TRANSPARENCY IN INVESTOR-STATE ARBITRATION: THE WAY FORWARD

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A. INTRODUCTION

The push for transparency in investor-State arbitration is gaining momentum. In July 2013 the United Nations Commission on International Trade Law (UNCITRAL) adopted the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*.[1] In December 2014 the General Assembly adopted the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (*Mauritius Convention on Transparency*),[2] providing a streamlined mechanism for States to adopt the *Rules on Transparency*. These developments are part of a welcomed trend towards transparency in investor-State arbitration.[3] This article explains why transparency of

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[1] *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, Report of the United Nations Commission on International Trade Law – Forty-Sixth Session (8-26 July 2013), UN GAOR, 68th sess, Supp No 17, UN Doc A/68/17 (2013) annex I, 81 ('*Rules on Transparency*'). See the decision adopting the Rules on Transparency: at 22. See also *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules*, GA Res 68/109, UN GAOR, 68th sess, 68th plen mtg, Agenda Item 79, UN Doc A/Res/68/109 (18 December 2013) 2; *Verbatim Record of the 68th Plenary Meeting*, UN GAOR, 68th sess, 68th plen mtg, Agenda Items 77 and 173, UN Doc A/68/PV.68 (16 December 2013) 6.

[2] *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, GA Res 69/116, UN GAOR, 69th sess, 68th plen mtg, Agenda Item 76, UN Doc A/RES/69/116 (18 December 2014) annex, 3 ('*Mauritius Convention on Transparency*').

[3] See J Anthony VanDuzer, 'Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation' (2007) 52(4) *McGill Law Journal* 681, 686.

investor-State arbitration is so important, why the *Rules on Transparency* should be widely adopted, and how the *Mauritius Convention on Transparency* can make that happen.

B. IDENTIFYING TRANSPARENCY IN INVESTOR-STATE ARBITRATION

Arbitrations are generally conducted in private, but may be strictly confidential by agreement.[4] The general position is that arbitration hearings are private;[5] evidence is presented privately and the deliberations and awards of arbitrators are private. As arbitration is the creation of agreement, the parties may agree that it should be confidential – and consequently, not transparent. Confidentiality may be the very reason the parties agreed to dispute resolution by arbitration in the first place,[6] to protect information such as trade secrets, business plans and financial results.[7]

The notion of confidential arbitration literally expresses the norm whereby the parties are free to agree to its confidentiality. This is an application of freedom of contract. This rationale does not transpose well to investor-State arbitration, which arises from treaties that protect investments or investors ('investment treaties'), reflecting agreement between Member States.[8] Unlike other forms of arbitration, investor-State arbitration

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[4] *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10[33] (Mason CJ) ('*Esso*'). Cf Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Wolters Kluwer, 2012) 103 [2.7.15].

[5] Third parties should not generally be present in arbitrations conducted under the *UNCITRAL Arbitration Rules* (as revised in 2010), Report of the United Nations Commission on International Trade Law – Forty-Third Session (21 June-9 July 2010), UN GAOR, 65th sess, Supp No 17, UN Doc A/65/17 (2010) annex I, 79, art 28(3) ('*UNCITRAL Arbitration Rules*').

[6] Cf litigation: Cindy G Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration' (2003) 14, *American Review of International Arbitration* 121, 121.

[7] Ileana M Smeureanu, *Confidentiality in International Commercial Arbitration* (Wolters Kluwer, 2011), xv.

[8] For the meaning of investments and investors, see Mark Mangan, 'Australia's Investment Treaty Program and Investor-State Arbitration' in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 191, 194-5.

has an unquestionably public character – the United Nations General Assembly resolution that adopted the *Mauritius Convention on Transparency* '[r]ecognizes the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations'.[9]

Transparency has long been an important part of investment treaties. The term can be used to refer to the proper conduct of a government. A lack of transparency might be challenged in investor-State arbitration[10] as a violation of the right to fair and equitable treatment provided for under an investment treaty.[11] This article is primarily concerned with transparency of process: transparency of the conduct of the investor-State arbitration itself.

In this context, transparency has a meaning corresponding to the common law principle of open justice.[12] The principle applies so that proceedings are heard in an open court to which any member of the public has admission.[13] Evidence is presented publicly.[14] Arguments are made in open court and sometimes even published on the Internet.[15] When a judge decides the case, the reasons are made public.[16] Open justice makes

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[9] *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, GA Res 69/116, UN GAOR, 69th sess, 68th plen mtg, Agenda Item 76, UN Doc A/RES/69/116 (18 December 2014) 1.

[10] See, eg, *Metalclad Corporation v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/97/1, 25 August 2000) [76]; cf *Thailand-Australia Free Trade Agreement*, signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005) arts 1401-05.

[11] Jacob Stone, 'Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment' (2012) 25(1) *Leiden Journal of International Law* 77, 78.

[12] See also *le principe de la publicité*: Severine Menetrey, 'L'evolution des fondements de la publicite des procedures judiciaires internes et son impact sur certaines procedures arbitrales internationales' (2008) 40 Ottawa Law Review 117.

[13] *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

[14] Attorney-General v Leveller Magazine Ltd [1979] AC 440, 450 (Lord Diplock).

[15] See, eg, High Court of Australia, *Current Cases – Submissions* <http://www.hcourt.gov.au/cases/current-cases-submissions>.

[16] *Ives v State of Western Australia [No 2]* [2010] WASC 221, [5] (Le Miere J); see also Frank Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787, 790.

courts better. It creates confidence in the administration of justice,[17] and confidence in the judiciary as a facilitator of dispute resolution.

Like open justice, transparency is recognisable in terms of several characteristics.[18] These could include registration of disputes (making the public aware that the arbitration exists), public access to key documents,[19] access to arbitral awards,[20] public access to the proceedings themselves,[21] and allowing the proceedings to be reported on.[22]

Generally, investor-State arbitration is not transparent. Magraw and Amerasinghe recognise that '[t]here are many deficits in the availability of information regarding investor-state arbitrations'.[23] They argue that the public might be ignorant of the following:

1) That a case or arbitration even exists;

2) What the allegations of wrongdoing are;

3) What the schedule of the arbitration is;

4) Who the arbitrators are likely to be, or are;

5) What legal issues are at stake;

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[17] In re S (A Child) [2004] UKHL 47 [15], [19]-[30] (Lord Steyn).
[18] Jack J Coe Jr, 'Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership' (2006) 54(5) *Kansas Law Review* 1339.
[19] *Esso* (1995) 183 CLR 10, 27 (Mason CJ); cf access to court documents: *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 525.
[20] Organisation for Economic Co-operation and Development (OECD) Investment Committee, 'Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures' (Working Papers on International Investment No 2005/1, OECD, June 2005) < http://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf > 3-4.
[21] *Esso* (1995) 183 CLR 10, 26 (Mason CJ); cf open courts: *McPherson v McPherson* [1936] AC 177, 200; *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs CJ).
[22] Ronald Bernstein, *Handbook of Arbitration Practice* (Sweet & Maxwell, 1987) [13.6.3].
[23] Daniel Barstow Magraw Jr and Niranjali Manel Amerasinghe, 'Transparency and Public Participation in Investor-State Arbitration' (2009) 15(2) *ISLA Journal of International and Comparative Law* 337, 342.

6) What legal arguments and factual assertions are being made;

7) What oral presentations are being made;

8) What procedural or interim orders are issued; and

9) What the final award is.[24]

Although this may be the general position, it is not absolute. Even before the advent of the *Rules on Transparency* some investment treaties provided for the transparent conduct of investor-State arbitration.[25] For example, Chapter 11 article 26 of the *ASEAN –Australia-New Zealand Free Trade Agreement* provides that 'the disputing Party may make publicly available all awards and decisions produced by the tribunal'.[26] The permissive 'may' is distinguishable from the position in respect of open courts, but it is a step in that direction.

The *North American Free Trade Agreement*[27] contains some minimal transparency measures.[28] Article 1126(13) provides that the NAFTA Secretariat 'shall maintain a public register' of the request for arbitration or notice of arbitration and receipts for that request or notice. At the very least, the public will know that an investor-State arbitration initiated under NAFTA exists.

At the time of writing, a leaked draft of the Investment Chapter of the *Trans-Pacific Partnership Agreement* (TPP) includes transparency provisions. A draft 'Article II.23'

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[24] Ibid 342-3 citing Daniel Magraw et al, 'Ways and Means of Citizen's Participation in Trade and Investment Dispute Settlement Procedures' (Working Paper No 53/08, Society of International Economic Law, 2008), 9.

[25] VanDuzer, above n 3, 687.

[26] *Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010) ch 11 art 26(1) cited in Mangan, above n 8, 213.

[27] *North American Free Trade Agreement*, signed 17 December 1992 [1994] CTS 2 (entered into force 1 January 1994).

[28] VanDuzer, above n 3, 697-708.

provides that, amongst other things, hearings of arbitral tribunals established under the TPP shall be generally open to the public.[29]

There are numerous other examples of transparency measures in modern investment treaties, providing varying levels of transparency.[30] If the *Rules on Transparency* are adopted by parties to investment treaties, it will take transparency to another level. The next section explains that there is a strong public interest in transparent investor-State arbitration.

C. THE CASE FOR TRANSPARENCY

The recent increase in the number of International Investment Agreements (IIAs) being concluded highlights the need for transparency in investor-State Arbitration. In February 2015, the United Nations Conference on Trade and Development (UNCTAD) published its annual IIA Issue Note,[31] which observes that the year 2014 saw the conclusion of 27 IIAs (14 bilateral investment treaties (BITs) and 13 'other IIAs'), bringing the total number of agreements to 3,268 (2,923 BITs and 345 'other IIAs'). The Note also highlights that, in 2014, claimants initiated 42 known treaty-based investor-State dispute settlement (ISDS) cases, with 40 per cent of new cases initiated against developed countries, which means that the relative share of cases against developed countries has been on the rise (the historical average is 28 per cent). By UNCTAD's count, the total number of ISDS cases has reached 608, the number of

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[29] See Wikileaks, *Secret Trans-Pacific Partnership Agreement (TPP) - Investment Chapter* (30 March 2015) <https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter/page-27.html>.

[30] See, eg, *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, signed 8 April 2014 [2014] ATS 43 (entered into force 12 December 2014); *Australia-Chile Free Trade Agreement*, signed 30 July 2008 [2009] ATS 6 (entered into force 6 March 2009).

[31] UNCTAD IIA Team, *IIA Issue Note No 1 – Recent Trends in IIAs and ISDS* (February 2015).

concluded cases reached 356: approximately 37 per cent (132 cases) were decided in favour of the State, and 25 per cent (87 cases) ended in favour of the investor. Approximately 28 per cent of cases (101) were settled and eight per cent of claims (29) were discontinued for reasons other than settlement. In the remaining two per cent (seven cases), a treaty breach was found but no monetary compensation was awarded to the investor. In light of these figures, the importance of transparency in investor-State arbitration will now be explored in detail.

1. Public Values

The public nature of investor-State arbitrations should not be ignored. The disputing entity's grievance will concern an action by a government: investor-State arbitrations consider foreign challenges to government measures intended to achieve public policy goals.[32]

The values that underlie the democracies of State parties to investment treaties favour transparency of investor-State arbitrations. In a democracy individuals *should* have access to information that concerns matters of public interest,[33] as a well-informed electorate is essential to the success of a responsible and accountable government. The Center for International Environmental Law and International Institute for Sustainable Development identify this as key to the public interest which distinguishes investor-State arbitration from commercial arbitration:

> the very presence of a State as a party to the arbitration raises a public interest because the nationals and residents of that State have an interest in how the government acts during the

[32] See VanDuzer, above n 3, 684.
[33] Magraw and Amerasinghe, above n 23, 348-9.

> arbitration and in the outcome of the arbitration. Moreover, the existence of this public interest has implications for the conduct of the arbitration: according to principles of human rights law and good governance, government activities should be subject to basic requirements of transparency and public participation.[34]

For example, as Australian citizens have an interest in the success of the tobacco plain packaging laws,[35] they also have an interest in Philip Morris' challenge to the laws.[36] Transparency of investor-State arbitration allows individuals to be informed of the true cost of domestic laws and, conversely, of their governments' commitments under investment treaties.

Even in non-democratic societies, the principle of transparency is fundamentally important. Any society that espouses the rule of law ought to be open in matters that affect the public interest.[37] Citizens cannot determine that there is a 'rule of law' without seeing it in operation. In the investment arbitration sphere, transparency allows the people to see that investor-State arbitration is conducted according to law. The transparent conduct of investor-State arbitration is a simple application of principles of good governance and the rule of law.

The case for transparency is enhanced by the fact that the decisions challenged in investment-State arbitrations often touch on very important issues of public policy

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[34] Center For International Environmental Law and International Institute for Sustainable Development, 'Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations' (December 2007) <http://www.ciel.org/Publications/CIEL_IISD_RevisingUNCITRAL_Dec07.pdf>4 quoted in Julie Lee, 'UNCITRAL's Unclear Transparency Instrument: Fashioning the Form and Application of a Legal Standard Ensuring Greater Disclosure in Investor-State Arbitrations' (2013) 33(2) *Northwestern Journal International Law & Business* 439, 446.

[35] *Tobacco Plain Packaging Act 2011* (Cth).

[36] See *Philip Morris Asia Limited v The Commonwealth of Australia (Notice of Claim)* (UNCITRAL, PCA Case No 2012-12, 22 June 2011).

[37] On the rule of law in non-democratic societies, see Brian Z Tamanaha, 'The Rule of Law for Everyone?' (2002) 55 *Current Legal Problems* 97, 98-100.

driven by social justice considerations.[38] In particular, investor-State arbitration could challenge laws protecting human rights,[39] environmental protection[40] or public health.[41] For example, recent investor-State arbitrations[42] have related to the drinking water supply system in Bolivia[43] and Tanzania,[44] the ban of an additive to gasoline in California,[45] the rescission of fishing permits in Chile due to environmental concerns,[46] and racially-focused affirmative action measures in South Africa.[47] The public interest in social policy translates to a public interest in the transparency of arbitrations challenging social policy.

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[38] Magraw and Amerasinghe, above n 23, 348-9. Cf *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) annex I art 40.

[39] See John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN HRC, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31(21 March 2011).

[40] See, eg, Permanent Court Of Arbitration, *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment* (2009).

[41] As in: Philip Morris Asia Limited v The Commonwealth of Australia, UNCITRAL, Written Notification of Claim pursuant to Agreement Between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (22 June 2011).

[42] See Center For International Environmental Law and International Institute for Sustainable Development, 'Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations' (December 2007) 4-5 cited in Lee, above n 34, 446.

[43] *Aguas del Tunari SA v Republic of Bolivia (Jurisdiction)* (ICSID, Case No ARB/02/3, 21 October 2005) <http://italaw.com/sites/default/files/case-documents/ita0020_0.pdf>.

[44] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania (Award)* (ICSID Case No ARB/05/22, 24 July 2008) <http://www.italaw.com/cases/157>; see also Fiona Marshall, 'The Precarious State of Sunshine: Case Comment on Procedural Orders in the *Biwater Gauff (Tanzania) Ltd v Tanzania* Investor-State Arbitration' (2007) 3(2) *McGill International Journal of Sustainable Development Law and Policy* 181.

[45] *Methanex Corporation v United States of America (Final Award of the Tribunal on Jurisdiction and Merits)* (Arbitration under Chapter 11 of the *North American Free Trade Agreement and the UNCITRAL Arbitration Rules*, 3 August 2005); see also Lucas Bastin, 'The Amicus Curiae in Investor-State Arbitration' (2012) 3(1) Cambridge Journal of International Comparative Law 208, 219.

[46] *Sociedad Anónima Eduardo Vieira v República de Chile (Award)* (ICSID Case No ARB/04/7, 21 August 2007); see also Jonathan C Hamilton, 'A Decade of Latin American Investment Arbitration' in Mary Helen Mourra and Thomas Carbonneau (eds), *Latin American Investment Treaty Arbitration: The Controversies and Conflicts* (Wolters Kluwer, 2008) 69, 75.

[47] *Piero Foresti v Republic of South Africa (Award)* (ICSID Case No ARB(AF)/07/1, 4 August 2010); see also Annika Wythes, 'Investor–State Arbitrations: Can the 'Fair and Equitable Treatment' Clause Consider International Human Rights Obligations?' (2010) 23(1) *Leiden Journal of International Law* 241, 242-4.

However, it should be noted that many investment treaties provide exceptions specifically for matters such as 'the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources'. For example, the United Nations Conference on Trade and Development's *World Investment Report 2014* indicates that of the 18 investment agreements concluded in 2013, all but three contained provisions protecting these matters,[48] providing 'that parties should not relax health, safety or environmental standards in order to attract investment.'[49] Similarly, the recently concluded *Korea-Australia Free Trade Agreement* provides that 'nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures … necessary to protect human, animal or plant life or health'.[50] The ascendancy of measures such as these strengthens the need for transparency of investor-State arbitration to ensure that these provisions are given their full force.

2. Fairness to Locals

The case for transparency is made stronger by the point that the parties initiating investor-State arbitrations are foreign entities. Investment treaties imbue foreign investors with rights not afforded to domestic citizens and investors.[51] Respondent States owe it to their citizens to be transparent, to fully communicate how the costs of defending investor-State arbitration weigh up against the benefits flowing from investment treaties.

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[48] United Nations, 'World Investment Report 2014' (Paper presented at United Nations Conference on Trade and Development, New York and Geneva) (2014) 117.
[49] Ibid 118.
[50] Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea, signed 8 April 2014, [2014] ATNIF 4 (not yet in force) art 22.1.3.
[51] Razeen Sappideen and Ling Ling He, 'Investor-State Arbitration: The Roadmap from the Multilateral Agreement on Investment to the Trans-Pacific Partnership Agreement' (2012) 40(2) *Federal Law Review* 207, 218.

As members of the public could be affected by the outcome of investor-State arbitration, they ought to have an opportunity, in appropriate cases, to put forward arguments that would otherwise not be presented.[52] Thus the right of non-parties to make submissions as *amici curiae* is an important aspect of transparency.

3. For the Foreign Investors

Transparency advantages investors. When material about investor-State arbitration is made public, other investors with interests in the respondent country will be in a better position to understand their rights under the investment treaty. In this way transparency measures can allow investors to more accurately assess the real risk to their investment in different States.[53]

4. For the Institution Itself

Another important advantage of transparency is that it improves the quality of decision-making.[54] This point is also the foundation of the principle of open justice. In the leading case of *Scott v Scott*, Lord Shaw quoted the philosopher, Jeremy Bentham, 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.'[55] If an investor-State arbitration is subject to international scrutiny, the arbitrators would be motivated to conduct the arbitration impeccably out of pure self-interest. Similarly, if the award is to be published online, they would be motivated to ensure it is free of error.

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[52] See also Bastin, above n 45.

[53] Mark Gillard and Louise Dargan, *Clayton Utz Insights – Transparency is the New Black in Investor-State Arbitration: UNCITRAL's New Transparency Rules* (1 August 2013) Clayton Utz <http://www.claytonutz.com/publications/edition/01_august_2013/20130801/transparency_is_the_new_black_in_investor-State_arbitration_uncitrals_new_transparency_rules.page>.

[54] Magraw and Amerasinghe, above n 23, 345-8.

[55] *Scott v Scott* [1913] AC 417, 477 (Lord Shaw).

Publicity translates to accountability. Given the important public nature of investor-State arbitrations, it is important that the proceedings are conducted properly and that arbitrators are accountable.

In the longer term, the publication of arbitral decisions will create a *de facto* body of case law.[56] This has already happened to an extent, with the regular publication of decisions and other important documents by the International Centre for Settlement of Investment Disputes (ICSID).[57] Although there is no doctrine of *stare decisis* for international investment law,[58] tribunals do not make their decisions in a vacuum. The same pressures that encourage an arbitrator to decide fairly in a single arbitration will encourage the arbitrator to behave fairly across multiple arbitrations. Transparency could encourage the development of consistent decision-making across investor-State arbitrations conducted under the *UNCITRAL Arbitration Rules*. By promoting consistency, transparency will also promote relative equality in the treatment of parties to investor-State arbitration. Thus transparency can serve the principle of equality at the foundation of the rule of law: that we ought to treat like cases alike and different cases differently.[59]

By improving the quality of decision-making, transparency also assists in promoting investor-State arbitration as a means of effective dispute resolution. If the public

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[56] Cf Thomas Walde, 'Confidential Awards as Precedent in Arbitration – Dynamics and Implication of Award Publication' in Yas Banifatemi (ed), *Precedent in International Arbitration* (Juris Publishing, 2008 113, 115; Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521, 1545.

[57] See *Cases* < https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>.

[58] Only the parties are bound by the award: Kyla Tienhaara, Submission No 86 to Department of Foreign Affairs and Trade, *Australia's Particiation in the Trans-Pacific PartnershipNegotiations*, 19 May 2010, 5.

[59] HLA Hart, *The Concept of Law* (Clarendon Law Series, 2nd ed, 1997 159.

believes that arbitrations are conducted fairly and effectively, individuals may be less likely to complain about the grant of arbitration rights to private entities under future investment treaties. Transparency could legitimise investor-State arbitration itself.[60] On this reasoning, transparency promotes future investment treaties and so indirectly promotes trade and foreign investment.

5. Disadvantages?

Despite the advantages identified by this article, transparency of investor-State arbitrations does have some disadvantages.[61] Chief among them is that transparency can result in delays and higher costs. For example, allowing the involvement of non-parties as *amici curiae* would require the debate of more material,[62] requiring more time and, consequently, higher legal fees. On the side of the State-respondent, those costs would ultimately be borne by taxpayers. These disadvantages may be minimised by limiting the length of non-party submissions and by mandating that a non-party must have a sufficient interest as a prerequisite to involvement.

In the authors' view, the disadvantages of transparency in investor-State arbitration are vastly outweighed by the advantages of transparency. Recently, UNCITRAL affirmed that view.

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[60] See Magraw and Amerasinghe, above n 23, 351.
[61] Ibid, 352-6.
[62] If amici submissions are accepted the parties should have a right to respond: see, eg, *Australia-Chile Free Trade Agreement*, signed 30 July 2008 [2009] ATS 6 (entered into force 6 March 2009) art 10.20(2).

D. RECENT DEVELOPMENTS AT UNCITRAL:

THE *RULES ON TRANSPARENCY*

The *Rules on Transparency* mark a departure from the position that arbitrations are generally private or confidential.[63] In many respects, the rules transpose aspects of the principle of open justice to the conduct of investor-State arbitration.

The public will gain access to basic information regarding investment-State arbitrations conducted under the *UNCITRAL Arbitration Rules* by the publication of key documents on the Internet.[64] These documents will be available on a 'Transparency Registry' maintained by the UN Secretary-General through the UNCITRAL secretariat.[65] A number of matters will be published, including the following:

- information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made (upon commencement of the arbitration);[66]
- the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written submissions by any disputing party;
- a table listing all exhibits, expert reports and witness statements (if prepared for the proceedings);

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[63] See Joachim Delaney, 'Investor-State Arbitrations: UNCITRAL Adopts New Transparency Rules' (2013) 1(1) *Australian Centre for International Commercial Arbitration Review* 32, 33.
[64] Keith Loken, 'Introductory Note to UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration' (2013) 52(6) *American Society of International Law* 1300, 1300.
[65] See United Nations Commission on International Trade Law, *Transparency Registry* (2015) <http://www.uncitral.org/transparency-registry/en/introduction.html>.
[66] *Rules on Transparency* art 2.

- any written submissions by the non-disputing party (or parties) to the treaty and by third persons;
- transcripts of hearings, where available; and
- orders, decisions and awards of the arbitral tribunal.[67]

Hearings of arbitrations will be public to the extent that an open hearing will not undermine the integrity of the arbitral process or divulge confidential information.[68] This is directly analogous to the application of the principle of open justice:[69] courts may be closed if necessary to secure the proper administration of justice,[70] and publication of proceedings can be restricted to protect confidential information.[71]

A third party can make submissions in the arbitration if it has a 'significant interest' in the matter and will assist the tribunal in a determination of fact or law.[72] This position is directly analogous to the common law principles relevant to amici curiae: in a court's discretion, an *amicus curiae* (or 'friend of the court') can make submissions if those submissions would be of assistance.[73] Similar rights are afforded to non-disputing State parties to the investment treaty, who may be invited to make submissions on interpretation of the treaty.[74]

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[67] *Rules on Transparency* art 3(1).
[68] *Rules on Transparency* art 6; see also art 7.
[69] *David Syme & Co Ltd v General Motor-Holden's Ltd* [1984] 2 NSWLR 294, 299-300 (Street CJ); *Scott v Scott* [1913] AC 417, 437-438 (Lord Haldane); *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR, 353 (Spigelman CJ).
[70] *Hogan v Hinch* (2011) 243 CLR 506 [21] (French CJ).
[71] *Rinehart v Welker* [2011] NSWCA 403 [113] (Young JA).
[72] *Rules on Transparency* art 4(3).
[73] *Levy v Victoria* (1997) 189 CLR 579, 604 (Brennan CJ); [1974] 1 NSWLR 391, 399 (Hutley JA).
[74] *Rules on Transparency* art 5(1); see also Delaney, above n 63, 34.

These principles of transparency – like the principle of open justice[75] – are not absolute. Article 7 of the *Rules on Transparency* provides for exceptions. Confidential information (including confidential business information) is protected, as is the 'integrity of the arbitral process'.[76] A respondent State need not make information publicly available if it would be contrary to its security interests.[77]

E. FUTURE APPLICATION OF THE *RULES ON TRANSPARENCY*: THE *MAURITIUS CONVENTION ON TRANSPARENCY*

It is likely that the *Rules on Transparency* will be widely adopted for investor-State arbitration conducted under the *UNCITRAL Arbitration Rules*. Arbitration conducted under the *UNCITRAL Arbitration Rules* and initiated under treaties concluded after 1 April 2014 will be covered as a matter of course.[78]

At the time of writing, at least nine new investment treaties have been concluded that provide for investor-State arbitration under the *UNCITRAL Arbitration Rules*. Accordingly, arbitration conducted under these investment treaties that are also subject to the *UNCITRAL Arbitration Rules*[79] will be subject to the *Rules on Transparency*. These new investment treaties include the following:[80]

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[75] *Hogan v Hinch* (2011) 243 CLR 506 [20] (French CJ); *West Australian Newspapers Ltd v The State of Western Australia* [2010] WASCA 10 [30] (Owen JA).
[76] *Rules on Transparency* arts 7(1)-7(7).
[77] *Rules on Transparency* art 7(5).
[78] *Rules on Transparency* art 1(1).
[79] Note that some investment treaties provide for investor-State arbitration under alternative arbitration rules; that is, even if investor-State arbitration is initiated under such an investment treaty, the application of the *UNCITRAL Arbitration Rules* is not guaranteed. See eg Japan – Uruguay BIT, signed 26 January 2015, art 31(3).
[80] The following information was sourced from: UNCTAD, *Investment Policy Hub* (2015) <http://investmentpolicyhub.unctad.org/>

- Japan – Uruguay BIT, signed on 26 January 2015;[81]
- Canada – Côte d'Ivoire BIT, signed on 30 November 2014;[82]
- Canada – Mali BIT, signed on 28 November 2014;[83]
- Canada – Senegal BIT, signed on 21 November 2014;[84]
- Japan – Kazakhstan BIT, signed on 23 October 2014;[85]
- Canada – Republic of Korea FTA, signed on 22 September 2014;[86]
- Canada – Serbia BIT, signed on 1 September 2014;[87]
- Canada – Nigeria BIT, signed on 6 May 2014;[88] and
- Australia – Republic of Korea FTA, signed on 8 April 2014.[89]

However, even when the *UNCITRAL Arbitration Rules* are selected, the application of the *Rules on Transparency* is not guaranteed. Parties to an investment treaty may agree

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[81] *Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment*, signed 26 January 2015 <http://investmentpolicyhub.unctad.org/IIA/country/105/treaty/3549>.

[82] *Canada - Côte d'Ivoire Foreign Investment Promotion and Protection Agreement*, signed 30 November 2014 <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3539>.

[83] *Canada - Mali Foreign Investment Promotion and Protection Agreement*, signed 28 November 2014 <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3540>.

[84] *Canada - Senegal Foreign Investment Promotion and Protection Agreement*, signed 27 November 2014 < http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3541>.

[85] *Agreement between Japan and the Republic of Kazakhstan for the Promotion and Protection of Investment*, signed 23 October 2014 <http://investmentpolicyhub.unctad.org/IIA/country/107/treaty/3548>.

[86] *Canada – Korea Free Trade Agreement*, signed 22 September 2014 <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/toc-tdm.aspx?lang=eng>.

[87] *Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments*, signed 1 September 2014 <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3502>.

[88] *Canada-Nigeria Foreign Investment Promotion and Protection Agreement (FIPA)*, signed 6 May 2014 <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3531>.

[89] *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, signed 8 April 2014 [2014] ATS 43.

that the *Rules on Transparency* will not apply.[90] That is, State parties may opt out of transparent investor-State arbitration.

Arbitration initiated subject to treaties concluded before 1 April 2014 will be covered if the State parties to the treaty agree, or if the parties to the arbitration agree.[91] Further, the *Rules on Transparency* are 'available for use' in arbitrations not conducted under the *UNCITRAL Arbitration Rules*[92] and so might apply if State parties to a relevant treaty agree, or if the parties to an investor-State arbitration agree. Loken recognises that this 'opt-in' approach means that 'absent further affirmative steps, the [*Rules on Transparency*] will not apply when the *UNCITRAL Arbitration Rules* are selected under any of the approximately 3,000 investment treaties currently in force globally.'[93]

UNCITRAL has recognised that the need to opt-in is an issue. At its forty-fourth session, it:

> confirmed that the question of applicability of the legal standard on transparency to ... [pre-April 2014] investment treaties ... was part of the mandate of the Working Group and a question of great practical interest, taking account of the high number of investment treaties currently in existence.[94]

In response to the issue UNCITRAL's Working Group II has developed the *Mauritius Convention on Transparency*, which provides for the application of the *Rules on*

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[90] *Rules on Transparency* art 1(1).
[91] *Rules on Transparency* art 1(2).
[92] *Rules on Transparency* art 1(9).
[93] Loken, above n 64, 1301.
[94] *Settlement of Commercial Disputes: Applicability of the UNCITRAL Rules on Transparency to the Settlement of Disputes Arising Under Existing Investment Treaties – Note by the Secretariat*, UN GAOR, 46th sess, UN Doc A/CN.9/784 (6 March 2013) 2 [2] ('*Note by the Secretariat*').

Transparency to arbitrations arising out of investment treaties concluded before April 2014.[95]

The *Mauritius Convention on Transparency* provides a streamlined basis for States to opt into the *Rules on Transparency* in respect of their pre-April 2014 investment treaties. The *Mauritius Convention on Transparency* allows the *Rules on Transparency* to apply to arbitrations arising under almost 3,000 investment treaties concluded before that date. The convention gives those States that wish to make the *Rules on Transparency* applicable to their treaties, an efficient and flexible mechanism to do so, without creating any expectation that other States would necessarily have to use the mechanism offered by the convention. In short, the *Mauritius Convention on Transparency* provides States that so wish a powerful instrument to enhance transparency in investor-State dispute settlement.

The *Mauritius Convention on Transparency* was opened for signature on 17 March 2015. At the time of writing, ten countries have signed on: Canada, Finland, France, Germany, Mauritius, Sweden, Switzerland, Syria, the United Kingdom and the United States of America.[96] The Convention is not yet in force: it will enter into force six months after the deposit of the third instrument of ratification.[97]

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[95] See *Note by the Secretariat*, UN Doc A/CN.9/784, 2.

[96] See UNCITRAL, *Status - United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)* (2015) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html>.

[97] ie after acceptance, approval or accession; see United Nations Information Service, *Signing Ceremony for the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (UNIS/L/214, 17 March 2015) <http://www.unis.unvienna.org/unis/en/pressrels/2015/unisl214.html>.

It is important to emphasise that, once in force, the Convention could affect countries other than the current signatories. Article 2 provides that the *Rules on Transparency* shall generally apply to investor-State arbitration where the respondent State is a party to the Convention, if the claimant (i.e. the investor) is of a State that is a party to the Convention, or if the claimant agrees to the application of the *Rules on Transparency*. This is a continuation of the opt-in approach. Still, this is good for the cause of transparency. UNCITRAL's transparency standards can potentially apply to investor-State arbitration initiated under any investment treaty of a State that is a party to the *Mauritius Convention*. This could impact dozens of investment treaties. In Asia and the Pacific, it could affect the following:

- Thailand's BITs with Canada, Finland, Germany, Sweden and the United Kingdom;[98]
- Kuwait's BITs with Canada, Finland, France, Germany, Mauritius, Sweden, Syria and the United Kingdom;[99]
- Iraq's BITs with France, Germany and Syria;[100]
- Hong Kong's BITs with Finland, France, Germany, Sweden and the United Kingdom;[101]
- Singapore's BITs with Canada, France, Germany, Mauritius and the United Kingdom; and[102]

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[98] See UNCTAD, *Thailand – Bilateral Investment Treaties (BITs)* (2015) Investment Policy Hub <http://investmentpolicyhub.unctad.org/IIA/CountryBits/207>.
[99] UNCTAD, *Kuwait – Bilateral Investment Treaties (BITs)* (2015) Investment Policy Hub <http://investmentpolicyhub.unctad.org/IIA/CountryBits/112>.
[100] UNCTAD, *Iraq – Bilateral Investment Treaties (BITs)* (2015) Investment Policy Hub <http://investmentpolicyhub.unctad.org/IIA/CountryBits/99#iiaInnerMenu>.
[101] UNCTAD, *Hong Kong, China SAR – Bilateral Investment Treaties (BITs)* (2015) Investment Policy Hub <http://investmentpolicyhub.unctad.org/IIA/CountryBits/93>.

- The Republic of Korea's BITs with Finland, France, Germany, Mauritius, Sweden and the United Kingdom.[103]

The future uptake of the *Mauritius Convention on Transparency* and the future application of the *Rules on Transparency* more broadly will be dependent on international attitudes towards the importance of transparency.

1. Attitudes Towards Transparency

In recent years the view that investor-State arbitration should be transparent has gained momentum.[104] The very fact that the *Rules on Transparency* were adopted indicates at least some contemporaneous support for transparency among the international community. For example, UNCITRAL has 60 State members[105] that contributed to adoption of the *Rules on Transparency*.[106] Various non-governmental organisations (NGOs) from around the world were represented at the sessions that led to their formulation. Importantly, both the *Rules on Transparency* and the *Mauritius Convention on Transparency* were approved by consensus.[107]

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[102] UNCTAD, *Singapore – Bilateral Investment Treaties (BITs)* (2015) Investment Policy Hub <http://investmentpolicyhub.unctad.org/IIA/CountryBits/190#iiaInnerMenu>.
[103] UNCTAD, *Republic of Korea – Bilateral Investment Treaties (BITs)* (2015) Investment Policy Hub <http://investmentpolicyhub.unctad.org/IIA/CountryBits/111#iiaInnerMenu>.
[104] See, eg, United Nations, 'Dispute Settlement – International Commercial Arbitration' (Module presented at United Nations Conference on Trade and Development, 2005), 8.
[105] Structured to ensure that the various geographic regions and the principal economic and legal systems of the world are represented, the 60 member States include 14 African States, 14 Asian States, 8 Eastern European States, 10 Latin American and Caribbean States and 14 Western European and other States. Currently, the Asian States members are China, Indonesia, Japan, Republic of Korea, Thailand, Singapore, Pakistan, India, Iran, Malaysia, Philippines, Jordan, Kuwait and Fiji.
[106] United Nations Commission on International Trade Law, *Origin, Mandate and Composition of UNCITRAL* (20 June 2014), 2.
[107] See *Report of the United Nations Commission on International Trade Law Forty-Sixth Session*, UN GAOR, 68th sess, UN Doc A/67/17 (8-26 July 2013) 2. For Japan, Professor Shotaro Hamamoto, see, eg, Shotaro Hamamoto and Luke Nottage, 'Foreign Investment In and Out of Japan: Economic Backdrop,

Explicit statements on State dispositions to transparency are not readily available. The European Union and Canada join together in a notable exception: they have publicly announced that their forthcoming Comprehensive Economic and Trade Agreement ('CETA')[108] will be the first agreement to apply the *Rules on Transparency* 'in substance'.[109]

Important sections of the international community are embracing transparency. This article is another illustration of support within the academy.[110] Further, there is support among legal practitioners working in this area. For example, Christian Leathley, partner at Herbert Smith Freehills in London, was involved in drafting the new rules as the International Bar Association's representative to WGII. In July 2013 he described the *Rules on Transparency* as 'a welcome development and the product of tremendous work on the part of many member states and observers and notably the secretariat of UNCITRAL.'[111]

If support from the profession, the academy and NGOs is maintained, more and more States will join the transparency bandwagon. Failure to do so will come at a cost.

Domestic Law, and International Treaty-Based Investor-State Dispute Resolution' (Sydney Law School Research Paper No 10/145, 2010). For Indonesia, Professor Huala Adolf, see, eg, Huala Adolf, *Arbitration Under the Indonesian Investment Law* (Sinar Grafika, 2008).

[108] See European Commission, *EU and Canada Strike Free Trade Deal* (18 October 2013) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=973>.

[109] European Commission, *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)* (26 September 2014) <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf>.

[110] See also Jürgen Kurtz, 'Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication' (2012) 27(1) *ICSID Review* 65, 66.

[111] Christian Leathley and Deborah Wilkie, *UNCITRAL Unveils New Transparency Rules for Investor-State Arbitrations*, Herbert Smith Freehills Dispute Resolution – Arbitration Notes (18 July 2013) <http://hsfnotes.com/arbitration/2013/07/18/uncitral-unveils-new-transparency-rules-for-investor-state-arbitrations-2/>.

2. The Cost of Opting Out of Transparency

The primary cost of opting out of transparency is the loss of an opportunity to legitimise a State's commitments under investment treaties and the loss of an opportunity to legitimise investor-State arbitration itself.

This cost should not be underestimated. The rights of investors to initiate investor-State arbitration have attracted the ire of diverse voices within the international community. On the left, those rights are criticised for providing a means for multi-national corporations (MNCs) to challenge domestic public health, human rights and environmental protection measures.[112] On the libertarian right, investor-State arbitration has been identified as undermining the broader agenda of trade liberalisation by being controversial, as an unnecessary 'subsidy for MNCs and a tax on everyone else'.[113] From the centre, investor-State arbitration has been characterised as leading to regulatory chill.[114] These critiques translate to a legitimacy problem, which could have real consequences for the future of the institution.[115]

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[112] See, eg, Ruth Townsend, When Trade Agreements Threaten Sovereignty: Australia Beware, The Conversation (15 November 2013) <http://theconversation.com/when-trade-agreements-threaten-sovereignty-australia-beware-18419>.

[113] Dan Ikenson, *Eight Reasons to Purge Investor-State Dispute Settlement From Trade Agreements*, Forbes (3 April 2014) <http://www.forbes.com/sites/danikenson/2014/03/04/eight-reasons-to-purge-investor-state-dispute-settlement-from-trade-agreements/?ss=business:energy; see also Brent Patterson, *Understanding Right-Wing Opposition to Investor-State Provisions*, The Council of Canadians (7 March 2014) <http://canadians.org/blog/understanding-right-wing-opposition-investor-state-provisions>.

[114] Productivity Commission, Australian Government, *Bilateral and Regional Trade Agreements: Final Report* (13 December 2010) <http://www.pc.gov.au/projects/study/trade-agreements/report> 271, 274; cf Kurtz cogently argues that the APC's report was based on 'a set of problematic assumptions and omissions' which cast doubt on its recommendations: Kurtz, above n 110, 66.

[115] For example, the Parliament of Australia is considering an anti-investor-State arbitration bill, which would return Australia to its hardline April 2011 position: *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 (Cth)*; see also Luke Nottage, 'Throwing the Baby Out with the Bathwater: Australia's New Policy on Treaty-Based Investor-State Arbitration and its Impact in Asia' (2013) 37(2) *Asian Studies Review* 253.

Transparency is not a panacea for these critiques, or for the issues that they raise. However, transparency can ameliorate the sting of some criticism. Transparency is a necessary condition for any meaningful independent analysis of the benefits of investor-State arbitration. That analysis, and the public conversation surrounding it, will strengthen investor-State arbitration and so strengthen investment treaties.

F. CONCLUSION

UNCITRAL's *Rules on Transparency* present an opportunity for States to improve investor-State arbitration. If that opportunity is realised it will advantage investors by reinforcing the benefits enjoyed under investment treaties. More broadly, investment treaties are a means for controlling risks associated with foreign investment.[116] Their uptake can translate to increased foreign investment and a subsequent path towards economic development.[117]

UNCITRAL's work on the *Mauritius Convention on Transparency* is a positive development. We urge States to opt-in to the *Rules on Transparency* and sign and ratify the *Mauritius Convention on Transparency*. Transparency in treaty-based investor-State arbitration can enhance international trade and development in the Asia-Pacific region and beyond. The choice before us is not between having or not having transparency in investor-State arbitration. The choice before us is having or not having investor-state-arbitration. Transparency is the only way forward for investor-State arbitration.

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[116] Mangan, above n 8, 191.

[117] Christopher Dugan et al, *Investor-State Arbitration* (Oxford University Press, 2008), 6.