

# Confidentiality and Transparency - ICSID Convention Arbitration

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The level of confidentiality or transparency in an ICSID arbitration depends on the agreement of the parties, the applicable treaty and the decisions of the Tribunal. In addition, there are specific rules applicable to the ICSID Secretariat and the Members of a Tribunal.

### Parties' Agreements

The ICSID Convention and Arbitration Rules do not contain a general presumption of confidentiality or transparency applicable to the parties. Instead, the parties may tailor the level of confidentiality or transparency to their proceedings.

The parties sometimes agree on the information and documents that they wish to keep confidential. Such confidentiality agreement is usually signed by the parties and adopted by the Tribunal in an order. The agreement may allow either party to designate documents as confidential, in part or whole, for use only in the arbitration. It may also allow for portions of documents introduced into the proceeding or issued by the Tribunal to be redacted before being made public.

Similarly, the parties could agree on greater transparency in the proceedings. For example during the [first session](#) of the Tribunal, parties may agree to publish documents to consider publication or on a case by case basis. They may also agree to allow public access to hearings through web or video broadcasting or in person (Arbitration [Rule 32\(2\)](#)). ICSID posts an advance notice of hearings open to the public and details about access to such hearings. In those circumstances, measures are taken to protect proprietary or privileged information (for example by suspending the broadcast of a portion of the hearing dealing with sensitive information).

### Treaty Provisions

The treaty, contract or law containing the parties' consent to arbitration may include specific provisions on confidentiality and transparency applicable to the arbitration proceeding. They are usually recited in the Tribunal's first procedural order.

An example of a treaty provision on confidentiality and transparency is found in [Article 10.21 of the United States-Dominican Republic - Central America Free Trade Agreement \(CAFTA\)](#).

### Tribunal Decisions

If the parties do not agree on the scope of confidentiality or transparency and the proceedings are not subject to specific provisions, the parties may request that the Tribunal decide the issue. Such decision could be issued as provisional measures ([Article 47](#) of the ICSID Convention, Arbitration [Rule 39](#)), or pursuant to the inherent powers of a Tribunal to decide any question that is not covered by the ICSID Convention and Arbitration Rules ([Article 44](#) of the Convention, Arbitration [Rule 19](#)).

### Rules Applicable to the ICSID Secretariat

The Centre publishes information on the registration of requests for arbitration, conciliation and post-award remedies and maintain registers of all proceedings

(Administrative and Financial Regulations [22\(1\)](#) and [23](#)). The registers are continuously updated under the Procedural Details published for each case on ICSID's website. They include details concerning the method of constitution and composition of each Tribunal, Conciliation Commission and *ad hoc* Committee, and the procedural steps in the proceedings.

The Centre publishes all awards with consent of the parties. If the parties do not consent to the publication of the award, the Centre publishes excerpts of the legal reasoning of the Tribunal promptly after an award has been rendered ([Article 48\(4\)](#) of the ICSID Convention; Arbitration [Rule 48\(4\)](#)). In addition, the Centre publishes other material with the parties' consent (for example, decisions of the Tribunal, procedural orders, parties' submissions, transcripts and minutes of hearings, etc.) (ICSID Administrative and Financial [Regulation 22\(2\)](#)).

The Centre is committed to enhancing understanding of the ICSID process and international investment law and contacts parties to concluded and pending cases to seek their authorization to publish material from the record.

### **Rules Applicable to Arbitrators**

Tribunal members must keep confidential all information obtained as a result of their participation in the proceeding, including the contents of the award (Arbitration [Rule 6\(2\)](#)) and the deliberations (Arbitration [Rule 15](#)). They are required to sign a declaration with this undertaking at the time of the acceptance of their appointment. Any [Tribunal Assistant](#) is subject to the same duty of confidentiality.

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- Joshua D. H. Karton, *A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards*, Arbitration International, Vol. 28, No. 3, pp. 447–486 (2012)
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- Andrea J. Menaker, *Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration*, Arbitration Under International Investment Agreements: A Guide to the Key Issues (Katia Yannaca-Small ed.), Oxford University Press, pp. 129-160 (2010)
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