confidentiality agreement that requires them to keep even the existence of future arbitral disputes secret.<sup>55</sup> Despite the transparency trend, in a recent report on investor-state arbitration, the ICC explains how to draft a modified arbitration clause that “protects confidentiality.”<sup>56</sup> When such a clause is inserted in a contract, any future dispute arising out of or related to the contract will be highly confidential: the tribunal, the arbitral institution, *and the disputants* will be bound to keep the arbitration secret, unless required by applicable law to disclose certain information.<sup>57</sup>

Thus, even though the default structure of international arbitration does not place secrecy restrictions upon the disputants, confidentiality, due to the ease of its full implementation, is still

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arbitral process, and “approves” arbitral awards. Although the approval process, at first glance, seems akin to a form of appellate review, it is not; the ICA merely checks that the tribunal addressed all pertinent issues in a dispute and that the award is adequately written. *Id.*

54. *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring) (finding that a court must always inquire whether the parties agreed to arbitrate, because arbitration is a “creature of contract”).

55. ICC Commission, *ICC Arbitration Commission Report on Arbitration Involving States and State Entities under the ICC Rules of Arbitration*, 3, Doc. 862, (Mar. 17, 2014) [hereinafter ICC State Report], available at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities-under-the-ICC-Rules-of-Arbitration/>.

56. *Id.* The model modified ICC confidential arbitration clause reads as follows:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. *The parties agree to keep confidential the existence of the arbitration, the arbitral proceedings, the submissions made by the parties and the decisions made by the arbitral tribunal, including its awards, except as required by applicable law and to the extent not already in the public domain.*

*Id.* (italics added in lieu of bolded text in original).

57. For example, limited regulatory reporting requirements may exist. See discussion *infra* Part III.C.

considered a major advantage of arbitration, compared to litigation.<sup>58</sup> The confidential nature of arbitration makes it ideal for protecting trade secrets, which may be more prone to information leaks during litigation.<sup>59</sup> Yet, the efficacy of confidentiality in arbitration extends beyond protecting intellectual property. Confidentiality may silence all of the arbitral players and, as a result, the negative press that often surrounds litigation may be avoided.<sup>60</sup> Thus, a modified arbitration clause that includes a confidentiality provision may function as an effective reputational risk mitigation tool. This helps explain why multinational corporations in industries prone to negative publicity and closely monitored by special interest groups, such as the energy sector, report that to them “confidentiality” is an especially important characteristic of international arbitration.<sup>61</sup>

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58. See, e.g. GARNETT ET AL., *supra* note 5, at 14; Buys, *supra* note 1, at 121; PriceWaterhouseCoopers & Queen Mary University of London School of International Arbitration, INTERNATIONAL ARBITRATION: CORPORATE CHOICES IN INTERNATIONAL ARBITRATION 8 (2013) [hereinafter CORPORATE CHOICES] (showing confidentiality ranked in the top two perceived benefits of arbitration for 36 percent of survey respondents).

59. See Gu Weixia, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?*, 15 AM. REV. INT'L ARB. 607, 630 (2004).

60. Confidentiality is important to parties that “would prefer to keep their disputes private, thereby avoiding publicity that may hurt their image or benefit their competitors. The confidentiality of arbitral proceedings enables parties to resolve their disputes in private, without media attention, and ensure that the substance of the proceedings will not be disclosed.” See Brown, *supra* note 34, at 972 n.8 (quoting Philip Rothman, *Pssst, Please Keep It Confidential: Arbitration Makes It Possible*, 49-SEP DISP. RESOL. J. 69 (1994).

61. See CORPORATE CHOICES, *supra* note 58, at 8 (discussing survey that found energy industry respondents to value confidentiality highly among the benefits of international arbitration, compared to other industries, such as construction); See also Cynthia A. Williams, *Civil Society Initiatives and “Soft Law” in the Oil and Gas Industry*, 36 N.Y.U. J. INT'L L. & POL. 457, 465–66 (2004). Focusing on the energy sector, Williams discusses how international oil conglomerates have embraced corporate social responsibility as a way to manage the “globalization backlash” and calls for them to act more responsibly, given the global impact of their actions and their heightened visibility in the media. See *Id.* Williams explains that a tactic of energy producers is to “work with” nongovernmental organizations (“NGOs”), rather than let them dictate the conversation and calls for regulatory reform. See *Id.* Modern NGOs, often focused on environmental or human rights concerns, are “extremely well versed at harnessing the power of publicity.” *Id.* at 466.

### 3. Transparency

Ironically, “transparency” is not always clearly defined in the context of international arbitration.<sup>62</sup> Scholarly debate and confusion surrounding the issue has led to a variety of definitions, spurred warnings to “listen carefully” when scholars define “transparency,” and even prompted an allegorical symposium speech.<sup>63</sup> In the speech, the task of defining “transparency” is compared to the parable of blind persons who encounter an elephant and attempt to identify what they have found after each person touches only one part of the animal—a leg is mistaken for a tree, the stringy tail is mistaken for rope, and the watery trunk is mistaken for a hose.<sup>64</sup> The pertinent lesson is that narrow definitions of “transparency” consider only one part of the term’s full meaning—if the other parts are regarded as independent, then sooner or later one is liable to be stepped on by an elephant.<sup>65</sup>

Some scholars, nonetheless, parse out what most consider to be parts of “transparency” into three “distinct but related concepts:” (1) public access; (2) public disclosure; and (3) transparency.<sup>66</sup> The third “transparency” concept, however, is narrowly defined to refer only to “the ready availability to ‘interested parties’ of the rules that regulate” the adjudicatory process, a largely procedural concern.<sup>67</sup> Thus, “transparency” becomes merely about whether the “interested” disputants are informed of what procedures and rules govern the tribunal’s conduct. Such a narrow conception of the term is best described as “procedural transparency” because it does nothing to notify the public about the substance of disputes. By narrowing the definition of “transparency,” these scholars reach the distorted conclusion that a “surprisingly high level of transparency” already exists in international commercial arbitration.<sup>68</sup> Under the narrow definition, admittedly, procedural aspects of arbitration have become highly transparent due to the rise in popularity of institutional

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62. Rogers, *supra* note 4, at 1303.

63. See John R. Crook, *Joint Study Panel on Transparency in International Commercial Arbitration*, 15 ILSA J. INT'L & COMP. L. 361, 363 (2009).

64. *Id.*

65. *See id.*

66. Rogers, *supra* note 4, at 1303.

67. *Id.* at 1303.

68. *Id.*

arbitration,<sup>69</sup> which uses flexible, but officially codified, procedures that are readily available in rulebooks.<sup>70</sup>

But current usage of the term “transparency” by the ICC, the content of the Transparency Rules, and scholarly discussions of the public interest rationale for increasing transparency in investor-state arbitration all indicate that the term is prudently defined in a broad manner that includes the trifecta of public access, public disclosure, and procedural transparency.<sup>71</sup>

The 2012 ICC report on investor-state arbitration uses “transparency” to refer to procedural transparency<sup>72</sup> and the public disclosure of arbitral awards;<sup>73</sup> consequently, the ICC rejects the narrow definition of “transparency.”<sup>74</sup> Furthermore,

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69. Institutional arbitration is defined in contrast to “ad hoc” arbitration. The former applies rules set by an arbitral institution and is supervised by the institution to a limited extent. For example, the institution sometimes plays a role in appointing the arbitrators and, under ICC rules, a central body summarily approves awards. Ad hoc arbitration, by contrast, may still apply the rules of an institution, but the proceedings occur outside the supervision of an arbitral institution. *Arbitration*, ICC, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/> (last visited Oct. 25, 2014).

70. The arbitration rules of major international arbitral institutions, such as the ICC, the London Court of International Arbitration (“LCIA”), and the International Centre for Settlement of Investment Disputes (“ICSID”), are readily available online to interested parties and the public alike. See ICC Rules of Arbitration, *supra* note 7; *LCIA Arbitration Rules*, LCIA, available at [http://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx); See Int’l Ctr. for Settlement of Investment Disputes, *ICSID Rules of Procedure for Arbitration Proceedings*, available at [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf).

71. See ICC State Report, *supra* note 55, at 3–4; Transparency Rules, *supra* note 13, ¶ 3; CIEL Report 2007, *supra* note 16.

72. *Id.* at 4. (“States seeking transparency in [investor-state] arbitration may wish the court to communicate the reasons for its decision” and thus may include a clause in their agreement that says so). Although this usage of “transparency” initially seems substantive, it is really about arranging a transparent procedural mechanism. The decision referred to is a discretionary procedural decision made by the ICA, the central supervisory body of the ICC, to reject the appointment of a party-selected arbitrator.

73. ICC State Report, *supra* note 55, at 3. (explaining that states and their private contractual counterparties, while negotiating an arbitration clause, “can agree on greater transparency . . . by providing for the award . . . to be made public.”).

74. A counterargument exists, claiming that the ICC does not *reject* the narrow meaning, but rather it uses “transparency” in two distinct but related

UNCITRAL's Transparency Rules overwhelmingly support a broad definition of "transparency" because its two pivotal provisions, making arbitral hearings public and requiring that arbitral documents be published, respectively relate to public access and public disclosure.<sup>75</sup> Additionally, the widely accepted public interest rationale for increasing transparency in investor-state arbitration is about shedding light on the state actors involved, not the procedures and actions of the tribunal.<sup>76</sup> Thus, the transparency trend in international arbitration is primarily about increasing *public access* to arbitral hearings and increasing *public disclosure* of arbitral awards and other documents;<sup>77</sup> secondarily, the trend is about ensuring that the *procedures* governing the arbitration are known to the parties. It is therefore time to step away from narrow definitions of the past<sup>78</sup>—away from the elephant's foot—and move forward to fully endorse broad definitions of "transparency," which reflect current realities.<sup>79</sup>

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ways. See Buys, *supra* note 1, at 133. Nevertheless, by using the term "transparency" in both instances, the ICC rejects the notion that "transparency" is only about procedural matters.

75. Transparency Rules, *supra* note 13, ¶ 6 (public hearings), ¶ 3 (documents "shall be made public").

76. CIEL Report 2007, *supra* note 16, at 4.

77. See ICC State Report, *supra* note 55, at 3–4; see also Transparency Rules, *supra* note 13.

78. See also Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 153 (2009) (arguing that transparency means that the "interested parties, both inside and outside the judicial process, can observe its processes and outcomes").

79. See Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership*, 54 U. KAN. L. REV. 1339, 1339 (2006) ("transparency" means the "extent to which the public may be alerted to, gain information about, and perhaps participate in, proceedings organized to adjudicate"); see also Florentine P. Feliciano, *The Ordre Public Dimensions of Confidentiality and Transparency in International Arbitration*, in TRANSPARENCY IN INTERNATIONAL TRADE AND INVESTMENT DISPUTE SETTLEMENT 16, 19 (Junji Nakagawa ed., 2013) ("transparency" in international arbitration "generally takes the form of disclosure to third parties"); Jeffrey T. Cook, *The Evolution of Investment-State Dispute Resolution in NAFTA and CAFTA: Wild West to World Order*, 34 Pepp. L. Rev. 1085, 1100 (2006) ("transparency" means "the full and timely disclosure of information").

*B. The New York Convention, Award Enforcement, and Finality*

## 1. Enforcement

Besides its privacy and confidentiality features, the fundamental advantage of international arbitration compared to litigation is the easy enforceability of arbitral awards under the New York Convention.<sup>80</sup> Although courts historically had a “parochial” view of arbitration and therefore regularly refused to compel arbitration, and often refused to enforce awards when they were challenged in court, the convention marked a paradigm shift.<sup>81</sup> This shift ushered in the modern era of arbitration, in which nations, including the United States, have adopted laws and policies that expressly favor the enforceability of arbitral awards under the convention.<sup>82</sup> Thanks to the New York Convention, foreign arbitral awards are now broadly enforceable

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80. GARNETT ET AL., *supra* note 5, at 11–14. In addition to enforceability and finality, which this Note will specifically address, other advantages of arbitration include the ability to select arbitrators, neutrality, speed, choice of language, and costs. *Id.* See also, CORPORATE CHOICES, *supra* note 58, at 8 (listing such benefits of international arbitration as the ability to appoint experts as arbitrators, neutrality, confidentiality, enforceability, flexibility of procedure, speed, and cost). “Privacy” is notably absent from such lists because it is included in the discussion of confidentiality in many sources, contributing to the confusion between the two terms. See generally, Schmitz, *supra* note 46; see also Brown, *supra* note 34, at 972–75 (“confidentiality is impossible without privacy and privacy is meaningless without confidentiality.”). The notable disadvantages of arbitration include the “lack of coercive power,” such as the inability to adequately compel discovery if needed, and unsuitability for multiparty claims. GARNETT ET AL., *supra* note 5, at 15. Because only parties bound by an arbitration clause may generally be compelled to arbitrate, compared to litigation, it is more difficult to consolidate multiparty claims under arbitration joinder rules. *Id.* Yet, a nonsignatory party may be bound to arbitrate just as a nonsignatory may be held liable under traditional principals of contract law, such as estoppel and assumption. See Thomson–CSF, S.A. v. American Arbitration Association, 64 F.3d 773, 775–76 (2d Cir. 1995).

81. See generally, Thomas E. Carbonneau, *Judicial Approbation in Building the Civilization of Arbitration*, 113 PENN ST. L. REV. 1343, 1365–68 (2009).

82. See *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24 (1983) (holding that the Federal Arbitration Act is a “congressional declaration of a liberal federal policy favoring arbitration agreements” and that since the 1960s courts of appeals have addressed “questions of arbitrability . . . with a healthy regard for the federal policy favoring arbitration. We agree.”).



around the world.<sup>83</sup> The convention is of “paramount importance” for international commercial arbitration and is one of the most widely ratified treaties.<sup>84</sup> Although enforcement in the minority of states that have not acceded to the convention, which are mostly new and developing nations, remains an obstacle,<sup>85</sup> to date there are 149 member nations.<sup>86</sup> After accession, member states implement the New York Convention by adopting domestic legislation to codify its principles.<sup>87</sup>

The New York Convention has a “pro-enforcement bias.”<sup>88</sup> Under Article V of the convention, consequently, there are limited exclusive defenses against the recognition and enforcement of arbitral awards.<sup>89</sup> Once enforcement proceedings are com-

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83. GARNETT ET AL., *supra* note 5, at 101.

84. FAVRE-BULLE, *supra* note 12, at 61–62.

85. *Id.* at 77.

86. UNCITRAL provides a current list of member states, notable reservations, and a chronology of events regarding changes in the status of the convention. See *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited October 30, 2014).

87. Shearman & Sterling and Columbia Law School, in cooperation with UNCITRAL, operate a user-friendly website designed to track developments in the evolution of case law involving the New York Convention. The website also includes links to the codifying legislation of many states. See NEW YORK CONVENTION GUIDE, <http://www.newyorkconvention1958.org>.

88. *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 969, 973 (2d Cir. 1974).

89. The limited defenses focus primarily on procedural fairness. Article V(1) permits courts to refuse to enforce an award on the following grounds: (a) showing incapacity of a party; (b) showing a lack of proper notice, or showing that a party was “otherwise unable to present [its] case”; (c) showing the award goes “beyond the scope” of the agreement to arbitrate; (d) showing the “composition” of the tribunal or the “arbitral procedure was not in accordance with the agreement of the parties”; (e) showing the award is not yet binding or “has been set aside,” meaning vacated, “by a competent authority of the country in which, or under the law of which, that award was made.” Practically, (e) means that only the courts of the country that is the place of arbitration may generally set aside the award. Article V(2) is more substantive, but limited, and narrowly construed, see *infra* Part III, and permits courts to refuse to enforce an award on the following grounds: (a) showing the subject matter of the dispute is nonarbitrable under the law of the country where enforcement is sought; and (b) showing “enforcement of the award would be contrary to the public policy” of the country where enforcement is sought. New York Convention, art V, June 10, 1958, 339 U.N.T.S. 38.

menced in court, the burden is on the party challenging enforcement of the award to use the Article V defenses to basically prove that the arbitration was procedurally unfair. One Article V defense is a showing that the “subject matter of the [dispute] . . . is not capable of settlement by arbitration” under the law of the country where enforcement of the award is sought.<sup>90</sup> But, in light of the *Mitsubishi Motors* decision, which broadened subject matter arbitrability,<sup>91</sup> such a defense is practically unusable. Simply put, later courts, both domestically and abroad, cite *Mitsubishi Motors* in support of the principle that, absent legislation to the contrary,<sup>92</sup> any subject matter is arbitrable. Article V is the exclusive source of defenses against the recognition and enforcement of foreign arbitral awards.<sup>93</sup> Even if the party challenging enforcement of the award proves that the tribunal erroneously applied the law, such proof is not grounds for non-enforcement because legal error is not an Article V defense.<sup>94</sup> The pro-enforcement bias of the New York Convention and its limited Article V defenses militate against challenging awards in court, which helps explain why voluntary award compliance is so common.<sup>95</sup>

The objective of the New York Convention was to make arbitral awards “truly mobile and universal.”<sup>96</sup> After over fifty years in force and considering the enforceability of awards around the world, scholars find it a resounding success.<sup>97</sup> In litigation, a court judgment from one country may not be recognized by the courts of another country, specifically the country in which the

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90. New York Convention, *supra* note 89, art. V(2)(a).

91. *See infra* Part III.

92. An example of legislation to the contrary is a 1993 directive by the Council of the European Union, entitled “Unfair Terms in Consumer Contracts.” Some EU member states have interpreted the directive as proscribing mandatory consumer arbitration, which effectively makes consumer disputes nonarbitrable. *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648 (2005); Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002).

93. *See* GARNETT ET AL., *supra* note 5, at 102-03.

94. *See id.* at 117-18.

95. *See* FAVRE-BULLE, *supra* note 12.

96. *See* GARNETT ET AL., *supra* note 5, at 102.

97. FAVRE-BULLE, *supra* note 12, at 61.

assets of the losing party are located.<sup>98</sup> Such an occurrence denies the winning party effective means to collect damages. Under the New York Convention, however, an arbitral award rendered in one member state “shall” be enforced by the courts of all other member states, unless a limited Article V defense applies.<sup>99</sup> Such easy enforceability of awards around the world promotes international commerce because parties may enter international contracts that contain an arbitration clause without worrying about how or where they will be able to collect damages if a dispute arises.<sup>100</sup>

## 2. Finality

In addition to the privacy and confidentiality aspects of international arbitration and the easy enforceability of arbitral awards under the New York Convention, international arbitration has become the most widely used mechanism for the resolution of international commercial disputes, due to the final and binding nature of arbitration.<sup>101</sup> All modern arbitration laws follow the fundamental principle that the substantive decisions of the arbitral tribunal are not subject to appeal.<sup>102</sup> The “very intention” of submitting to arbitration is that the dispute be finally decided by the tribunal.<sup>103</sup> Under the New York Convention, even a clear misapplication of law is not sufficient grounds for a

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98. Still, if certain parameters are met, courts will recognize foreign judgments. In such proceedings, the party challenging enforcement of the foreign court judgment is not constrained by the Article V defenses of the New York Convention; thus, international arbitration remains a more enforceable dispute resolution mechanism than international litigation because defenses are severely limited in arbitration. *See* *Sung Hwan Co., LTD. v. Rite Aid Corp.*, 850 N.E.2d 647 (N.Y. 2006) (finding a Korean court judgment against a U.S. corporation enforceable because the foreign court’s exercise of jurisdiction comports with “New York’s concept of personal jurisdiction” under New York’s long-arm statute).

99. *See* New York Convention, *supra* note 89, art. III (member states “shall recognize arbitral awards as binding and enforce them”); New York Convention, Article V(1) (enforcement of the award may be refused “only if” the party challenging enforcement furnishes proof that satisfies an Article V defense).

100. *See* GARNETT ET AL., *supra* note 5, at 101–03.

101. *Arbitration*, ICC, [iccwbo.org/products-and-services/arbitration-and-adr/arbitration/](http://iccwbo.org/products-and-services/arbitration-and-adr/arbitration/) (Sept. 6, 2013, 3:35 PM).

102. Karl-Heinz Böckstiegel, *Public Policy as a Limit to Arbitration and its Enforcement*, 2 J. DISP. RESOL. 123, 129 (2008).

103. *Id.*

refusal to enforce an arbitral award.<sup>104</sup> Although parties challenging the enforcement of an award often rely on the public policy defense found in Article V(2)(b) of the convention, such arguments are generally futile; courts construe the public policy defense narrowly because it is intended to protect only the “specific, sacrosanct taboos and interests” of a state.<sup>105</sup>

Furthermore, international arbitration is final because arbitral awards are binding.<sup>106</sup> Unlike systems of amicable dispute resolution,<sup>107</sup> such as mediation, wherein the parties may or may not agree to follow the recommendations of a mediator, arbitration results in a binding award; by submitting to arbitration, the parties “agree to agree” to be bound by the decision of the arbitral tribunal. Once the tribunal issues its decision in an arbitral award, the award is easily enforceable around the world under the New York Convention.

### C. History of the Transparency Trend

The transparency trend in international arbitration derives from the system of investor-state arbitration and thus far is

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104. *Id.*

105. *Id.* at 132. While losing parties often try to use the public policy exception as a last resort “catchall” defense in enforcement proceedings, such efforts are largely futile. The public policy exception is narrowly interpreted to require a finding that enforcement is against not only the public policy of the adjudicating state, but also against *international* public policy. For example, even if enforcement would violate the antitrust laws of the adjudicating state, the competitive market principles behind such laws are not universally accepted. Thus, an antitrust violation might not be sufficient to trigger the public policy exception. GARNETT ET AL., *supra* note 5, at 109–10. An example of enforcement violating *international* public policy is an arbitral award that is demonstrably tainted by fraud or corruption. *Id.* Even so, courts have set a high bar for meeting the exception on the basis of fraud. The fraud must be established by clear evidence, it must have been non-discoverable by the exercise of due diligence during the arbitration, and it must be materially related to an issue in the arbitration. *Bonar v. Dean Witter Reynolds Inc.* 835 F.2d 1378, 1383 (11th Cir. 1988).

106. See GARNETT ET AL., *supra* note 5, at 11–14.

107. “Amicable” dispute resolution systems include mediation, negotiation, and nonbinding arbitration. Nonbinding arbitration is occasionally used by parties to preview the likely outcome of their dispute in contemplated binding arbitration or litigation. J. M. Townsend, *Promoting Peace Before Conflict: Integrating Alternative Methods of Dispute Resolution into the Arbitration Process*, in *ARBITRATION ADVOCACY IN CHANGING TIMES* 35, 35 (2012).

mainly limited to such system.<sup>108</sup> This Note, however, calls for a broadening of the trend and its public interest motives to the system of international commercial arbitration. The trend to increase transparency dates back to at least July 31, 2001, when the Free Trade Commission (“FTC”) of the North American Free Trade Agreement (“NAFTA”)<sup>109</sup> issued an interpretation of NAFTA’s arbitration regime that aimed to protect public interests. The FTC’s 2001 interpretation stated that the public should have “nearly unfettered access” to documents created during disputes conducted under the regime.<sup>110</sup> Since the text of NAFTA was silent on issues of confidentiality, the interpretation relied on such omission to argue that documents may be publicly disclosed.<sup>111</sup> But the practical effects of the FTC’s 2001 interpretation were limited. Arbitral disputes conducted pursuant to NAFTA’s arbitration regime were still subject to the rules of the arbitral institution selected by the parties, many of which were much more restrictive than the FTC’s interpretation.<sup>112</sup> In most investor-state contracts, parties select the arbitration rules of UNCITRAL or the International Centre for Settlement of Investment Disputes (“ICSID”),<sup>113</sup> both of which contain provisions that keep arbitral documents private and confidential at the time.<sup>114</sup> Therefore, the early efforts of the FTC’s 2001 interpretation to increase transparency brought about little change. It did, however, plant the seed for the transparency trend.<sup>115</sup>

Five years later, ICSID resolved to support greater transparency in investor-state arbitration through amendments to its 2006 Arbitration Rules—the revised rules grant the tribunal discretionary power to permit public access to hearings, unless either party to the dispute objects.<sup>116</sup> The rules also establish that “excerpts of the legal reasoning of the tribunal” shall be

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108. See generally, Nakagawa, *supra* note 15 (including various articles tracing transparency trend developments).

109. NAFTA’s FTC is comprised of trade ministers from each of the three member governments. The commission has the authority to interpret NAFTA. Lee, *supra* note 24, at 450.

110. *Id.*

111. *Id.* at 453.

112. *Id.* at 452.

113. *Id.*

114. *Id.* at 450–53.

115. *Id.* at 458.

116. *Id.* at 454–56.

promptly published by the courts.<sup>117</sup> The arbitral award, however, may not be published without unanimous party consent.<sup>118</sup> Although these revisions are admirable attempts to increase transparency, the ability of a party to unilaterally proscribe publication of the award limits the practical impact of such measures.<sup>119</sup> Still, in the past four years, ICSID has jumped ahead of the normative transparency trend curve on a few occasions by webcasting, in real time, certain arbitration proceedings that have involved highly palpable public interest implications.<sup>120</sup> ICSID's revised rules helped set the stage for UNCITRAL's adoption of the Transparency Rules.

Most recently, UNCITRAL advanced the transparency trend by incorporating the Transparency Rules into the UNCITRAL Arbitration Rules 2013;<sup>121</sup> yet not all arbitral institutions have fully endorsed the trend. The ICC revised its arbitration rules in 2012, but the revisions did not advance, or set back, the transparency trend. Instead, the ICC issued a report on investor-state arbitration, concomitant to the ICC Arbitration Rules 2012, that includes advice on how to achieve more or less transparency.<sup>122</sup> The report notes that states and their private counterparties

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117. Int'l Ctr. for Settlement of Inv. Disputes [ICSID], ICSID Convention, Regulations and Rules, rule 48(4), at 122, ICSID Doc. ICSID/15 (Apr. 2006), available [at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf) [hereinafter ICSID Rules].

118. *Id.*

119. *See id.*

120. *See* Sofia Plagakis, *Webcasting: A Tool to Increase Transparency in Judicial proceedings*, in *TRANSPARENCY IN INTERNATIONAL TRADE AND INVESTMENT DISPUTE SETTLEMENT* 84, 84 (Junji Nakagawa ed., 2013). The first case to be webcast by ICSID involved a dispute on stopping harmful metal mining in El Salvador. The holding in *Pac Rim Cayman LLC v. Republic of El Salvador* gave the public greater access to information that affected public health and the environment. *Id.* at 84.

121. Unless states agree otherwise, the Transparency Rules only apply to new BITs by default; they do not apply retroactively to BITs enacted prior to the effective date of the Transparency Rules—even where the terms of a BIT contemplate “dynamic” periodic amendments to UNCITRAL's arbitration rules; for a nuanced critique of how UNCITRAL incorporated the Transparency Rules into its arbitration rules *see* Samuel Levander, *Resolving “Dynamic Interpretation”: An Empirical Analysis of the Uncitral Rules on Transparency*, 52 *COLUM. J. TRANSNAT'L L.* 506, 507 (2014).

122. ICC State Report, *supra* note 55, at 2–4.

“can agree on greater transparency” by establishing in an arbitration clause that the arbitral award or party submissions shall be made public.<sup>123</sup> Additionally, the report advises states “seeking transparency” to include transparency requirements in BITs. It suggests, as an example, a requirement that the tribunal disclose a reasoned decision to the disputing parties.<sup>124</sup> In allegiance to its commercial roots and the party autonomy principle,<sup>125</sup> the ICC remains neutral in the debate regarding the importance of transparency versus privacy and confidentiality in international arbitration. The ICC, by explaining how to adjust the level of transparency in its recent report on investor-state arbitration, nevertheless, recognizes that the demand for greater transparency in international arbitration is on the rise.<sup>126</sup>

## II. CHALLENGING THE PUBLIC INTEREST DIFFERENCE

The rationale for narrowing the scope of the Transparency Rules, and the transparency trend in general, to investor-state arbitration is that a “public interest difference” exists between investor-state arbitration and international commercial arbitration.<sup>127</sup> Part II of this Note examines flaws in the public interest difference rationale pertaining to each of the four categories of supposed differences between investor-state arbitration and international commercial arbitration.

### A. *Democratic Deficit Concerns*

An indisputable difference between international commercial arbitration and investor-state arbitration is that, in the latter system, only the “very presence” of a state or state-owned entity as a party to the dispute yields a public interest. Arguably, citizens of the arbitrating state have an interest in knowing how their government conducts itself during an arbitration.<sup>128</sup> Such a concept invokes the democratic deficit principle.<sup>129</sup> Since public

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123. *Id.* at 3.

124. *Id.* at 4.

125. See Charles Chatterjee, *The Reality of The Party Autonomy Rule in International Arbitration*, 20 J. INT'L ARB. 539, 547 (2003).

126. *Id.* at 2–4.

127. CIEL Report 2007, *supra* note 16, at 3–4.

128. *Id.* at 4.

129. A system creates a democratic deficit when it “curtails democratic principles” by making issues that directly impact citizens “structurally isolated

involvement in arbitration is the exception, rather than the norm, and citizens of the arbitrating state are generally unaware of disputes,<sup>130</sup> investor-state arbitration plainly isolates state conduct from public input, thereby creating a democratic deficit. To reduce such a deficit, adherents to the “public interest difference” line of reasoning believe that remedial measures, like the Transparency Rules, are necessary to fix the system of investor-state arbitration—a system that lacks, in their minds, “democratic participation”<sup>131</sup> and therefore does not fit their conception of “good governance.”<sup>132</sup>

But the “democratic deficit” argument is not a legitimate basis to advocate for transparency in investor-state arbitration, a global system, because such an argument presupposes that non-democratic forms of government are inherently bad governance.<sup>133</sup> According to a recent Congressional Research Service report, China’s Communist Party “is committed to maintaining

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from public input.” Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAN. J. TRANSNAT’L LAW 775, 784 (2008).

130. See ORG. FOR ECON. COOPERATION AND DEV., *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures 2-3* (OECD Working Papers on International Investment, No. 2005/01, 2005), available at <http://dx.doi.org/10.1787/524613550768>.

131. Ctr. for Int’l Envtl. Law & Int’l Inst. for Sustainable Dev., *New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps* 4 (2013), available at [http://ccsi.columbia.edu/files/2014/04/UNCITRAL\\_Rules\\_on\\_Transparency\\_commentary\\_FIN\\_AL.pdf](http://ccsi.columbia.edu/files/2014/04/UNCITRAL_Rules_on_Transparency_commentary_FIN_AL.pdf).

132. CIEL Report 2007, *supra* note 16, at 5.

133. The democratic deficit argument for greater transparency in investor-state arbitration also presupposes that covert state action is never beneficial to the people of a democratic state. Yet, secret state actions and classified information, justifiably, have their place in even the most democratic of nations. Both proponents and critics of the United States Freedom of Information Act often quote a 1965 Senate report, which states that “[a] government by secrecy benefits no one. It injures the people it seeks to serve . . . and mocks their loyalty.” See, e.g., Martin E. Halstuk, *When is an Invasion of Privacy Unwarranted Under the FOIA? An Analysis of the Supreme Court’s “Sufficient Reason” and “Presumption of Legitimacy” Standards*, 16 U. FLA. J.L. & PUB. POL’Y 361, 368 (2005) (quoting S. Rep. No. 89-813, at 10 (1965)). The same report, nevertheless, recognizes that “[a]t the same time that a broad philosophy of ‘freedom of information’ is enacted into law, it is necessary to protect certain equally important rights of privacy . . . certain material, such as the investigatory files of the Federal Bureau of Investigation.” S. Rep. No. 89-813, at 3 (1965).



a permanent monopoly on power” and places a “heavy emphasis on maintaining political stability.”<sup>134</sup> From the Communist Party’s perspective, good governance therefore means rejecting the democratic separation of powers doctrine and granting all powers ultimately to the Party’s highest ranking “committee of seven,” without concern for creating structural isolation from public input.<sup>135</sup> Accordingly, under the Communist Party’s paternalistic form of government, the public interest is best served where a democratic deficit exists. Since democratic principles are not globally accepted, and since investor-state arbitration is a global system, the democratic deficit argument is fundamentally flawed.<sup>136</sup> Thus, even though investor-state arbitration raises democratic deficit concerns and international commercial arbitration does not, such a “public interest difference” is not a legitimate reason to increase transparency solely in the system of investor-state arbitration.

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134. SUSAN V. LAWRENCE & MICHAEL F. MARTIN, UNDERSTANDING CHINA’S POLITICAL SYSTEM 1–2 (Congressional Research Service, 2013).

135. *Id.*

136. The contention that the presence of communist states in the global system of international arbitration undermines the democratic deficit argument for more transparency in investor-state arbitration is more than a theoretical argument; it is a relevant practical matter because in July, 2013, the United States and China reached a breakthrough in negotiations to adopt a BIT. Betsy Bourassa, *U.S. and China Breakthrough Announcement on the Bilateral Investment Treaty Negotiations*, U.S. DEP’T TREASURY (July 15, 2013), <http://www.treasury.gov/connect/blog/Pages/U.S.-and-China-Breakthrough-Announcement.aspx>. China has been a member of the New York Convention since 1987 and is not a newcomer to international arbitration. 1958 NEW YORK CONVENTION GUIDE, <http://www.newyorkconvention1958.org> (follow “China” hyperlink) (last visited Oct. 30, 2014). The recent breakthrough marks the first time China has been willing to negotiate a BIT that “includes all stages of investment and sectors.” Bourassa, *supra*. Yet, if the United States urges transparency for the sake of encouraging *democratic principles*, instead of the more globally amenable reason of increasing transparency to shed light on disputes that impact public interests, such as environmental protection, negotiations may hit added roadblocks. An environmentalist angle may be especially persuasive in negotiations since China is getting serious about reducing air pollution—Beijing authorities recently shut down high-polluting factories in a “military-style operation.” Andrew Browne, *Beijing Takes Aim at Smog—a Moving Target*, WALL ST. J., Jan. 15, 2014, at A9.

*B. Public Purse and Taxpayer Concerns*

The second “public interest difference” rationale used to explain why the transparency trend in international arbitration should apply to investor-state arbitration, but not international commercial arbitration, is that only investor-state arbitration directly impacts the “public purse” of an arbitrating state.<sup>137</sup> Since investor-state arbitration commonly “involves large potential monetary liability for public treasuries,” and because recent awards have increasingly exceeded US\$100 million in the past few years, the “public’s interest is clear.”<sup>138</sup> The citizens of the arbitrating state arguably have a right to see their tax dollars at work and a right to know about arbitrations that impact state finances. In contrast, public funds are not directly at stake in international commercial arbitration; commentators therefore conclude that greater transparency is only necessary in investor-state arbitration.<sup>139</sup>

Yet, numerous nations around the globe “have a long-standing policy of subsidizing the energy sector” to keep energy rates at an affordable level for the majority of their citizens.<sup>140</sup> Both developing and developed nations have such policies in amounts that far exceed the amounts that have been at stake in investor-state arbitration.<sup>141</sup> Therefore, even though the fate of a subsidized entity in international commercial arbitration only indirectly impacts the “public purse,” if the transparency trend is intended to let the public see their tax dollars at work, international commercial arbitration should be transparent, especially when comparing the award amounts in investor-state arbitration to the enormity of energy sector subsidy programs alone.<sup>142</sup>

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137. CIEL Report 2007, *supra* note 16, at 5.

138. *Id.* at 4.

139. *Id.*

140. Felix Mormann, *Requirements for A Renewables Revolution*, 38 *ECOLOGY L.Q.* 903, 932 (2011).

141. For example, government spending in Argentina on energy subsidies rose by nearly 72 percent in the first three quarters of 2013 to ARS\$60 billion (US\$8.86 billion). Ken Parks, *Argentina Threatens to Revoke Utility Concessions Amid Power Outage*, *WALL ST. J.*, Dec. 10, 2013. Similarly, in the United States, oil industry tax breaks alone average about US\$4 billion annually. David Kocieniewski, *As Oil Industry Fights a Tax, it Reaps Subsidies*, *N.Y. TIMES*, July 3, 2010, at A9.

142. When a highly subsidized corporation loses in arbitration, the damages it pays out may be perceived as coming directly out of the profits of the corpo-

Thus, the “public purse” and taxpayer concern argument is not a sufficient basis to justify limiting the transparency trend to investor-State arbitration.

### *C. Allegations of Government Misconduct*

The third “public interest difference” used to explain why greater transparency is required in investor-state arbitration, but not international commercial arbitration, is that opening up the former system to public scrutiny will expose government misconduct and therefore allegedly protect public interests.<sup>143</sup> Indeed, whether government misconduct occurred is a common issue in investor-state arbitral disputes.<sup>144</sup> Paradoxically, however, in the context of investor-state arbitration, exposing government misconduct actually serves the *private* interests of the investor rather than the public interests of the citizens of the arbitrating state. Although proponents of the “public interest difference” advocate for greater transparency in the name of protecting public interests, they are more concerned with protecting the *private* interests of investors—at least when it comes to exposing government misconduct.<sup>145</sup> The veiled intent of such advocates becomes clear upon realizing that a primary function of BITs, and the investor-state arbitration regimes established therein, is to protect foreign investors from the nationalization or expropriation of their property by state actors.<sup>146</sup> Expropriation is a serious risk to foreign direct investments.<sup>147</sup> Although certain aspects of BITs vary from state to state, recent BITs generally mandate that a state must compensate private investors

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ration’s immediate shareholders; less profit, however, means fewer investments, less future profit, and consequently the need for more subsidies. Thus, the public is a key stakeholder in subsidized private parties.

143. CIEL Report 2007, *supra* note 16, at 4.

144. *Id.*

145. *Id.* at 4–5.

146. See Jeswald W. Salacuse & Nicholas P. Sullivan, *Do Bits Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67, 87 (2005).

147. Between 1960 and 1974, the U.N. identified 875 independent instances of governmental taking of foreign property in sixty-two countries. See Don C. Piper, *New Directions in the Protection of American-Owned Property Abroad*, 4 MD. J. INT’L L. & TRADE 315, 330 (1979). See generally U.N. Conf. on Trade and Dev., EXPROPRIATION: A SEQUEL, U.N. Sales No. E.12.II.D.7. (2012) (examining recent investment treaty practices regarding expropriation).

if it expropriates property.<sup>148</sup> Since exposing government misconduct in investor-state arbitration really protects the private interests of investors, it is not a legitimate “public interest difference” that justifies increasing transparency in investor-state arbitration but not international commercial arbitration.

#### *D. Issues of Public Policy*

The final “public interest difference” rationale put forth to defend increasing transparency solely in investor-state arbitration, and not in international commercial arbitration, is that investor-state arbitral disputes often raise “profoundly important issues of public policy”—such as environmental protection, public safety and health, and market competition—and therefore the public has a right to know about such disputes.<sup>149</sup> Advocates of this view further argue that governmental decision making and conduct that impacts public policies (i.e., investor-state arbitral disputes concerning drinking water supplies, hazardous waste, fishing permits, racial discrimination, and responses to fiscal crises) should be transparent.<sup>150</sup>

Proponents of the “public interest difference” oddly appear unperturbed by the fact that hazardous waste is dangerous, and thus of public concern, regardless of whether it is at issue in an arbitration between private parties or, instead, between a private investor and a state or state-owned entity. The seminal report on this topic, by The Center for International Environmental Law (“CIEL”), seems especially contradictory. CIEL’s mission is “to protect the environment, promote human health, and ensure a just and sustainable society.”<sup>151</sup> Such a mission is quite limited, and easily compromised, if the organization is only concerned about protecting the environment from state actors and not from private polluters as well.<sup>152</sup> CIEL’s 2007 report, which

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148. Jeswald W. Salacuse & Nicholas P. Sullivan, *supra* note 144, at 89.

149. CIEL Report 2007, *supra* note 16, at 5.

150. *Id.*

151. *Who We Are*, CTR. FOR INT’L ENVTL. L., [http://www.ciel.org/About\\_Us/index.html](http://www.ciel.org/About_Us/index.html).

152. B.P., P.L.C., for instance, is a private polluter that caused billions of dollars’ worth of environmental damages in relation to the Deepwater Horizon disaster; to truly promote its mission, CIEL certainly must be concerned about protecting the environment from such private polluters, in addition to guarding the environment from state actors that pollute or otherwise jeopardize the environment and human health. See Tom Fowler, *BP Slapped with Record*

advocates for limiting the scope of the then nascent Transparency Rules to investor-state arbitration, describes how it is “often impossible” for the public to learn about investor-state arbitrations—even disputes that impact basic human needs like sanitary drinking water.<sup>153</sup> The report also states that, in theory, a party may voluntarily choose to publicize information regarding a dispute that impacts the environment because parties are not bound, under the default arbitration rules of UNCITRAL, by a duty of confidentiality.<sup>154</sup> In practice, however, voluntary disclosure “rarely happens.”<sup>155</sup> Such facets of investor-state arbitration apply equally to international commercial arbitration, but the report parrots the “widely acknowledged” fact that there is a “public interest difference” between the two systems of arbitration.<sup>156</sup> The report limits its recommendation for greater transparency to investor-state arbitration, expressly excluding international commercial arbitration, since private commercial disputes “do not necessarily concern the public interest.”<sup>157</sup>

Yet the report omits any refutation of the principle that commercial disputes may also impact the “profoundly important issues of public policy” discussed in the report.<sup>158</sup> Although commercial disputes do not *necessarily* impact public policy issues, the elephant in the room is that, if the subject matter of a dispute involves anticompetitive behavior, hazardous waste, or a toxic chemical leaking into sources of drinking water, public interests are no less impacted because the disputants are private parties.<sup>159</sup> Public notice of such disputes would allow states to adopt

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*Fine—Oil Giant to Pay \$4.5 Billion, Plead Guilty to Criminal Charges in 2010 Gulf Spill*, WALL ST. J., Nov. 16, 2012.

153. CIEL Report 2007, *supra* note 16, at 5.

154. *Id.* For more information on confidentiality and the lack thereof under the default arbitration rules of the ICC *see* discussion *supra* Part I.A.2.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 4.

159. For example, a privately held international commercial arbitration hypothetically could have occurred prior to the Elk River chemical spill in West Virginia. Thus, if international commercial arbitration was not capable of being absolutely private, regulators may have become aware of a past arbitral dispute in which Freedom Industries Inc., the owner of the chemical storage facility, took part, related to the retrofitting of its storage tanks—which it never retrofitted. Then, regulators could have taken preemptive action to prevent the spill, instead of starting probes presently into how a leaky storage tank that dates back to 1938 was still in use and spilled 7,500 gallons of a toxic

rules and regulations that address the actual problems faced by commercial parties, ideally before public disasters occur.<sup>160</sup> Thus, when it comes to profoundly important issues of public policy, there is no genuine “public interest difference” between investor-state arbitration and international commercial arbitration.

### *E. The Public Interest Difference is Bunk*

Even if the first three rationales for limiting the transparency trend to investor-state arbitration—democratic deficit concerns, public purse concerns, and allegations of government misconduct—are accepted at face value, the “public interest difference” is not a sufficient basis to exclude international commercial arbitration from the transparency trend, because commercial disputes can, and do, impact profoundly important issues of public policy, such as environmental protection, public safety and health, and market competition. Since the Supreme Court of the United States decided *Mitsubishi Motors* in 1985,<sup>161</sup> even anti-trust claims, which impact the important public policy of market competition, have been at stake around the world in international commercial arbitration.<sup>162</sup>

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chemical into the Elk River, polluting drinking water for days. See Valerie Bauerlein & Cameron McWhirter, *Leaky Tank's Design, Age Probed*, WALL ST. J., Jan. 16, 2014.

160. See *Id.*

161. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

162. The impact of *Mitsubishi Motors* is not limited to the United States, because, unlike in the United States, the high courts of other nations are not hesitant to examine the decisions of other nations as persuasive authority. Additionally, the New York Convention incorporates principles of reciprocity, and, therefore, how one nation interprets the Convention may influence how others interpret it. The “reciprocity reservation” in Article I of the New York Convention permits states to apply the Convention on a reciprocal basis, which means the courts of states that adopt the reservation need only enforce awards made in states that are also members of the Convention. Joseph T. McLaughlin & Laurie Genevro, *Enforcement of Arbitral Awards under the New York Convention - Practice in U.S. Courts*, 3 INT'L TAX & BUS. LAW. 249, 252 (1986). At least forty-three states have adopted the reciprocity reservation. *Id.* Although this Note focuses on U.S. jurisprudence, other states, such as France, have adopted similar judicial policies in favor of arbitration. See generally Carbonneau, *supra* note 81, at 1347 (describing post-New York Convention developments in the United Kingdom, France, and the United States).

## III. MITSUBISHI MOTORS AND BLIND SPOT JUSTICE

In its landmark *Mitsubishi Motors* decision, the United States Supreme Court mistakenly opened the floodgates for disputants to use international commercial arbitration to privately resolve disputes that impact profoundly important issues of public policy, such as the protection of market competition.<sup>163</sup> In *Mitsubishi*, the Court reversed the First Circuit's ruling on an antitrust claim, a ruling which had followed the Second Circuit's *American Safety* doctrine; ultimately, the Court held that antitrust claims under the Sherman Act are arbitrable subject matter in the context of international commercial arbitration.<sup>164</sup> Until *Mitsubishi*, the *American Safety* doctrine was good law; it held that antitrust claims were nonarbitrable because "the *per-vasive public interest* in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration."<sup>165</sup>

Although antitrust actions that are raised or investigated by the Department of Justice ("DOJ") draw most of the media attention,<sup>166</sup> the Sherman Act allows any person injured by a "restraint of trade or commerce" to bring suit under the Act, and awards prevailing claimants treble damages.<sup>167</sup> When a contractual dispute arises, therefore, private commercial parties may raise antitrust matters as collateral claims or counterclaims to the initial breach of contract claim. *Mitsubishi* is a prime example of such a scenario.

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163. See *Mitsubishi*, 473 U.S. 614 (1985).

164. *Id.* at 628–40.

165. *Id.* at 629 (emphasis added).

166. See e.g., Matthew Goldstein, *Secretive Apple Squirms in Gaze of U.S. Monitor*, N.Y. TIMES, Jan. 14, 2014, at A1 (chronicling developments in Apple's feud with a court appointed monitor, Michael Bromwich, and the Antitrust Division of the Department of Justice regarding the company's duties to cooperate with further investigations into the e-book price-fixing conspiracy that it was found guilty of entering in the summer of 2013).

167. Under the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (2012). Furthermore, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (2012).

Justice Stevens' dissent succinctly describes the factual background relevant to the antitrust claim in *Mitsubishi*.<sup>168</sup> Soler Chrysler-Plymouth Inc., an American automobile dealer, claimed that two major automobile manufacturers, including Mitsubishi Motors Corp., were part of an "international cartel" restraining competition in the American marketplace in violation of the Sherman Act.<sup>169</sup> Based upon an arbitration clause in Chrysler's franchise agreement with the manufacturers, and after deciding that antitrust claims are arbitrable subject matter, the Court ultimately compelled the parties to arbitrate all of their claims in Japan, the place of arbitration named in the franchise agreement.<sup>170</sup> Notably, this is an instance where the parties ended up in court *prior* to arbitration because the first reaction of the manufacturers, who claimed Chrysler breached the franchise agreement, was to go to district court seeking an order to compel arbitration of the claim<sup>171</sup>—presumably since the manufacturers anticipated that Chrysler would be reluctant to arbitrate in Japan without a court battle.<sup>172</sup>

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168. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (Stevens, J., dissent) (1985).

169. *Id.*

170. The arbitration clause of the franchise agreement provided as follows:

All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.

*Mitsubishi*, 473 U.S. at 617.

171. The manufacturers invoked Section 206 of the Federal Arbitration Act ("FAA,") which reads "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." See Federal Arbitration Act, 9 U.S.C.A. § 206 (1970).

172. This Note focuses on public notice via the potentiality of an enforcement proceeding *after* arbitration has privately occurred. The public is notified of disputes *prior* to arbitration, in instances like *Mitsubishi*, because the parties dispute whether their arbitration agreement is valid or argue that the subject matter of a claim is nonarbitrable. Yet, post-*Mitsubishi*, the latter occurrence is almost nonexistent because *Mitsubishi* effectively holds that *all* subject matter is arbitrable, even statutory claims that impact important public policy interests like market competition. See *Mitsubishi*, 473 U.S. 614.



*A. The Misguided Rationale of Mitsubishi Motors*

In *Mitsubishi*, the pro-enforcement bias of the New York Convention heavily influenced the ratio decidendi of the Court.<sup>173</sup> Revisiting the decision demonstrates that the Court discounted public interest concerns under the misguided presumption that the “award-enforcement stage”<sup>174</sup> would provide an opportunity to protect public interests by allowing courts to minimally review outcomes and at least determine whether tribunals “took cognizance [of], . . . and actually decided,” claims that raise issues of public policy.<sup>175</sup> The Court also expected enforcement proceedings to serve the “policing function” of the Sherman Act.<sup>176</sup> But hindsight reveals that enforcement proceedings have become the exception rather than the norm in international commercial arbitration because most arbitrations end in settlement or voluntary award compliance.<sup>177</sup> Thus, the policing function of the Sherman Act has been compromised.<sup>178</sup> Public notice via enforcement proceedings in court of disputes otherwise arbitrated in private, which the Court envisioned as a sufficient procedural safeguard to protect public interests, rarely occurs. The current system of international commercial arbitration therefore knowingly permits commercial disputes that impact profoundly important issues of public policy, such as the protection of market competition, to be resolved in absolute privacy.<sup>179</sup> Such willful ignorance is blind spot justice.

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173. The pro-enforcement bias of the New York Convention is shown clearly by the presumption in Article II of the Convention that “[e]ach Contracting State *shall recognize*” written agreements to arbitrate that “concern[] a subject matter capable of settlement by arbitration.” Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 2, June 10, 1958, 330 U.S.T.S. 3. Prior to *Mitsubishi*, the Court had declared that the FAA, which essentially codifies the Convention, “create[d] a body of federal substantive law establishing and regulating the duty [of courts] to honor an agreement to arbitrate” and represents a “liberal federal policy favoring arbitration agreements.” *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24–25 (1983). Thus, the Court begins with a strong bias in favor of enforcement.

174. 473 U.S. at 638.

175. *Id.*

176. *Id.* at 635.

177. See discussion *infra* Part I.A.1.

178. See *Mitsubishi*, 473 U.S. 614, 635.

179. See *id.* at 638.

The Court framed the issue of whether antitrust claims are arbitrable as a balancing of the public interest concerns of the *American Safety* doctrine against the “strong belief” in the effectiveness of arbitration for resolving international commercial disputes, as established by *Scherk*,<sup>180</sup> and a “commitment to the enforcement of freely negotiated choice of forum clauses.”<sup>181</sup> Then, the Court proceeded to dismantle the latter three of the four “ingredients” of the *American Safety* doctrine, finding, essentially, that the doctrine underestimated the capabilities of an arbitral tribunal to hear complex cases, to be “conscientious,” and to be neutral.<sup>182</sup> Next, the court recognized that the first ingredient of the *American Safety* doctrine still remained, stating: “[w]e are left, then, with the core of the *American Safety* doctrine—the fundamental importance to American democratic capitalism of the regime of the antitrust laws.”<sup>183</sup> In other words, “private parties play a pivotal role in aiding governmental enforcement of the antitrust laws by means of the private action for treble damages.”<sup>184</sup> This is the policing function of the Sherman Act. Private actions help enforce the Act and bring to light antitrust violations that would otherwise go undetected by government authorities, which in turn serves the public interest in protecting market competition.<sup>185</sup>

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180. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 507 (1974) (holding that Securities Exchange Act claims arising out of or related to an *international* contract are arbitrable because specifying the forum for potential disputes is “an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction” and a “parochial refusal by the courts of one country to enforce an international arbitration agreement” would undermine such an achievement).

181. *Mitsubishi*, 473 U.S. 614, 631. *See generally* *M/S Bremen v. Zapata Off-Shore Co.* 407 U.S. 1, 9 (1972) (rejecting the traditional “parochial” view of pre-dispute forum selection clauses as “ousting” the jurisdiction of the court and holding such clauses enforceable because of the following reasons: (1) modern businesses operate in “world markets,” (2) it is an “era when all courts are overloaded,” and (3) the courts of the United States cannot operate in world markets “exclusively on our terms, governed by our laws, and resolved in our courts.”).

182. *Mitsubishi*, 473 U.S. at 632–33.

183. *Id.* at 634.

184. *Id.* at 632.

185. Although there is a sticky similarity here to democratic deficit concerns, which this Note deems an illegitimate basis from which to argue for greater transparency in investor-state arbitration, *see supra* Part II, there is a comprehensive distinction. Although capitalism is closely associated with democracy,

Yet the Court failed to recognize the downstream effects of allowing antitrust claims to be resolved in the private—and sometimes fully confidential—system of international commercial arbitration. Although antitrust actions raised by private parties in arbitration might still aid the government by stopping specific instances of collusion, broadened arbitrability has blinded the government, courts, and regulators alike, to the existence of, and information about, such actions. Despite the pivotal role that private party claims play in policing world markets for antitrust violations, the Court swept such concerns under the rug. In one sentence, the Court shifts the discussion of private party claims from the importance of protecting market competition, to its final determination that the primary purpose of private antitrust claims is to compensate the injured party.<sup>186</sup>

Notwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties, . . . and pursued by [Chrysler] here by way of its third counterclaim, seeks primarily to enable an injured competitor to gain compensation for that injury.<sup>187</sup>

The Court utilizes the oxymoron “important incidental” to sweep aside the policing function of private party antitrust claims. Once the Court narrows the issue of whether private party antitrust claims should be arbitrable to hinge on whether arbitration provides an “adequate mechanism” for the private party to “seek his antitrust recovery,” the issue skews in favor of arbitrability.<sup>188</sup> The Court willingly swept aside the policing function of the Sherman Act because the majority of the Court mistakenly presumed that when future antitrust disputes would

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it is an economic construct and not a political one. Even though states like China do not embrace democratic *political* principles, when such states engage in world markets and international commercial arbitration, they are embracing the *economic* principles of market capitalism. Politics aside, market competition is considered publicly beneficial, and thus protecting it serves public policy interests because competition results in lower prices. If antitrust laws are not enforced, then businesses may collude, or merge to form a monopoly over an industry, and charge higher prices. For an in-depth study of Chinese state capitalism, see generally, Li-Wen Lin and Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697 (2013).

186. *Mitsubishi*, 473 U.S. at 635.

187. *Id.*

188. *Id.* at 636.

be decided in arbitration, courts would “have the opportunity at the award-enforcement stage” to ensure that the tribunal at least applied the antitrust law of the state where enforcement is sought.<sup>189</sup>

Additionally, the Court assumed that a tribunal adjudicating enforcement proceedings, upon finding a violation of antitrust law, would be able to refuse enforcement of an award as contrary to public policy, under Article V(2)(b) of the New York Convention.<sup>190</sup> Although this theory may have been sound at the time, in hindsight the Court was wrong for two reasons. First, the vast majority of international commercial arbitrations end in settlement or voluntary award compliance; thus, the enforcement stage is never reached.<sup>191</sup> Second, even if the enforcement stage is reached, scholarship and court precedent strongly suggest that the Article V(2)(b) public policy defense may only be invoked if enforcement is “obnoxious” to “internationally accepted standards.”<sup>192</sup> In other words, enforcement must be against *international* public policy.<sup>193</sup> Fraud is the best example of an act that is sufficiently condemnable under international standards, but anticompetitive behavior is considered improper only under the laws of some countries.<sup>194</sup> Courts often balk when asked to refuse enforcement of an award on the grounds that enforcement would only be contrary to *national* public policy—such grounds reek of the “parochialism” the New York Convention is intended to stop.<sup>195</sup> Consequently, sophisticated commercial parties are more likely to voluntarily comply with arbitral awards of damages for antitrust violations because they are well aware that courts generally hold that the public policy exception is not a valid defense to the enforcement of such awards.

### *B. The Global Impact of Mitsubishi Motors*

In the current post-*Mitsubishi* era of broadened subject-matter arbitrability, as claims impacting public policy interests funnel away from public court litigation to privately conducted interna-

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189. *Id.* at 638.

190. *Id.* at 638–39.

191. *See supra*, Part II, at 7.

192. *See* GARNETT ET AL., *supra* note 5, at 109.

193. *Id.*

194. *Id.*

195. *See* *M/S Bremen v. Zapata Off-Shore Co.* 407 U.S. 1 (1972).

tional commercial arbitration, history lends merit to the contention in Justice Stevens' *Mitsubishi* dissent—that an arbitration clause should not be construed to cover statutory claims and remedies that it does not “expressly identify.”<sup>196</sup> Justice Stevens also found that Congress did not intend for the FAA to apply to antitrust claims and, moreover, that Congress did not intend for the New York Convention to apply to disputes not covered by the FAA.<sup>197</sup> Thus, the Court should have adhered to the *American Safety* doctrine that “the pervasive public interest in enforcement of the antitrust laws” makes antitrust claims nonarbitrable.<sup>198</sup> Hindsight reveals that such an affirmation would have better served public policy interests, while also providing greater protection for the physical and financial safety of individual Americans and world markets.

The majority decision in *Mitsubishi* instead opened the floodgates for subject matter concerning important public interests to be arbitrable, without consideration for the consequences of allowing such claims to be arbitrated in private. The privacy of arbitration undermines the policing function of statutes like the Sherman Act because the government and the public cannot see disputes that impact public interests, such as market competition, unless enforcement proceedings occur. Yet such proceedings have become the exception, not the norm.<sup>199</sup>

The impact of *Mitsubishi* is global. In a sanitized final award from 2010, Case No. 14046, unofficially published by the International Council for Commercial Arbitration (“ICCA”),<sup>200</sup> that

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196. *Mitsubishi*, 473 U.S. at 641. Still, this suggestion is likely unworkable because it would require parties to negotiate an exhaustive list to include in their arbitration clause of what statutory claims they want to be arbitrable. Conversely, if the parties left such a list out of their contract, then there would likely be an inefficient rise in parallel litigation and arbitration—parties would be bound to arbitrate their breach of contract claims and forced to litigate all of their collateral statutory claims.

197. *Id.* at 641.

198. *Id.* at 629 (quoting *American Safety*).

199. See discussion *infra* Part I.A.1.

200. Case No. 14046 of 2010, 35 Y.B. Com. Arb. 241 (ICC Int'l Ct. Arb.) [hereinafter Case No. 14046]. The ICCA is a global NGO governed by a board of dispute resolution specialists. The organization is “devoted to promoting the use and improving the processes of arbitration” and “its activities include convening . . . congresses and conferences, sponsoring . . . publications, and promoting the harmonization of arbitration and conciliation rules, laws, procedures and standards.” ICCA, *About the International Council for Commercial*

concerns a dispute between Italian parties arbitrated in Switzerland, the tribunal cites *Mitsubishi* as a “decisive turning point.”<sup>201</sup> The tribunal describes how the Supreme Court of Switzerland, in light of *Mitsubishi*, “no longer questions whether issues of anti-trust laws are arbitrable,” and thus holds under Swiss law that it has the authority to decide matters of EU and Italian competition law.<sup>202</sup> The dispute concerned a non-compete clause that restricted the “business activities” of Respondents 1 and 2 for five years; the tribunal ultimately reduced the clause to two years.<sup>203</sup> More importantly, the tribunal found that Italian competition law applied, even though the penalties owed for the antitrust violations “fell below the threshold for mandatory communication to the Italian anti-trust authority.”<sup>204</sup> Although minor violations are not required to be disclosed to the government, Italy has, at least partially, solved the problem of blind spot justice in the context of competition law, while the United States has utterly failed.<sup>205</sup>

Under the United States Clayton Act, companies considering a merger or acquisition above a certain threshold “must notify both the Antitrust Division and the Federal Trade Commission.”<sup>206</sup> The Sherman Act, however, lacks similar reporting requirements.<sup>207</sup> Thus, if a party raises an antitrust claim, such as alleging that its adversary is part of a vast price-fixing scheme,

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*Arbitration*, ARBITRATION-ICCA.ORG, <http://www.arbitration-icca.org/about.html> (last visited Aug. 6, 2014).

201. Case No. 14046, *supra* note 197, at 250.

202. *See id.* at 250-51. Since the place of arbitration was Switzerland, Swiss law governed the jurisdictional and procedural aspects of the arbitration, including what subject-matter was arbitrable—unless the parties had specified otherwise. The choice of law provision in the contract of the parties determines what substantive law the tribunal is to apply, once the tribunal determines that it has jurisdiction over the claim. Here, the choice of law was EU and Italian law. Thus, Swiss law determined the procedural issue of whether the tribunal could decide antitrust issues, but the tribunal applied EU and Italian competition law to decide the substantive antitrust issue. *Id.* at 245-47, 250-51.

203. *Id.* at 259.

204. *Id.* at 241.

205. *Id.*

206. *Antitrust Laws and You*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/atr/about/antitrust-laws.html> (last visited Aug. 6, 2014).

207. *Id.*

within the private and sometimes confidential context of international commercial arbitration,<sup>208</sup> then the tribunal might render an award that compensates the claimant for its injury and award treble damages; nevertheless, there is no public disclosure mechanism in place to alert authorities to the anti-competitive acts that are the basis for such an award.<sup>209</sup>

Case No. 14046 therefore suggests the solution to the problem of blind spot justice. In the context of U.S. antitrust law, Congress must amend the Sherman Act to require private party claimants, or courts, to report findings of antitrust violations to the DOJ. Where U.S. law is the substantive law that governs an international commercial arbitration, such an amendment would effectively compel the claimant, or tribunal, as required by applicable law,<sup>210</sup> to report the award to the DOJ. Since arbitral tribunals are already finding facts and determining the legal merits of such claims, a reporting requirement is an efficient solution. Increasing arbitral transparency by requiring the publication of unsanitized awards will simultaneously reinvigorate the policing function of the Sherman Act and serve the public interest in protecting market competition.<sup>211</sup> Requiring the publication of arbitral awards that contain findings of antitrust violations provides a microcosmic solution to end blind spot justice.

## CONCLUSION

In light of the refutation of the “public interest difference,”<sup>212</sup> which proves to be illegitimate, at worst, and insufficient, at

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208. See discussion *supra* Part I.A.II.

209. The lack of a disclosure mechanism may explain why it has taken over ten years for the FBI and DOJ to close in on Mitsubishi Electric Corporation and its fellow colluders in their latest price-fixing scandal. This current price-fixing scandal also illustrates that nearly thirty years after *Mitsubishi*, the Mitsubishi conglomerate is not deterred by existing antitrust law. Mitsubishi's recidivism also suggests that, had *Mitsubishi* not broadened the blind spot in international commercial arbitration to include private claims under the Sherman Act, it is likely that—considering the litigious nature of the auto industry—privately conducted arbitrations regarding such claims would have instead been in public courtrooms. See Ayapana, *supra* note 27, at 20; Ashby Jones, *Plaintiff Lawyers Take Aim at GM*, WALL ST. J., June 9, 2014, at A1.

210. Even the ICC's model confidential arbitration clause contemplates disclosures that are required by law. See ICC State Report, *supra* note 55, at 3.

211. See discussion *supra* Part III.B.

212. See discussion *supra* Part II.

best, as a basis to restrict the transparency trend in international arbitration to investor-state arbitration, and the lesson of *Mitsubishi*,<sup>213</sup> which reveals how broadened subject matter arbitrability, the privacy of arbitration, and the rarity of enforcement proceedings all unite to imperil the public interests at stake in international commercial arbitration, responsible organizations like UNCITRAL must end blind spot justice.

“Blind spot justice” describes the phenomenon that the current system of international commercial arbitration permits, wherein private parties resolve disputes that impact profoundly important issues of public policy, such as environmental protection, public health and safety, and market competition, without any public notice. Due to the pro-enforcement bias and success of the New York Convention,<sup>214</sup> blind spot justice currently thrives. Since the presumption under the convention is that awards shall be enforced by the courts of member states, defenses to enforcement are limited to the procedural fairness grounds of Article V(1) and the narrowly construed public policy defense of Article V(2)(b), and, since *Mitsubishi* has hollowed out the nonarbitrable subject matter defense of Article V(2)(a), the party that loses in arbitration has little expectation of subsequently “winning”<sup>215</sup> in a court enforcement proceeding. As a result, and as verified by statistics,<sup>216</sup> generally the losing party’s best choice is voluntary award compliance, which avoids the monetary costs of litigation and the reputational costs of public disclosure of the dispute.<sup>217</sup> Such compliance signals that the system is working because arbitral awards are meant to be final and binding.<sup>218</sup> But the system is final and binding only because courts around the globe stand behind it—like a backstop. International commercial arbitration is therefore innately tied to the public court system. Even in cases where voluntary award compliance occurs, the decision of the tribunal becomes final and binding due to the implied enforcement power of the public court system. Since the

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213. See discussion *supra* Part III.

214. See discussion *supra* Part I.B.1.

215. From the perspective of the party challenging an award in enforcement proceedings, “winning” means an outcome where a court refuses to enforce the award or a court in the place of arbitration sets it aside. See GARNETT ET AL., *supra* note 5, at 107.

216. See discussion *supra* Part I.A.1.

217. See discussion *supra* Part I.A.

218. See GARNETT ET AL., *supra* note 5, at 20.



system of international commercial arbitration exploits the enforcement power of the public court system, even where voluntary award compliance occurs, the public has a right, at the very least, to notice of arbitral disputes in which the tribunal issues a final award.<sup>219</sup> But, the current system of international commercial arbitration permits private disputes that impact profoundly important public policy interests to be arbitrated in absolute privacy and, sometimes, confidentiality. Such blind spot justice must end.

Before the conception that greater transparency is required only in the system of investor-state arbitration takes root via the promulgation of the Transparency Rules, UNCITRAL must broaden the transparency trend in international arbitration by promulgating a companion rule for international commercial arbitration that requires the publication of unsanitized arbitral awards.

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219. The issuance of an arbitral award triggers the public right to notice of the dispute because it signifies that the parties have relied upon the adjudicatory power of the tribunal and, implicitly, the enforcement power of the public court system; this Note does not go so far as to suggest that arbitrations that settle before the issuance of an award must be publicly disclosed; nor does it fall into the Owen Fiss camp of commentary in opposition to settlement. *See generally* Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1076 (1984).

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