

**PCA CASE NO. 2016-7**

**In The Matter Of An Arbitration Before A Tribunal Constituted In Accordance With  
The Agreement Between The Government Of The United Kingdom Of Great Britain  
And Northern Ireland And The Government Of The Republic Of India  
For The Promotion And Protection Of Investments**

**-and-**

**The Arbitration Rules Of The United Nations Commission On International Trade Law,  
1976 (the “UNCITRAL Arbitration Rules”)**

**-between-**

**CAIRN ENERGY PLC  
CAIRN UK HOLDINGS LIMITED**

*Claimants*

**-and-**

**The Republic of India**

*Respondent*

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**Procedural Order No. 2**

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The Arbitral Tribunal  
Dr. Laurent Lévy (Presiding Arbitrator)  
Mr. Stanimir A. Alexandrov  
Mr. Christopher Thomas QC

Registry  
Permanent Court of Arbitration

12 August 2016

## **I. BACKGROUND**

1. At the first procedural hearing held on 18 April 2016, the Respondent made a proposal on the applicable transparency regime for the present arbitration.
2. At the Tribunal's invitation, the Parties conferred with a view to arriving at a mutually agreeable transparency regime. By letter of 28 April 2016, the Claimants rejected the Respondent's proposal and made their own proposal, which the Respondent rejected by letter of 5 May 2016.
3. On 17 May 2016, the Respondent informed the Tribunal that the Parties had failed to reach an agreement on the applicable transparency regime for the present arbitration, reiterated its proposal and suggested that the Tribunal invite the Parties to make submissions. By email of 18 May 2016, the Claimants objected to additional briefing related to transparency and reiterated their proposal for a transparency regime.
4. On 20 May 2016, "[c]onsidering in particular the important policy considerations that would underlie any decision by the Tribunal on matters of transparency and the need to protect business secrets", the Tribunal invited both Parties to make brief submissions on "the appropriate regime of transparency (and confidentiality, if any) that they believe should be adopted in this arbitration, including the actual text that they propose, as well as any reasons why they believe such a regime is appropriate."
5. Following the Tribunal's instructions, the Respondent filed its submission on transparency on 27 May 2016, while the Claimants filed their submission on 8 June 2016.
6. On 28 June 2016, the Respondent requested an opportunity to reply to the Claimants' submission. The Claimants did not object to this request; the Tribunal invited the Respondent to make any additional comments by 8 July 2016.
7. On 8 July 2016, the Respondent submitted its Reply on Transparency.
8. The present Order addresses the transparency and confidentiality regime to be adopted in this arbitration.

## **II. PARTIES' POSITIONS**

9. As it is the Respondent who requests a transparency regime, the Tribunal will start with the Respondent's position, and will then address the Claimants'.

### **A. The Respondent's Position**

10. The Respondent submits that a high degree of transparency is appropriate in this arbitration, for the following reasons:
  - a. According to the Respondent, the UNCITRAL Arbitration Rules (1976) (the "UNCITRAL Arbitration Rules") do not prescribe a regime of absolute

confidentiality. Only two provisions of the UNCITRAL Arbitration Rules require that certain matters be kept confidential: (i) Article 25(4) of the UNCITRAL Arbitration Rules, which requires that, subject to the agreement of the parties, any hearings be held in camera, and (ii) Article 32(5) of the UNCITRAL Arbitration Rules, according to which the award shall be confidential. As has been recognized by scholars<sup>1</sup> and tribunals,<sup>2</sup> these two provisions alone cannot give rise to a general duty of confidentiality.

- b. Likewise (and contrary to what the Claimants contend), the Respondent submits that there is no default rule of confidentiality under the law of the seat of the arbitration.<sup>3</sup> To the contrary, the 2015 Dutch Arbitration Act deliberately omitted ruling on the issue of confidentiality, “recognis[ing] that the issue of confidentiality should be regulated in practice, and that different considerations apply to investment treaty arbitrations (given the public interest elements engaged)[.]”<sup>4</sup>
- c. Citing the decisions of several national courts<sup>5</sup> and international arbitral tribunals,<sup>6</sup> the Respondent also submits that there is no general principle of confidentiality in international arbitration. In any event, as noted in *S.D. Myers*, whatever may be the position in commercial arbitration, it has not been established that any general principle of confidentiality exists in investment arbitration.<sup>7</sup>
- d. To the contrary, the Respondent asserts that there is now a “widespread recognition of the need for greater transparency in investment treaty arbitration”,<sup>8</sup>

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<sup>1</sup> The Respondent cites David Caron and Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed, 2010), p. 37.

<sup>2</sup> The Respondent cites *Biwater Gauff (Tanzania) Ltd v. Tanzania* (ICSID Case No ARB/05/22), Procedural Order No 3 of 29 September 2006, ¶ 132 (Exh. RLA-4) (“*Biwater*”).

<sup>3</sup> Respondent’s Reply on Transparency, ¶¶ 11-13.

<sup>4</sup> *Id.*, ¶ 13, citing an informal English translation of the Wijziging Van Boek 3, Boek 6 En Boek 10 Van Het Burgerlijk Wetboek En Het Vierde Boek Van Het Wetboek Van Burgerlijke Rechtsvordering In Verband Met De Modernisering Van Het Arbitragerecht (Arbitragewet 2015) (Amendment of Book 3, Book 6 and Book 10 of the Civil Code and the Fourth Book of the Code of Civil Procedure regarding the Modernisation of Arbitration Law (Arbitration Act 2015)) (Exh. RLA-25), pp. 35-38. The Tribunal notes that this is the second Exh. RLA-25 in the record. It will thus refer to this one as “Exh. RLA-25 bis”.

<sup>5</sup> The Respondent cites *United States v. Panhandle Eastern Corporation*, 118 FRD 346, 349-350 (DC Delaware, 1988) (Exh. RLA-5); *Eso Australia Resources Ltd v. Plowman* (1995) 183 CLR 10 (Exh. RLA-6); *Bulgarian Foreign Trade Bank Ltd v. A I Trade Finance Inc., Judgment of the Supreme Court of Sweden*, 27 October 2000 (Exh. RLA-7); *Emmott v. Michael Wilson and Partners Ltd* [2008] EWCA Civ 184 (Exh. RLA-8).

<sup>6</sup> *Loewen Group, Inc. v. United States of America*, ICSID Case No ARB(AF)/98/3, Decision on Jurisdiction of 5 January 2001 (Exh. RLA-9) (“*Loewen*”), ¶ 26.

<sup>7</sup> Respondent’s Reply on Transparency, ¶ 13, citing *S.D. Myers Inc. v. Canada*, Procedural Order No 16 of 13 May 2000 (Exh. RLA-24) (“*S.D. Myers*”), ¶ 8.

<sup>8</sup> Respondent’s Submission on Transparency, ¶ 10, citing *Biwater*, ¶ 114 and UNCITRAL - Note by Secretariat - Settlement of Commercial Disputes - Preparation of a Legal Standard on Transparency, 2 August 2012 (Exh. RLA-10).

and that “the default rule in investment arbitration is transparency.”<sup>9</sup> According to the Respondent, “the legitimacy of the arbitral process would be enhanced by greater transparency.”<sup>10</sup>

- e. The Respondent submits that the need for greater transparency is stronger in a case such as this one, “where the Respondent faces two claims arising out of its adoption of the same measure to the same transaction in circumstances where those two claims have not been consolidated, and the Respondent faces the real risk that the two tribunals will reach inconsistent decisions.”<sup>11</sup> The Respondent explains that “the Claimants’ claim concerns the tax demand issued by the Respondent’s Income Tax Department against Cairn UK Holdings Ltd. (‘CUHL’) for its failure to pay tax capital gains when it sold shares in Cairn India Holdings Ltd (‘CIHL’), a Jersey company, to Cairn India Ltd (‘CIL’), an Indian company”, while “in the related proceedings, *Vedanta Resources PLC v Republic of India*, the claimant’s claim identically concerns the tax demand issued against CIL for its failure to withhold capital gains (as the buyer) before making payment to CUHL, a non-resident company.”<sup>12</sup> The Respondent emphasizes that in both proceedings the underlying economic transaction (the sale and purchase of the shares) is “one and the same”, as is the consequent tax liability: CUHL is being asked to discharge that liability as the seller, while CIL (through which Vedanta makes its claim) is being asked to discharge it as the buyer.<sup>13</sup> The Respondent argues that both claims are “directly and intrinsically linked such that the possibility of conflicting arbitral awards – and so, inconsistent findings on the said tax liability – would be extremely controversial, place the Respondent in an invidious position, and ultimately serve to undermine confidence in the system of investment treaty arbitration”.<sup>14</sup> The Respondent further contends that “[i]t cannot be correct that claimants with obviously related claims should be given latitude to avoid effective coordination of proceedings through the imposition of confidentiality rules behind which they can shelter to avoid the sharing of information between the parallel arbitrations.”<sup>15</sup> The Respondent denies that it is the only one with full visibility over both proceedings. It notes that Vedanta and the Claimants share the same Indian counsel (Mr. Harish Salve SA), and therefore the only ones without full visibility over both proceedings are this Tribunal and the *Vedanta* tribunal.<sup>16</sup>

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<sup>9</sup> Respondent’s Reply on Transparency, ¶10.

<sup>10</sup> Respondent’s Submission on Transparency, ¶ 10, citing *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* (formerly *Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*), ICSID Case No. ARB/03/19, Order in response to a Petition for Transparency and Participation as Amicus Curiae of 19 May 2005 (“*Vivendi*”), ¶ 22.

<sup>11</sup> Respondent’s Submission on Transparency, ¶ 10.

<sup>12</sup> Respondent’s Submission on Transparency, ¶ 3.

<sup>13</sup> Respondent’s Submission on Transparency, ¶ 3.

<sup>14</sup> *Id.*

<sup>15</sup> Respondent’s Submission on Transparency, ¶ 2.

<sup>16</sup> Respondent’s Reply on Transparency, ¶ 26.

11. In light of the above, the Respondent submits that the Claimants' limited proposal (under which the arbitral process would be conducted behind closed doors and only their result would be made public), is "clearly inadequate".<sup>17</sup>
12. Instead, the Respondent requests the Tribunal to order that "the UNCITRAL Rules on Transparency<sup>18</sup> will apply to this arbitration (with all relevant information to be published on the PCA website and/or on the UNCITRAL Registry) with the exception of Article 4, Article 5 and (should the Claimants maintain their refusal to vary the rule in Article 25.4 of the UNCITRAL Arbitration Rules 1976) Article 6."<sup>19</sup>
13. More specifically, the Tribunal understands that the Respondent's proposal is the following:
  - a. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "UNCITRAL Rules on Transparency") shall apply in this arbitration, with the exceptions set out in paragraph (c) below.
  - b. The repository of published information referred to in Article 8 of the UNCITRAL Rules on Transparency (the "Repository") shall be the Permanent Court of Arbitration ("PCA").<sup>20</sup>
  - c. The following provisions of the UNCITRAL Rules on Transparency shall not apply:
    - i. Article 4 ("Submission by a third person");
    - ii. Article 5 ("Submission by a non-disputing Party to the treaty"), and
    - iii. If the Claimant maintains its objection to public hearings, Article 6 ("Hearings").
14. The Respondent argues that the differences between the Parties on the issue of transparency and confidentiality are "reasonably limited".<sup>21</sup> It notes in this respect that the Parties agree to the publication of any decisions, orders and awards of the Tribunal, subject to the redaction of confidential business information or information that is otherwise protected.<sup>22</sup> The further transparency that the Respondent requests is thus the following:
  - a. Certain basic information concerning the dispute (the name of the disputing parties, the economic sector involved, and the treaty under which the claim is

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<sup>17</sup> Respondent's Submission on Transparency, ¶ 12.

<sup>18</sup> All references to the UNCITRAL Rules on Transparency in this Order are to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Exh. C-94).

<sup>19</sup> Respondent's Submission on Transparency, ¶ 18.

<sup>20</sup> Respondent's Submission on Transparency, ¶ 13(a) and 18; Respondent's Reply on Transparency, ¶ 3(a).

<sup>21</sup> Respondent's Submission on Transparency, ¶ 17.

<sup>22</sup> *Id.*, ¶ 13.

being made) would be published in accordance with Article 2 by the Repository.<sup>23</sup> (In its Reply, the Respondent notes that the Claimants are now willing to accept this.)<sup>24</sup>

- b. Certain documents (specifically, the Notice of Arbitration, the Statement of Claim, the Statement of Defence, any other written submissions by the Parties, witness statements, expert reports, a list of the documentary exhibits and the documentary exhibits themselves) would be published in accordance with Article 3, subject to the redaction of any “confidential or protected information” in accordance with Article 7.<sup>25</sup> According to the Respondent, no issue of aggravation of the dispute arises in this case that would justify restricting the publication of these documents, as was the case in *Biwater*.<sup>26</sup>
  - c. Any hearings would be open to the public in accordance with Article 6, unless the Claimants maintain their objection. The Respondent notes that, given the express terms of Article 24(5) of the UNCITRAL Arbitration Rules, the Claimants’ agreement would be needed for any hearings to be held in public.<sup>27</sup>
15. The Respondent argues that its proposal is “a balanced and sensible one”, because “it protects the Claimants’ confidential information as well as the Respondent’s sensitive government information, but also permits an appropriate degree of transparency given the important issues of public interest which are engaged in the present arbitration, and given the specific difficulties created by the separate pursuit of separate arbitral proceedings by the buyer and seller of the assets subjected to the impugned capital gain tax measure.”<sup>28</sup>
16. The Respondent notes that “[e]ven before the elaboration and publication of the UNCITRAL Transparency Rules, tribunals have recognized that it was open to them to make orders to ensure a degree of transparency in their proceedings as part of their inherent powers.”<sup>29</sup> Here, the Respondent submits that the Tribunal should use its inherent powers under Article 15(1) of the UNCITRAL Arbitration Rules “to order that the authoritative transparency standard now published by UNCITRAL be applied”.<sup>30</sup> Citing the decisions of other investment tribunals acting under the UNCITRAL Arbitration Rules, the Respondent submits that the Tribunal’s procedural powers under

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<sup>23</sup> *Id.*

<sup>24</sup> Respondent’s Reply on Transparency, ¶ 5(b).

<sup>25</sup> *Id.*, ¶ 13(b).

<sup>26</sup> Respondent’s Reply on Transparency, ¶ 23.

<sup>27</sup> *Id.*, ¶ 14.

<sup>28</sup> *Id.*, ¶ 16.

<sup>29</sup> *Id.*, ¶ 15, citing *Biwater*.

<sup>30</sup> *Id.*, ¶ 15

Article 15(1) of the UNCITRAL Arbitration Rules allow it to order the appropriate regime of transparency applicable to this arbitration.<sup>31</sup>

## **B. The Claimants' position**

17. The Claimants first argue that “[t]he law and arbitration rules applicable to these proceedings do not require the adoption of a specific regime of transparency. Rather, they establish a default regime of limited confidentiality, subject to the Parties consenting otherwise, and where applicable, subject to the Tribunal’s determination in light of the circumstances of the proceedings.”<sup>32</sup> Specifically, the Claimants contend that:
- a. The UK-India BIT<sup>33</sup> contains no provision that mandates a particular regime of transparency or confidentiality.
  - b. The UNCITRAL Arbitration Rules establish a regime of limited confidentiality, requiring the confidentiality of all hearings, interim awards and final awards.<sup>34</sup> They do not require the publication of any submissions or evidence, or that hearings be open to the public; nor do they require that the existence or nature of the dispute be made public.<sup>35</sup> According to the Claimants, this default regime can only be varied on the basis of the consent of the parties.<sup>36</sup> Contrary to the Respondent’s suggestion, the Tribunal’s general powers under Article 15(1) of the UNCITRAL Arbitration Rules “cannot be read to extend to the power to abrogate the consent requirements of Articles 25(4) and 32(5), with respect to opening of hearings to the public or to the publication of any awards or orders.”<sup>37</sup>
  - c. The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the “Mauritius Convention”) does not apply, nor does it operate to make the UNCITRAL Rules on Transparency applicable to these proceedings. The Claimants note in this respect that the offer to arbitrate accepted by the Claimants was without reference to either the Mauritius Convention or the UNCITRAL Rules on Transparency; that the BIT was likewise adopted without

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<sup>31</sup> Respondent’s Reply on Transparency, ¶¶ 8, 14-17, citing *Methanex Corporation v. United States of America* (UNCITRAL), Decision on Amicus Curiae of 15 January 2001, ¶¶ 25-27 (Exh. RLA-18) (“*Methanex*”); *United Parcel Service of America, Inc. v. Canada* (UNCITRAL), Decision on Amicus Curiae Participation of 17 October 2001 (“*UPS*”), ¶ 38, and *Philip Morris Asia Ltd. v. Australia* (UNCITRAL), Procedural Order No 5 of 30 November 2012 (Exh. RLA-26) (“*Philip Morris*”).

<sup>32</sup> Claimants’ Submission on Transparency and Confidentiality, ¶ 3.

<sup>33</sup> The Agreement Between The Government Of The United Kingdom Of Great Britain And Northern Ireland And The Government Of The Republic Of India For The Promotion And Protection Of Investments (the “UK-India BIT” or the “BIT”).

<sup>34</sup> Claimants’ Submission on Transparency and Confidentiality, ¶ 5.

<sup>35</sup> Claimants’ Submission on Transparency and Confidentiality, ¶ 6.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*, ¶ 6, FN 7.

reference to either instrument, and that India is not a party to the Mauritius Convention, nor has it seen fit to become a party to that convention.<sup>38</sup>

18. Accordingly, for the Claimants “there is simply no authority binding on this Tribunal that mandates the degree of transparency proposed by India.”<sup>39</sup> As a result, “[v]ariations to the default regime of transparency and confidentiality should be based on the Parties’ consent to specific categories of public disclosure to ensure protection of confidential information and, where applicable, the Tribunal’s determination in light of the circumstances.”<sup>40</sup>
19. The Claimants further contend that the Respondent has failed to identify any other legal authority to support the adoption of the “overbroad” transparency regime it proposes, or invokes authorities that are inapposite.<sup>41</sup> The authorities invoked by the Respondent do not mandate the level of transparency proposed by it; to the contrary, they favor the Claimants’ proposal.<sup>42</sup> Specifically:
  - a. In *Biwater*, the tribunal was interpreting the ICSID Convention and Rules. That being said, while the tribunal did state that there is no general duty of confidentiality in ICSID arbitrations, it also stated that “there is no provision imposing a general rule of transparency or non-confidentiality [...]”<sup>43</sup> In any event, the order of the tribunal runs counter to the Respondent’s proposal, as it ordered the parties to refrain from disclosing minutes or records of hearings, documents produced in the arbitral proceedings, any of the pleadings or written memorials (and attached witness statements and expert reports), and any correspondence between the parties and/or the arbitral tribunal.<sup>44</sup>
  - b. In *Vivendi*, another ICSID case, the tribunal was considering a request for the participation of a third party as *amicus curiae*, rather than transparency generally. While the tribunal granted the petitioner leave to make an *amicus* submission, it denied the petitioner’s request to attend hearings.
20. The Claimants also note that, while the Respondent has cited comparative legal authority from various States in support of its proposal, it has not cited authority from the law of the seat of the arbitration.<sup>45</sup> The Claimants “presume that this omission is

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<sup>38</sup> *Id.*, ¶ 8.

<sup>39</sup> *Id.*, ¶ 6.

<sup>40</sup> *Id.*, ¶ 7. The Claimants note that the UNCITRAL Working Group charged with revising the 1976 UNCITRAL Rules determined that regarding areas not covered by the default regime, the scope of transparency should be determined on a case-by-case basis. *Id.*, FN 9, citing the UNCITRAL Working Group Report, Exh. C-93, ¶ 85.

<sup>41</sup> *Id.*, ¶ 14.

<sup>42</sup> *Id.*, ¶ 17.

<sup>43</sup> *Id.*, ¶ 18, citing *Biwater*, ¶ 121.

<sup>44</sup> *Id.*, ¶ 19, citing *Biwater*, p. 42(a).

<sup>45</sup> *Id.*, ¶ 23.



due to the fact that Dutch law historically viewed confidentiality as the default law in arbitral proceedings.”<sup>46</sup>

21. In the absence of any legal authority binding on this Tribunal, the Claimants argue that the Respondent seeks to rely “purely on policy justifications for its transparency proposal, namely the supposition that not implementing its proposal will permit the coordination between this arbitration and the dispute being brought by Vedanta Resources plc [...]”<sup>47</sup> For the Claimants, however, “[i]t is a logical fallacy and is procedurally unnecessary to suggest that transparency is the best or only mechanism to permit tribunals in two separate and distinct proceedings against a sovereign State to be apprised of the respective statuses of the two proceedings.”<sup>48</sup> The Claimants submit that their proposal would accomplish the same goal by allowing the publication of all awards and orders.<sup>49</sup> The Claimants note in addition that the Respondent already has full visibility over both proceedings, and that nothing prevents the Respondent from seeking leave from this Tribunal to introduce into evidence in this proceeding information it has obtained in the *Vedanta* arbitration, or from advising this Tribunal as to the status of those proceedings (which, other than the statements of its Counsel at the first procedural hearing, the Respondent has not done to date).<sup>50</sup>
22. Finally, the Claimants note that the Respondent has requested, “without discussion or argument”, a “blanket prohibition on the intervention of third parties, including States and *amici*.”<sup>51</sup> With respect to non-disputing State parties, the Claimants “presume[] that this is due to the strong position taken by the United Kingdom on the wrongful conduct by India at issue in this arbitration.”<sup>52</sup> The Claimants, for their part, take no position at this time on submissions by third parties (whether States or *amici*), arguing that “[t]he matter is not one of transparency and was not covered by the Tribunal’s request for submissions.”<sup>53</sup>
23. Against this background, the Claimants propose the following transparency regime (the Claimants’ “Primary Proposal”): “the publication (on the PCA website or otherwise) of all Tribunal awards (including interim and final awards) and orders (including procedural orders), subject to Cairn’s right to redact any commercially sensitive and/or confidential information.”<sup>54</sup> As a result, they request the Tribunal to:

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<sup>46</sup> *Id.*, ¶ 23, FN 26.

<sup>47</sup> *Id.*, ¶ 15.

<sup>48</sup> *Id.*, ¶ 16.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*, ¶ 15 and FN 17. The Claimants note that at the first procedural hearing the Respondent stated that “[t]he reason why we are saying the Vedanta proceedings should proceed is that they are more advanced. It’s as simple as that”. Tr., 107:24-108:1.

<sup>51</sup> *Id.*, ¶¶ 21-22 and ¶ 6, FN 8.

<sup>52</sup> *Id.*, ¶ 22, citing “Gordon Brown writes to Manmohan on Vodafone” (Economic Times, 5 February 2010) (Exh. C-101).

<sup>53</sup> *Id.*, ¶ 22, FN 24, citing the Tribunal’s letter of 20 May 2016 (Exh. C-99).

<sup>54</sup> Claimants’ letter of 28 April 2016 (Exh. C-97), restated in Claimants’ Submission on Transparency and Confidentiality, ¶¶ 9 and 25.

- “(a) DIRECT that the Permanent Court of Arbitration and/or the Parties are in no way restricted from making public (including through publication on websites or otherwise) any and all awards (including interim and final awards) and orders (including procedural orders), subject to the Parties’ right to redact any commercially sensitive and/or confidential information;
- (b) ORDER that neither Party shall make public, in part or in whole, procedural correspondence, the Notice of Dispute, the Notice of Arbitration, the Statement of Claim, the Statement of Defence, any other written submissions by the Parties, any and all witness statements, expert reports, or documentary exhibits;
- (c) DIRECT that the proceedings, including any hearings, shall not be open to the public; and,
- (d) RESERVE DECISION on the issue of submissions [by] *amicus curiae* or submissions by non-disputing States.”<sup>55</sup>
24. According to the Claimants, their Primary Proposal provides “a degree of transparency above and beyond what is legally required and which is expansive enough to address all of the issues of policy and preference presented by the Respondent, in addition to those legal and policy considerations identified by the Claimants.”<sup>56</sup> In particular, the Claimants believe that their proposal will provide the high degree of transparency that the Respondent requests, because “orders and awards will necessarily include significant discussion of Parties’ written submissions and hearings”.<sup>57</sup> In this respect, the Claimants “would hope that any orders or awards would promote the legitimacy of investor-State arbitration by adding to the corpus of learning relating to investment treaty arbitration and the proper conduct of international arbitration proceedings generally.”<sup>58</sup>
25. By contrast, the Respondent’s proposal “would impose further logistical and financial burdens on Cairn, in particular stemming from the vetting of confidentiality issues regarding documentary evidence, as well as pleadings, witness and expert testimony, and oral hearings.”<sup>59</sup> The Claimants add that “this burden may extend to having to seek the consent of various counterparties for public disclosure, in the appropriate circumstances”, and that “[e]ven with necessary redactions, the volume of information covered by India’s nearly limitless public disclosure regime would necessarily increase the risk of disclosure of the Claimants’ sensitive and confidential information relating to Cairn’s global business affairs and operations.”<sup>60</sup>

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<sup>55</sup> *Id.*, ¶ 29.

<sup>56</sup> *Id.*, ¶ 2.

<sup>57</sup> *Id.*, ¶ 11.

<sup>58</sup> *Id.*, ¶ 10.

<sup>59</sup> *Id.*, ¶ 12.

<sup>60</sup> *Id.*, ¶ 12.

26. Alternatively, should the Tribunal reject their Primary Proposal, the Claimants state that they are willing to agree on an even greater degree of transparency and would accept publishing certain basic information on the dispute<sup>61</sup> (the Claimants' "Alternative Proposal"). In this respect, the Claimants request in the alternative that the Tribunal:
- (a) Grant all relief requested by the Claimants in Paragraphs 29 a. through d. above [i.e., para. 23 above]; and, further,
  - (b) DIRECT that the Permanent Court of Arbitration and/or the Parties are in no way restricted from making public (including through publication on websites or otherwise) the name of the disputing parties (i.e., Cairn Energy PLC, Cairn UK Holdings Limited, and the Republic of India), the economic sector involved (i.e., oil and gas exploration and production), and the treaty under which the claim is being made (i.e., the UK-India BIT)."<sup>62</sup>

### III. ANALYSIS

#### A. The Tribunal's task

27. The Respondent has requested the Tribunal to order the application of the UNCITRAL Rules on Transparency (with some exceptions) to the present arbitration. It submits that the UNCITRAL Arbitration Rules do not prescribe a regime of absolute confidentiality, and argues that a high degree of transparency is justified in investment arbitration in general (to enhance the legitimacy of the system) and in this arbitration in particular (to prevent conflicting findings in this arbitration and in the *Vedanta* arbitration).
28. The Claimants reject the Respondent's proposal for a transparency regime, arguing essentially that (i) there is no basis in the applicable law or arbitration rules for such a broad proposal, nor is there any legal authority to support it; (ii) the Respondent's proposal puts the Claimants' confidential information at risk, and (iii) would be unduly burdensome on the Claimants. Instead, the Claimants make their own proposal which they argue provides a higher degree of transparency than is required while fully addressing the Respondent's policy concerns.
29. It can be confirmed that there is a current welcome trend towards greater transparency in investment arbitration.<sup>63</sup> The issuance of the UNCITRAL Rules on Transparency and

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<sup>61</sup> Claimants' Submission on Transparency and Confidentiality, ¶ 28.

<sup>62</sup> *Id.*, ¶ 30.

<sup>63</sup> See, e.g., *Vivendi*, ¶ 22 (noting that "[t]he acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function."); *Biwater*, ¶ 114 (noting that "[w]ithout doubt, there is now a marked tendency towards transparency in treaty arbitration."); L. Malintoppi and N. Limbasan, "Living in Glass Houses? The Debate on Transparency in International Investment Arbitration", *BCDR International Arbitration Review* (2015, Vol. 2, Issue 1), pp. 35-37; M. Douglas and J. Ribeiro, "Transparency in Investor-State Arbitration: The Way Forward", *Asian International Arbitration Journal*, Singapore International Arbitration Center (2015, Vol. 11, Issue 1), p. 49.

the signature of the Mauritius Convention are signs of a progressing change in paradigm with respect to public access to information regarding investment arbitration proceedings. However, the Working Group tasked with the UNCITRAL Rules on Transparency understood that they could not impose these Rules on existing treaties or disputes. The UNCITRAL Rules on Transparency apply only to the following disputes:

- a. “[T]o investor-State arbitration[s] initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”)\* concluded on or after 1 April 2014 unless the Parties to the treaty\*\* have agreed otherwise.”<sup>64</sup>
  - b. To “investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014”, only when:
    - i. “The parties to an arbitration (the “disputing parties”) agree to their application in respect of that arbitration;” or
    - ii. “The Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application.”<sup>65</sup>
30. The present arbitration falls under category (b) above, but here neither the disputing parties nor the Parties to the UK-India BIT have agreed to the application of the UNCITRAL Rules on Transparency.
31. Absent consent (whether by the disputing parties or the Contracting Parties), the UNCITRAL Rules on Transparency do not automatically apply to this arbitration. It thus falls upon the Tribunal to determine whether they shall apply over the Claimants’ express objection, or whether the Tribunal may and should then decide to order the application of a different transparency regime. In the Tribunal’s view, this requires (i) an analysis of the applicable rules governing confidentiality and transparency in the present arbitration; (ii) determining whether the Tribunal has the power to impose a regime of transparency and/or confidentiality that the Parties have not agreed to and, if that power exists, (iii) the determination of the appropriate transparency and confidentiality regime.
32. Before undertaking this exercise, the Tribunal notes that the Claimants have consented to a certain degree of transparency in their Primary Proposal as outlined in paragraph 23 above. It is therefore undisputed that, at a minimum, the Parties are in agreement that the PCA and the Parties may publish (through publication on websites or otherwise) any and all awards (including interim and final awards) and orders (including procedural orders), subject to the Parties’ right to redact any commercially sensitive and/or confidential information. In addition (and although this is formulated as an alternative should the Tribunal reject their Primary Proposal), in their Alternative Proposal the

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<sup>64</sup> Article 1(1) of the UNCITRAL Rules on Transparency. The asterisks (\* and \*\*) are in the original text. The UNCITRAL Rules on Transparency use the phrase UNCITRAL Arbitration Rules as a reference to the UNCITRAL Arbitration Rules as revised in 2010 and adopted in 2013.

<sup>65</sup> Article 1(2) of the UNCITRAL Rules on Transparency.

Claimants state that they would be willing to accept the publication of certain basic information on the case on the PCA's website.

33. The Tribunal's task is therefore limited to determining whether it may impose the additional transparency requirements requested by the Respondent and, if the answer is yes, whether they are appropriate in this arbitration.
34. Other than the Respondent's request that Articles 4 and 5 of the UNCITRAL Rules on Transparency be excluded, the Parties have not addressed the participation of non-disputing parties and *amici curiae*. The Claimants have expressly stated that they take no position on this matter at this stage. As a result, the Tribunal does not address this matter in this order.

## **B. Applicable law**

35. As the Parties have noted, the UNCITRAL Arbitration Rules contain no rules on transparency, and very few rules on confidentiality. Specifically:
  - a. Article 25(4) provides that "[h]earings shall be held *in camera* unless the parties agree otherwise."
  - b. Article 32(5) provides that "[t]he award may be made public only with the consent of both parties."
36. The Tribunal agrees with the Respondent that this is insufficient to create a presumption of confidentiality for arbitrations conducted under the UNCITRAL Arbitration Rules. As noted by Caron, Caplan and Pellonpää, since these provisions "address discrete aspects of the arbitral process", "they alone cannot give rise to a general duty of confidentiality."<sup>66</sup> That being said, it does not necessarily follow from this conclusion that there is a general duty of transparency under the UNCITRAL Arbitration Rules. Investment tribunals operating under the ICSID Convention and Rules (which also contain discrete provisions on confidentiality) have reached similar conclusions.<sup>67</sup>
37. Nor can a general duty of confidentiality or transparency be derived from the arbitration agreement. The UK-India BIT (which contains the offer to arbitrate that was accepted by the Claimants) contains no express duty of confidentiality, nor an express duty of transparency. And while it could be argued that a duty of confidentiality could be implied from the arbitration agreement in commercial arbitrations,<sup>68</sup> it would be more

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<sup>66</sup> David Caron, Lee Caplan and Matti Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed, 2010), p. 37.

<sup>67</sup> See, e.g., *Biwater*, ¶ 121 ("In the absence of any agreement between the parties on this issue, there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources."). See also *Abaclat and others v. The Argentine Republic* (formerly *Giovanna a Beccara and others v. The Argentine Republic*) (ICSID Case No. ARB/07/05), Procedural Order No. 3 (Confidentiality Order) of 27 January 2010 ("*Abaclat*"), ¶ 67.

<sup>68</sup> The Tribunal notes however that it is far from being clear whether there is an implied duty of confidentiality in commercial arbitrations. Different national laws take different positions: while some favor the existence of a duty of confidentiality, others distinguish between privacy and confidentiality. See, e.g., UNCITRAL Notes

difficult to do so in investment treaty arbitrations, where there is no direct agreement to arbitrate between disputing parties, but rather an offer to arbitrate made by the host State that has been accepted by the Claimants.<sup>69</sup>

38. In the absence of a general rule of transparency or of confidentiality in the arbitration agreement or the applicable arbitration rules, the Tribunal must turn to the law of the seat, i.e., Dutch law. The Claimants have argued (without evidentiary support) that “Dutch law historically viewed confidentiality as the default law in arbitral proceedings.”<sup>70</sup> However, as pointed out by the Respondent, the 2015 Dutch Arbitration Act contains no provision on confidentiality. Indeed, the legislative history of that Act suggests that this omission was deliberate, in order to allow arbitral tribunals to fashion the most appropriate regime of confidentiality taking into consideration the circumstances of each case, including the public interest concerns arising from investment arbitrations.<sup>71</sup> The Tribunal is thus satisfied that there is no mandatory rule of either confidentiality or transparency that would prevent it from ruling on this matter.
39. Accordingly, the Tribunal concludes that there is no general duty of confidentiality or of transparency in the present arbitration.

### **C. The Tribunal’s powers**

40. Having determined that there is no general duty of confidentiality or of transparency in the present arbitration, the question that arises is whether the Tribunal may impose a regime of transparency and/or confidentiality without the Parties’ consent.
41. The Respondent’s view is that Article 15(1) of the UNCITRAL Arbitration Rules authorizes the Tribunal to do so. The Claimants appear to agree that Article 15(1) empowers the Tribunal to establish a confidentiality or transparency regime without the Parties’ consent, except in matters in which the UNCITRAL Arbitration Rules expressly require such consent (specifically, with respect to opening hearings to the public or to the publication of awards and orders).<sup>72</sup>
42. The Tribunal agrees that the power to impose a confidentiality and/or transparency regime must be found in its procedural powers for the efficient conduct of the arbitration, found at Article 15(1) of the UNCITRAL Arbitration Rules. This has also

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on Organizing Arbitral Proceedings (1996), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf> (“UNCITRAL Notes”), ¶ 31 (noting that “there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case.”). See also Caron, Caplan & Pellonpää, p. 34.

<sup>69</sup> See, e.g., S.D. Myers, ¶ 8 (“Whatever may be the position in private consensual arbitrations between commercial parties, it has not been established that any *general principle* of confidentiality exists in an arbitration such as that currently before this Tribunal. The main argument in favour of confidentiality is founded on a supposed implied term in the arbitration agreement. The present arbitration is taking place pursuant to a provision in an international treaty, not pursuant to an arbitration agreement between the disputing parties.”)

<sup>70</sup> *Id.*, ¶ 23, FN 26.

<sup>71</sup> See Exh. RLA-25 bis, pp. 35-38.

<sup>72</sup> Claimants’ Submission on Transparency, ¶ 6-7 and FN 7.

been the view of other investment tribunals ruling on issues of confidentiality<sup>73</sup> or of participation of non-disputing third parties.<sup>74</sup>

43. Article 15(1) has been referred to as the “heart” of the UNCITRAL Arbitration Rules.<sup>75</sup> As noted by the *Methanex* tribunal, this provision “grants the Tribunal a broad discretion as to the conduct of this arbitration”, and “is intended to provide the broadest procedural flexibility within fundamental safeguards, to be applied by the arbitration tribunal to fit the particular needs of the particular arbitration.”<sup>76</sup> However as, the same tribunal pointed out, this provision limits the Tribunal’s power, as illustrated by breaking down the provision into sub-paragraphs:<sup>77</sup>

“[1] Subject to these Rules, [2] the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, [3] provided [a] that the parties are treated with equality and [b] that at any stage in the proceedings each party is given a full opportunity of presenting its case.”

44. The Tribunal’s power is therefore limited first and foremost to the UNCITRAL Arbitration Rules themselves if they include a direction about the issue in dispute. As noted above, Article 25(4) requires the Parties’ consent to make hearings open to the public, while Article 42(5) requires such consent to make awards public. The Claimants have consented to the latter but objected to the former. As a result, the Tribunal cannot impose public hearings on the Claimants against their express objection. For the same reason, it cannot authorize the publication of any transcripts.<sup>78</sup>
45. Other than that, the Tribunal has the discretion to order the confidentiality and/or transparency regime that it finds appropriate, provided that (a) it treats the Parties with equality and (b) it allows each Party a full opportunity of presenting its case. The Tribunal exercises this discretion in the next section.

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<sup>73</sup> See *Abaclat*, ¶¶ 63-66 (holding that its power to rule on issues of confidentiality derived from its procedural powers for the conduct of the arbitration under Rule 19 of the ICSID Arbitration Rules). The Tribunal notes that in *Biwater* the tribunal derived its power to rule on questions of confidentiality/transparency from its power to issue provisional measures under Article 47 of the ICSID Convention and Article 39(1) of the ICSID Arbitration Rules. However, in that case the claimant had framed its request for a confidentiality order as a request for provisional measures. See *Biwater*, ¶¶ 6, 109.

<sup>74</sup> See, e.g., *Methanex*, ¶¶ 26-27. In the ICSID context, see *Vivendi*, ¶¶ 14-16 (finding that this was a procedural question that could be addressed through its powers under Article 44 of the ICSID Convention, which is “substantially similar” to Article 15(1) of the UNCITRAL Rules).

<sup>75</sup> Caron, Caplan & Pellonpää, p. 26, citing H. Bagner, “Enforcement of International Commercial Contracts by Arbitration: Recent Developments”, 14 Case Western Reserve Journal of International Law (1982), p. 577.

<sup>76</sup> *Methanex*, ¶¶ 26-27. See also UNCITRAL Notes, ¶ 4 (explaining that rules such as Article 15(1) “allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings”, which “is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.”)

<sup>77</sup> *Methanex*, ¶ 26. This Tribunal has subdivided sub-paragraph [3] into sub-clauses [a] and [b], which were not present in the *Methanex* tribunal’s sub-division.

<sup>78</sup> See, e.g., *Biwater*, ¶ 155; and *Abaclat*, ¶¶ 99-100.

**D. Appropriate regime for transparency and/or confidentiality**

46. As noted above, the Parties agree that the PCA and the Parties may publish (through publication on websites or otherwise) any and all awards (including interim and final awards) and orders (including procedural orders), subject to the Parties' right to redact any commercially sensitive and/or confidential information. The Claimants also agree (as an alternative) that the PCA may publish certain basic information on the case.
47. Other than that, the Parties' positions differ widely. While the Respondent wishes to publish almost all documents produced in the case, including the Parties' submissions, witness statements, expert reports and documentary exhibits, the Claimants oppose the publication of any of these documents.
48. The Tribunal acknowledges (as already stated) that there is a general trend in investment arbitration for more transparency. The proponents of transparency argue that, by allowing the general public to access to more information regarding investment arbitrations that might touch on issues of public policy and potentially require the disbursement of public funds, transparency gives more legitimacy to the system.<sup>79</sup> This Tribunal agrees as a matter of principle to the extent that one distinguishes between pre-award transparency and post-award transparency.
49. The Tribunal agrees that post-award transparency (i.e. the revelation of information and documents regarding the dispute after it has been resolved) is a commendable goal and should be adopted in investment arbitration cases, subject to some exceptions like the protection of privileged information. Post-award transparency allows third parties to have substantial information on the case once the dispute is over (usually through the publication of the award and other decisions). Given the length and thoroughness of most investment arbitration awards, the award provides third parties with significant insight on the issues discussed, as well as on the tribunal's reasoning. Post-award transparency also contributes to the harmonization of investment treaty jurisprudence. This type of transparency places a minimal burden on the parties and, importantly, on the proceedings themselves, as there are no transparency obligations during the proceedings that could hinder or delay them, nor are the proceedings affected by the risks discussed below for pre-award transparency.<sup>80</sup>
50. Pre-award transparency (i.e., the publication of information and documents related to the dispute during its pendency, including pleadings, witness statements, expert reports and documentary exhibits) must be assessed more carefully. In the absence of an agreement between the parties, and in the presence of an express objection, the Tribunal cannot impose it unilaterally without first assessing whether it is appropriate in the circumstances of the case, whether it impairs the Parties' right to equal treatment or to a

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<sup>79</sup> See, e.g., Malintoppi & Limbasan, pp. 31-32, 35-37.

<sup>80</sup> See, e.g., Boris Kasalowsky and Amanda Neil, "Chapter V: Investment Arbitration, Pre-Award Transparency in Investment Arbitration from the Perspective of Parties and Counsel", in C. Klausegger, P. Klein et al. (eds), *Austrian Yearbook on International Arbitration 2016*, pp. 231-232.



full presentation of their case, and whether its benefits outweigh its costs.<sup>81</sup> The costs of pre-award transparency are potentially high:

- a. First, and as the Claimants have pointed out, it places a burden on the parties, who must devote time and resources to redact confidential or commercially sensitive information, or obtain permission to disclose from various business partners or governmental entities.<sup>82</sup> This may compromise the Parties' ability to fully present their case.
- b. Second, it could make the dispute more difficult to solve. By allowing the publication of the parties' pleadings and documents filed with it, transparency might politicize the dispute. It presents to the public the parties' one-sided views of the facts and arguments, sometimes months away from the other party's pleading, allowing public opinion to escalate on the basis of lawyers' attempts to persuade the Tribunal. In doing so, it risks aggravating the dispute and imposing an additional burden on the parties, who must sometimes also defend themselves on the public and political arena.<sup>83</sup> Some commentators have argued that "a party may be motivated to use the 'court of public opinion' to influence the arbitration process: to gain public support for its position, to tarnish the reputation of the other party (e.g. to undermine the credibility of an investor or to sully the reputation of a State as an investor-friendly jurisdiction), or to pressure the other party into settling the dispute."<sup>84</sup> This could potentially give a party an unfair advantage over the other, thereby undermining the principle of equal treatment.
- c. Finally, pre-award transparency may put at risk the integrity of the proceedings, because the prospect of publication may arguably induce parties, witnesses and experts to be less candid in their submissions or statements. This might also compromise the Parties' possibility of fully presenting their case.

51. Other investment tribunals have shared this Tribunal's concerns. According to *Biwater*, on which the Respondent relies, "[i]t is self-evident that the prosecution of a dispute in the media or in other public fora, or the uneven reporting and disclosure of documents or other parts of the record in parallel with a pending arbitration, may aggravate or exacerbate the dispute and may impact upon the integrity of the procedure."<sup>85</sup> The *Metalclad* tribunal considered that "it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the Parties if during the proceedings they were both to limit public discussion of the case to a minimum, subject only to any externally imposed obligation of disclosure by which

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<sup>81</sup> See, e.g., Noah Rubins, "Chapter V: Investment Arbitration 'Transparency' in Investment Arbitration: A Call to Cost Benefit Analysis", in C. Klausegger, P. Klein et al. (eds), *Austrian Yearbook on International Arbitration 2016*, pp. 293-305.

<sup>82</sup> Rubins, p. 299.

<sup>83</sup> Rubins, p. 297-299.

<sup>84</sup> Kasalowsky & Neil, p. 239.

<sup>85</sup> *Biwater*, ¶ 136.

either of them may be legally bound.”<sup>86</sup> The *Loewen* tribunal repeated the essence of this statement, stating that public discussion of the case should be limited to “what is considered necessary.”<sup>87</sup>

52. Citing these concerns, the *Biwater* and *Abaclat* tribunals refused to allow for the publication of hearing transcripts, pleadings and submissions, witness statements, expert reports, documentary exhibits<sup>88</sup> or correspondence between the parties.<sup>89</sup> As noted by the *Biwater* tribunal, here the interests of transparency are outweighed by the requirements of procedural integrity.<sup>90</sup> Both the *Biwater* and *Abaclat* tribunals noted that “any uneven publication or distribution of pleadings or memorials is likely to give a misleading impression about these proceedings”<sup>91</sup> as they present “a one-sided story of the dispute.”<sup>92</sup> As a result, “[t]heir publication [...] carries the inherent risk to give an incorrect impression about the proceedings”, which “would not only thwart public information purposes, but would further antagonise the Parties and aggravate their differences.”<sup>93</sup> The same consideration applied to witness statements and expert reports.<sup>94</sup>
53. In their Primary Proposal, the Claimants agree to the publication of awards, decisions and procedural orders, subject to redaction of commercially sensitive or confidential information. The Claimants have not specified when this publication will occur, but the Tribunal understands that the Claimants agree for these documents to be published as they are issued, after any necessary redactions. The Claimants have also agreed (under their Alternative Proposal) to the publication of certain information on the dispute on the PCA’s website. The Claimants thus propose a limited form of pre-award transparency regarding procedural orders and decisions, to be followed by post-award transparency with respect to the award.

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<sup>86</sup> *Metalclad Corp. v. United Mexican States* (ICSID Case N° ARB (AF)/97/1, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information Regard the Case, 27 October 1997, ¶ 10.

<sup>87</sup> *Loewen*, ¶ 26. The Tribunal is aware that the practice of NAFTA tribunals has evolved towards considerably more transparency since the *Metalclad* and *Loewen* awards. However, this was the result of an interpretative note issued by the NAFTA Free Trade Commission (which is composed of all parties to the NAFTA) (see NAFTA Free Trade Commission, Note of Interpretation of 31 July 2001, available at <http://www.state.gov/documents/organization/38790.pdf>. See also, Andrea K. Bjorklund, Chapter V: Investment Arbitration, NAFTA Chapter XI’s Contribution to Transparency in Investment Arbitration, in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Yearbook on International Arbitration* 2016, p. 294). Here the parties to the BIT have not issued such an interpretation.

<sup>88</sup> With the exception of a party’s own documents, unless they were subject to contractual or confidentiality provisions).

<sup>89</sup> *Biwater*, ¶¶ 155-163; *Abaclat*, ¶¶

<sup>90</sup> *Biwater*, ¶¶ 157, 161.

<sup>91</sup> *Biwater*, ¶ 158.

<sup>92</sup> *Abaclat*, ¶ 102.

<sup>93</sup> *Id.*

<sup>94</sup> *Biwater*, ¶ 159; *Abaclat*, ¶ 104.

54. The Tribunal considers that the Claimants' Alternative Proposal strikes a right balance between transparency and confidentiality, and between public interest and the possible cost to the parties and to the integrity of the arbitration proceedings. The general public will have access to information on the dispute, and to the Tribunal's more balanced portrayal of the dispute through its orders, decisions and awards. The publication of these orders, decisions and awards may also contribute to the harmonization of investment treaty practice and case law. At the same time, the Parties will not need to spend more resources and time on the redaction of confidential or commercially sensitive information from numerous documents, nor will they risk an aggravation of the dispute by having their every argument scrutinized by public opinion.
55. The Tribunal has considered the Respondent's argument that its proposed transparency regime would prevent conflicting decisions in this and in the *Vedanta* arbitration. The Tribunal cannot agree. Even if both tribunals had access to the same documents, they could reach different conclusions on the basis of the parties' differing arguments, although it is not to be excluded that full transparency in that regard might diminish the risk of contradictions. It also is debatable whether it is appropriate to use transparency (which is designed to give third parties and the public at large information on the case) to allow the parties (or the tribunal) to obtain information on a separate arbitration. Informing the public at large in order to make sure that a limited circle of persons (parties and arbitrators in two arbitrations) are informed and avoid contradictory decisions would be diverting transparency from its purpose, and would in any event be a convoluted way to prevent conflicting decisions. To avoid conflicting decisions, the proper remedy would rather be the consolidation or coordination of proceedings, be it by allowing evidence or pleadings in one arbitration to be submitted before the other tribunal, or other forms of coordination. The Claimants have conceded that nothing prevents the Respondent from seeking leave from this Tribunal to introduce into evidence in this proceeding information it has obtained in the *Vedanta* arbitration, or from advising this Tribunal as to the status of those proceedings. Transparency to the public has little bearing on the Respondent's achieving its stated objective of avoiding conflicting decisions and would be less effective than applications to adduce documents from one arbitration into the other.
56. The Tribunal also notes that the Respondent has offered no information as to the transparency of the *Vedanta* proceedings. Even if full pre-award transparency *guaranteed* that two tribunals considering the same issues would not arrive at conflicting decisions (a questionable premise), this could arguably only occur if full pre-award transparency was adopted in both arbitrations. Finally, the Tribunal notes some inconsistency in the Respondent's wishing to import the transparency of pleadings and documents from the UNCITRAL Rules on Transparency, but at the same time seeking to exclude the participation of non-disputing parties (in this case, the United Kingdom) or *amici curiae*. This shows some tension in the Respondent's position.
57. For the reasons set out above, the Tribunal rejects the Respondent's request, and adopts the Claimants' Alternative Proposal, with certain amendments, as set out below.
- a. The Parties may make public (on the PCA's website, their own websites or otherwise) certain basic information about the case, namely the name of the disputing parties (i.e., Cairn Energy PLC, Cairn UK Holdings Limited, and the

Republic of India), the economic sector involved (i.e., oil and gas exploration and production), the treaty under which the claim is being made (i.e., the UK-India BIT), and summaries of their positions (including the relief requested). If a Party wishes to publish a summary of its position, it shall first provide the other Party with the proposed text. If the other Party expresses no objection within one week of receiving the proposed summary, the first Party may proceed with the publication. If however there is an objection and the Parties are unable or unwilling to resolve the difficulty through negotiation, the first Party shall submit the proposed summary to the Tribunal who, after hearing both Parties, will issue a decision.

- b. The Parties may publish on the PCA's website any and all awards (including interim and final awards) and orders (including procedural orders), subject to the Parties' right to redact any commercially sensitive and/or confidential information. Prior to such publication, the Party intending to publish the order, decision or award will consult with the other Party with respect to the necessary redactions. If the Parties are unable or unwilling to solve any redaction issues, the first Party shall apply to the Tribunal who, after hearing both Parties, will then make a decision. In case of a final award, upon request from either Party prior to the rendering of such award or on its own motion, the Tribunal will issue appropriate directions together with the award.
- c. Neither Party shall make public in part or in whole any other document submitted, produced or created in connection with this proceeding, including but not limited to procedural correspondence, the Notice of Dispute, the Notice of Arbitration, the Statement of Claim, the Statement of Defence, any other written submissions by the Parties, transcripts of hearings any and all witness statements, expert reports, or documentary exhibits.
- d. The proceedings, including any hearings, shall not be open to the public.

58. The Tribunal does not address the issue of third party submissions (be it by non-disputing parties or *amici curiae*).

#### **IV. ORDER**

59. For the reasons set out above, the Tribunal:

- a. DIRECTS that the Parties are in no way restricted from making public (including through publication on the website of the Permanent Court of Arbitration, their own websites or otherwise) the name of the disputing parties (i.e., Cairn Energy PLC, Cairn UK Holdings Limited, and the Republic of India), the economic sector involved (i.e., oil and gas exploration and production), the treaty under which the claim is being made (i.e., the UK-India BIT), and summaries of their positions (including the relief requested). If a Party wishes to publish a summary of its position, it shall first provide the other Party with the proposed text. If the other Party expresses no objection within one week of receiving the proposed summary, the first Party may proceed with the publication. If there is an objection and the Parties are unable or unwilling to resolve the difficulty through


negotiation, the first Party shall submit the proposed summary to the Tribunal who, after hearing both Parties, will issue a decision.

- b. DIRECTS that the Parties are in no way restricted from making public on the website of the Permanent Court of Arbitration any and all awards (including interim and final awards) and orders (including procedural orders), subject to the Parties' right to redact any commercially sensitive and/or confidential information. Prior to such publication, the Party intending to publish the order, decision or award will consult with the other Party with respect to the necessary redactions. If the Parties are unable or unwilling to solve any redaction issues, the first Party shall apply to the Tribunal who, after hearing both Parties, will then make a decision. In case of a final award, upon request from either Party prior to the rendering of such award or on its own motion, the Tribunal will issue appropriate directions together with the award.
- c. ORDERS that neither Party shall make public, in part or in whole, any other document submitted, produced or created in connection with this proceeding, including but not limited to procedural correspondence, the Notice of Dispute, the Notice of Arbitration, the Statement of Claim, the Statement of Defence, any other written submissions by the Parties, any transcripts of hearings, any and all witness statements, expert reports, or documentary exhibits.
- d. DIRECTS that the proceedings, including any hearings, shall not be open to the public; and,
- e. CONFIRMS that this order is not intended to and will not produce any effect on the issue of submissions by *amicus curiae* or submissions by non-disputing States.
- f. DEFERS its decision on costs to a later stage.

Seat of arbitration: The Hague, Netherlands

Date: 12 August 2016

**For the Arbitral Tribunal:**



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Dr. Laurent Lévy  
Presiding Arbitrator