Confidentiality and Cooperation with Law Enforcement Authorities in International Arbitration

Teresa Bravo

Abstract: This article addresses confidentiality in international arbitrations against the background of suspicions of transnational criminal offenses (corruption, bribery, tax evasion or money laundering) or issues of a regulatory nature, arising during an arbitration procedure. It also discusses the scope and limits of confidentiality agreements and the powers of arbitral tribunals to accept *amicus curiae* intervention while focusing on the role played by the European Commission in the BIT's and its impact on the future of arbitration. Our analysis also takes into account the UNCITRAL Transparency Rules, as model rules, and assesses whether an international standard of cooperation with law enforcers exists in international arbitration *lato sensu*.

Key words: international arbitration, money laundering, corruption, confidentiality, transparency, public interest, regulatory frameworks, duty to cooperate, European Union, European Commission, BIT's, law enforcement authorities.

Introduction

For the majority of the public, international arbitration is a distant reality due to the confidential nature of its proceedings. For many years, the business world and its conflicts were kept away from public scrutiny and were held in private meetings between entrepreneurs and panels of experts[1].

[1] See, Nisja, O. Confidentiality and Public Access in Arbitration – The Norwegian Approach, p. 188, in Int. A. L.R (2008) Thomson Reuters, p. 187- 192, in which the author explains that: "In a survey from 1992 performed by the London Court of International Arbitration, confidentiality was reportedly recognized as the most important perceived benefit for the US and the European users of international commercial arbitration to choose arbitration.

One of the reasons behind arbitration´s success was the fact that most corporations did not want their business details (strategies, trade secrets, market shares, key figures) to become public, since it could affect their commercial practices and undermine their image.

Nonetheless, confidentiality is by far not the only reason to opt for an arbitral proceeding instead of a judicial proceeding. Neutrality of the arbitral tribunal and enforceability of the award are the most important factors but also, costs, time and expertise of the arbitrators can play an important role in that choice. Moreover, in certain countries the lack of a credible, independent and mature legal system turns arbitration into the only reliable option for foreign business stakeholders.

Another reason that justifies the recourse to arbitration is linked to the fact that, in some cases, one or both of the parties involved want to avoid the establishment of a judicial precedent that could be used in future disputes. Other authors refer instead, to the national bias of some home-judges as one of the reasons for the parties to opt for arbitration[2]. From a sociological and economic point of view, globalization, the growth of sales and commercial interchanges around the globe have also contributed to a significant increase of arbitration procedures worldwide.

Paradoxically, despite the fact that confidentiality is perceived by many users as one of the core features of arbitration, there is no pre-established international consensus so as to the meaning and scope of confidentiality, in this context.

What remains consensual about confidentiality is its multidimensional nature (not easy to define though), since it can accommodate different layers and is dependent on the legal environment in which the arbitration procedure takes place.

One of those first layers concerns the difference between private commercial arbitration and arbitration involving States. Nowadays, arbitration is not only used

[2] See, Huber, D. and Pavic, V. Arbitration and Crime, in Journal of International Arbitration, 25 (4), 461- 471, Kluwer International, 2008.

by private parties but also involves State actors and other public entities, particularly in the form of Investor State Dispute Settlement- ISDS). In ISDS, the increasing debate around transparency and accountability is closely linked to the nature of the disputes at stake and the fact that they often involve tax-payer's money and public interest issues (education, health, natural resources, environment and infra-structures):

"Civil society groups cite the lack of transparency in ISDS as one major reason to withhold from international free trade and investment agreements. Freedom of information is widely considered a basic human right, significantly affecting the public´s access to other international human rights, such as, participation in government education and security."[3]

The second layer that needs to be taken into account refers to the distinction between procedural and substantive confidentiality. While the first refers to the procedural aspects of the arbitration (its different stages, the parties involved, the hearing, the identity of the witnesses or of the experts, and the publicity of award), the second refers to the material nature of the dispute, the facts and arguments of the case, as well as, the submissions produced by the parties, the documents and the factual content of the evidence provided.

Within the next pages, the *status quo* of this debate in the international setting will be scrutinized, regarding both ISDS and commercial arbitration.

In the context of ISDS, the focus will be placed on the UNCITRAL Transparency rules and the Mauritius Convention (as a paradigmatic set of rules to increase transparency.

The second half of this paper will focus on the supranational regional level and address the impact of the EU Framework concerning money laundering and tax evasion and the role played by the European Commission, as regulator, in arbitration procedures involving BIT's.

[3] See, Kenny, W. Transparency in Investor State Arbitration, Journal of International Arbitration 33, no. 5 (2016), Kluwer law International, The Netherlands, 471- 500.

1. Transparency and Confidentiality in International Arbitration

One of the most challenging features of international law is the lack of clear, objective and consensual legal concepts. In the majority of the international conventions, treaties and other legal instruments, the concepts enshrined therein are so broad and vague that one would say they could contain everything and mean nothing at the same time. Even though the Vienna Convention on the Law of Treaties has implemented guidelines regarding the interpretation of Treaties (free consent, good faith and *pacta sunt servanda* just to name a few) its norms constitute general guidelines and, in some cases, do not provide a clear solution for a specific case which is basically done by the interpreter on an *ad hoc* basis.

Similarly, international arbitration is also affected by its pluralistic features since it involves a multitude of institutional and private actors, different seats of choice for the arbitral tribunal, as well as actors from different nationalities and legal cultures while offering a prolific set of choices as to the applicable legal framework (*lex arbitrii).*

However, there are two key issues that have emerged in recent discussions concerning the status of international arbitration (particularly, the one that concerns ISDS) due to the public interest involved: transparency and confidentiality and how to reconcile them. Apparently, these are two opposite concepts but further clarification of its purpose and scope can help us finding a possible convergence between these two dimensions.

In fact, transparency relates to accountability and the systemic features of a procedure in which relevant interests are at stake (for instance, energy, environment, infra-structures, etc.), whereas, confidentiality is an essential element to protect specific business secrets, marketing strategies and a company´s public image.

Confidentiality can, however, be used as a shield to cover certain malpractices, misconduct or serious criminal behavior. This possibility has been also recognized by arbitral institutions like the International Court of Arbitration of the International Chamber of Commerce[4].

The core issue is, then, how to reconcile two apparent contradictory concepts: to ensure confidentiality and, at the same, prevent the abuse of arbitration's proceedings.

There is no common approach and the answers vary according to the legal framework and the scholars involved. For instance, Jan Paulsson and Nigel Rawding suggested the following stipulations concerning confidentiality in institutional rules or contractual clauses:

"No information concerning an arbitration, beyond names of the parties and the relief requested, may be unilaterally disclosed to a third party by any participating party unless it is required to do so by law or by a competent regulatory body, and then only:

• by disclosing no more than what is legally required, and

• furnishing to the arbitrator details of the disclosure and an explanation of the reason for it[5]."

Nonetheless, it must be recognized that there are many advantages of promoting transparency in international arbitration:

- it renders the decision- making process more accurate[6];

- it guarantees that democratic principles of fairness, rule of law and equity are applicable throughout the whole procedure and potential abuses may be prevented or discouraged;

[4] See, Khvalei, V. Using red flags to prevent arbitration from becoming a safe harbor for contracts that disguise corruption, in ICC International Court of Arbitration Bulletin, Vol. 24/Special Supplement, 2013.
[5] See, Paulsson, J. & Rawding, N. The Trouble with Confidentiality, 1994, ICC International Court of Arbitration Bulletin 48, p. 315 and 11 Arb. INT'L 303 (1995).
[6] In cases where complex technical issues are at stake transparency and public disclosure can bring into the arbitral proceeding new information and technical expertise from third non-parties.

- it prevents prospective disputes on the same grounds or of the same nature (it has a pedagogical dimension) and allows the development of arbitral law promoting legal certainty.

Transparency increases efficiency, trust and confidence in the arbitration system worldwide. Indeed, the alleged transparency – deficit in international arbitration has been constantly raised in the last decade as a symptom of its lack of accountability, particularly, in sectors where public interests are at stake.[7]

Moreover, the fight against organized crime, corruption, tax evasion, bribery and money laundering at a global scale imply that arbitration does not became a safe haven for these practices.

Apparently, there is a global consensus that the need to fight organized crime at a global scale demands cooperation between States, private sector and law enforcement agencies but, on the other hand, there is a lack of mutual understanding on how to implement such strategies.

Indeed, according to an estimate provided by the United Nations Office on Drugs and Crime (UNODC) every year 2 to 5% of the global GDP is laundered. This means approximately USD 840 billion to 2.2 trillion a year[8].

In 2017, the European Commission´s Inception Impact Assessment recognized the need to implement a set of legislative initiatives to improve cooperation between member states and law enforcement authorities. As such, that Impact's Assessment, provided general guidelines for the revision of the EU´s directive on Money laundering:

"With the use of modern technology, money can be transferred between several bank accounts around the world in a matter of hours. At the same time, investigators

[7] See, for instance, Maupin, J. Transparency in International Investment Law: The Good, the Bad and the Murky, in Transparency in International Law, Andrea Bianchi and Anne Peters, eds. Cambridge University Press 2013. Also, International Investment Law and Sustainable Development - Key cases from 2000-2010, Edited by Bernasconi-Osterwalder, N. and Jonhson, L. ISCD.

[8] See, Nacimiento, P. Hertel, T., Gayer, C. Arbitration and Money Laundering: What are the Obligations placed on Counsel and Arbitrators and what risks do they face?, in http://arbitrationblog.kluwerarbitration.com/2017/11/10/arbitration-money-laundering/, consulted online on 01 October 2018.

may need weeks to follow these transactions and understand to whom money has been transferred.

Organized crime groups operate internationally on a regular basis and are usually active in more than one Member State. Their investments and assets, including bank accounts, are usually located across the European Union, or even outside of it. In order to combat organized crime effectively, there is a need for greater speed in financial investigations, with a view to follow, freeze and confiscate the money transferred to bank accounts located in different countries. Expedient access to information on bank accounts is essential for many authorities:"

The general objective of the envisaged initiative is to contribute to the prevention of organized crime and other serious offences by enabling public authorities to get timely access to information on the identity of holders of bank and payments accounts in their Member State, thereby facilitating criminal investigations and the confiscation and recovery of criminal assets.

Smooth and fast access to the information found in the aforementioned registries would provide direct operational support to law enforcement agencies, AROs, and ACAs and strengthen their effectiveness and efficiency."[9]

A misuse of international arbitration may represent a potential risk for the rule of law. Moreover, confidentiality and secrecy around arbitration proceedings can provide a cover for criminal activities:

"Secrecy in the outcomes of investment arbitration remains high in part, we suggest, because parties have found ways to use settlement of investment disputes to hide information such as key facts and legal reasoning from the public view."[10]

In this context, transparency and accountability mechanisms need to be clearly defined and implemented. In this respect, Lise Johnson and Brooke Skartvedt Guven, wrote:

[9] See, Inception Impact Assessment, ARES (2017) 3971182- 09/08/2017, available online in http://ec.europa.eu.
[10] See, Hafner-Burton, E. Puig, S. and Victor, G. Against Secrecy the social cost of International Dispute Settlement, 45 Yale Journal of International Law, 2017, available online https://hq.ssrn.com, consulted on 8 October 2018.

"ISDS provisions and arbitral rules do not provide rules aimed at protecting non-party rights and interests nor mechanisms for ensuring public oversight of arbitral proceedings or settlement agreements"[11].

Transparency is an "umbrella concept" which includes two different dimensions; the first one, refers to the disclosure of information pertaining to a specific arbitral proceeding so as to render it more open and subject to public scrutiny, the second dimension refers to cooperation with law enforcers (being it the police and judicial authorities or regulators). In this sense, transparency is not merely a theoretical definition, it has a practical dimension related to the accountability of the decision-making process and it can be a useful resource to combat criminal practices in international arbitration proceedings.

Some authors argue that the actual trend is to consider transparency as one of the key features of ISDS and, as such, the balance has gradually begun to shift towards greater openness and accountability[12]. On the other hand, from an institutional point of view, confidentiality and transparency in international arbitration has also been discussed.

The ICC has recently adopted a model clause against corruption, which is intended to apply to any contract that incorporates it, either by reference or in full. To the ICC this aims at providing the parties "with a contractual provision that will reassure them about the integrity of their counterparts during the pre-contractual period as well as during the term of the contract and even thereafter"[13].

The same institution (ICC) has also adopted new Notes to parties and arbitrators in order to ensure more transparency in arbitration proceedings[14]. The purpose of these Notes is to increase information available to parties, business community and academia. In this context, transparency is regarded as a key issue

[11] See, Johnson. L and Skartvedt, G. B. The settlement of Investment Disputes: a discussion of democratic accountability and the public interest, in Investment Treaty News, available online in http://www.iisd.org.
[12] See, Kenny, W. ob. cit., page 474.
[13] See, https://iccwbo.org/publication/icc-anti-corruption-clause/, consulted on 13 march 2019.
[14] See, https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/, consulted online on 13 march 2019.

that provides greater confidence in the arbitration process and helps protect arbitration against inaccurate or ill-informed criticism. In accordance to such targets the ICC publishes on its website: (i) the names of the arbitrators, (ii) their nationality, (iii) their role within a tribunal, iv) the method of their appointment, and (v) whether the arbitration is pending or closed.

It also publishes the award, unless a confidentiality agreement covers certain aspects of the arbitration and the parties do not consent in that publication.

Traditionally, confidentiality as a general concept means that, neither the arbitral proceeding, its various steps, the legal reasoning, the facts of the case, the evidence and the final award are publicly disclosed. In principle, they are only accessible to the parties and the arbitrators. Except in a few cases (mostly, in institutional arbitration) there is no uniform legal framework imposing or stating the criteria to disclose arbitration proceedings or its outcome. Nonetheless, as we have pointed out, despite the absence of an international uniform practice, some institutional rules include important norms that can provide some guidance on issues of confidentially and transparency, as the UNCITRAL Transparency Rules for ISDS.

2. Towards International "transparency standards"- UNCITRAL as model rules

The need to address, develop and adopt international transparency rules and practices in international arbitration is more important in investment law than in commercial arbitration. In fact, commercial arbitration involves ordinary contractual claims whose nature and impact usually concern a private sphere only.

On the contrary, international investment disputes often relate to the state regulatory practices, involve measures adopted by the host state to enhance public purposes and interests, and an award rendered against a State will directly affect that State's budget (with inherent political and economic implications).

In this chapter, we will address the challenges in the investor-state arbitration field and narrow our scope of analysis by focusing on one of the main international legal frameworks that can operate as model rules.

Defining international transparency standards in investment law is a cumbersome task due to the decentralized nature of the international investment law system and its multifarious environment:[15]

- Plurality of overlapping bilateral and regional treaties, thousands of transnational contracts and contracts and domestic statutes;
- Several competing arbitration-related institutions with specific sets of procedural rules;
- Non-harmonized legal practices and jurisprudence from different arbitral tribunals.

The approval and subsequent implementation of the UNCITRAL Rules on Transparency in Treaty-Based Investor State Arbitration (hereinafter, UNCITRAL Transparency Rules), under the auspices of the United Nations, was the catalyst of a friendlier approach to transparency and public scrutiny in state investment disputes[16].These rules came into effect on 1 April 2014 and, in principle, only apply to treaties concluded on or after that date and provided that they are incorporated in it. Regarding treaties approved before that date, this set of Rules can also be used if the parties agree on it.

This was, indeed, one of the major steps towards a harmonized international legal framework in these proceedings. The rationale behind this model-framework is to enhance good - governance practices, particularly, when public policy issues are at stake.

In the Preamble of the General Assembly's Resolution. the purpose of these rules was underlined as follows:

[15] See, Maupin, J. ob. cit., page 2.
[16] Approved by a General Assembly Resolution of the United Nations dated from the 16 December 2013.

- to recognize public interest and the need to ensure transparency in treaty-based investment disputes;

- to promote fair and efficient settlement of state-investment disputes;

- to ensure and promote good governance practices, transparency and accountability in these procedures.

In the Model Rules the arbitral tribunal is placed at the epicenter of the whole arbitration process. Subsequently, it is up to the arbitral tribunal to bear the burden of disclosing information and to evaluate the circumstances that justify some restraint. Indeed, the UNCITRAL Model Rules allow the arbitral tribunal to adapt certain provisions of the Rules to the specific circumstances of the case (provided that the parties are consulted and the decision is consistent with the need to ensure transparency). Moreover, it also allows the arbitral tribunal to accept submissions from third parties.

Consequently, presumptive procedural and substantive publicity are the leading principles enshrined in the UNCITRAL Transparency Rules. In fact, the Rules state that the commencement of the proceedings, as well as the documents enshrined therein are also to be of public domain (which includes, the notice of arbitration, response to that notice, statement of claims, statement of defense, written statements and submissions, transcript of hearings, orders, decisions and awards).

Also, the hearings in these proceedings should be open to the public, unless there is a need to protect confidential information and/or security interests arise. However, the arbitral tribunal can also restrain or delay the publication of information when exceptional circumstances justify it. Despite the apparent openness of this set of rules the fact remains that the treaty provisions and the applicable law to the dispute, prevail over the transparency rules.

We suggest that the UNCITRAL Model Rules do represent a major step towards more transparency and accountability in this area, however, the Model Rules do not specifically contemplate any provision regarding cooperation with

regulators and law enforcement agencies and authorities. Despite this fact, this is an essential dimension of transparency that needs particular attention.

As a consequence, the analysis needs to be done on a case by case while bearing in mind the specific features of the applicable legal framework.

3. The potential role of law enforcers as *"amicus curiae"*

The plurality of *lex arbitrii* and the lack of a uniform international legal framework renders more difficult the clarification of the *amicus curiae's* role in international arbitration proceedings.

The term "amicus curiae" refers to someone who is not a party to a law suit but who petitions the court or is requested by the court to file a brief in the action because that person/organization has a strong interest in the subject – matter. This might well be the case of law enforcement authorities and regulators.

"Nonetheless, this role has become clearer now (than it was a few years ago) in investor-state disputes than in private commercial arbitration, due to the amendments and changes introduced under the NAFTA, ICSID and UNCITRAL Rules.

The role played by *amicus curiae* in cases involving the North American Free Trade Agreement (NAFTA) between Mexico, Canada and the USA (which entered into force in 1994) became clearer after the *Methanex case*[17]."

In fact, it was the case law produced by two arbitral tribunals, constituted under the (UNCITRAL Model Rules) - *Methanex Corp. vs. United States and United Parcel Service of America Inc. vs. Canada* regarding NAFTA's Agreement, that paved the way to the admission of third parties in investment – related arbitral proceedings[18]. In the Methanex case, the International Institute for Sustainable

[17] In *Methanex Corporation vs. United States* the arbitral tribunal has stated that the provisions in the UNCITRAL Arbitration Rules (usually applicable to NAFTA cases) and NAFTA chapter 11 neither expressly admit or deny the tribunal's power to accept *amicus curiae* submissions.

[18] Available in https://www.italaw.com/sites/default/files/case-documents/italaw9096.pdf, consulted online on 7th February 2019.

Development (IISD) requested permission from the arbitral tribunal to submit an *Amicus Curiae* brief on critical legal issues, to produce oral submissions and to participate in it as an observer on behalf of the public interest of the case.[19]

The grounds for such a request were, *inter alia*, the following:

1. Permission was sought on the basis of the immense public importance of the case and the critical impact of the tribunals' decision on environmental and other welfare lawmaking process in the NAFTA region;
2. The tribunal could grant such Petition under its general procedural powers contained in Article 15 of the UNCITRAL Arbitration Rules;
3. The case raises issues of constitutional importance, concerning the balance between a) governmental authority to implement environmental regulations and b) property rights.

In the *Methanex case*, the claimant sought dismissal of the petition based on three arguments: a) confidentiality, b) jurisdiction and c) fairness of the proceedings.

On the contrary, the Respondent argued that procedural rules governing the arbitration allowed for the acceptance of *amicus curiae* and its submissions, whenever suitable and likely to assist the arbitral tribunal.

The arbitral tribunal has decided to accept *amicus curiae* submissions based on article 15 (1) of the UNCITRAL Arbitration rules which grant it a broad discretion as to the conduct of the arbitration subject always to the requirements of procedural fairness and equality of arms. However, the arbitral tribunal

[19] IISD is a Canadian based international non-governmental organization originally established by an Act of the Parliament of Canada. The mandate of the IISD is to foster local, regional and international policies and practices in support of the achievement of sustainable development. The IISD has an independent and international Board of Directors. Senior officers of the IISD are regularly consulted by the World Trade Organization and its Director General, the Organization for Economic Cooperation and Development, the North American Commission for Environmental, see, Amicus Curiae Petition, available online: https://www.italaw.com/sites/default/files/case-documents/italaw9096.pdf.

established a clear distinction between the status of the parties and the procedural status of *amicus curiae*:

"their rights, both procedural and substantive, remain juridical exactly the same before and after receipt of such submissions, and the third person acquires no rights at all. The legal nature of the arbitration remains wholly unchanged."

In those two cases, the arbitral tribunals have accepted *amicus curiae* submissions.

In reaction to these two decisions, the NAFTA Free Trade Commission decided to issue an interpretative statement clarifying that: "no provision of the North American Free Trade Agreement … limits a Tribunal's discretion to accept written submissions from a person or an entity that is not a disputing party".

In 2007, in the *Suez Vivendi vs. Argentina* case (ICSID No. Case ARB/03/19) the arbitral tribunal (constituted under the ISCID Rules) has also accepted submissions from non-parties, under Article 44 of the ISCD Rules, depending on three main criteria:

a) the appropriateness of the subject matter of the case;

b) the suitability of a given non- party to act as *amicus curiae* in that case and;

c) the procedure by which *amicus curiae* submissions was made and considered.[20]

Indeed, on January 28, 2005, five non-governmental organizations filed a "Petition for Transparency and Participation as Amicus Curiae" asserting that the case involved matters of basic public interest and the fundamental rights of people living in the area affected by the dispute: Consequently, the petitioners requested the arbitral tribunal to grant three requests:

a. to allow Petitioners access to the hearings in the case;

[20] The Amicus Curiae submissions is available online at https://www.ciel.org/wp-content/uploads/2015/03/SUEZ_Amicus_English_4Apr07.pdf, consulted on 13 march 2019.

b. to allow Petitioners opportunity to present legal arguments as *amicus curiae*;

and

c. to allow Petitioners timely, sufficient, and unrestricted access to all of the documents in the case.

In this case, the arbitral tribunal defined *amicus curiae* in a broaden way, highlighted the public interest of the case and underlined that, admitting *amicus curiae* to the arbitral proceedings would increase transparency of these proceedings as follows:

"The Tribunal does not accept Claimants' interpretation of the ICSID Convention and Rules on this point. An *amicus curiae* is, as the Latin words indicate, a "friend of the court," and is not a party to the proceeding. Its role in other forums and systems has traditionally been that of a nonparty, and the Tribunal believes that an *amicus curiae* in an ICSID proceeding would also be that of a nonparty. The traditional role of an *amicus curiae* in an adversary proceeding is to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide. In short, a request to act as amicus curiae is an offer of assistance – an offer that the decision maker is free to accept or reject. An *amicus curiae* is a volunteer, a friend of the court, not a party.[21]"

(...) Given the public interest in the subject matter of this case, it is possible that appropriate nonparties may be able to afford the Tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision. Rather than to reject offers of such assistance peremptorily, the Tribunal, while taking care to preserve the procedural and substantive rights of the disputing parties and the orderly and efficient conduct of the arbitration, believes it is appropriate to consider carefully whether to accept or reject such offers.

[21] Ob. cit., page 6.

(…) The acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration.

Indeed, the last decade has witnessed the greater participation of civil society groups as non-disputing parties in international investment proceedings due to an increase of public interest in arbitrations that concern environment, public health, human rights and labor standards.

As a consequence of such interest, several amendments were made to the existing international investment instruments in order to incorporate new provisions on the acceptance of *amicus curiae* during arbitral proceedings.

This was precisely the case of the ICSID arbitration rules (which were amended and come into force on the 10th April 2016) so as to allow the intervention of non- parties to investment arbitral proceedings under article 37.

Pursuant to rule 37 (2) the arbitral tribunal has discretion to refuse or accept a submission from a non-party after consulting with the parties and provided that the above mentioned three criteria are met.

More recently, the UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration (which came into force in 2014) contain specific provisions on the participation of non- disputing parties in article 4.

These amendments were directed at the issue of increasing demands for transparency and public scrutiny in state investment disputes. Following this trend, we submit that law enforcement agencies and regulators should be allowed to intervene in arbitration proceedings under *amicus curiae* provisions.

This is a significant development since *amicus curiae status* is not an exclusive of non- governmental bodies or private organizations.

But what kind of "legal and public interests "may justify the intervention of a law enforcement or regulatory agency in an arbitral proceeding?

From our point of view, a distinction needs to be made between investment arbitration and commercial arbitration.

We submit that, as far as, commercial arbitration is concerned, this intervention is possible in four scenarios:

1.A party to the arbitration may raise questions of a criminal nature regarding the facts of the case (e.g. money laundering, corruption, tax evasion);

2.The arbitral tribunal may become suspicious regarding the legitimacy of the dispute or the purported transaction underlying the dispute;

3.The entire arbitration may be a fabrication (this is closely related to the second situation);

4.The issues of the case raise complex and highly technical analysis that may justify the intervention of special technical bodies and impact public interest (e.g. competition law enforcers, regulators in the fields of finance, banking or pharmaceuticals or health authorities).

However, until now there were very few cases in which the issue of criminal practices being were raised during arbitral proceedings. According to Domitille Baizeau and Tessa Hayes there are, in fact, only two published cases involving corruption:

The first one was the so – called *Lagergreen Case*, ICC case No. 11101 (1963) in which the arbitrator observed that, as matter of principle, he had the power to rule e*x – officio* that the contract was null and void due to corruption, but found that in such case there was no evidence that corruption has occurred.

The second case was the *Metal -Tech Ltd. Vs. Republic of Uzbekistan* (ISCID Case No. ARB/10/3) – Award rendered on 4 October 2013. In this case, the arbitral tribunal has decided to request, on its own initiative, for more evidence in order to determine if corruption has occurred.

In another case (Qatar. Vs. Barhain)[22], one of the arbitrators -Judge Fortier- has raised, in his Separate Opinion, the fact that the arbitral tribunal (constituted under the auspices of the International Court of Justice) has paid little, if none

[22] Maritime delimitations and Territorial Questions between Qatar and Bahrain, Application filed before the ICJ on 8 july 1991. Available on the website https://www.icj-cij.org/en/case/87/summaries, consulted on 13 march 2019.

attention, to the fact, that 82 documents presented by Qatar were not reliable as evidence, because they have been forged, and were later withdrawn from the proceedings:

"Before I write my separate opinion in respect of Zubarah and Janan Island, I wish to address one important issue which has arisen in the course of the present proceedings and which, 1 believe, should have been commented upon in the Judgment. Since the Court chose not to address this issue, I have decided that it was my duty to do so. 1 refer to the 82 Qatari documents whose authenticity was successfully challenged by Bahrain.

2. The only reference to the 82 documents in the Judgment is found in paragraphs 15 to 23 of the section setting out the history of the proceedings before the Court. It consists of a mere narrative. 1 am of the view that this extraordinary incident merits the following comments. (...)

I believe that the Court should not simply disregard and fail to take into consideration this unprecedented incident. In my opinion, these documents have "polluted" and "infected" the whole of Qatar's case (CR2000/11, pp. 12 and 14).

5. Some of them resurface, directly or indirectly, at various stages of Qatar's written and oral pleadings. They remain in the record and some of them linger and are invoked occasionally in support of Qatar's alternative argument.

6. While I must accept, as I do, Qatar's disclaimer and apologies, in my opinion I cannot consider Qatar's case without having in mind the damage that would have been done to the administration of international justice, indeed to the very position of this Court, if the challenge by Bahrain of the authenticity of these documents had not led Qatar, eventually, to inform the Court that it had "decided [to] disregard al1 the 82 challenged documents for the purposes of the present case".[23]

[23] See, Separate Opinion of Judge Fortier, available online at: https://www.icj-cij.org/files/case-related/87/087-20010316-JUD-01-10-EN.pdf and consulted on 4 march 2019.

In this case, the arbitral tribunal should have specifically addressed the issue in the award and explain, in a clear and transparent way, what had happened and the reasons that led it to disregard the content of those documents.

From my point of view (which is not consensual nor unanimous) international arbitrators do have a duty to preserve confidentiality but also, to cooperate with law enforcement authorities whenever requested or necessary. This is an essential element so as to guarantee that parties do not engage in any illegal or unethical behavior in the course of the proceedings or they use it to pursue illegal or criminal intentions.

This must be done not only for the purpose of safeguarding the enforceability of the award but also, the credibility of the procedure and of international arbitration *per se,* as a fair, legal and reliable ADR (amicable dispute resolution) mechanism.

Bearing in mind the above mentioned four scenarios and the examples provided earlier, we have to distinguish two different situations: whether arbitral proceedings raise issues related to criminal practices or whether the issues at stake are of public interest, for instance if they involve issues of a regulatory nature.

From our point of view, the intervention of law enforcement agencies in arbitral proceedings is directly linked with the extent of confidentiality and this is dependent upon the seat of the tribunal and the arbitral rules applicable to the case.

However, if the law of the seat of the tribunal or the *lex arbitrii* do not contain specific rules, the arbitral tribunal will have to decide if the intervention of a law enforcement agency is admissible (for instance, under the *amicus curiae* rules) and to what extent. Consequently, the arbitral tribunal will first have to address the parties and obtain its consent to define the scope of confidentiality (documents, written submissions, hearing, award) and what can or cannot be disclosed to the third non- party.

For instance, under the English Arbitration's Act 1996 there is no specific and detailed norm on confidentiality but it contains three rules that provide some guidance for arbitral tribunals:

- Arbitration proceedings must be held private:
- Confidentiality is implied in every arbitration:
- Confidentiality is subject to certain exceptions: court orders, parties' consent, public interest and reasonable necessity.

On the contrary, jurisdictions like the US and Australia reject any implied confidentiality and usually leave it to the parties' discretion.

The same happens in Switzerland where the law does not provide for confidentiality, so that arbitration is only fully confidential if both parties agree to it. Parties in Switzerland are not bound by any duty of confidentiality contrary to what happens with counsel and arbitrators.

We submit that if a criminal offence or a highly complex technical issue is at stake and a law enforcement agency (or a regulatory authority) requests access either to the evidence submitted, the parties' submissions or even to participate in the proceedings as an *amicus curiae*, the arbitral tribunal, upon consultation with the parties, will have to decide on such request.

The arbitral tribunal will have to assess the gravity of the issue (s) at stake, the conflictual interests and to perform a proportionality test (necessity, adequacy and balance of conflicting rights and legal obligations). The arbitral tribunal will have to assess which interest will prevail: the one identified by the law enforcement agency or the interests of the parties to keep the proceedings confidential.

This means that the arbitral tribunal will have to perform a case by case analysis and decide if cooperation will law enforcement authorities is really needed (necessity test), to what extent and whether access to the case file does not compromise the integrity of the arbitral proceeding.

4. The intervention of the European Commission in arbitral and annulment proceedings

Law enforcers can also act as *amicus curiae* in proceedings in which there is a legitimate legal interest that justifies such intervention. Scholars agree that the identity of *amicus curiae* is varied since it can include professional associations, trade unions, private companies, scholars and even, intergovernmental organizations, notably, the European commission.[24]

"(...) the European Union, through the European Commission (EC), has requested and been granted authorization to take part in several investment proceedings. "

This interest has been growing, due to three main reasons: in some cases, the dispute between the foreign investor and the host state raises matters pertaining to the interpretation and application of European law (particularly, when the defendant is a European Union member state and the impugned state measure was adopted in compliance with or in order to execute European Union Law). Second, several disputes regarding investments in the field of energy have emerged over the past years most of them under the rules of the Energy Charter Treaty and thirdly, in proceedings between member states and third countries is also required by the Regulation EU N. 1219/2012 of the European Parliament and the Council of December 12, 2012, which establishes "transitional arrangements for BIT's[25] between member states and third countries."

The reason for this is the fact that the European Commission has been entrusted by the Treaty with the responsibility for the effective application,

[24] See, ob. cit., page 247.
[25] Bilateral investment treaties are international agreements which typically grant protection to investment by nationals and companies of one State in another one. These treaties focus on investor protection, for example by means of compensation for expropriation and provide for a system that allows the settlement of investment disputes between investors and the country where the investment is made.

implementation and enforcement of EU law. According to a Press Release, dated the 19 july 2019, and launched by the European Commission, it was held that:

"In this role, the Commission can review national measures and act to ensure compliance with EU safeguards protecting investors. The Commission is committed to act firmly on infringements of EU law which obstruct the implementation of important EU policy objectives or which risk undermining the four fundamental freedoms, which are essential for investors.[26]"Some EU Member States had concluded BITs with some countries in Central and Eastern Europe before those countries had joined the EU in 2004 (CY, CZ, EE, HU, LT, LV, MT, PL, SI, SK), 2007 (BG and RO) and 2013 (HR) respectively. The central and Eastern European countries also concluded such agreements amongst themselves. From the date of EU accession, the agreements concerned thus became treaties among EU Member States ("intra-EU"). Slightly less than 200 intra-EU bilateral investment treaties still formally exist to date between the Member States, though some Member States, such as Ireland and Italy no longer have any bilateral investment treaties at all.

From the Commission's point of view, these BITs and the arbitral proceedings which concern it, can jeopardize the uniform application of EU law, compromise the regulatory framework as well as the European's Commission leading role in this respect.

This view was also confirmed by the ECJ in the *Achmea Judgement* (Case C-284, issued on 20 April 2018).[27]

"In its judgment of 6 March 2018 in the *Achmea* case, the ECJ confirmed the Commission's view that investor-to-State arbitration in an agreement concluded between Member States is not compatible with EU law. The ECJ ruled that these clauses do not have legal effect. It explained that, when applied in an intra-EU

[26] See, "Commission provides guidance on Protection of cross border EU investments: Questions and Answers," available online at: europa.eu/rapid/press-release_Memo-18-4529-en.htm, consulted on 4 march 2019.
[27] The Judgment can be read online in the following website: http://curia.europa.eu/juris/documents.jsf?num=C-284/16, consulted on 4 march 2019.

context, such a mechanism undermines the system of legal remedies foreseen in the EU Treaties for resolving such disputes. It therefore poses a threat to the autonomy of EU law and the principle of mutual trust between the Member States. The treaties should therefore be legally terminated in order to ensure legal certainty.

The *Achmea* judgment is also relevant for the application of the Energy Charter Treaty between EU Member States. In the Commission's view that Treaty cannot be used as a basis for dispute settlement between EU investors and EU Member States."

Colin Brown, Deputy Head of Unit, Dispute Settlement and legal Aspects of Trade Policy, Directorate -General for Trade in the European Union, has also explained how, in his view, arbitral proceedings can impact the EU regulatory framework concerning European union's internal market:

"It arises there because the *ad hoc* nature of a system, coupled with the public law nature of the disputes under treaties concluded between sovereigns is such that it fundamentally cannot provide the certainty and predictability about the core aspects of these investment protection standards that is required by all stakeholders, whether they be investors or governments or other interested parties. It is very difficult to point to a key decision taken by a tribunal and be able to honestly say that one knows that that particular decision will, with a high degree of certainty, be followed.[28]"

The intervention of the European Commission in state investment disputes involving BIT´s is twofold: the EC intervenes as *amicus curiae* in the proceedings (where it usually raises issues of arbitrability of the agreement) and it further objects to the enforcement of the awards.

[28] See, Colin Brown, Deputy Head of Unit, Dispute Settlement and legal Aspects of Trade Policy, Directorate -General for Trade in the European Union, in "The EU Approach to investment dispute settlement", The 3rd Vienna Investment Arbitration Debate, 22 june 2018, published at: http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157112.pdf, consulted on 4 march 2019. Also, see, The Enforcement of Intra-EU BIT Awards: Micula v Romania and Beyond Wehland, H. in: Journal of World Investment & Trade 2016, volume 17, issue 6, 942 et seq.

In the case *Micula vs. Romania*[29], Romania was sentenced to pay the amount of RON 376,433,229 and interest in favor of the Claimants in the original arbitral proceeding.

However, on April 9, 2014, Romania filed with the Secretary- General of the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") an application requesting the annulment of the Award rendered on December 1, 2013. The Applicant argued, *inter alia*, that the enforcement of the award would cause Romania to breach its obligations under Article 107 of the Treaty on the Functioning of the European Union (TFUE), which might lead to infringement proceedings against Romania before the European Court of Justice (ECJ). On October 15, 2014, the EC file an application in the annulment proceedings requesting leave to file a written *amicus curiae* submission in support of the annulment of the award, to be granted access to documents filed and to provide oral testimony at hearings. The EC argued that it was able to intervene as a non - disputing party under Rules 37 (2) and 53 of the ICSID arbitration Rules (2006).

Following this request, the Committee issued a decision in which it stated that the EC had an interest in it as non- disputing party and found that the EC had satisfactorily established that it had the "expertise, experience and independence to be of assistance" in the annulment proceeding. The Committee followed the criteria established in the *Vivendi vs. Argentina* case: (i) the subject matter of the application must be appropriate, (ii) the applicant must be suitable to act as *amicus curiae* and (iii) procedural fairness must be respected.

The Committee has also defined the role of the EC in the annulment proceedings and established that, its intervention would have to adhere to certain conditions: (i) the submissions must be limited to the grounds for the annulment under Article 52 (1) of the ICSID Convention, (ii) the EC would not be granted access to the documents filed by the Parties in the annulment proceeding and, (iii)

[29] ICSID Case ARB/05/20, see, Decision on Jurisdiction and Admissibility, online at: https://www.italaw.com/sites/default/files/case-documents/ita0530.pdf, consulted on 11 march 2019.

the EC would not be permitted to attend the hearings as the Claimants (in the original arbitral proceedings) had opposed such attendance[30].

Scholars and practitioners have been very critical of this approach by the EC since they argue it will compromise the possibility of enforcing awards that have resulted from successful (but still lengthy and expensive) disputes and it will lead to the end of the existing BIT´s in the EU.[31]

Also, the approach taken by the European Court of Justice is not consensual among arbitrators because even after the *Achmea* ruling, arbitral tribunals took the view that arbitration clauses contained in the BIT's are still valid and, as a consequence, the EC cannot argue their lack of jurisdiction to dispose on the merits of the proceedings.

In one of the most recent cases, the arbitral tribunal constituted to hear the claim submitted by *Vattenfall AB and others* against the Federal Republic of Germany (ICSID Case No. ARB/12/12) rejected the Respondent's (Germany) objections to its jurisdiction[32]. In a decision held on 29 August 2018, the arbitral tribunal adjudicated on the issue of jurisdiction raised by Respondent and the EC and, specifically, addressed the impact of the ECJ 's ruling (*Achmea*) in the arbitral proceedings.

For the purpose of this paper, what is important to highlight though, in the context of that case, is the fact that the arbitral tribunal had accepted the intervention of the European Commission as Non-Third Party and allowed it to file written submissions. In the next chapter we will develop further on the role played by the arbitrators when criminal or regulatory issues emerge in the context of an arbitration.

[30] See, the Decision on Annulment (ICSID case No. ARV/ 05/20), published online and available at: https://investmentpolicyhub.unctad.org/ISDS/Details/180, consulted on 11 march 2019.
[31] See, Lavranos Nikos.
[32] Those objections were based on the March 2018 judgment of the Court of Justice of the European Union (the CJEU) in *Slovak Republic v Achmea B.V*. Contrary to the views of its Advocate General, the CJEU held the investor-state arbitration provision contained in the Netherlands-Slovakia bilateral investment treaty to be incompatible with EU law. See, https://www.italaw.com/cases/1654, consulted on 11 march 2019.

5. The role of arbitrators

This chapter focuses on the relationship between arbitrators and law enforcement or regulatory authorities and discusses if there is any common understanding or harmonized international practice in relation to disclosure of information, in arbitral proceedings, to those entities. There is no clear and uniform answer for this question. An arbitral tribunal will always have to decide how to approach such situation on a case by case basis bearing in mind the factual and legal issues at stake, the provisions of the *lex arbitrii* (which, in most cases does not have any specific provisions on these issues) and ultimately, the law of the place where the award is likely to be enforced.

The arbitral tribunal, when confronted with allegations or suspicions of criminal offences, shall take a three steps approach:

- To identify if the *lex arbitrii* contains any provisions in this respect;
- To identify the relevant facts of the case and evaluate if those facts amount to a qualified criminal offence under the applicable law;
- Lastly, to determine the impact or the importance of those facts in the overall context of the arbitral proceeding (which includes evaluating whether the whole arbitration is a fabrication and the award rendered could be enforced).[33]

Evaluating the impact of those facts in the arbitral proceedings means that the arbitral tribunal has to assess whether evidence needs to be produced and if the facts at stake can determine the outcome of the case.

[33] In this respect, see Palay, M.S and Ugarte, R. Money Laundering as a defense in International Commercial arbitration: a practitioner's perspective, available online http://www.ICLG.CO.Uk, consulted on 11 December 2018.

Alan Redfern and Martin Hunter are of the view that the arbitral tribunal should not go over its mandate because its main role is to solve the dispute between the parties and not to uncover criminal activities[34].

Nonetheless, international and regional supranational organizations have raised serious concerns regarding the prevention of money laundering and financing of terrorism. As such, those organisms started developing legal frameworks, establishing standards and recommendations addressed at member's states in order to improve international cooperation and the mechanisms directed at the fight against organized crime. Despite the fact that these mechanisms are not specifically directed at international arbitration proceedings, they establish guidelines and procedures to be applied to several institutions (including lawyers, notaries and independent legal professionals) that may also have an impact on arbitral proceeding's.

Moreover, the fight against organized crime (like money laundering, corruption, financing of terrorism) is also an issue of "international public policy". This is a key concept that may affect and jeopardize the enforceability of an award resulting from an arbitration procedure.

The Financial Action Task Force (FATF) is an example of an inter-governmental body (established in 1989 by the Ministers of its Member jurisdictions) whose mandate is to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing, the financing of proliferation, and other related threats to the integrity of the international financial system. The FATF Recommendations[35] therefore set an international standard, which countries should implement through measures adapted to their particular circumstances. The aim is to reinforce international cooperation in this field and to enhance the

[34] See, Redfern, A. and Hunter, M. Law and Practise of International Commercial Arbitration, 4th ed. London, Thomson, Sweet & Maxwell, At. 3-7 and 5- 28 to 5-29, 2004.
[35]See,http://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdfadopted as of 16 February 2012, consulted online on 7th December 2018.

role played by law enforcement agencies and competent authorities so as to identify the risks and develop policies and domestic coordination. One of the most important aspects of this policy is the importance given to the role played by law enforcers and supervisory bodies.

In fact, according to the FATF Recommendations: "(…) Supervisors should have adequate powers to supervise or monitor, and ensure compliance by, financial institutions with requirements to combat money laundering and terrorist financing, including the authority to conduct inspections. They should be authorized to compel production of any information from financial institutions that is relevant to monitoring such compliance, and to impose sanctions, in line with Recommendation 35, for failure to comply with such requirements. Supervisors should have powers to impose a range of disciplinary and financial sanctions, including the power to withdraw, restrict or suspend the financial institution's license, where applicable."

Concomitantly, we argue that, pursuant to the requirements set out in Recommendations 18 to 21 (applicable to all designated non-financial businesses and professions), lawyers, arbitrators and other legal professionals are obliged to report such cases to law enforcement authorities:

(a) Lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph.

Moreover, pursuant to Recommendation 22. Countries are strongly encouraged to extend the reporting requirement to the rest of the professional activities of accountants, including auditing.

Paradoxically, in the interpreting notes on Recommendation 23. the FAFT allows states to determine, in their own internal legislation, the scope and the extend of the disclosure of information to law enforcement authorities by legal

professionals acting as counsel and lawyers, if they are under the professional privilege, as follows:

"1. Lawyers, notaries, other independent legal professionals, and accountants acting as an independent legal professionals, are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.

2. It is for each country to determine the matters that would fall under legal professional privilege or professional secrecy. This would normally cover information lawyers, notaries or other independent legal professionals receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings.

3. Countries may allow lawyers, notaries, other independent legal professionals and accountants to send their STR to their appropriate self-regulatory organizations, provided that there are appropriate forms of cooperation between these organizations and the FIU.

4. Where lawyers, notaries, other independent legal professionals and accountants acting as independent legal professionals seek to dissuade a client from engaging in illegal activity, this does not amount to tipping-off."

As a consequence, one may ask if an arbitral tribunal is confronted with *indicia* of criminal practices, in the context of an arbitral proceeding, does it have the duty to report it to the competent authorities?

Since there is no harmonized international legal framework in this respect and, particularly, in the case of arbitral proceedings, each jurisdiction applies its own national law and each arbitral tribunal deals with these issues on a case by case approach bearing in mind the *lex arbitrii,* the procedural framework of the case and the facts at stake.

For instance, in the said case *Qatar vs. Bahrain* should the arbitral tribunal have raised the issue regarding the forged documents and should have made a reference to it in the award?

We submit that a distinction needs to be made between the role played by lawyers and the one played by arbitrators. Moreover, the understanding of what can fall under the "professional privilege" is subject to a proportionality test and does not amount *per se* to an absolute right.

Lawyers acting as counsel in international arbitration proceedings are also bound by a duty of loyalty towards the party they represent. Mutual trust between counselor and client is an essential element of this relationship and as a consequence, counsel is not obliged to disclose to law enforcers any illegal activities committed by their clients unless, under their national law or the regulations of their bar association, they are obliged or allowed to do it.

Arbitrators, on the other hand, have a mandate to fulfill which is also based on mutual trust however, their role is closer to the role played by the judiciary and similarly, they have to comply with stricter ethical and legal duties[36].

From our point of view, the evaluation the arbitral tribunal needs to perform is based on a three pronged test:

1.To identify the legal interest at stake and evaluate whether is it necessary/obligatory to share confidential information;

2.To evaluate if sharing such information is adequate to the envisaged purpose (legal proceedings against one of the people involved, investigation, etc.);

3.Finally, to assess if the damage of sharing information would cause more harm (to the integrity of the arbitral proceeding) than benefit to public or other legal interests.

[36] Even though there are no compulsory ethical requirements that are specifically addressed at arbitrators, there are several international documentations of different origins that have established commonly accepted standards of conduct, see, for instance, the IBA Rules of Ethics for International Arbitrators, in http://www.ibanet.org, consulted online on 11 December 2018 and also the CIArb Guidelines and Ethics, available online in http://www.ciarb.org/guidelines-and-ethics, consulted online on 11 december 2019.

If we agree that there is a similarity between the role judges and arbitrators play we must conclude that arbitrators are, in principle, bound by a duty to report any information related to criminal practices that became aware in the course of arbitral proceedings.

In fact, this was the view of the Appeal's Court of Paris which held, in a Judgement rendered on 29 may 1992, the following:

"The arbitrator is not a third party in relation to the dispute which he has decided. On accepting his functions, he assumes the status of a judge, as a result of the contract appointing him. He, therefore, enjoys the same rights and is subject to the same duties as a judge (…)."

Another scholar (Frahm Oellers) points out that the status and role of judges and arbitrators are closely related to the function and role of international adjudication, which is increasingly being called upon to decide international disputes, originally only between States, merely on the basis of fact and law (International Courts and Tribunals; Judicial Settlement of International Disputes). Both judges and arbitrators adjudicate and this means that they have to decide cases in an objective and impartial manner:

"In that respect, impartiality is a central element in the composition and balance of the tribunal as a whole and ensures the neutrality and integrity of every single judge. Judges and arbitrators are thus the guarantors of judicial independence and impartiality which are central to judicial function, nationally and internationally."[37]

However, if we take the view that arbitrators are not judges but independent legal practitioners, then their work is closer to the one performed by counsel and, similarly they are bound by a duty of confidentiality due to the specific nature of their mandate and their contractual obligations towards the parties.

[37] See, Oellers-Frahm, K. International Courts and Tribunals, Judges and Arbitrators, published online //http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e45, consulted on 4 march 2019.

In Switzerland for instance, attorney- client communications are protected by attorney client privilege. This privilege is enshrined in the professional rules governing the conduct of attorneys admitted in Switzerland. This privilege is protected under Swiss criminal and procedural law, as well as, under the contract governing the attorney- client relationship; specifically article 13 of the attorney's act (BGFA). Also, under article 398 of the Swiss Code of Obligations, an attorney has also a confidentiality obligation towards the client.[38] The protections of attorney-client privilege are generally recognized in all Swiss civil, criminal and administrative proceedings provided that the communication in question relates to the attorney's typical activity. Only the client *per se* can waive this protection. These protections are not even overcome by any criminal or civil proceeding.[39]

However, on 20 September 2016, the Swiss Federal Supreme Court (case number 1 B _85/2016)[40] ordered the production of certain documents (to prosecutors and regulators) from an internal investigation of suspicious banking relationship, held by a law firm. The Supreme court held that parts of the law firms' work product were not protected by the client-attorney's privilege since the bank was bound by the anti-money laundering regulation and could not avail itself of the protection of attorney-client privilege by simply delegating the investigation into a law firm.[41]

In the last years, different organizations and stakeholders have been paying a closer attention to the issues of bribery and corruption involving legal professionals. One of the most active entities in this regard is the International Bar Association (IBA) which, in partnership with other organizations, has launched a

[38] See, Muller, D. and Oural M. Switzerland, in Legal Privilege and Professional Secrecy, 2017, Law Business Research, available online at: https://www.lenzstaehelin.com/uploads/tx_netvlsldb/edition-531-chapter-29-1706231526449 83-legal-privilege-professional-secrecy-2017-switzerland.pdf.
[39] See, ob. cit., page 47.
[40] See, a summary of the judgement published online at: https://www.bger.ch/ext/eurospider/live/fr/php/clir/http/index.php?lang=fr&type=show_document&highlight_docid=atf://143-IV-462:fr&print=yes, consulted on 11 march 2019.
[41] See, ob. cit., page 46.

series of workshops and initiatives worldwide to sensitize legal practitioners, states and bar associations to this phenomena and implement good practices - see for instance their initiative "About Anti -Corruption Strategy for the Legal Profession". Despite this international trend, the role of arbitrators is not entirely clear in regard to cooperation with law enforcers or regulatory authorities and the actual *status quo* looks seems more like a puzzle which accommodates different legal framework and opens room for debate and different views of these duties.

In this context, and for the time being, the only way forward is to trust that arbitrators and counselor are aware of the interests at stake and able to reconcile public and private interests in a balanced manner.

Conclusion

International arbitration (either commercial or related to state investment treaties) is a successful tool to solve complex disputes involving private parties or states.

Nowadays, several international institutions are involved in this mechanism to provide assistance and guidance to both parties and arbitrators.

Despite all the success that surrounds arbitration and its outcome, new issues have arisen in respect of transparency and confidentiality of arbitral proceedings.

In the case of State – Investment disputes, it is clear that the media and public opinion are aware of the needs to scrutinize those proceedings when public interest is at stake (being it environment, health, or infra-structures).

As a consequence of this external pressure, some institutions have been creating guidelines and frameworks towards ensuring that more transparency is added to these cases - (the UNCITRAL model Rules on State Investment Disputes are such an example) in order to render it more accountable.

Some of these rules allow, for instance, the intervention of external elements to the procedure as *amicus curiae* and, in many cases, these *amicus curiae* can even

intervene in the course of the arbitration, filing written submissions or participating at the hearings as observers.

In the European Union for instance, the European Commission has taken the initiative to participate in several arbitration proceedings and has even opposed the enforcement of awards related to BIT's (bilateral investment treaties) due to its role as law enforcer in the field of competition law in the internal market. The EC's is of the view that these treaties pose an actual threat to the development and maintenance of a level playing field in the internal market, since they favor some investors in detriment of others. However, in the field of commercial arbitration (where the majority of the disputes are of a private nature and do not involve major public issues) the role of arbitrators *vis a vis* law enforcers and arbitral proceedings is more complex and unclear because it is dependent of the *lex arbitri* and the procedural framework defined by the parties. In these cases, parties' autonomy tends to prevail, in detriment of more transparency.

This trend partially explains the *ad hoc* nature of the decisions taken by arbitral tribunals in respect of third parties having access to the case and participating as *amicus curiae*. As such, there is no harmonized legal practice in this field of international arbitration and it's almost impossible to identify a consolidated international standard.

Our view is that the arbitral tribunal should have an open approach to the particularities of each case and, when confronted with a request to disclose information on file from a law enforcement agency or a regulatory authority, it must perform a balancing and proportionality exercise between the legal interests at stake while taking into account the parties views. In cases where a criminal activity is at stake (because it is being investigated) arbitrators should, in principle, cooperate with law enforcement agencies.

This positioning is essential not only to guarantee the enforceability of the award but also, to keep the integrity of the procedure and a good reputation of international arbitration, as a reliable tool to settle disputes worldwide.