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Requirements Governing Compliance with the Principle of Transparency and the Principle of Confidentiality in International Arbitration Agreements (A Comparative Study in Iranian and German Law)

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The principle of transparency is currently regarded as one of the most significant principles governing the process of international arbitration. It has been argued that this principle guarantees the validity and accuracy of procedures within this process and, accordingly, may be considered a factor ensuring the parties' access to the necessary information in arbitration proceedings. Although resistance has occasionally arisen against the acceptance of this principle in international commercial arbitration, the majority of jurists and legal analysts have endorsed the necessity of the existence and protection of this principle in the course of international arbitration proceedings. Nevertheless, this principle is closely connected with another principle governing international commercial arbitration, namely the principle of confidentiality. In resolving the tension between these two principles, scholars have ultimately concluded that the principle of confidentiality should not serve as a basis for violating the principle of transparency. The foundation for recognizing the obligation to preserve confidentiality, in the absence of an explicit provision in the contract, is the doctrine of implied terms. However, it should be noted that the scope of this obligation is limited to specific aspects of arbitration proceedings, and, on the other hand, not all individuals participating in arbitration can necessarily be regarded as bound by confidentiality obligations. Furthermore, certain exceptions, due to particular circumstances, govern this issue and compel those bound by confidentiality to breach such obligations and disclose matters that would otherwise be considered confidential. However, where disclosure occurs outside the scope of such exceptions, the party breaching confidentiality must be required to compensate for the damages resulting from such conduct. Therefore, it can be observed that the claim regarding the superiority of the principle of transparency over the principle of confidentiality in international commercial arbitration—except in specific cases—is not unfounded. Nevertheless, with respect to two categories of disputes, the situation becomes more challenging. First, disputes relating to patents, in which, due to the necessity of protecting the moral rights of the intellectual property holder, emphasis is generally placed on adherence to the principle of confidentiality rather than transparency, except in cases where, for any reason, the precedence of transparency over confidentiality in patent matters becomes necessary. Second, disputes relating to foreign investment, in which, gradually, due to their connection with issues such as public order and the national character of projects, greater emphasis has been placed on the precedence of the principle of transparency over confidentiality.

Keywords: *Principle of Transparency, Principle of Confidentiality, International Commercial Arbitration, Challenges of the Principle of Transparency.*

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1. Introduction

Today, the settlement of disputes through alternative dispute resolution methods, particularly arbitration, has developed to such an extent that arbitration may perhaps be regarded as the most common method of adjudicating disputes in the field of international commercial law. On the other hand, the confidentiality of the arbitration process has, since the early spread of arbitration, been mentioned—alongside the need for expeditious proceedings—as one of the salient features of arbitration that has contributed to its rapid expansion. Nevertheless, in recent years, the issue of the need to pay attention to transparency in international commercial arbitration has developed significantly, and legal doctrine has made serious efforts to incorporate it into existing legal instruments in the field of international commercial arbitration (Ruscalla, 2015).

This issue initially attracted attention as a result of the friction between arbitral confidentiality and the principle of transparency in international investment agreements (Feldman, 2016), because one of the main and necessary elements for attracting foreign capital is the existence of transparency in the host country and in the treaties concluded by that country. Obviously, an investor can make correct and well-considered decisions by being informed of the laws and regulations of the target market. Accordingly, one of the most important factors that can contribute to increasing both the desirability and the stability of foreign investment in a country is the existence of transparency in the legal-economic system of the host country. Although, in the past, the obligation of transparency was mostly raised in the domestic laws and regulations of the host country and was not considered within the framework of earlier investment treaties, in recent years it has gradually found its way into bilateral and multilateral treaties and is still evolving (Eftekhar, 2011).

Although only a limited number of treaties concluded in the past decade contain a transparency clause, the rationale and substance of this clause have undergone remarkable developments in recent years.

Accordingly, the initial hypothesis of this study is that the necessity of transparency in certain arbitration agreements and clauses, such as foreign investment contracts, is justifiable on the basis of their specific circumstances. On the other hand, the necessity of a certain degree of transparency in arbitral proceedings in order to safeguard the rights of third parties who may have an interest in the arbitration process, as well as the need to publish awards because of the necessity of informing individuals and arbitrators of existing practice, is also justifiable (Karimi & Partow, 2012). This degree of transparency is necessary even in a field such as arbitration related to patents, where confidentiality is of heightened importance because of the need and necessity to protect the rights of the holder of the intellectual property.

At the same time, it is not possible to apply all rules concerning transparency that are applicable to judicial proceedings to arbitral proceedings (Karimi & Partow, 2012; Salacuse, 2013). Therefore, this article first provides a general explanation of the challenges between confidentiality and transparency in arbitration; then, in two special fields where a separate examination appears necessary, a specific discussion is presented: arbitration concerning patents and arbitration concerning foreign investment.

2. General Explanation of the Challenges Between Confidentiality and Transparency

To examine such challenges, it is necessary to define the two principles of transparency and confidentiality and to explain their elements, so that the overlap and conflict between these two principles can be delineated.

2.1. The Concept and Elements of the Principles of Transparency and Confidentiality

2.1.1. The Concept and Elements of the Principle of Transparency in International Commercial Arbitration

Transparency in international law has three dimensions:

Institutional transparency is the aspect of transparency that organizations and institutions must employ in their daily activities (Van den Bossche, 2007).

Legislative transparency concerns transparency in the process of adopting laws in the international sphere (Addink, 2009); and

Procedural transparency concerns the manner in which international standards are used and applied by courts and tribunals (Delaney & Magraw, 2008).

It should also be noted that various definitions have been offered for the concept of transparency in international

law, which are not the subject of this article. However, the creation of an obligation of transparency in bilateral investment treaties may be observed in three areas: transparency in information disclosure, transparency in decision-making, and transparency in dispute settlement.

It should be mentioned that the word "transparency" literally means "clarity" and "lucidity" (Addink, 2009). In Black's Law Dictionary, "transparency" is defined as openness, clarity, absence of deceit, and absence of any attempt to conceal damaging information. In the Larousse dictionary, the principle of transparency is defined as "full accessibility of information in areas that affect public opinion." Transparency is synonymous with predictability, information, consultation, efficiency, and the legitimacy of power; it is expected not only in financial matters and the fight against corruption, but also in decision-making, motivation, and the manner of management adopted by decision-makers in companies and, more generally, in the political sphere (Bjorklund, 2010).

The necessity of observing transparency in the adjudication of foreign investment disputes, unlike the issue of due process, has a much weaker connection with investment treaties or customary law relating to the protection of investment, and arbitral awards concerning this issue rely on other sources and instruments for their reasoning. In the Waste Management II case, the tribunal's ruling on the absence of transparency in the procedure of the court of first instance, as well as the tribunal's emphasis on the necessity for the host state to observe administrative transparency in relation to the foreign investor, as cited in the Tecmed case, provides a sound basis for establishing a systematic approach by investment tribunals to the issue of transparency.

The starting point for the attention of investment dispute-settlement tribunals to the issue of transparency should be sought in the Jesse Lewis decision issued in 1921. In that case, the dispute between the German government and the British government concerning fishing in the Atlantic Ocean was referred to arbitration, and the American party argued that the British Coast Guard's prevention of fishing by German vessels was unacceptable because the British government had abruptly changed the manner in which it implemented its fishing laws and had obstructed the operation of American vessels.

The tribunal rejected this argument by the German government and explained its position by stating that the American government's knowledge of the new fishing policy adopted by the British government had been established, and that it could not be regarded as a sudden and abrupt measure causing harm to foreigners. In fact, it may be said that in the Jesse Lewis decision, the tribunal focused its attention on determining whether free and easy access to information concerning the political-administrative acts of a foreign state had been available to the foreign party, or whether such access had been restricted.

The issue related to this discussion in foreign investment claims is the examination of the existence of good faith on the part of the host state toward the foreign party. On this basis, the foreign investor must be able to become aware, in a timely and effective manner, of the measures taken by the host state so that it can adopt the necessary measures to respond to them under the investment contract.

In any event, in most trade agreements concluded between states, there is a tendency toward transparency in the arbitration-based settlement of disputes. For example, in the agreement between Germany and Singapore, disclosure of information relating to dispute settlement and the public nature of such information are expressly stipulated, and the parties undertake to make available to the public documents, submissions, orders, directions, and decisions of the tribunal. The substance of this agreement was also included in Germany's subsequent agreements with other countries, such as Chile in 2003. Trade agreements between the Islamic Republic of Iran and other states have followed the same approach.

The necessity of greater transparency in the settlement of disputes between states has been raised and discussed in international relations. In 2001, in Doha, Qatar, the World Trade Organization raised this issue and included it in its declaration. In 2002, in line with the Doha Declaration, the European Community supported greater transparency in international dispute settlement. In the same year, the United States proposed greater transparency in international commercial arbitration practice. The proposal of the United States included the public conduct of proceedings and the

possibility of access to documents, reports, and summaries of the procedural history (Kaufmann-Kohler, 2012; Khazaei, 2007).

2.2. The Concept and Elements of Confidentiality in Commercial Arbitration

Merchants and businesspersons are highly sensitive to the disclosure of their trade secrets and adopt all necessary measures and precautions to ensure that such secrets remain protected. The emergence of disputes in commercial transactions creates a context in which the commercial status of the parties, the difficulties they face in the disputed transactions, the breaches and omissions they may have committed in the relevant contract or transaction, the debts they have or are alleged to have, and finally the characteristics and details of the contract and transaction underlying the dispute may become public and disclosed. In particular, if the matter is brought before a court, the possibility of disclosure of these facts increases further (Buys, 2003; Wolfe, 2003).

Moreover, although the occurrence of disputes in commercial transactions is natural, it does not necessarily mean the end of the commercial relationship. For this reason, if merchants cannot settle their disputes through negotiation and are compelled to resort to legal mechanisms, they prefer the process to be conducted in such a way that no harm is caused to their principal business objective, namely the continuation of commercial relations, and so that they may resume their relationship after the conclusion of the dispute. Naturally, if the dispute-settlement process is confidential, this objective can be achieved more effectively (Levine, 2011).

Arbitration serves this objective well because the arbitration process is conducted confidentially, and only the parties to the dispute, their attorneys, and the arbitrator or arbitrators appointed by them participate in and attend the proceedings and become aware of the contents of the file and the subject matter of the dispute. At the conclusion of the process, a copy of the arbitral award is provided only to the parties, and no one else is informed of it. Today, the confidentiality of arbitration is regarded as an implied term in arbitration agreements [the presumption is in favor of the confidentiality of arbitration], unless the parties have agreed otherwise (Enayat, 1999).

Article 16 of the Statute of the International Court of Arbitration of the International Chamber of Commerce and Article 25(Gollnick et al.) of the UNCITRAL Arbitration Rules establish the presumption that hearings are not public and that matters raised in any manner during the arbitration are confidential. The UNCITRAL Model Law, as well as the Iranian Law on International Commercial Arbitration, which was modeled on it, is silent in this regard. The reason for this silence is that the legislator considered that determining this issue, like certain other matters such as capacity to conclude an arbitration agreement and the arbitrability or non-arbitrability of a dispute, should be left to the legal system of each country (Enayat, 1999; Ruscalla, 2015).

3. Overlap and Conflict Between the Two Principles of Transparency and Confidentiality

Despite the acceptance of the principle of confidentiality, in some cases the full observance of this principle appears difficult. One of these cases is the need to inform interested third parties of the arbitration process in order to enable them to intervene in the proceedings. In the amendments made to the UNCITRAL Rules in 2006, Article 32 provides: “Unless either party objects, the arbitral tribunal, after consultation with the Secretary-General, may allow other persons to attend or observe all or part of the hearing.” Thus, at present, we are witnessing such a presumption [the principle of public proceedings], provided that neither party expressly declares its objection, in favor of public proceedings in investment arbitration (Salacuse, 2006).

Another change concerning the presence of third parties in the proceedings occurred in Article 37[2], which added a new provision in this regard to the ICSID investment arbitration rules. Article 37[2] of the ICSID Arbitration Rules provides, with respect to the conditions for third-party intervention: “After consulting both parties to the dispute, the tribunal may allow a person or entity that is not a party to the dispute to file a written submission with the tribunal regarding a matter within the scope of the dispute. In determining whether such a submission may be filed by a third party, the tribunal must consider, among other matters, the following issues” (Moghadam Abrishami & Zemami, 2017).

4. Challenges Between Confidentiality and Transparency in Arbitration Concerning Patents

In arbitration concerning patents, both the possibility of arbitrating the validity or infringement of a patent and the effects of such arbitration are related to the issue of confidentiality. In many legal systems, and usually under many arbitration rules, confidentiality is observed in arbitration proceedings (Mousavi Harami, 2010). If arbitrations are confidential, it is difficult for the parties to use the award or any other part of the arbitration in subsequent proceedings, and third parties and registration authorities cannot become aware of the arbitration that has taken place. The degree of confidentiality in disputes, of course, varies greatly. In general, the parties may include confidentiality conditions directly in their arbitration agreements (Mousavi Harami, 2010; Schmitz, 2008). If the arbitration agreement is silent on confidentiality, the arbitration rules designated by the parties constitute the content of the confidentiality rules and therefore apply (Bernstein et al., 1998). If both the agreement and the arbitration rules selected by the parties are silent on the matter, the rules of the arbitral tribunal determine what is confidential and what is not confidential (Meyer, 2012).

The confidentiality rules included in arbitration rules and in the laws of arbitral tribunals vary greatly (Meyer, 2012). For example, under English law, there is an implied agreement concerning confidentiality that applies if the parties have not specifically referred to confidentiality in their agreement (Meyer, 2012). In Australia and the United States, there is no such implied agreement unless the parties have agreed otherwise. On this basis, the High Court of Australia held in Esso Australia Resources Ltd v Plowman that there is no implied contractual term concerning confidentiality (Meyer, 2012).

Under the rules of the London Court of International Arbitration and the Singapore International Arbitration Centre, the parties are prohibited from disclosing any details concerning the arbitration, including even its existence (Enayat, 1999). Exceptions are permitted in certain specific circumstances, such as a legally binding requirement to disclose arbitration information or the commencement of proceedings to enforce an arbitral award (Enayat, 1999). Under the rules of the International Chamber of Commerce, generally only information protected as trade secrets is considered confidential. Nevertheless, arbitration provides no guarantee of secrecy, because awards may later be submitted to courts for enforcement. In some cases, confidentiality may even be regarded as a form of concealment, such that companies subject to certain reporting obligations may later find themselves trapped by a strong confidentiality agreement (Enayat, 1999).

With respect to patents, this may arise especially where the parties need to report the result of the arbitration to the patent office or to licensees, or where the result of arbitration concerning a patent, as a specific event, affects the assets of a publicly traded business company (Elahyari, 2010; Kriebaum, 2007). Even where absolute confidentiality is at issue, the parties can usually submit the award to a court for enforcement. Nevertheless, in general, a confidentiality agreement cannot be breached on the pretext of enforcing the award or presenting information relating to the arbitration in other proceedings. For example, if an alleged infringer is absolved of liability through a ruling invalidating the patent, that party cannot use that ruling in other proceedings involving a separate infringement claim by the patent holder.

These issues and matters can create difficulties for individuals seeking the final settlement of their dispute and must be considered at the drafting stage of the arbitration agreement. Confidentiality and filing may also create problems for countries that wish to provide greater protection for public-order issues related to patent arbitration. In such cases, simple legal remedies exist, such as requiring that the award be filed with the national intellectual property or patent office (Elahyari, 2010).

From a comparative perspective, in German law, neither the arbitration law nor other statutes specifically refer to the confidentiality of patent arbitration, except for a statutory requirement concerning the registration of notice of the arbitral award with the German Patent and Trademark Office. The German Arbitration Institute also does not address confidentiality in any of its commercial arbitration or patent arbitration rules. However, the rules specific to the International Dispute Resolution Institute have adopted numerous arrangements concerning confidentiality, including the requirement to destroy documents within thirty days from the date of issuance of the award (Stoeckel & Fisher, 2008).

In general, United States courts do not object to enforcing written confidentiality agreements between merchants during arbitration proceedings (Stoeckel & Fisher, 2008). Courts even take the necessary measures to seal information submitted to them by the parties to arbitration. A party requesting the court to seal documents must prove the necessity of confidentiality and, for example, must establish the existence of a trade secret in such a way as to rebut the presumption that information is public. In any event, if the documents are submitted to an appellate court, maintaining their confidentiality mechanism will be somewhat difficult (Stoeckel & Fisher, 2008).

In principle, all arbitration information may be discoverable for subsequent proceedings. However, such information cannot be obtained directly from the arbitrators themselves or from the institution responsible for administering the arbitration. The extent to which a court must respect confidentiality agreements when faced with a request for discovery remains at the center of debate and controversy (Stoeckel & Fisher, 2008).

The possibility of discovering arbitral documents means that even a very brief and concise award filed with the German Patent and Trademark Office may lead third parties to become aware of arbitration-related issues. Whether the information obtained may be relied upon in subsequent claims generally depends on the ordinary rules concerning evidence and procedural law (Khodari, 2015; Shams, 2011). Rule 408 of the German rules of evidence, which excludes statements made during settlement negotiations from the scope of admissible evidence, cannot be regarded as governing the mechanism and statements made during arbitration proceedings (Van den Bossche, 2007). Documents submitted by counsel in arbitration may fall within the exception set out in Rule 26 of the rules of civil procedure. Preliminary documents submitted in any arbitration or judicial proceeding cannot be treated as privileged in subsequent arbitrations (Perret, 2008).

5. Challenges Between Confidentiality and Transparency in Arbitration Concerning Foreign Investment

In this section, the challenges between confidentiality and transparency in arbitration concerning foreign investment are examined respectively in domestic law, international treaties, and international commercial arbitration practice.

5.1. Challenges Between Confidentiality and Transparency in Arbitration Concerning Foreign Investment in Domestic Law

The practice of countries concerning the scope of the transparency and information-disclosure clause is not uniform. Some countries refer only to the obligation of the host state to provide the body of domestic laws and regulations, international treaties, administrative procedures, judicial decisions, and awards of arbitral bodies related to investment and similar matters that are regularly available and whose updating is necessary for potential investors of the other party (Eftekhar, 2011).

Some countries merely content themselves with an information-disclosure obligation concerning investment opportunities. A number of treaties, in addition to the two categories of obligations mentioned above, also impose an obligation to respond to questions raised by investors of the other country concerning investment. A small number of treaties also provide for an authority for the exchange of such information in order to operationalize the implementation of the obligation of transparency. Iran has undertaken the obligation to publish laws and regulations related to investment only in two of its treaties, namely those with Austria and Sweden.

It appears that if the obligation to provide laws and regulations is accepted in a treaty, this will certainly not impose a heavy financial burden on our country; rather, it will contribute to the attractiveness of our country's investment environment. Even assuming a breach of such an obligation, the damages contemplated for it would not be comparable to those contemplated for fair and equitable treatment.

On the one hand, the Foreign Investment Promotion and Protection Act provides certain forms of the obligation of transparency in information disclosure for the Organization for Investment, Economic and Technical Assistance, and other governmental agencies [Articles 21 and 22]. On the other hand, Note 3 of Article 7 of the Law on the Implementation of the General Policies of Article 44 of the Constitution also requires the Ministry of Economic Affairs and Finance to prepare an investment guidebook and obliges that institution to revise this collection once every six months. The inclusion of such

provisions in domestic laws clearly indicates that adding a clause on the obligation of transparency amounts to restating domestic law and merely gives it an international character; beyond that, it imposes no additional burden on the country.

Another dimension of the obligation of transparency is the clarity of the conduct of the capital-exporting state and the provision and creation of diverse opportunities to encourage foreign investment in other countries; more objective and clearer mechanisms must be provided for the obligation of the capital-exporting state to encourage investors.

5.2. Challenges Between Confidentiality and Transparency in Arbitration Concerning Foreign Investment in International Treaties

In some new treaties, the parties are required, before adopting regulations affecting foreign investment, to allow foreign investors to express their views on such regulations within a reasonable and customary period, as in Article 8 of the bilateral foreign investment treaty between Japan and Uzbekistan. Some treaties go beyond this issue and regard the obligation of transparency as encompassing the investor's right to fair hearing and review concerning administrative and judicial decisions relating to its investment, as in Article 11 of the bilateral investment treaty between Germany and Uruguay. It appears that transparency in the decision-making process is not practically possible in our country, considering the process of legislation and the adoption of regulations and executive by-laws (Eftekhar, 2011).

In circumstances where domestic enterprises, even when they are beneficiaries of regulations, sometimes have absolutely no right to express an opinion, a fortiori such a right cannot be recognized for foreign investors. However, the second category of obligations related to transparency in decision-making, namely the right to benefit from review within a fair framework, may be recognized in light of the basis of the relevant provision, namely fair and equitable treatment, treaty-based dispute settlement, and the existence of institutions such as the Administrative Court of Justice. This matter has increased the attractiveness of our country's investment environment through this agreement (Eftekhar, 2011).

At present, the current practice in some newly concluded treaties is that the arbitration agreement, submissions, and transcripts of arbitral hearings are published publicly. For example, the Canadian rules in this regard provide that, provided the necessary measures are taken to preserve confidential commercial information, the proceedings may also be conducted publicly (Salacuse, 2013). Pursuant to Article 48(Gollnick et al.) of the ICSID Convention, the Secretary-General is also required, where the parties agree, to publish matters such as the existence of the dispute, the nature of the dispute, the members of the arbitral tribunal, and the award rendered (Salacuse, 2013).

In 2002, the NAFTA member states also decided to publish all documents filed by the parties, as well as the decisions of arbitral tribunals, in order to create transparency (Delaney & Magraw, 2008). Investment security is ensured through stable economic policies and clear and transparent legal instruments and mechanisms (Hasibi, 2011). "Transparency" and "protection of the investor's legitimate expectations" are two closely related issues. Transparency means that the legal framework within which investment operations must be conducted is known, and that decisions that may produce effects for the investment are made within that same legal framework (Dolzer & Schreuer, 2008).

Before commencing investment, investors must examine the laws and regulations of the host state, and host states must be aware that the laws and regulations in force at the time of investment will constitute the basis of the investor's legitimate expectations (Dolzer & Schreuer, 2008). Transparency is usually one of the functions and elements of the principle of fair and equitable treatment included in bilateral treaties. However, it appears that even if no reference is made in a bilateral investment treaty to fair and equitable treatment, arbitral bodies regard this standard as one of the principles of international law and thereby protect the investor's legitimate expectations (Asgari, 2012). In this regard, particular attention must be paid to two dimensions of transparency:

First, transparency in arbitral bodies; and second, transparency in the host legal system.

Transparency means that the operation of the host state's legal system in relation to the investor's activities must be highly clear and explicit, and any decision by the state affecting the foreign investor must be made within, and derived from, this legal system (Dolzer & Schreuer, 2012; Suchlike, 2008). The legal system includes domestic laws, international treaties, regulations, and

circulars upon which the foreign investor may rely. The host state's departure from the implementation of what has created expectations for the investor will result in a breach of the principle of fair and equitable treatment. The foreign investor invests on the basis of the legal system existing at the time of investment, and there must be the necessary transparency and clarity in this regard (Roberts, 2014).

Just as the host state plans and acts to attract investment in accordance with its economic and legal framework, it must also recognize the investor's right to plan by relying on a stable system within the legal and economic framework of the host state. This requires the necessary transparency in the host state's legal system, so that the investor can predict the future with reasonable probability and so that the outcomes of activities, measures, violations of laws, and other matters depending on the law, economy, politics, and other aspects of the host country are foreseeable for the investor (Addink, 2009).

Although transparency appears to be rooted in the standard of fair and equitable treatment, there is a theory according to which, even in the absence of a fair and equitable treatment provision in the treaty, transparency in the host state's legal system and protection of the investor's legitimate expectations must still be observed (Dolzer & Schreuer, 2012). Thus, if the required transparency does not exist and fair and equitable treatment has not been provided for, where the host state acts in a manner inconsistent with the investor's legitimate expectations, such measures will still face the sanction of invalidity.

5.3. Challenges Between Confidentiality and Transparency in Arbitration Concerning Foreign Investment in International Commercial Arbitration Practice

Many awards have been issued by arbitral bodies concerning transparency in arbitration related to foreign investment. Part of these awards concerns the legitimate expectations of the foreign investor. For example, in the SPP v. Egypt case, the respondent state, Egypt, claimed that the acts of Egyptian officials were null and void because they conflicted with the non-transferable nature of state lands and because their transfer had not taken place in accordance with the procedures and methods expressly set out in Egyptian law. The tribunal rejected the respondent's reasoning (Dolzer & Schreuer, 2012; Sands & Mackenzie, 2008) and ruled as follows: "Under Egyptian law, it may be possible that certain acts of Egyptian state officials, even Presidential Decree No. 475, constitute an unlawful act that is null and void or ineffective and voidable; however, these acts were carried out under the authority of state officials and were discussed and negotiated in such a way that the foreign investor built its investment in reliance on them (Addink, 2009). Whether or not those acts were lawful under Egyptian law, they were acts performed by competent Egyptian authorities, including the highest executive authorities of the state. These acts, which are now alleged to have violated Egypt's domestic legal system, created expectations protected by established principles of international law" (Addink, 2009).

Another example in this regard, in which transparency was the central issue of the case, is Metalclad v. Mexico. In that case, the federal government of Mexico and the state government had issued construction and operation permits for a waste recycling project for the foreign investor, and the investor had been assured that it had obtained all permits necessary for carrying out its investment. Subsequently, however, local authorities refused to grant and issue the necessary permits for operation (Dolzer & Schreuer, 2012; Titi, 2014). The claimant argued that the required transparency had not existed in the course of affairs. In adjudicating this dispute, the tribunal, interpreting Article 1105 of NAFTA, stated: "Among the principles and rules introduced in the agreement, transparency is one of the most prominent and outstanding." The tribunal understood this principle to mean that, under the agreement, all legal requirements for the commencement, completion, and successful operation of a project that needs to be carried out must be easily identifiable and obtainable by investors of the other party to the agreement affected by those requirements.

In such cases, there must be no ambiguous or unclear matter. Therefore, as soon as the central government authorities of the parties become aware of any misunderstanding or ambiguity in this regard, they are obliged to disclose it while ensuring the adoption of prompt corrective measures, so that the investor may proceed by applying appropriate solutions and with confidence that it is acting in accordance with the relevant laws (Titi, 2014).

The administrative tribunal held that the investor was entitled to rely on and trust the representations of local authorities (Collins-Williams & Wolfe, 2010); consequently, the conduct of the state and local authorities under Article 1105 of NAFTA breached the standard of fair and equitable treatment. The tribunal declared: "Mexico failed to ensure transparency and predictability for Metalclad's business planning and investment. A general examination of the circumstances indicates the absence of an orderly process and a precise situation in relation to the investor of one party to the treaty, who expected to receive fair and equitable treatment under NAFTA" (Collins-Williams & Wolfe, 2010).

In CMS v. Argentina, Argentina, as the respondent state, had guaranteed adjustment of the price of natural gas transportation in regulations and issued licenses; however, over time, it suspended this essential law and other related laws and regulations and, at the next stage, repealed them (Dolzer & Schreuer, 2012). In this case, the tribunal relied on the preamble to the bilateral investment treaty between Germany and Argentina and stated: "Undoubtedly, a stable legal and business environment is an essential element of fair and equitable treatment. The measure complained of completely altered the legal and business environment under which the investment had been made, and it is clear that the guarantee granted under the legal system and its salient elements for the decision to make the investment had fundamental and vital value. In addition to the specific terms of the treaty, many other bilateral and multilateral treaties indicate the inseparability of the fair and equitable treatment standard from stability and predictability" (Dolzer & Schreuer, 2008). Many arbitral awards and practical studies have also confirmed this matter. Ultimately, the tribunal held that Argentina's conduct resulted in a breach of fair and equitable treatment.

In this context, another important issue that must be explained in relation to transparency, and which forms the foundation and basis of transparency, is the "legitimate expectations" of the investor. In Thunderbird v. Mexico, the tribunal offered a general definition of legitimate expectations as follows: "In light of recent investment jurisprudence and the principle of good faith contained in customary international law, the concept of legitimate expectations within the NAFTA system refers to a situation in which the conduct of a treaty member creates reasonable and justified expectations for the investor [or for the investment], such that the investor relies upon that conduct, and failure by the NAFTA members may result in damage to the investor" (Asgari, 2012).

In Azurix v. Argentina, the tribunal discussed the issue of legitimate expectations in detail. The tribunal believed that expectations are not necessarily formed on the basis of the contract; rather, they may also be created on the basis of express or implied assurances or indications observed from the host state and taken into account by the investor when making its investment (Dolzer & Schreuer, 2008).

It should be noted that the discussion of legitimate expectations does not apply only to the express obligations of the host state; rather, it is a concept used for obligations in general. Therefore, the host state's legal system is specifically a very important source for determining and identifying the expectations of the foreign investor (Dolzer & Schreuer, 2012). The legitimate expectations of the investor are determined on the basis of the host state's legal system at the time of investment (Asgari, 2012). As long as this legal situation of the host state is transparent and has not violated minimum standards, the investor will find it difficult to persuade the adjudicatory body that the host state's proper implementation of the law has resulted in expropriation (Dolzer & Schreuer, 2012).

At the same time, it must be noted that not every change in the legal system of the host country affecting the property of foreigners results in a breach of legitimate expectations. If the change falls within the scope of ordinary and civil adjustments and changes in the host country, which are also accepted in other countries, no breach has in fact occurred. The occurrence of such changes is foreseeable for a prudent and farsighted investor at the time of investment (Dolzer & Schreuer, 2012). For example, in Methanex v. United States, the tribunal held that the Canadian foreign investor could have foreseen the specific environmental rules adopted in California (Titi, 2014).

6. Conclusion

Transparency is one of the fundamental principles of international trade and also of the World Trade Organization. It consists of interdependent activities,

including the manner of drafting, publishing, implementing, and communicating regulations, as well as discussing and examining them. One of the advantages traditionally attributed to arbitration is the confidentiality of the proceedings and of the issuance of the award in this method of dispute settlement. One party to international investment arbitration is a sovereign power, and this requires that, in order to obtain greater legitimacy for the arbitral awards issued, the proceedings and the award itself should enjoy greater transparency. In fact, unlike international commercial arbitration, where free disclosure is very limited and partial, the current practice of international investment arbitration tends toward the publication of most awards arising from the settlement of investment disputes. Some bilateral investment treaties have even expressly made public access to arbitral awards mandatory and have excluded the application of this rule only where both parties jointly agree otherwise (Salacuse, 2013). It is obvious that creating transparency in issued awards can contribute to the formation of an international investment arbitration practice and increase predictability, thereby causing arbitrators to make more balanced and precise decisions and preventing them from disregarding mandatory rules of international law and engaging in unfair interpretations in favor of investors.

It should be added that transparency does not arise by itself; rather, certain measures must be taken in order for the grounds for its emergence and establishment to be created. Enjoyment of the right to express opinions, the provision of necessary mechanisms for hearing the views of the parties involved, the adoption of laws concerning disclosure of information, the existence of free and independent media, and public participation in decision-making are among the requirements for creating a transparent environment. In this regard, tools and methods may be used. The use of information and communication technology and the creation of e-government can, together with other conditions, facilitate access to information. Moreover, creating transparency in the activities of member states, particularly in financial matters, not only prevents corruption but also plays an important role in creating a trade system based on transparency; because where there is a healthy state, members will not fail to publish and provide complete and accurate notifications concerning their activities to the organization and will observe maximum transparency.

It should also be noted that one of the characteristics of traditional arbitration is the confidentiality of the arbitral award. Nevertheless, some do not regard the confidentiality of arbitration as inherent and believe that the necessary transparency must exist in positive law and arbitration rules, or that the parties must expressly agree that the arbitration is private and confidential.

What is very important and necessary to examine in relation to transparency in international commercial arbitration, and what has also been addressed in this study, is the challenge that can be raised between the principle of confidentiality on the one hand and the principle of transparency on the other. This challenge is particularly examinable in relation to two issues: claims concerning patent infringement and claims concerning foreign investment. With respect to observing the principles of confidentiality and transparency in investment arbitration, it should be said that many changes in today's global environment have, more than anything else, been related to the conduct of states. Citizens have significant access to various types of information through the use of the Internet, television, radio, and newspapers, and are increasingly challenging governments and demanding that states explain their actions and be subject to accountability. Confidentiality, which until recently was regarded as an advantage of commercial arbitration, is today presented as an obligation in international investment arbitration. Thus, because states are now present on one side of the dispute and because of their obligation toward their citizens to publish information about their activities, this advantage has been transformed into an obligation called transparency. The subject matter of investment arbitration is state action, meaning acts performed by states using public funds in order to respond to demands related to public order. Therefore, the public character of such arbitrations is among their inherent and essential attributes, and they need to be accessible to the public. Although this right has been recognized in many investment treaties, the challenging issue is how, in practice, such transparency can be achieved. Over the past decade, one of the greatest challenges in the settlement of investment disputes has been the demand for transparency in proceedings, and innovative measures by states have responded to this demand.

However, with respect to the implementation of the principle of transparency or the principle of confidentiality in claims concerning patents, it should be said that, in view of the necessity of respecting the moral rights of the creator [the invention], or copyright, emphasis today is placed on the precedence of the principle of confidentiality over the principle of transparency in arbitration concerning patents. Undoubtedly, in the course of arbitration concerning this right, there is a high possibility of disclosure of formulas, findings, and works created or discovered. On the other hand, the rights arising from these matters for the holders of such works must be respected, protected, and safeguarded. Therefore, instead of observing the principle of transparency, which is generally emphasized in various disputes, including claims concerning foreign investment examined earlier, one must move toward observing the principle of confidentiality in claims concerning patents. However, even in this latter category of claims, whenever, for reasons such as public interest or other considerations and policy-based concerns, disclosure of information and findings does not face an obstacle, adherence to the principle of confidentiality in claims concerning patents will be moderated.

Authors' Contributions

Authors contributed equally to this article.

Declaration

In order to correct and improve the academic writing of our paper, we have used the language model ChatGPT.

Transparency Statement

Data are available for research purposes upon reasonable request to the corresponding author.

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Declaration of Interest

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Ethical Considerations

In this research, ethical standards including obtaining informed consent, ensuring privacy and confidentiality were observed.

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