An Evaluation and Critique of the Transparency Movement in Investment Treaty Arbitration

Rebecca E. Khan

A dissertation submitted in partial fulfillment of the requirements for the degree of

Doctor of Juridical Science (S.J.D.)

under the supervision of
Tibor Várady
Professor Emeritus

Department of Legal Studies
Central European University
Budapest, Hungary

June 2018

This dissertation does not contain materials accepted by any other institution for any other degree nor materials previously written and/or published by another person unless otherwise acknowledged.

s/ Rebecca E. Khan

Abstract

Enhancing transparency is touted as one of the responses to the ongoing criticism regarding the legitimacy of the investor-State dispute settlement system. Since investment disputes involve matters of public interest, granting public access to certain aspects of the arbitral proceedings ensures that members of the citizenry have the opportunity to be informed of the matters in dispute, as well as to be heard on these issues if the outcome potentially affects them. A palpable move towards increased transparency in investment arbitration has resulted in the revision of institutional arbitral rules, a set of rules devoted entirely to transparency, and even a convention. This dissertation evaluates the movement for increased transparency in investor-State dispute settlement – with a focus on investment treaty arbitration – and critique the efficacy of the transparency measures currently in place. This study also proposes recommendations for further enhancing the transparency of investment arbitration, by highlighting emerging issues that have yet to be examined from a transparency paradigm.

This dissertation aims to operationalize the concept of transparency for international investment arbitration, by determining: (1) what information must be made accessible; (2) who is obliged to make such information accessible; (3) who is entitled to access such information; (4) how the information can be accessed; (5) when and where access must be granted; and (6) why the information must be accessible. The exceptions to the above also form part of the analysis in this dissertation, because a balanced approach to transparency is preferred to an absolute one. The exceptions to transparency are expressed in the texts of rules and the arbitral decisions discussed throughout this dissertation; a study of this material attests to the delicate task of finding an appropriate balance of transparency and confidentiality.

This dissertation examines transparency from different angles: the transparency of the investor-State dispute settlement system towards the public, the transparency owed by the actors within the system towards the arbitral process, and the effects of transparency on these actors. The literature on transparency has heretofore focused on the first angle almost exclusively. It is hoped that the fresh perspectives in this dissertation can contribute to the legal scholarship on transparency in a novel manner.

Acknowledgements

This dissertation would not have been possible without the invaluable guidance of my supervisor, Professor Emeritus **Tibor Várady**. I am tremendously grateful for benefiting from the insights of one of the most distinguished pillars of the international arbitration community; his decades of experience in arbitration are not only inspiration to a young professional, but a source of wisdom that has shaped my research with nuance and depth. As I was previously a litigation practitioner prior to entering the doctoral program, I consider myself very fortunate that my academic path has been graciously steered by a well-respected arbitrator whose appreciation of the practical aspects of international arbitration have ensured that my research can contribute to actual arbitral practice.

My thanks also go to Professor **Tibor Tajti** and Professor Emerita **Csilla Kollonay-Lehoczky**, who were directors of the doctoral program during the years that I was completing the various requirements for the degree. Their encouragement, understanding, and kindness will always be remembered with much gratitude.

Thanks to generous financial support from **Central European University**, part of the research for this dissertation was carried out at the **Max Planck Institute for Comparative Public Law and International Law** in Heidelberg, Germany. I am very grateful to Prof. Dr. iur. **Anne Peters** for warmly welcoming me to the Institute and giving me the opportunity to present my research and receive feedback from the supportive community of legal scholars during the three months I was there.

I am also forever grateful to **The George Washington University Law School** in Washington, D.C. Having obtained my Master of Laws (LL.M.) in International and Comparative Law as a Buergenthal scholar of the Law School in addition to a Fulbright grant, I have greatly benefited from continued and unlimited use of the library, which has one of the most complete collections on international investment arbitration in the world. I am thankful for this generous alumni benefit which allowed me to conduct a substantial amount of research for this dissertation during my visits to Washington, D.C.

My colleagues in the doctoral program at Central European University have become dearest friends, and my memories of Budapest will always be intertwined with the great S.J.D. adventure embarked upon with these comrades-in-arms. I am thankful for their friendship, which I am confident will endure despite the distances of oceans and continents.

Finally, I would like to thank my family, in particular my parents **Eloisa** and **Ismael**, for their support for all my endeavors throughout the years, and for their many visits to Budapest.

Table of Contents

Introduction

The proliferation of international investment agreements since the 1990s[1] has as a corollary a brisk increase in the number of investment arbitration cases between investors and the States that hosted foreign investment.[2] Just as rapidly, a backlash against investor-State dispute settlement has gained momentum, questioning a system which was originally envisioned to provide foreign investors with recourse against governmental abuse of power. Inconsistency in arbitral jurisprudence, perceived interference with the regulatory powers of sovereign States, and the use of a private dispute resolution process for cases involving public interest are among the many criticisms that have led to the contention that the investor-State dispute settlement system lacks legitimacy.[3]

Investment treaty arbitrations place private parties[4] against sovereign States in a dispute resolution process that was modeled on international commercial arbitration.[5] Because international commercial arbitration was intended for resolving disputes between private parties, the confidentiality of proceedings was assumed by default. The lack of publicly available information about investment cases has drawn public scrutiny in recent years, and a

[1] The United Nations Conference on Trade and Development (UNCTAD) notes that by year-end of 2016, the regime of international investment agreements consisted of 3,324 treaties. WORLD INVESTMENT REPORT 2017: INVESTMENT AND THE DIGITAL ECONOMY, xii (UNCTAD ed., 2017).
[2] Recent statistics highlight the continuing surge in investment claims: 62 new cases were filed in 2016 alone. *Id.* at xii.
[3] THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY, xxxviii (Michael Waibel et al. eds., 2010).
[4] An emerging issue that will not be specifically addressed in this dissertation concerns the implications of State-owned enterprises acting as claimants and suing host States under bilateral investment treaties. The issue will take this dissertation farther afield than necessary in examining its main focus on transparency in investment arbitrations involving private parties and States. *See generally* Mark Feldman, *State-Owned Enterprises as Claimants in International Investment Arbitration*, 31 ICSID REV. - FOREIGN INVEST. LAW J. 24–35 (2016).
[5] Julie A. Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT. LAW 367–436, 394 (2013).

movement for increased transparency has accelerated since the beginning of this century. Soon after the International Centre for Settlement of Investment Disputes (ICSID) amended its arbitration rules in 2006 to allow for more transparency in cases it administered, an ICSID Tribunal made the observation that "[c]onsiderations of confidentiality and privacy have not played the same role in the field of investment arbitration, as they have in international commercial arbitration."[6] The Tribunal went on to emphasize that "there is now a marked tendency towards transparency in treaty arbitration."[7]

Enhancing transparency is touted as one of the responses to the ongoing criticism regarding the legitimacy of the investor-State dispute settlement system. Since investment disputes involve matters of public interest, granting public access to certain aspects of the arbitral proceedings ensures that members of the citizenry have the opportunity to be informed of the matters in dispute, as well as to be heard on these issues if the outcome of the arbitration potentially affects them. A palpable move towards increased transparency in investment arbitration has resulted in the revision of institutional arbitral rules, a set of rules devoted entirely to transparency, and even a convention.

The United Nations Conference on Trade and Development (UNCTAD) has identified some of the factors that have contributed to calls for increased transparency in the investor-State dispute settlement system, including: "the increasing emphasis on the public interest inherent within investor-State disputes", "the possible involvement of broader human rights concerns", and "the determination of large damages awarded against host States".[8] One of the most prominent scholars in the development of international investment law, M. Sornarajah,

[6] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006 ¶ 114.
[7] *Id.*
[8] TRANSPARENCY: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, 8 (UNCTAD ed., 2012).

observes that the clamor for public participation in investment arbitration was spurred by the global attention drawn by cases involving issues such as water rights, corruption of government officials, or access to medicine.[9] The public interest in such cases highlights the reality that these investment disputes affect not just the interests of the State parties to the investment treaty and the foreign investor, but have an impact on global concerns.[10]

This dissertation will evaluate the movement for increased transparency in investor-State dispute settlement – with a focus on investment treaty arbitration – and critique its efficacy in relation to addressing the legitimacy crisis currently being faced by the system. This study will also propose recommendations for further enhancing the transparency of the investor-State dispute settlement system, by looking at emerging issues that have yet to be examined from a transparency paradigm.

Some of the discussion in this dissertation will point to the difference between investor-State dispute settlement and international commercial arbitration as the springboard for the transparency movement. The first chapter will take a deeper look at the divergence of investment arbitration from international commercial arbitration, including a focused examination of public interest as the key difference that has spurred the transparency movement in investment arbitration.

Transparency: Defining an elusive concept

Transparency is currently the topic of study across several areas of international law. As a concept, however, transparency eludes definition. In recent collections of academic articles on transparency in international law, a general consensus among the editors and

[9] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 540 (2017).
[10] *Id.* at 540.

contributors to these books appears to be that transparency is an oft-bandied term that encompasses amorphous ideals.[11]

Definitions of transparency are often made through association, such as with concepts like "publicity", "publicness", and "openness".[12] "Transparency is often associated with information and knowledge, legitimacy and accountability, participatory democracy and good governance. It means different things to different people in different contexts."[13]

Often, attempts at defining transparency are made by proffering what it is *not*. Looking at transparency across different fields of international law, renowned public international law scholar Anne Peters observes, "…if something is transparent, you can see through it. The opposites of transparency are not only opacity, secrecy and confidentiality, but also complexity and disorder. The multitude of antonyms shows that the concept of transparency has multiple meanings itself, *inter alia* depending on the context."[14]

In the specific context of investment arbitration, "confidentiality" is the most often used antonym to transparency. In international arbitration more generally, confidentiality is an "instrument designed to control third parties' access to the arbitral proceedings",[15] and it refers

[11] "Transparency has been called 'an overused but underanalysed concept'." Anne Peters, *Towards Transparency as a Global Norm*, *in* TRANSPARENCY IN INTERNATIONAL LAW 534–607, 534 (Andrea Bianchi & Anne Peters eds., 2013); "Transparency is not just difficult to couch in legal terms. It is also difficult to grasp in terms of content. […] In fact the definition has haunted us (i.e. the co-editors) from the outset of this project." Andrea Bianchi, *On Power and Illusion: The Concept of Transparency in International Law*, *in* TRANSPARENCY IN INTERNATIONAL LAW 1–19, 7–8 (Andrea Bianchi & Anne Peters eds., 2013); "'Transparency' has become a catchword in the economic-political debate. The term is used and overused - sometimes perhaps misused." Jens Forssbæck & Lars Oxelheim, *The Multifaceted Concept of Transparency*, *in* THE OXFORD HANDBOOK OF ECONOMIC AND INSTITUTIONAL TRANSPARENCY 3–30, 3 (Jens Forssbæck & Lars Oxelheim eds., 2015); "In the last two decades, transparency has become a ubiquitous, but stubbornly ambiguous term." RESEARCH HANDBOOK ON TRANSPARENCY, 1 (Robert G. Vaughn & Padideh Ala'i ed., 2014).

[12] Peters, *supra* note 11 at 535.

[13] Bianchi, *supra* note 11 at 8.

[14] Peters, *supra* note 11 at 534–535.

[15] Ileana M. Smeureanu, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION (2011) 2.

to the "secrecy attached to the materials created, presented and used in the context of the arbitral process."[16]

As will be examined further in the succeeding chapters of this dissertation, assessing confidentiality in the context of investor-State dispute settlement was the first steps leading to the transparency movement. As Knahr and Reinisch have noted in an oft-cited paper, '[t]he question of how to balance the demands for transparency against the need for confidentiality touches on a core issue of arbitral proceedings."[17]

The idea that information is concealed from third parties is central to the concepts of both confidentiality and transparency. If confidentiality and transparency are two sides of the same coin, then information is that coin.

Moving forward from this idea, a concept that stands out from the literature on transparency is the proposition that transparency is a mechanism for addressing "information asymmetries", referring to a situation where an entity "has access to information that others do not have."[18] Transparency, then, refers to the mechanism or process by which information is made accessible to parties other than the entity that possesses such information.[19] Furthermore, "[t]he information made available should be relevant and possible to use as a basis for decisions, and the manner in which it is made available should be systematic."[20]

With respect to transparency in international investment law, it has been observed that "the complex and decentralized nature of the international investment law system complicates the quest for transparency from the outset by both proliferating and obfuscating the lines of

[16] *Id.*, at p. 3.
[17] Christina Knahr & August Reinisch, *Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise*, 6 LAW PRACT. INT. COURTS TRIB. 97–118, 98 (2007).
[18] Forssbæck and Oxelheim, *supra* note 11 at 6.
[19] *Id.* at 6.
[20] *Id.* at 6.

communication through which information flows,"[21] and that "any investigation of transparency within international investment law must pay heed to the many different forms and faces it can take. It must also devote sufficient attention to the individuals and groups whose joint and separate activities are shaping the system's trajectory."[22] UNCTAD has defined transparency in this context as "a state of affairs in which the participants in the investment process are able to obtain sufficient information from each other in order to make informed decisions and meet obligations and commitments."[23] With respect to investment treaty arbitration specifically, transparency refers to, *inter alia*, the extent to which the public may be informed about the proceedings of an arbitration,[24] usually indicating full and timely disclosure of such information.[25]

It must be noted, however, that – in investment arbitration as well as in other areas of law where the transmission of information is in issue – disclosure is *not* synonymous with transparency. Disclosure is a simpler concept that transparency, in that it relates to specific pieces of information, and the act of making this information available to the public.[26] Transparency is a more nuanced concept. Transparency requires knowledge of who the user of the information is, and providing specific pieces of information that will enhance the user's understanding of the larger set of information available.[27] Inundating the recipient with a tidal wave of information, or overwhelming the user with information that is too complex or

[21] Julie Maupin, *Transparency in International Investment Law: The Good, the Bad and the Murky*, *in* TRANSPARENCY IN INTERNATIONAL LAW 142–171, 143 (Andrea Bianchi & Anne Peters eds., 2013).
[22] *Id.* at 148.
[23] Forssbæck and Oxelheim, *supra* note 11 at 6, citing a 2012 publication of UNCTAD.
[24] Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership*, 54 U. Kan. L. Rev. 1339 (2006).
[25] Jeffrey T. Cook, *The Evolution of Investor-State Dispute Resolution in NAFTA and CAFTA: Wild West to World Order*, 34 Pepp. L. Rev. 1085, 1100 (2007).
[26] Tom Berglund, *Corporate Governance and Optimal Transparency*, *in* THE OXFORD HANDBOOK OF ECONOMIC AND INSTITUTIONAL TRANSPARENCY 359–370, 363 (Jens Forssbæck & Lars Oxelheim eds., 2015).
[27] *Id.* at 363.

disordered, can reduce transparency rather than enhancing it.[28] In this sense, transparency relates to the quality, rather than the quantity of the information provided.

Distilling the concepts outlined above, transparency can be defined for the purposes of this dissertation as the balancing of an information asymmetry through the timely and organized disclosure of relevant information between the appropriate parties.

As will be seen in this dissertation, transparency in international investment arbitration pertains to different types of information, that must be made available to the parties – and in certain instances, the public – whose decisions would rely on such information. The relationships between the various parties involved, what information must be disclosed and to whom, varies at different points throughout the arbitral process, and these will be discussed in detail throughout this dissertation.[29]

Thesis Statement

The public interest involved in international investment arbitrations is the rationale for greater transparency of the investor-State dispute settlement system.[30] As already described above, transparency eludes definition and must be understood in a specific context. This dissertation aims to contextualize how transparency is understood and applied in international investment arbitration.

Anne Peters, Director at the Max-Planck-Institut for Comparative Public Law and Public International Law in Heidelberg, makes this astute pronouncement in the concluding

[28] Peters, *supra* note 11 at 534; Tom Berglund, *supra* note 26 at 363.
[29] "Disclosure" in the sense used in the working definition of transparency for the purposes of this dissertation must be differentiated from "disclosure" used in the sense of discovery procedures between parties to an arbitration.
[30] Further elaboration of the concept of public interest appears in the first chapter of this dissertation. *See discussion infra*.

chapter to the book *Transparency in International Law*, a volume that surveys the transparency movements concurrently happening in several different fields of international law:

> […] because of the mixed effects of transparency, any move in this direction must be *qualified*. The question is not so much *whether* transparency should be created but rather *how much* and *when*? Total transparency of international law is neither appropriate nor realistic. Law- and policy-makers should treat transparency as a variable of institutional and legal design. They need to balance the potential negative effects against the positive ones.[31]

In the same chapter, summarizing the findings of the contributing authors with various international law specializations, Peters distills that the book analyzes: "obligees and beneficiaries of transparency obligations", "objects of transparency", the "objective of transparency", the timing of transparency obligations, and the "scope and nature of exceptions to transparency".[32] Essentially, the answers to "what, who, when, and why" in relation to transparency in international law.

The research questions in this dissertation hew closely to the foregoing observations. Beginning from the premise that transparency is a needed and desired element of the investor-State dispute settlement system, this dissertation aims to operationalize the concept of transparency for international investment arbitration, by determining: (1) what information must be made accessible; (2) who is obliged to make such information accessible; (3) who is entitled to access such information; (4) how the information can be accessed; (5) when and where access must be granted; and (6) why the information must be accessible. The exceptions to the above also form part of the analysis in this dissertation, because a balanced approach to transparency is preferred to an absolute one. The exceptions to transparency, which are expressed in the texts of rules and the arbitral decisions discussed throughout this dissertation

[31] Peters, *supra* note 11 at 595.
[32] *Id.* at 535.

shall attest to the delicate task of finding this balance. Most importantly, this dissertation will examine whether transparency produces beneficial effects for the investor-State dispute settlement system.

This dissertation will look at transparency from different angles: the transparency of the system towards the outside, the transparency owed by the actors towards the arbitral process, and the effects of transparency on the actors. The literature on transparency has heretofore focused on the first angle almost exclusively. It is hoped that the fresh perspectives in this dissertation contributes to the legal scholarship on transparency in a novel manner.

Scope of the Dissertation

While transparency is relevant to the investor-State dispute settlement system as a whole, this dissertation will analyze transparency in **investment treaty arbitration**, also known as **treaty-based investor-State arbitration**, in particular. This refers to arbitrations initiated pursuant to the dispute resolution clause of an international investment agreement, whether a bilateral investment treaty or the investment portion of a multilateral free trade agreement. In this form of investor-State dispute settlement, the State makes a unilateral offer to arbitrate in an investment treaty, and this is converted to an arbitration agreement when the foreign investor accepts this unilateral offer by initiating proceedings through a request for arbitration.[33] This explains why sovereign States are the respondents, and the foreign investors are the claimants, in this type of investment arbitration. Consent to arbitration expressed separately in two different legal instruments sets investment treaty arbitration apart from the

[33] Stanimir A. Alexandrov, *The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis*, 4 LAW PRACT. INT. COURTS TRIB. 19–59 (2005); M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 139–140 (2015); August Reinisch, *Investors, in* NON-STATE ACTORS IN INTERNATIONAL LAW 253–271, 257–258 (Math Noortmann, August Reinisch, & Cedric Ryngaert eds., 2015).

traditional notions of arbitration. These separate instruments of consent to arbitration are joined together to establish the jurisdiction of the investment arbitration tribunal over the dispute.[34]

The narrowed scope of this dissertation can be understood as derivations of the following broader fields of study: investment treaty arbitration is a subset of **international investment arbitration**, which includes investment treaty arbitration as described above, as well as arbitrations between investors and States initiated through the dispute resolution clause of a contract to which both the investor and State are contracting parties, and arbitrations filed pursuant to the domestic investment laws of the host State. Investment arbitration, in turn, is an important facet of the **investor-State dispute settlement system**, which also includes other dispute resolution processes such as mediation and conciliation. The investor-State dispute settlement system is part of a larger field of law, generally referred to as **international investment law**, where dispute resolution is but one aspect, along with the treaties and substantive laws that create the international investment law regime, governing foreign investment from a regulatory standpoint and a policy perspective.

This dissertation's focus on investment treaty arbitration – rather than the broader fields to which it belongs, as described above – is a decision based on the following reasons: first, treaty-based investment arbitration, which has famously been called "arbitration without privity" in the seminal 1995 essay by Jan Paulsson,[35] is the category of investment arbitration that has drawn the public scrutiny that catalyzed the transparency movement. Pointing to the North American Free Trade Agreement (NAFTA), the Energy Charter Treaty, and the bilateral

[34] SORNARAJAH, *supra* note 33 at 140.
[35] Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. - FOREIGN INVEST. LAW J. 232–257 (1995).

investment treaties that were rapidly growing in number globally at that time, Paulsson asserted as follows:

> By allowing direct recourse by private complainants with respect to such a wide range of issues, these treaties create a dramatic extension of arbitral jurisdiction in the international realm. […] It grants innumerable present and future investors the right to arbitrate a wide range of grievances arising from the actions of a large number of public authorities, *whether or not any specific agreement has been concluded with the particular complainant* […].[36]

States being sued by investors, with whom no specific agreement to arbitrate had been signed, constitutes the scenario that has spurred calls for greater transparency in investment treaty arbitration, as will be discussed in further detail throughout this dissertation.

Second, investment treaty arbitrations comprise the overwhelming majority of investment disputes, rendering treaty-based investor-State arbitration a highly relevant focus on its own. In between 1972 and 30 June 2017, the World Bank's International Centre for Settlement of Investment Disputes (ICSID) registered 619 cases.[37] Of these cases, only 16.8% were initiated pursuant to an investment contract between the investor and the host State, and only 9.6% pursuant to the investment law of the host State.[38] 60.2% of cases came to ICSID pursuant to a bilateral investment treaty, and the remaining cases were through other multilateral free trade agreements or investment agreements, such as NAFTA (2.9%), and the Energy Charter Treaty (9.5%).[39] While ICSID is not the only facility that handles investment disputes, the total number of known investment treaty disputes globally is 817,[40] indicating that ICSID statistics area reliable indicator of the current situation with respect to investment disputes.

[36] *Id.* at 233. Italics in original.
[37] The ICSID Caseload - Statistics (Issue 2017-2), 7 (2017).
[38] *Id.* at 10.
[39] *Id.* at 10.
[40] UNCTAD Investment Dispute Settlement Navigator, *available at* http://investmentpolicyhub.unctad.org/ISDS.

Third, the topic of this dissertation was prompted by two recent international legal instruments: (1) the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency"), which came into effect on 1 April 2014, and (2) the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, also known as the "Mauritius Convention on Transparency", which entered into force on 18 October 2017. The author of this dissertation was a member of a State delegation to UNCITRAL at the time that the Rules on Transparency were being drafted. As will be discussed in this dissertation, these instruments, though recent, reflect the efforts of the transparency movement in investment arbitration that began at the beginning of this century. Because the UNCITRAL Rules on Transparency and its related Convention concern treaty-based investment arbitration, this dissertation follows that model.

Fourth, limiting the scope of this dissertation to investment treaty arbitration allows for an examination of issues that appear in treaty-based disputes but not in contract-based arbitrations. For example, nationality as a basis for the jurisdiction of an investment arbitration tribunal, a topic in Chapter 4 of this dissertation, is an issue that is relevant for investment treaty claims exclusively. Likewise, the participation of States that are parties to the investment treaty being invoked as a basis for investment claims, but are not disputing parties in the arbitrations, is an issue that is relevant for investment treaty arbitration but not contract-based arbitrations. The role of non-disputing State parties will be examined in Chapter 3. These are aspects of transparency that have not yet been examined in the current academic literature, and this dissertation's defined scope allows for such an analysis.

While the evaluation and critique herein is done from the paradigm of investment treaty arbitration specifically, the applicability of the observations in this dissertation to international

investment arbitration or the investor-State dispute settlement system more generally is not precluded. However, in order to maintain the focus of this dissertation, and to ensure that various facets of the arguments presented herein are thoroughly examined, it is necessary to define a particularized scope that does not purport to encompass the various issues presented by the broader fields of investment law of which investment treaty arbitration is a subset.

Finally, in relation to the structure of the dissertation which will be discussed below, this dissertation evaluates transparency from the perspectives of the stakeholders in the investor-State dispute settlement system: State parties to the investment treaties, foreign investors, and third parties seeking involvement in investment disputes. A consideration was made whether to include a chapter on transparency from the viewpoint of arbitrators; however, decision-makers are not stakeholders in the same sense as the parties earlier mentioned, which would render such a chapter out of place. Also, a preliminary review of the literature in relation to arbitrators and transparency revealed that the issues of arbitrator disclosure pertained to conflicts of interest and arbitrator impartiality, which would take this dissertation farther afield than practicable in evaluating the transparency issues indicated in the thesis statement.

Structure of the Dissertation

The trend towards transparency, as borne by the arbitration rules and the amendments thereto, as well as tribunal orders and awards in investment arbitrations, will be examined in **Chapter 1** of this thesis. This first chapter will also explore the result of this trend as embodied in the 2014 UNCITRAL Rules on Transparency, and the related Convention. The impetus for the transparency movement has, at its core, the idea that investment arbitration concerns public interest, and thus, a special section exploring this concept will begin the first chapter. A closer look at the tension between confidentiality and transparency as a dynamic differentiating

investor-State arbitration from international commercial arbitration will serve as an introductory discussion.

The "information asymmetry" referenced earlier denotes relationships between (1) the parties to whom disclosure of information is obliged, and (2) the parties who have the obligation of disclosure of information throughout the arbitral process. Thus, the approach to the research questions mentioned in the preceding section, in relation to information asymmetry, is reflected in the structure of this dissertation by building chapters around the perspectives of parties involved in investor-State dispute settlement.

Chapter 2 looks at non-disputing parties involved in investment disputes. The increasing involvement of *amici curiae* will be examined in Chapter 2, and their influence on the arbitral process will be analyzed. Recommendations about the appropriate level of their involvement will be proposed, as examined through the three main modes of non-disputing party participation: open hearings, access to documents, and written submissions.

Another type of third party that is increasingly becoming involved in investment disputes is the third-party funder. This potentially controversial new trend of funding has crossed over from court litigation into the investment dispute realm, and the recent surge in scholarship on this subject has not focused on this topic as a transparency issue. This dissertation will explore issues relating to third-party funding in investment arbitration from this novel perspective, and make recommendations about disclosure requirements.

Because of the unique concerns of State parties, sovereigns that find themselves involved in investment claims are pulled in opposite directions of the transparency–confidentiality continuum. **Chapter 3** will examine this dilemma. Governments are expected to disclose all information to a public that demands transparency, while at the same time maintaining confidentiality over privileged information in the interest of smooth functioning

of government.[41] Additionally, because some government decisions are inherently political, governments may be constrained to take unbeneficial litigation positions influenced by pressure from certain constituencies if the arbitration is made totally public.[42]

As a throwback to the days of diplomatic protection, State parties to the IIAs which are not the respondents in the investment arbitration are once again getting involved. Whether these non-disputing State parties have the same transparency concerns as the sovereign respondent will also be a topic of inquiry in Chapter 3.

This thesis will examine what practices States will adopt or modify in light of an increasingly transparent dispute settlement system, with respect to: arguments and defenses put forth in investment claims; document production during arbitral proceedings; and domestic legislation governing access to information, among others. Additionally, of particular interest in this research project is determining what effect, if any, the trend of increased transparency in investment arbitration has upon the emergence of corruption as an affirmative defense raised by sovereign parties to argue against a tribunal's jurisdiction over, and the admissibility of, investment claims lodged against the State.[43]

Investors, whether corporations or natural persons, have their own unique concerns in investment arbitration, and the confidentiality of the arbitration process was one of the attractive features for private entities wishing to engage in litigation against a State. The prevailing trend towards transparency will have an impact on how multinational

[41] *See* Note, Mechanisms of Secrecy, 121 Harv. L. Rev. 1556 (2008).
[42] Cindy Galway Buys, *The Tensions between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT. ARBITR. 121, 123 (2003).
[43] *See, e.g. World Duty Free Company Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award dated 4 October 2006; *Metal-Tech Limited v. Uzbekistan*, ICSID Case No. ARB/10/3, Award dated 4 October 2013.

conglomerates, as well as smaller investors, will approach investment arbitration, and whether their interests deserve protection. These issues will be discussed in **Chapter 4**.

That this dissertation begins its examination of actors in the transparency movement with non-disputing parties and concludes with a chapter on investor-claimants is not happenstance: the sequence of these chapters reflects the directional flow of the transparency wave. Chapter 2 and its discussion of third-party intervention in these disputes – to which they are otherwise not privy – demonstrates the pull of outside forces to make the dispute resolution process more transparent, drawing information from within the process in an outward direction. Chapter 3 and its examination of the dual role of States, as litigants and wielders of governmental authority, reveals a balancing act in protecting privileged information while also owing a duty to uphold public interest. Of the three sets of actors examined in this dissertation, sovereign parties are the entities that are pulled in opposing directions. Chapter 4 and its focus on investor-claimants recalls the international commercial arbitration model upon which investment arbitration was based: investors are the private parties in these arbitrations that are not accountable to the public, and have initiated the arbitral process with expectations of privacy and confidentiality. While there are some notable exceptions, investors can generally be viewed as the resisting force in opening up the investor-State dispute resolution process to increased transparency. If not offering resistance, at the very least, investors can be seen as the passive object in this movement towards greater transparency, trying to hold onto the previous *status quo*.[44]

[44] This is not to say, however, that investors have always been the party that tries to keep the proceedings under wraps. There are instances wherein the investor publicizes the *existence* of the dispute, in order to put public pressure on the sovereign respondent.

A final section shall present a summary of the content of this dissertation, along with recommendations and conclusions that can be drawn from this study.

Methodology and Sources

Primary sources for this dissertation include documents from investment arbitration cases, and the texts of investment treaties and institutional rules. An examination of ICSID cases, as well as cases filed pursuant to Chapter 11 of the North American Free Trade Agreement (NAFTA), and investment treaties following UNCITRAL rules, will be main sources for this survey of the development of the trend towards transparency. The arbitration rules of ICSID[45] and UNCITRAL[46], particularly their revisions in 2006 and 2010, respectively, as contrasted with older versions of the rules, will also be examined. Of course, the 2014 UNCITRAL Rules on Transparency will be the subject of special focus. The UNCITRAL Convention for the application of the Rules on Transparency to existing investment treaties, and developments regarding the adoption of this convention will be examined, as well, having recently come into force. Where relevant, the rules of other arbitral institutions will also be discussed.

Additional primary sources will be notes of interpretation issued by governmental or intergovernmental institutions. Secondary sources include commentaries in the form of books, book chapters, and journal articles.

[45] ICSID Arbitration Rules (2006)
[46] UNCITRAL Arbitration Rules (as revised in 2010); UNCITRAL Arbitration Rules (1976).

Chapter 1

The Trend Towards Transparency

An examination of the trend towards increased transparency in investor-State dispute settlement necessarily entails a chronological review of the developments leading up to the current status of the transparency movement. This chapter will provide a retrospective on the developments leading to greater transparency in investment arbitration.

Before that, however, it is essential to view the trajectory of the transparency movement through two lenses: (1) the role of confidentiality in international arbitration; and (2) investment arbitration and its requirement for greater transparency.

1.1. Confidentiality in international arbitration

The investor-State dispute settlement system draws its main procedural features from international commercial arbitration.[47] The ICSID Convention was the first multilateral treaty that established international arbitration as the dispute settlement method for cases between States and investors,[48] stating right at the outset that the purpose of ICSID "shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States."[49]

When opting for arbitration in lieu of court litigation, confidentiality is one of the perceived advantages sought by disputing parties.[50] Christoph Schreuer, one of the most prominent commentators on the ICSID Convention, observes that, while "[c]onfidentiality is traditionally considered one of the cornerstones of international commercial arbitration between private parties", "[t]he issues of public interest in investment arbitration have led to increasing demands for more openness and transparency."[51] Practitioner and commentator Andrea Menaker has likewise observed that "the potentially far-reaching policy implications

[47] Markus W. Gehring & Dimitrij Euler, *Public Interest in Investment Arbitration*, *in* TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNICTRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 7–27, 8 (Dimitrij Euler, Markus W. Gehring, & Maxi Scherer eds., 2015); Judith Knieper, *The UNCITRAL Transparency Standards in ISDS as a Result of Multi-lateral Negotiation*, 1 EUR. INVEST. LAW ARBITR. REV. 155–167, 156 (2016).
[48] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 55 (2007).
[49] ICSID Convention, Article 1(2).
[50] Andrea J. Menaker, *Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 129–160, 129 (Katia Yannaca-Small ed., 2010); Gehring and Euler, *supra* note 47 at 8.
[51] CHRISTOPH H SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 697–698 (2010).

of investment arbitration and the intense public interest generated by investment disputes" has resulted in a rethinking of nature and extent of the confidentiality obligations – or lack thereof – of disputing parties in investor-State arbitrations.[52]

This first section in this chapter will reexamine the role of confidentiality in international arbitration and then evaluate it against the goal of transparency in investment arbitration.

1.1.1. A brief reexamination of confidentiality as a feature of international arbitration

As discussed in the introduction to this dissertation, confidentiality is traditionally viewed as the opposite of transparency. Therefore, the movement for greater transparency in investor-State dispute settlement is often equated with eroding the confidentiality that surrounds arbitration procedures. This is not to say, however, that these seemingly antagonistic forces are battling for supremacy in the domain of international arbitration: confidentiality and transparency are equally positive values, and both have a place in dispute settlement proceedings. *Balance* between confidentiality and transparency is the goal in international arbitration, not the sublimation of one value in favor of the other.

Preeminent authority on arbitration, Professor Tibor Várady, notes that "confidentiality is one of the important comparative advantages of arbitration – and of international commercial arbitration in particular."[53] Respected international arbitrator Florentino P. Feliciano, who was also one of the original members of the Appellate Body of the World Trade Organization, likewise observed that international arbitration "capitalizes on being a less public venue" than

[52] Menaker, *supra* note 50 at 129.
[53] TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION - A TRANSNATIONAL PERSPECTIVE 764 (6th ed. 2015).

regular court proceedings, a fact that bolsters the value of confidentiality as a viable dispute resolution process across borders.[54]

Várady notes that issues regarding "the range and limits of confidentiality, as well as regarding the persons who are bound by confidentiality" are subject of ongoing debate.[55] Arbitrator Piero Bernardini echoes this view, noting with respect to these parameters that "the issue of confidentiality in arbitration is far from settled."[56] Várady and his casebook co-authors cite the case of *Esso v. Plowman*[57], decided by the Supreme Court of Australia to consider the idea that "the duty to observe confidentiality may be traced back to an implied consent."[58] Significantly, the UNCITRAL Working Group II (Arbitration and Conciliation) which developed the UNCITRAL Rules on Transparency, had recognized the importance of this case in earlier meetings to highlight the issue of confidentiality in arbitral proceedings as an area that merited further consideration.[59] Evaluating the nature of the duty of confidentiality in international arbitration, the High Court of Australia observed as follows:

> […] confidentiality, though it was not grounded initially in any legal right or obligation, was a consequential benefit or advantage attaching to arbitration which made it an attractive mode of dispute resolution. There is, accordingly, a case for saying that, in the course of evolution, the private arbitration has advanced to the stage where confidentiality has become one of its essential attributes so that confidentiality is a characteristic or quality that inheres in arbitration.[60]

[54] Florentino P. Feliciano, *The Ordre Public Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration*, 87 PHILIPPINE LAW J. 1–20, 1.
[55] VÁRADY ET AL., *supra* note 53 at 764.
[56] Piero Bernardini, *International Commercial Arbitration and Investment Treaty Arbitration: Analogies and Differences*, *in* PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 52–68, 60 (David Caron et al. eds., 2015).
[57] *Esso Australia Resources Ltd. V. Plowman Esso Australia Resources Limited and Others*, High Court of Australia on appeal from the Supreme Court of Victoria, 8 March 1994, 9 March 1994, 7 April 1995, *cited in* VÁRADY ET AL., *supra* note 53 at 765–768.
[58] *Id.* at 765.
[59] Gehring and Euler, *supra* note 47 at 14–15.
[60] *Esso v. Plowman, supra, quoted in* VÁRADY ET AL., *supra* note 53 at 767.

In this landmark case cited globally, the High Court also notably proffered the observation that confidentiality could *not* be presumed to be an essential attribute of arbitration.[61] In a similar vein, Feliciano underscores that confidentiality was "not the main impetus for the establishment of arbitration as a valuable mode of settling disputes. Rather, recourse to cross-border arbitration was moved by the ability to disassociate oneself from a given domestic judicial system".[62]

Since confidentiality is a feature of arbitration that the system has more or less slipped into by default, there is no inherent reason to prevent a departure from confidentiality towards a regime of increased transparency. This is true for investment arbitration, which is the focus of this dissertation, and a discussion about that necessitates a discussion of public interest, which follows below.

Prior to that examination however, mention must be made that there is a transparency movement gaining ground in the international commercial arbitration community, as well. The International Court of Arbitration of the International Chamber of Commerce (ICC) introduced new rules which became effective on 1 March 2017.[63] Streamlining the arbitral procedure and enhancing the transparency of the arbitral process are the main objectives of the 2017 amendments to the ICC Arbitration Rules.[64] In its 30 October 2017 *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration*, the ICC makes an explicit pronouncement regarding its current treatment of the values of confidentiality and transparency, as well as enumerating the information that it will make publicly available, thus:

---

[61] *Id.*
[62] Feliciano, *supra* note 54 at 1.
[63] *ICC Court amends its Rules to enhance transparency and efficiency* (4 November 2016), available at https://iccwbo.org/media-wall/news-speeches/icc-court-amends-its-rules-to-enhance-transparency-and-efficiency/.
[64] *Id.*

> The Court endeavours to make the arbitration process more transparent in ways that do not compromise expectations of confidentiality that may be important to parties. Transparency provides greater confidence in the arbitration process, and helps protect arbitration against inaccurate or ill-informed criticism.
>
> Consistent with that policy and unless otherwise agreed by the parties, the Court will publish on the ICC website, for arbitrations registered as from 1 January 2016, the following information: (i) the names of the arbitrators, (ii) their nationality, (iii) their role within a tribunal, (iv) the method of their appointment, and (v) whether the arbitration is pending or closed. The arbitration reference number and the names of the parties and of their counsel will not be published.[65]

The information that will be publicly released is nominal, relates principally to the decision-makers and not the parties, and does not pertain to the subject matter of the dispute or the reasoning of the arbitral award. Albeit not revealing much about the cases in the ICC docket, it is still a commendable step towards transparency in international commercial arbitration, notably for systemic purposes and not public involvement as is the main thrust for investment arbitration.

Similarly, the German Institution of Arbitation or *Deutsche Institution für Schiedsgerichtsbarkeit* (DIS), has new Arbitration Rules that came into force on 1 March 2018. Compared with the provisions on confidentiality in the 1998 version of the DIS Arbitration Rules, the 2018 version is less restrictive regarding disclosure of information. Whereas the 1998 version imposed a non-derogable duty of confidentiality on the institution and the parties, the 2018 version allows for party agreement regarding disclosure of information to outside entities, and for exceptions demanded by applicable law.[66]

[65] 30 October 2017 *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration*, available at https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/, ¶¶ 27 – 28.

[66] The 1998 version of the DIS Arbitration Rule on confidentiality states as follows:
Section 43 Confidentiality
43.1: The parties, the arbitrators and the persons at the DIS Secretariat involved in the administration of the arbitral proceedings shall maintain confidentiality towards all persons regarding the conduct of arbitral proceedings, and in particular regarding the parties involved, the witnesses, the experts and other evidentiary materials. Persons acting on behalf of any person involved in the arbitral proceedings shall be obligated to maintain confidentiality.

As will be seen in further detail below, the changes adopted by the ICC and DIS pale in comparison to the strides taken in ICSID, NAFTA, and UNCITRAL cases. This is not a criticism of the transparency efforts in institutions that cater primarily to commercial disputes between private parties, but rather to highlight the divergence with respect to the value of confidentiality between international commercial arbitration and that required in the investor-State dispute settlement system. Confidentiality is a value in both commercial and investment arbitration, but the degree to which it is balanced against the concomitant value of transparency is decidedly different between both systems.

Proceeding from the foregoing, confidentiality, while a valuable aspect of international arbitration, is not a fundamental feature that defines international arbitration as a dispute settlement process. Investment arbitration tribunals that have confronted the issue of the degree of confidentiality to accord investor-State arbitration proceedings have made pronouncements that stem from this premise, as will be seen in the next sub-section.

1.1.2. Investment arbitration awards interpreting the role of confidentiality

As already observed by an ICSID Tribunal, there is a "generally acknowledged trend

43.2: The DIS may publish information on arbitral proceedings in compilations of statistical data, provided such information excludes identification of the persons involved.
Meanwhile, the 2018 version of the rule on confidentiality is less restrictive, as can be seen in the following provisions:
Article 44 Confidentiality
44.1: Unless the parties agree otherwise, the Parties and their outside counsel, the arbitrators, the DIS employees and any other persons associated with the DIS who are involved in the arbitration shall not disclose to anyone any information concerning the arbitration, including in particular the existence of the arbitration, the names of the parties, the nature of the claims, the names of any witnesses or experts, any procedural orders or awards and any evidence that is not publicly available.
44.2: Disclosures may nonetheless be made to the extent required by applicable law, by other legal duties or for purposes of the recognition and enforcement or annulment of an arbitral award.
44.3: The DIS may publish statistical data or other general information concerning arbitral proceedings, provided that no party is identified by name and that no particular arbitration is identifiable on the basis of such information. The DIS may publish an arbitral award only with the prior written consent of all of the parties.

towards transparency in investment arbitration."[67] The parameters established by the ICSID Convention,[68] the Administrative and Financial Regulations, and the Rules of Procedure for Arbitration Proceedings[69] have allowed ICSID Tribunals to assess the prevailing confidentiality standards for arbitrations conducted under the auspices of this World Bank facility.

Most notably, the Tribunal in the case of ***Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania***[70] made the following pronouncement, often cited by legal scholars as well as other arbitration tribunals, as definitive commentary regarding confidentiality and transparency in ICSID:

> 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.[71]

The view is thus posited that ICSID does not mandate confidentiality, but neither does it promote transparency. This opinion was concurred in by the ICSID Tribunal in the case of ***Giovanna Beccara and Others v. The Argentine Republic***,[72] which went on to note that the aforementioned ICSID Convention, Regulation and Rules "only contain limitations on specific aspects of confidentiality and privacy,"[73] – citing as specific examples the publication of arbitral awards, opening hearings to non-parties, and deliberations of the Tribunal, among

[67] *Giovanna Beccara and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order), 27 January 2010.
[68] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington D.C., 1965), 575 UNTS 159.
[69] Hereafter, "ICSID Arbitration Rules".
[70] ICSID Case No. ARB/05/22.
[71] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, at ¶ 121.
[72] ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order), 27 January 2010, at ¶ 67.
[73] *Id.*, at ¶ 68.

others[74] – while acknowledging that the Convention and Rules "do not comprehensively cover the question of the confidentiality/transparency of the proceedings."[75]

These rulings hark back to the early case of ***Amco Asia Corporation and others v. Republic of Indonesia***,[76] where the arbitral tribunal observed that, "as to the 'spirit of confidentiality' of the arbitral procedure, it is right to say that the Convention and the Rules do not prevent the parties from revealing their case."[77]

The same observation has been made by an ICSID Tribunal in an arbitration utilizing the Additional Facility Rules.[78] In the case of ***Telefonica S.A. v. United Mexican States***,[79] the Tribunal agreed with the ***Biwater Gauff*** and ***Giovanni Beccara*** Tribunals, and likewise declared "neither the Convention nor the Arbitration Rules (Additional Facility) impose a general duty of confidentiality or transparency on the parties to a proceeding."[80] The key word in this quote is "impose". Expectations of confidentiality still exist in the context of ICSID arbitration, much like confidentiality in arbitration generally. However, just as confidentiality is not presumed to be an essential attribute of arbitration in general,[81] it cannot be presumed in investment arbitration either. Confidentiality can be waived by the parties in ICSID proceedings, or – to view it from the other side of the mirror – transparency can be embraced. Matters relating to access to documents, publication, and open hearings are typically covered in one of the first procedural orders issued by the Tribunal in an ICSID arbitration. This

[74] *Id.*
[75] *Id.*, at ¶ 73.
[76] ICSID Case No. ARB/81/1.
[77] Buys, *supra* note 42 at 124.
[78] Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes.
[79] ICSID Case No. ARB(AF)/12/4.
[80] *Telefónica S.A. v. Estados Unidos Mexicanos* (ARB(AF)/12/4), Resolución Procesal No. 1, 8 July 2013, p.23. Unofficial English Translation available at http://www.italaw.com/sites/default/files/case-documents/italaw1597.pdf.
[81] *See* discussion of *Esso v. Plowman*, *infra*.

procedural order, issued at the early stages of the arbitration, typically sets the tone whether that particular proceeding will lean towards confidentiality or transparency.

Plainly, there are no explicit rules regarding confidentiality or transparency in ICSID beyond the mandatory publication of basic case information. This should not be viewed in a negative light, because this has granted tribunals the flexibility with which to push for the disclosure of more information. In the case of ***World Duty Free Company Ltd. v. Republic of Kenya***,[82] the Tribunal made the observation that neither the ICSID Convention or its Arbitration Rules "contain any express restriction on the freedom of the parties" that would "prohibit public discussion of the arbitration proceedings by either Party."[83] Significantly, the Tribunal also made a pronouncement highlighting the importance of transparency when a state party is involved. The Tribunal said "[e]specially in an arbitration to which a Government is a Party, it cannot be assumed that the Convention and the Rules incorporate a general obligation of confidentiality which would require the Parties to refrain from discussing the case in public."[84]

In the absence of an express agreement between the parties regarding confidentiality, the duty of the parties to keep the proceedings (and information obtained in the course of the proceedings) confidential depends on the tribunal's discretion, applicable law, the particular arbitral procedure utilized, and the type of information under consideration.[85] A survey of the existing literature indicates that the following three areas of access to information are of key importance in enhancing transparency of investment disputes: open hearings, participation by third parties (non-disputing parties or *amici curiae*), and the publication of awards and

[82] ICSID Case No. ARB/00/7 [hereinafter *World Duty Free v. Kenya*]
[83] *World Duty Free v. Kenya*, Award dated 4 October 2006 ¶ 16, *citing* Procedural Order No. 3 dated 25 April 2001.
[84] *Id.*
[85] Buys, *supra* note 42 at 124.

submissions. These areas will be examined in the following chapter on non-disputing parties and transparency.

1.2. Investment arbitration as a special class of dispute settlement requiring greater transparency

This section will examine the divergence of investment arbitration from international commercial arbitration. The concept of public interest as the basis for increasing transparency in the investor-State dispute settlement system will be examined after a preliminary discussion about the differences between international commercial arbitration and investment arbitration with respect to the confidentiality and transparency dynamic.

1.2.1. Features of international arbitration that necessitate a different treatment of investor-State disputes

Certain elements of investor-State disputes, not present in international commercial arbitration cases, necessitate increased transparency for investment arbitration cases. A review of the academic literature reveals three systemic differences: (1) the consent mechanism for arbitration; (2) government regulatory measures as the subject matter of the dispute; and (3) the impact of arbitral awards on the rights of non-parties.

The consensual nature of arbitration is one of the fundamental features of this dispute resolution process. Unlike the compulsory nature of judicial procedure, arbitration may only be resorted to for the resolution of disputes if both parties to the arbitration have consented to have the dispute resolved through arbitration. In this regard, the consent of State parties to investment treaty arbitration is different from the manner in which consent to arbitration is conveyed in international commercial arbitration.

Van Harten argues that investment treaty disputes are distinct from "private" disputes that arise between entities acting in private capacities.[86] On these premises, van Harten presents the distinction between disputes resolved by international commercial arbitration and those adjudicated within the investment treaty system as one differentiated on the basis of consent, thus:

> […] in commercial arbitration, a party's consent to arbitrate takes place within the private sphere not because the consent is irrelevant to the public in general but because the disputing parties, acting in a private capacity, have agreed to use a particular method of dispute resolution in disputes arising between themselves. They have agreed, in a manner endorsed by the state, to insulate the adjudication of their dispute from the courts and subject it instead to arbitration. In contrast, the submission of sovereign decisions to review by an adjudicative process amounts to a policy choice by the state to use that particular method of adjudication as part of its governing apparatus. Public law adjudication is distinct from reciprocally consensual adjudication in the private sphere because the state acts in a sovereign capacity when it consents to the adjudication and because the relevant dispute arises from the exercise of sovereign authority by the state."[87]

Stated differently, a State's consent to arbitration as embodied in an investment treaty is not limited to a known dispute with an identifiable contracting partner; the State is "unilaterally exposed to claims by a broad class of potential claimants in relation to governmental acts" affecting foreign investments.[88]

Similarly underscoring the importance of the consent mechanism, Bernardini points out that "[t]he manner by which the arbitration agreement is concluded in investment treaty arbitrations has far-reaching consequences."[89] Foremost among these consequences is that it is the foreign investor, as the claimant in an investment treaty arbitration, has the prerogative of choosing which system of arbitration to utilize, among those offered by the respondent State

---

[86] VAN HARTEN, *supra* note 48 at 48.
[87] *Id.* at 48–49.
[88] Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT. COMP. LAW Q. 371–393, 379 (2007).
[89] Bernardini, *supra* note 56 at 54.

in its bilateral investment treaty.[90] This choice by the investor has an impact on the arbitral rules that will govern the process, which in turn dictates the parties' procedural rights and the arbitrators' procedural powers, as well as rules regarding the annulment and enforcement of the arbitral award.[91] This consent mechanism might seem asymmetrical in favor of the foreign investor. However, as will be examined in greater detail in Chapter 4 of this dissertation, there is an ongoing paradigm shift away from investor-centric bilateral investment treaties.[92]

In short, international commercial arbitration is "a reciprocally consensual method of dispute resolution that can be approached generally as private law", whereas investment arbitration, and investment treaty arbitration in particular, is, according to van Harten, "a form of public law adjudication."[93]

A characterization of investment arbitration as public law adjudication leads to the second crucial difference between investment arbitration and international commercial arbitration. Van Harten characterizes investment claims as "regulatory disputes", referring to a class of disputes arising between the State and private entities who are "subject to the exercise of the uniquely sovereign authority by the State."[94] Van Harten points out that "the establishment of international arbitration as an adjudicative mechanism to resolve regulatory disputes between states and individuals is a major departure from the conventional use of international arbitration in the private sphere."[95]

As Maupin points out, many of the recent claims brought by foreign investors against host States "challenge the application of general regulatory measures long thought to fall within

[90] *Id.* at 54.
[91] *Id.* at 54.
[92] *See* the discussion in Section 4.1, *infra*.
[93] Van Harten, *supra* note 88 at 374.
[94] VAN HARTEN, *supra* note 48 at 48.
[95] *Id.* at 47.

the legitimate and non-reviewable police powers of sovereign states", including "environmental regulations, affirmative action measures, cultural protection laws, energy policies, and regulatory responses to economic crises."[96] With an imprecise definition of investment, common in first-generation bilateral investment treaties, Host States risk violating treaty obligations regarding the rights of investors with almost any domestically enacted regulatory measure.[97] Investment claims lodged against these measures, or even the mere threat or possibility of investment arbitration, can cause a "regulatory chill", causing governments to hesitate from enacting or enforcing regulatory measures that would safeguard public interest.[98] A discussion of "public interest" follows in the succeeding sub-section.

A third key difference is that an investment arbitration tribunal's award, unlike that of an international commercial arbitration award, can have an impact beyond the parties to the dispute. In arbitrations pursuant to an arbitration clause in a contract, the tribunal looks at the rights of the parties as determined by the substantive provisions of their commercial contract, and adjudicates breach-of-contract claims accordingly; consequently, the arbitral award does not have an impact on the rights of external parties.[99] Even in contract-based arbitrations where a sovereign is a party, the dispute is confined to contractual claims, i.e. the specific legal relationship between the private entity and the State.[100] In contrast, treaty-based arbitrations settle claims based on breaches of treaty obligations. Between the two parties in an investor-State dispute, only the sovereign respondent – and not the claimant-investor – has positive obligations pursuant to the investment treaty.[101] Consequently, as Maupin points out, "a

[96] Maupin, *supra* note 5 at 377.
[97] Gehring and Euler, *supra* note 47 at 7.
[98] M. Sornarajah, *International Investment Law as Development Law: The Obsolescence of a Fraudulent System*, EUR. YEARB. INT. ECON. LAW, 224 (2016); Maupin, *supra* note 5 at 391.
[99] Maupin, *supra* note 5 at 395.
[100] Van Harten, *supra* note 88 at 372.
[101] Maupin, *supra* note 5 at 395.

tribunal's interpretation and application of a vague treaty provision may inadvertently impact upon the rights of persons not before the tribunal."[102] Furthermore, as will be seen in the next two chapters, investment arbitrations can impact particular sectors of society, as well as the non-disputing State party.

1.2.2. Public interest: the rationale for the transparency movement

While the points outlined in the preceding sub-section illustrate the more nuanced criteria for differentiating investment arbitration from international commercial arbitration, many authors have drawn the bright-line distinction by proffering the idea of "public interest". Feliciano points out that an international commercial proceeding between two private persons or entities is "likely to be essentially private in character, not involving any important community-wide or public interests that need protection through transparency mechanisms".[103] He sharply contrasts this with arbitrations between an investor and the host State, which necessitate transparency practices because these cases involve public funds and the exercise of authority by public officials.[104] Bernardini mirrors this view: "The need to ensure greater public accountability and access to information about the affairs of governments are at the root of the increasing request for greater transparency and less confidentiality in the context of investment treaty arbitration."[105]

Defining "public interest" can be as amorphous as defining "transparency", a struggle that was outlined (and hopefully resolved, at least for the purposes of this dissertation) in the Introduction. Much of the academic literature that reference public interest in investment

[102] *Id.* at 395.
[103] Feliciano, *supra* note 54 at 19.
[104] *Id.* at 19.
[105] Bernardini, *supra* note 56 at 64.

arbitration in relation to transparency mention these words as if the definitions of these terms are clear and can be taken for granted. This is not the case.

One interpretation of public interest equates it with the interest of the host State.[106] Another view posits that, because a treaty is a legal instrument concluded by sovereign States, and therefore a document of public international law, a dispute arising under it impacts not just the disputing parties, but the whole international community.[107]

The most helpful and comprehensive definition of public interest is offered by Schreuer and Kriebaum. These international investment law experts propose that international investment law serves two categories of interests: individual interests, i.e. those of foreign investors, and "community interests", which they define as "those of the host State and its population or of the international community as a whole."[108] Their definition essentially points to three components of public interest: (1) the government of host State; (2) the population of the host State; and (3) the wider international community that can be affected by the dispute.

Schreuer and Kriebaum further outline five main categories of community interests that are relevant to international investment law: (1) peace and security; (2) development; (3) protection of the environment; (4) common heritage; and (5) human rights.[109] These community interests may arise in investment disputes incidentally, such as "when environmental issues arise or when human rights of the investor or of the host State's population are affected."[110]

[106] Feliciano, *supra* note 54 at 19.
[107] Knieper, *supra* note 47 at 157.
[108] Christoph Schreuer & Ursula Kriebaum, *From Individual to Community Interest in International Investment Law*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 1079–1096, 1079 (Ulrich Fastenrath et al. eds., 2011).
[109] *Id.* at 1080–1091.
[110] *Id.* at 1080.

As non-governmental organizations participating as observers in the UNCITRAL Working Group on the revision of the UNCITRAL Arbitration Rules, the Center for Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD) submitted a 2007 joint paper "that set out why and how the UNCITRAL Rules should be revised to address the public interest needs of state arbitrations."[111] In that joint paper, CIEL and IISD delineated the reasons why investment treaty arbitration impacts the public interest. It is a concise and straightforward set of points that merits quoting here:

> First, 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 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.
>
> Second, investor-State arbitrations often involve large potential monetary liability for public treasuries. And any award of compensation will affect the State's budget. As above, the public's interest is clear.
>
> Third, many investor-State arbitrations, such as those arising under treaties for the protection of investments, involve direct allegations of governmental misconduct. Again the public interest, e.g. in knowing what the allegations, facts and outcome are, is self-evident.
>
> Finally, an increasing number of investor-State arbitrations raise profoundly important issues of public policy that penetrate deeply into domestic decision-making processes […]. Moreover, some treaties enable claimants to invoke contractual provisions that purport to constrain a State's power to regulate, such as stabilization clauses. In these cases, the public interest is also clear.[112]

Public interest is the rationale for increasing transparency in investment arbitration. Increasing transparency, in turn, is expected to have the following effects for the benefit of the investor-State dispute settlement system: "increased public awareness will allay suspicions that arbitral secrecy allows 'backroom dealings' in matters of great public concern, and will

[111] *Transparency and the UNCITRAL Arbitration Rules*, available at http://www.iisd.org/project/transparency-and-uncitral-arbitration-rules.
[112] IISD and CIEL, REVISING THE UNCITRAL ARBITRATION RULES TO ADDRESS INVESTOR-STATE ARBITRATIONS 4 (2007), http://www.iisd.org/pdf/2008/investment_revising_uncitral_arbitration_dec.pdf.

augment the legitimacy of investment arbitration by enhancing public confidence in the fairness and integrity of the arbitral process."[113]

Public perception has been perceived as an important effect of enhancing transparency, and public perception can only be achieved by opening the proceedings to the public. This may be why some of the literature appears to conflate transparency with third-party participation, which will be discussed in the next chapter. However, a few astute authors have cautioned that the idea of "public interest" should not be confused with the interest of a particular sector purporting to represent the public interest.

As Professor Alexander Bělohlávek has observed, a non-party that has been allowed to observe an arbitration or access documents therein is not necessarily the "public", which he defines as "a non-specific group of persons limited by no quantitative restrictions, and (often) no qualitative restrictions."[114] He expounds further, thus:

> […] we must distinguish between the two concepts, which are often confused with one another. On the one hand, it is the permission authorizing particular persons to attend the proceedings, the disclosure of particular information about the proceedings, and the provision of documents for specific purposes, permission to attend the hearing granted to a person who does not enjoy any qualified procedural status and/or the admission of a third party to the proceedings. On the other hand, there is a different category, i.e. allowing public access to information about the course of the proceedings (i.e. disclosure of this information to an unspecified group of persons) and especially duties of the parties in that respect. A strict differentiation between these two categories, albeit essential [...] is missing in certain commentaries. Such a distinction, together with a clear definition of the term "public" is, however, necessary, especially in investor v. state arbitration. Otherwise, it is not possible to arrive at any qualified conclusion regarding the "*public interest*", which in that context is specifically used as an argument in treaty arbitration.[115]

[113] Menaker, *supra* note 50 at 129.
[114] Alexander J. Bělohlávek, *Confidentiality and Publicity in Investment Arbitration, Public Interest and Scope of Powers Vested in Arbitral Tribunals*, *in* RIGHTS OF THE HOST STATES WITHIN THE SYSTEM OF INTERNATIONAL INVESTMENT PROTECTION 23–45, 35 (2011).
[115] *Id.* at 36.

Similarly, Maupin cautions that "the concept of 'public interest' is vulnerable to capture by specialized interest groups, questioning whether non-governmental organizations actually serve a "collective interest" beyond that of the sector represented by the organization or even simply the organization itself.[116]

1.3. The evolution of investment arbitration procedures towards greater transparency

The three most widely used arbitration procedures for the settlement of investment disputes are the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules and guidelines in the context of NAFTA.[117] According to the latest statistical data available from the United Nations Conference on Trade and Development (UNCTAD), there have been 448 cases applying the ICSID Arbitration Rules, 51 cases under the ICSID Additional Facility Rules, and 251 cases following UNCITRAL Arbitration Rules.[118] NAFTA is not a set of rules, but because there have been interpretative guidelines issues under this treaty regime, NAFTA is included in the discussion in this part of the dissertation. This section will look at the changes that have taken place under these three regimes in the past years with a view towards increasing transparency of proceedings in these arbitral contexts.

Before looking at these three regimes separately, it should be noted that the transparency developments now enshrined in rules or notes of interpretation were preceded by the pronouncements of arbitral tribunals in actual cases.[119] As arbitrator Laurence Boisson de Chazournes has observed, "emulation trends can be identified in practice."[120] These tribunal

[116] Maupin, *supra* note 5 at 405.
[117] Knahr and Reinisch, *supra* note 17 at 98; Knieper, *supra* note 47 at 156.
[118] Statistical data available at http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution
[119] Laurence Boisson de Chazournes & Rukia Baruti, *Transparency in Investor-State Arbitration: An Incremental Approach*, 2 BAHRAIN CHAMB. DISPUTE RESOLUT. INT. ARBITR. REV. 59–76, 60 (2015); Aurélia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID REV. - FOREIGN INVEST. LAW J. 427–448, 432–434 (2006).
[120] Boisson de Chazournes and Baruti, *supra* note 119 at 60.

decisions will be discussed in greater detail in the succeeding chapters of this dissertation, particularly in Chapter 2, which deals with the participation of non-disputing parties. The present chapter focuses on the evolution of the texts of the rules and interpretative guidelines.

Furthermore, while the changes discussed below will be discussed separately according to each of the three identified regimes, attention must be brought to the reality that the investor-State dispute settlement system as a whole was evolving, and that changes in one regime had influence over another. Moreover, the trend towards transparency in international dispute resolution more generally, particularly dispute settlement at the World Trade Organization (WTO), also influenced amendments to the rules applicable to investment arbitration. Boisson de Chazournes notes:

> […] WTO case law in relation to *amicus curiae* undoubtedly influenced decisions by investment tribunals under Chapter 11 of the North American Free Trade Agreement ("NAFTA"). […]
>
> NAFTA decisions rendered on the basis of the UNCITRAL Rules (the then Article 15(1) of the UNCITRAL Rules) had for their part some influence on the ICSID tribunals before the amendment of the ICSID Arbitration Rules (Article 37). The ICSID tribunal in an order given in the *Aguas Argentinas* case on May 19, 2005, referring to previous WTO and NAFTA decisions, considered that it was able to decide such questions of procedure under the ICSID Convention (Article 44). NAFTA Rules formally interpreted in this sense in 2003 and ICSID Rules amended in 2006 endorsed and developed further the decisions taken by the various dispute settlement bodies that have been mentioned.[121]

The following subsections will illustrate the specific amendments that aim for enhanced transparency in arbitrations under the context of NAFTA, the ICSID Arbitration Rules, and the UNCITRAL Arbitration Rules. To give context to the amendments, a retrospective look at the provisions that were subject of amendment will also be discussed.

[121] *Id.* at 60–61.

1.3.1. NAFTA Provisions and Notes of Interpretation

When one refers to NAFTA in the context of investment arbitration, it refers to Chapter Eleven of this free trade agreement. Chapter Eleven is entitled, "Investment" and governs foreign investment among the three Contracting States. The investment chapter "applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; and (b) investments of investors of another Party in the territory of the Party."[122] NAFTA Chapter Eleven is not in itself a set of Arbitration Rules but a portion of a free trade agreement. NAFTA arbitrations utilize either the ICSID Additional Facility Rules of the UNCITRAL Arbitration Rules.[123] However, NAFTA merits a discussion in this section of the dissertation because of the role of NAFTA arbitrations in shaping transparency in investor-State dispute settlement.

NAFTA arbitration is regarded as the trailblazer in the trend towards transparency in investment treaty arbitration.[124] The Treaty itself already contains provisions aimed at ensuring transparency of the arbitral process, and these are further enhanced by interpretative texts of the NAFTA Free Trade Commission.[125] The Trade Ministers of Canada, the United States, and Mexico – i.e. the three contracting States of NAFTA – comprise the NAFTA Free Trade Commission.[126] The Free Trade Commission "has the authority to issue interpretations of provisions of the Treaty which are binding on NAFTA Chapter 11 tribunals."[127]

The treaty itself has built-in provisions that ensure that the existence of an arbitration claim against one of the State parties is made known to the non-disputing State parties, as well as to the general public. Article 1126 mandates the filing of requests for arbitration with the

[122] NAFTA Article 1101.
[123] NAFTA Article 1120.
[124] Boisson de Chazournes and Baruti, *supra* note 119 at 62.
[125] *Id.* at 62.
[126] Menaker, *supra* note 50 at 133.
[127] *Id.* at 133.

NAFTA Secretariat,[128] and that the Secretariat maintain a public register for these documents.[129] Article 1127 requires the State sued by a foreign investor to inform the other State parties of the claim,[130] as well as to provide the other State parties copies of all the pleadings filed in the course of the arbitration.[131]

Decisions by NAFTA Tribunals helped shaped the trend towards transparency, as will be discussed in further detail in Chapter 2. For the purposes of the present section, however, attention must be drawn to two documents issued by the NAFTA Free Trade Commission.

The first is the 2001 NAFTA Free Trade Commission Note of Interpretation, which documents the agreement of the three Contracting States regarding access to documents.[132] It is notable for making an unequivocal declaration that "[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration", and, subject to specific exceptions, "nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal."[133] The interpretative note further declares that *all* documents submitted to a Chapter Eleven tribunal would be made available to the public in a timely manner.[134] The Note of Interpretation does recognize that confidentiality is still important for certain classes of information, however, as it allows redaction of: (1) "confidential business information;" (2) "information which is privileged or otherwise protected from disclosure under the Party's domestic law;" and (3)

[128] NAFTA Article 1126(10).
[129] NAFTA Article 1126(13); Menaker, *supra* note 50 at 131.
[130] NAFTA Article 1127(a) requires a disputing Party to deliver to the other Parties "written notice of a claim that has been submitted to arbitration no later than 30 days after the date that the claim is submitted."
[131] NAFTA Article 1127(b); Boisson de Chazournes and Baruti, *supra* note 119 at 62.
[132] NAFTA Notes of Interpretation of Certain Chapter 11 Provisions, (2001), http://www.state.gov/documents/organization/38790.pdf.
[133] *Id.* at 1.
[134] *Id.* at 2(b).

"information which the Party must withhold pursuant to the relevant arbitral rules, as applied."[135]

As a result of this document, the public has access to documents generated during the course of a NAFTA arbitration, through websites maintained by each of the NAFTA parties.[136] Menaker provides some insight into what happens in actual practice:

> In practice, where confidential or otherwise protected information is referenced in a submission, the disputing party generally creates both redacted and unredacted versions of that document. The unredacted versions are transmitted to the tribunal and the nondisputing NAFTA Parties, while the redacted version is posted to the Party's website. In some cases, redactions have been made to the tribunal's award before that is made publicly available.[137]

The second document pertinent to a discussion about transparency is the Statement of the Free Trade Commission on non-disputing party participation.[138] The contents of this document reflect NAFTA Chapter Eleven Tribunal rulings in the cases of ***Methanex Corporation v. United States of America*** and ***United Parcel Service of America v. Government of Canada***,[139] which will be discussed in the following chapter of this dissertation. Prior to this Statement by the Free Trade Commission, there was no guidance within the NAFTA text regarding *amici curiae*, since non-disputing Parties as contemplated in Chapter Eleven pertained to the other State Parties that were not respondents in the investment claim.[140] The document confirms the discretionary power of NAFTA Tribunals to accept written submissions from non-disputing parties.[141] In great detail, the document also outlines

[135] *Id.* at 2(b).
[136] Menaker, *supra* note 50 at 134.
[137] *Id.* at 134.
[138] Statement of the Free Trade Commission on non-disputing party participation, (2003), https://www.state.gov/documents/organization/38791.pdf.
[139] Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 253–274, 261 (Michael Waibel et al. eds., 2010).
[140] Menaker, *supra* note 50 at 140.
[141] Blackaby and Richard, *supra* note 139 at 261.

procedures for the acceptance of written submissions from *amici curiae*.[142] These detailed provisions will be discussed in the next chapter of this dissertation.

1.3.2. ICSID Arbitration Rules

ICSID has always adopted a transparent approach with regard to the publication of essential information about cases in its docket.[143] As asserted by ICSID Secretary General Meg Kinnear along with counsel of the ICSID secretariat, "[b]asic information about every case administered by ICSID has been publicly available since the first registered case in 1972."[144] In the age before the Internet, information about ICSID cases appeared in ICSID's annual reports and other publications.[145] Now, ICSID's website has an easily accessible list of pending and concluded cases.[146] Aside from the names of the parties and the treaty or instrument being invoked to bring the investment claim, the information available for each case includes: the subject matter of the dispute, the date of registration of the case, the date that the Tribunal was constituted, names and nationalities of the Tribunal members, names of counsel for the parties, and the status of the proceeding.[147] Amendments introduced in 2006 to some of the provisions of the ICSID Arbitration Rules were aimed at further enhancing transparency of ICSID proceedings. In 2016, ICSID launched a rule amendment project anew.

The first iteration of the ICSID Arbitration Rules appeared in 1967 and came into effect on 1 January 1968,[148] supplementing the 1965 Convention on the Settlement of Investment

[142] Statement of the Free Trade Commission on non-disputing party participation, *supra* note 138 at B.
[143] Meg Kinnear, Eloïse Obadia & Michael Gagain, *The ICSID Approach to Publication of Information in Investor-State Arbitration*, *in* THE RISE OF TRANSPARENCY IN INTERNATIONAL ARBITRATION: THE CASE FOR THE ANONYMOUS PUBLICATION OF ARBITRAL AWARDS 107–122, 111 (Alberto Malatesta & Rinaldo Sali eds., 2013).
[144] *Id.* at 112.
[145] *Id.* at 112.
[146] https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx.
[147] Kinnear, Obadia, and Gagain, *supra* note 143 at 112–113.
[148] Antonietti, *supra* note 119 at 428.

Disputes between States and Nationals of Other States, which established ICSID.[149] Amendments were first introduced in 1984, to "streamline the Regulations and Rules and to inject into them a greater degree of flexibility."[150] The Rules were again amended in 2002,[151] resulting in the 2003 version which will serve as the baseline comparison in this dissertation for the 2006 amendments, the latter being especially notable for introducing transparency-enhancing language into the text of the Rules.

Whereas amendments to the 1965 ICSID Convention require unanimous ratification by all the Contracting States thereto, the requirement for the adoption of amendments to the ICSID Rules is only a resolution of the ICSID Administrative Council, achieved through an affirmative vote of two-thirds of its members.[152] The Administrative Council is comprised of one representative of each Contracting State.[153]

Key provisions in the 2006 amendments geared towards enhancing transparency include: (1) mandatory publication of excerpts of arbitral awards; (2) greater access of non-disputing parties to oral hearings; (3) acceptance of *amicus curiae* submissions; and (4) expanded disclosure requirements for arbitrators.[154] The first three enumerated amendments shall be discussed below; the fourth is, as discussed in the Introduction, beyond the scope of this dissertation. While the 2006 ICSID Rules are lauded for introducing transparency-oriented provisions to the text, the amendments were not limited to, nor solely intended for the purposes of increasing public access to ICSID arbitration proceedings, however. Other amendments

[149] ICSID Secretariat Discussion Paper: Possible Improvements of the Framework for ICSID Arbitration, 2 (2004), https://icsid.worldbank.org/en/Pages/resources/Background-Papers.aspx. [Hereinafter "ICSID 2004 Discussion Paper".)
[150] *Id.* at 2.; Antonietti, *supra* note 119 at 428., citing Antonio R. Parra, Revised Regulations and Rules, *News from ICSID*, Vol. 2, No. 1 (1985).
[151] Antonietti, *supra* note 119 at 428.
[152] ICSID 2004 Discussion Paper, *supra* note 149 at 2; Antonietti, *supra* note 119 at 428.
[153] ICSID Convention, Article 4(1).
[154] Antonietti, *supra* note 119 at 429. ICSID Arbitration Rules 6, 32, 37 and 48.

dealt with provisional measures[155] and objections to jurisdiction.[156]

With respect to the amendments related to transparency, it may be helpful to think of ICSID's transparency measures as falling under one of two categories: (1) mandatory; and (2) elective. Mandatory transparency measures are those that are incorporated in the ICSID Convention or Arbitration Rules in a manner that is neither subject to the discretion of the arbitration tribunal nor the will of the disputing parties. Elective transparency measures refer to those rules that do allow for tribunal discretion in relation to party choice. This latter category can further be broken down into those rules wherein non-party access to information is: (a) subject to the affirmative consent of either or both disputing parties; (b) permitted when neither disputing party objects; or (c) left to the discretion of the tribunal.

The table below presents the provisions discussed above in the 2003 and 2006 versions of the ICSID Arbitration Rules, to facilitate a visual comparison of the changes. The text underlined in the column for 2003 represents texts that have been replaced in the 2006 version, which in turn present the amended or added text in an underlined format, as well.

2003	2006
Rule 32 **The Oral Procedure** (1) The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts. (2) The Tribunal <u>shall decide, with the consent of the parties</u>, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal **may** attend the hearings.	**Rule 32** **The Oral Procedure** (1) The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts. (2) <u>Unless either party objects</u>, the Tribunal, <u>after consultation with the Secretary-General, may allow</u> other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, <u>to</u>

[155] ICSID Arbitration Rule 39.
[156] ICSID Arbitration Rule 41.

(3) The members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations.	attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information. (3) The members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations.
Rule 37 **Visits and Inquiries** If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry.	**Rule 37** **Visits and Inquiries; Submissions of Non-disputing Parties** (1) If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry. (2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "nondisputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their

	observations on the non-disputing party submission.
Rule 48 **Rendering of the Award** *x x x* (4) The Centre shall not publish the award without the consent of the parties. The Centre may, however, include in its publications excerpts of the legal rules applied by the Tribunal.	**Rule 48** **Rendering of the Award** *x x x* (4) The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.

Following the categories delineated prior to the presentation of the above comparison table, it will be observed that prompt publication of excerpts of the legal reasoning of the Tribunal in the award is a "mandatory" transparency measure to be carried out by ICSID. Meanwhile, the publication of the award in its entirety is an "elective" measure subject to the affirmative consent of the disputing parties. Also categorizable as "elective" transparency measures are: allowing non-parties to attend oral hearings, and allowing non-parties to make written submissions. In the case of oral hearings, such can be allowed if neither party objects. As for written submissions, the tribunal has the discretion whether or not to allow this form of *amici* participation. The nuances of these mandatory and elective measures are discussed further below.

Rules 32 and 37 of the ICSID Arbitration Rules, as amended in 2006, are intended to enhance the access of non-disputing parties to the arbitral proceedings in two ways: (1) open hearings; and (2) written submissions. According to the ICSID Secretariat, the rationale behind these amendments is that the arbitral process could benefit from the participation of third parties, "not only civil society organizations but also for instance business groups or, in investment treaty arbitrations, the other State parties to the treaties concerned."[157] Notably, the

[157] ICSID 2004 Discussion Paper, *supra* note 149 at 9.

ICSID Secretariat sought comments on the proposed amendments to the ICSID Arbitration Rules from business and civil society groups,[158] and thus the sector that was viewed as potential *amici curiae* was able to provide input during the drafting of the amendments to the rules.

During the revision phase, the ICSID Secretariat acknowledged that reactions to the proposed amendments were "generally favorable", but "the suggestions regarding access of third parties in particular elicited some disagreement."[159] The main concern was the additional burden of such third party participation on the parties to the proceedings.[160]

Rule 32 of the ICSID Arbitration Rules governs the conduct of the oral hearings in an investment claim. The second paragraph of that provision deals with the presence of "third parties" or "other persons" at the oral hearing. These "other persons" pertain to individuals, i.e. natural persons, who are not considered as any of the following people: the disputing parties; agents, counsel or advocates of the disputing parties; witnesses and experts who provide testimony during the proceedings; and officers of the ICSID Tribunal hearing the dispute, i.e. arbitrators, tribunal secretaries and assistants. For witnesses and experts, they would be considered part of this list of "other persons" if permission is sought for their attendance during the hearing beyond the actual time that they are providing their testimony at the oral hearing.

The most noteworthy amendment to this provision is that the Tribunal's decision on whether or not to allow these third parties to attend the oral hearing is no longer passively contingent on the consent of the disputing parties. Prior to the 2006 amendments, the consent of the parties was explicitly required. This means that affirmative approval from all parties

[158] Working Paper of the ICSID Secretariat: Suggested Changes to the ICSID Rules and Regulations, 3 (2005), https://icsid.worldbank.org/en/Pages/resources/Background-Papers.aspx. [Hereinafter "ICSID 2005 Working Paper".]
[159] *Id.* at 4.
[160] *Id.* at 4.

was necessary before the Tribunal could allow other persons to attend the oral hearing. In 1968, the notes published with the first edition of the ICSID Arbitration Rules explained this requirement for consent as a manifestation of the consent requirement under Article 48(5) of the ICSID Convention.[161] That provision prevents ICSID from publishing the Tribunal's award without the consent of the parties.[162] Looking to this provision in the ICSID Convention, the drafters of the first iteration of the ICSID Arbitration Rules reasoned in 1968 "that, as a matter of principle, arbitration proceedings should not be public."[163] As the ICSID Secretariat noted in 2004, however, "[t]he notion that it connotes wider confidentiality or privacy obligations, beyond those of ICSID itself, is not supported by current arbitral practice."[164]

The 2006 version of the rule removes the phrase "with the consent of the parties", but a careful reading of the new paragraph indicates that consent of the disputing parties is still very much required, albeit phrased in a negative manner. The new version indicates that an objection from any of the disputing parties would bar third parties from being present at the oral hearing. In that sense, consent of the parties still controls the Tribunal's decision, except that, now, a formal objection to a request for the attendance of other persons has to actively be made by the disputing party that objects to their presence. It may be said that the new wording promotes transparency by default, since the parties will have to be more proactive in preventing third parties from attending the oral hearing, rather than simply withhold consent.

Cognizant of the logistical burdens that can be imposed by the physical presence of additional people at the oral hearing, the amended rule also provides that the decision to allow other persons to attend is "subject to appropriate logistical arrangements." At the time of the

[161] ICSID 2004 Discussion Paper, *supra* note 149 at 10.
[162] ICSID Convention, Article 48(5).
[163] ICSID 2004 Discussion Paper, *supra* note 149 at 10. Citing Note C to ICSID Arbitration Rule 31 (now Rule 32) in ICSID Regulations and Rules, Doc. ICSID/4/Rev.1 (1968).
[164] *Id.* at 10.

amendment of the 2006 ICSID Arbitration Rules, ICSID already had actual experience in opening hearings to the public, in two cases administered by ICSID wherein the disputing parties consented to allow public access.[165] As will be discussed in further detail in the next chapter of this dissertation, attendance by third parties at ICSID hearings has not been limited to actual physical presence in the hearing room: there have been instances where the hearing was live-streamed into another room within the hearing premises, or even webcast live over the Internet, and in some cases, the video of the oral hearing even made available beyond the actual time that the hearing was held.

The provision also mandates that the Tribunal establish procedures for the protection of proprietary or privileged information. This is a completely new addition to the text, and demonstrates that the key to effective transparency measures that will be acceptable to all concerned parties is observing a careful balance of transparency and confidentiality.

The text of Rule 37 was expanded to cover written submissions by third parties, a subject upon which the previous iterations of the ICSID Arbitration Rules was silent.[166] As can be seen from the table above, the second paragraph of Rule 37 is completely new. The original single-paragraph Rule 37 dealt solely with the issue of visits or inquiries by the Tribunal at a physical location connected with the dispute. Upon review, the juxtaposition of the two paragraphs in the current Rule 37 can be described as odd; "Visits and Inquiries" and "Submissions of Non-disputing Parties" is a curious pairing that perhaps may only be ascribed to an effort to refrain from renumbering the ICSID Arbitration Rules due to the addition of an entirely new provision (which plainly merits a standalone rule). Rule 37 is found in Chapter IV of the ICSID Arbitration Rules on "Written and Oral Procedures", and it clearly belongs in

[165] *Id.* at 10.
[166] Antonietti, *supra* note 119 at 433.

this chapter. Modifying any numbering here, however, would affect the subsequent Chapters V through VIII (Rules 39 to 56) of the rules, possibly generating unnecessary and avoidable confusion.

An important point to bear in mind is that the non-disputing parties referred to in this new provision also include the non-disputing State party, i.e. the home State of the investor. The implications of not having a distinct and separate provision for non-disputing State parties is discussed in greater detail in Chapter 3. For now, suffice it to say that the parameters provided by the second paragraph of Rule 37 does *not* distinguish between non-disputing parties that are: (1) State parties to the investment treaty being invoked in the claim; and (2) natural and juridical persons seeking to intervene in the case as *amici curiae*. A review of the ICSID discussion paper at the time of the amendments reveals that no distinction between these two categories of non-disputing parties seems to have been contemplated.[167] Indeed, the initial wording in the lead paragraph of this new provision was drafted as "person or State".[168] Responding to concerns that this phrasing was too restrictive, the phrase "person or entity" was adopted in the final text.[169]

The new second paragraph of Rule 37 reveals that the decision regarding whether or not to allow non-disputing parties to file written submissions is entirely up to the discretion of the Tribunal, requiring only consultation with the parties to the investment dispute, but not their consent. This is unlike Rule 32 discussed above, in which both the previous and current versions of the rule predicate the Tribunal decision on consent from the disputing parties, albeit phrased differently. This might be attributed to the fact that the amendments to Rule 32 are grounded in the previous version of the ICSID Arbitration Rules, and therefore the requirement

[167] ICSID 2004 Discussion Paper, *supra* note 149 at 9.
[168] Antonietti, *supra* note 119 at 435.
[169] *Id.* at 435.

for consent could not summarily be done away with. Conversely, the new second paragraph in Rule 37 is an entirely new provision that draws on ICSID Tribunal decisions as the basis for the text, instead of an older version of the ICSID Arbitration Rules. As will be discussed more extensively in the next chapter, ICSID Tribunals that faced requests for the filing of *amicus curiae* submissions, in cases decided prior to the addition of a specific rule on this matter, relied on their general discretion over the conduct of arbitral proceedings to resolve the issue. This may explain why the new rule gives the Tribunal the discretion to accept written submissions from non-disputing parties.

Significantly, a commentator familiar with the drafting history of the 2006 amendments reveals that "certain governments had a strong preference that the consent of both parties be made a condition for a tribunal allowing such submissions."[170] This view, however, is not reflected in the new rule.

The new rule also sets forth three criteria that the Tribunal is mandated to consider in deciding whether to allow a submission by a non-disputing party. As will be seen in the next chapter, where non-disputing party submissions will be discussed in greater detail, the most contentious among these criteria is Article 37(2)(b) which requires that "the non-disputing party submission would address a matter within the scope of the dispute". This phrasing actually appears twice within Rule 37, as "a matter within the scope of dispute" also appears in the lead paragraph of the new provision. This requirement is subject to a wide latitude of interpretation; as will be seen in the next chapter, this is the criterion that usually decides whether or not a Tribunal will accept a non-disputing Party submission.

Article 48(5) of the ICSID Convention prohibits ICSID from publishing the award

[170] *Id.* at 434.

without the consent of the parties, and this treaty provision is reflected in Rule 48(4). In the 1967 version of the Rules, the corresponding provision merely replicated the prohibition in the ICSID Convention. Beginning in 1984, some ICSID awards had been published unilaterally by some parties;[171] that year, Rule 48(4) was amended to the version as it appeared in the 2003 Rules, not having been further amended in that round of revisions.[172]

The fourth paragraph of Rule 48 was amended in 2006 the goal of facilitating prompt release of excerpts from awards.[173] Whereas the old version of the rule allowed ICSID to publish excerpts of the "legal rules" applied by the Tribunal, the amended version makes it mandatory for ICSID to "promptly" publish excerpts of the "legal reasoning" of the Tribunal.[174] An earlier version of the 2006 amendments considered the phrase "legal conclusions of the Tribunal".[175] As one of the legal advisers at ICSID observes, this new wording allows ICSID "to publish the tribunal's discussion of how to apply applicable legal principles."[176]

The word "promptly" was included to address issues regarding the timeliness of the publication of excerpts.[177] Timely information was deemed necessary because of the increase in the number of pending cases lodged with ICSID[178] involving similar issues for which the information might be relevant.[179]

In reality, however, several ICSID awards remain unavailable on the ICSID website.

[171] Kinnear, Obadia, and Gagain, *supra* note 143 at 114; ICSID 2004 Discussion Paper, *supra* note 149 at 8.
[172] Kinnear, Obadia, and Gagain, *supra* note 143 at 114.
[173] ICSID 2005 Working Paper, *supra* note 158 at 9; ICSID 2004 Discussion Paper, *supra* note 149 at 4.
[174] *See* underlined text in table above.
[175] Antonietti, *supra* note 119 at 442; ICSID 2005 Working Paper, *supra* note 158 at 9.
[176] Antonietti, *supra* note 119 at 442.
[177] ICSID 2004 Discussion Paper, *supra* note 149 at 8.
[178] ICSID 2005 Working Paper, *supra* note 158 at 9; Antonietti, *supra* note 119 at 442.
[179] ICSID 2004 Discussion Paper, *supra* note 149 at 8.

Finally, mention must be made that ICSID is currently in the process of revising its Arbitration Rules for the fourth time since the original version in 1967, launching an amendment process in October 2016.[180] A page devoted to the amendment process appears on the ICSID website, and the public was invited to submit comments.[181] Unlike the 2006 Arbitration Rules where transparency was one of the main thrusts of the amendment process, the current amendment process does not seem to have additional measures for increasing transparency.[182]

1.3.3. UNCITRAL Arbitration Rules

The UNCITRAL Arbitration Rules were drafted to govern international commercial arbitration proceedings.[183] As such, these rules lean heavily towards maintaining the confidentiality of the arbitration. Not being administered by a specific institution, UNCITRAL arbitrations are not recorded in any public registry.[184] Under UNCITRAL Arbitration Rules, consent of both parties is required for publication of the award.[185] The Rules are silent on non-disputing party participation.[186]

---

[180] ICSID 2017 Annual Report, 46 (2017).
[181] *Id.* at 46.
[182] A review of a document entitled "List of Topics for Potential ICSID Rule Amendment", which groups together comments received from the public according to theme, one of the categories is "Explore Possible Provisions on Transparency, Clarify Rules on Non-Disputing Party Participation", indicating that comments from the public have discussed further transparency concerns. However, a reading of another document prepared by ICSID entitled "The ICSID Rules Amendment Process" indicates that the ICSID Secretariat is not focusing on transparency for this round of amendments, although this fourth amendment process appears to be far more extensive than the three that preceded it. The list of "Potential Areas for Development" in that document look to the following: appointment of arbitrators, code of conduct for arbitrators, challenge of arbitrators, third party funding, consolidation, modernize means of communication, preliminary objections, first session, witnesses and evidence, discontinuance, awards and dissents, security for costs, security for stay of enforcement awards, allocation of costs, annulment, publication of decisions and orders. Both documents are available as links at https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx.
[183] Knieper, *supra* note 47 at 156.
[184] Menaker, *supra* note 50 at 137.
[185] UNCITRAL Arbitration Rules, Article 32(5); Menaker, *supra* at 137.
[186] Menaker, *supra* note 50 at 140.

The first version of the UNCITRAL Arbitration Rules in 1976, and its revised iteration in 2010 do not distinguish between commercial and investment arbitration.[187] However, in 2008, during the revision process that resulted in the 2010 version of the UNCITRAL Arbitration Rules, UNCITRAL acknowledged that "the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules."[188]

Thus, with respect to transparency in investment arbitration, the key development with respect to the UNCITRAL Rules is that the 2010 UNCITRAL Arbitration Rules were amended in 2013 to include a provision that expressly incorporated the UNCITRAL Rules on Transparency.[189] The new provision appears as the fourth paragraph of Article 1 of the UNCITRAL Arbitration Rules:

> For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration ("Rules on Transparency"), subject to article 1 of the Rules on Transparency.[190]

The new provision expressly incorporates the UNCITRAL Rules on Transparency into the Arbitration Rules. The scope referenced in the provision quoted above, i.e. Article 1 of the Rules on Transparency, will be discussed in the sub-section on the UNCITRAL Rules on Transparency below.[191]

[187] Knieper, *supra* note 47 at 156.
[188] Report of the Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session (Vienna, 15-19 September 2008), A/CN.9/665 (30 September 2008), ¶8.
[189] UN General Assembly Resolution 68/109, (2014); Boisson de Chazournes and Baruti, *supra* note 119 at 66.
[190] UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), Article 1(4).
[191] *See* Section 1.4.1.2., *infra*.

1.4. UNCITRAL Rules on Transparency and its related treaty

Tracing the trend towards transparency described in the previous sections is a necessary prologue for a discussion of the UNCITRAL Rules on Transparency, providing the backdrop for appreciating the context in which these Rules were created. An examination of the text of the UNCITRAL Rules on Transparency readily reveals that the text is derived from earlier efforts seen with regard to NAFTA and the 2006 revision of the ICSID Arbitration Rules.

Three components comprise the UNCITRAL Transparency Standards: (1) the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, a set of procedural rules designed to enhance public access to investment treaty disputes; (2) the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, also known as the Mauritius Convention, a treaty intended to facilitate the applicability of the Rules on Transparency to investment treaties concluded prior to 1 April 2014; and (3) the Transparency Registry, a repository for the publication of information and documents in treaty-based investor-State arbitration.[192]

This section of the dissertation is divided into two subsections expounding on the Rules and the Convention, respectively, wherein salient aspects of these transparency instruments will be examined.

As for the Transparency Registry, it is worth noting at the outset that Article 8 of the UNCITRAL Rules on Transparency mandates the creation of a repository of published information, thus:

> Article 8. *Repository of published information*
> The repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations or an institution named by

[192] Knieper, *supra* note 47 at 157.

UNCITRAL.

The UNCITRAL Secretariat, at the United Nations office in Vienna, serves as the Transparency Registry pursuant to the above-quoted rule.[193] The establishment and operation of the repository is funded by voluntary contributions from the European Commission and the OPEC fund for International Development.[194] The website of this repository makes information easily accessible by the public from anywhere in the world, and has a search function that has filter options to search for cases based on the respondent State, the investment treaty being invoked, or the economic sector involved in the investment dispute.[195]

At the time of this writing, however, a limited number of cases are available on the website. Most of the documents available for download pertain to eight concluded NAFTA cases wherein Canada, the second State to ratify the Mauritius Convention, is the sovereign respondent. It is worth noting that the documents made available were already subject to NAFTA's provisions on transparency, as discussed earlier in this chapter, so no new documents in relation to these cases appear on the website as a result of the UNCITRAL Rules on Transparency or the Mauritius Convention. The Government of Canada had agreed to publish these documents on the Transparency Registry to serve as examples of what documents could appear on the online database when the Rules on Transparency are employed in future investment disputes.[196]

As for the other two cases available on the Transparency Registry, ***Iberdrola v. Bolivia*** and ***BSG Resources Limited v. Guinea***, the details on the more nuanced applications of the

[193] *See* www.uncitral.org/transparency-registry/en/contact.html. Strictly construed, "[t]he function of the Transparency Registry is undertaken by the Secretary-General of the United Nations, through the UNCITRAL Secretariat." *See* www.uncitral.org/transparency-registry/en/introduction.html.
[194] *See* www.uncitral.org/transparency-registry/en/Registry_donors.html.
[195] The repository can be accessed at www.uncitral.org/transparency-registry/registry/index.jspx.
[196] Knieper, *supra* note 47 at 164–165.

UNCITRAL Rules on Transparency in these two cases will be discussed at specific junctures in the sections to follow.

1.4.1. UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration

The adoption by UNCITRAL of its Rules on Transparency in Treaty-based Investor-State Arbitration, which came into force on 1 April 2014, is a significant turning point in the development of investor-State dispute settlement. Recognizing "the importance of ensuring transparency in treaty-based investor-State arbitration,"[197] the Commission tasked its Working Group II with the preparation of a legal standard on this theme.[198] UNCITRAL produced a groundbreaking set of rules that affirmatively "take account of the public interest involved in such arbitrations" wherein one of the parties is a sovereign State.[199]

The UNCITRAL Rules on Transparency respond to a clamor for an increased transparency regime for investor-State dispute settlement, which coincides with the steady increase in the number of these types of cases over the past decade. Beyond its application to investment arbitrations following the UNCITRAL Arbitration Rules, the Rules on Transparency are important on a wider scale because they "acknowledge that the general public is a fundamental stakeholder in investor-State disputes."[200] This is a cognizant departure from the international arbitration model based on commercial disputes, where the rules followed in

[197] Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (Vienna, 4-8 October 2010), (20 October 2010), A/CN.9/712, at 3, *available at* http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.
[198] *Id.*
[199] UN General Assembly Resolution 68/109, *supra* note 189 at 1.
[200] Address to the Sixth Committee of the General Assembly by Mr. Michael Schöll, Chairman of the Forty-sixth session of UNCITRAL, 3 (2013), papersmart.unmeetings.org/media2/433210/chair-46th-session-uncitral.pdf (last visited Mar 5, 2018). [Hereinafter UNCITRAL Chairman GA Address]; Rule 4(a), UNCITRAL Rules on Transparency.

investment arbitration were initially based, and where confidentiality continues to be a key feature.[201]

The result of a relatively speedy three years of negotiations in UNCITRAL's Working Group II on Arbitration and Conciliation, the deliberations on the Rules on Transparency nevertheless revealed that the issue of transparency is "a highly sensitive one",[202] and that "the views on what information a government owes to its citizens regarding its dealings differ quite radically from one country to another."[203] These observations by the UNCITRAL Chairman, made in remarks to the UN Sixth Committee during a report about the adoption of the UNCITRAL Rules on Transparency, underscore the remarkable achievement of obtaining multilateral consensus on the resulting text.[204] UNCITRAL had, in fact, "urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in treaty-based investor-State arbitration."[205] The compromises that were reached through debates during the UNCITRAL sessions, that ultimately resulted in the final version of the text, serve to establish the legitimacy of this text as a product of multilateral rulemaking.[206]

As mentioned earlier, the idea for formulating an UNCITRAL text that would specifically address transparency in investment treaty arbitration came about during the revision of the UNCITRAL Arbitration Rules.[207] During that revision process, the Commission

[201] *See* discussion, *infra*.
[202] UNCITRAL Chairman GA Address, *supra* note 200 at 3.
[203] *Id.* at 3.
[204] *Id.* at 3.
[205] Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (New York, 7-11 February 2011), A/CN.9/717, 1 (2011). [Hereinafter "February 2011 UNCITRAL WG II Report".]
[206] Julia Salasky & Corinne Montineri, *UN Commission on International Trade Law and Multilateral Rule-making: Consensus, Sovereignty and the Role of International Organizations in the Preparation of the UNCITRAL Rules on Transparency*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 584–596, 593–594 (Jean Kalicki & Anna Joubin-Bret eds., 2015).
[207] Report of the Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session (Vienna, 15-19 September 2008), A/CN.9/665 (30 September 2008), ¶8; *See* discussion in Section 1.3.3., *infra*.

agreed that developing a standard on transparency would be a separate and discrete discussion.[208] Many issues in the formulation of the text became the subject of debate among the delegations that comprised UNCITRAL Working Group II. The following subsections will take a close look at the drafting history to better understand this new instrument for enhancing transparency in treaty-based investor-State arbitration. Aside from considerations about the form and structure of the UNCITRAL Rules on Transparency, the multilayered provision regarding the scope of the Rules will be the focus of this section of the dissertation.

1.4.1.1. Form and structure of the UNCITRAL Rules on Transparency

After the decision was made to develop the text outside the more general UNCITRAL Arbitration Rules, the next consideration was the form that this standard on transparency would assume.[209] Possible instruments contemplated by the UNCITRAL Working Group II included model clauses for inclusion in investment treaties, guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules, or optional clauses for adoption in specific investment treaties.[210] Ultimately, the debate boiled down to adopting either discursive guidelines or standalone rules.[211]

Considerations with respect to adopting guidelines as the form for the legal standard on transparency leaned towards a more flexible instrument with a more discursive writing style, that would lay out options to parties and provide detailed explanations therefor.[212] Proponents of standalone rules argued against guidelines as a form the legal standard of transparency,

[208] February 2011 UNCITRAL WG II Report, *supra* note 205 at 1; Salasky and Montineri, *supra* note 206 at 594.
[209] Salasky and Montineri, *supra* note 206 at 594.
[210] February 2011 UNCITRAL WG II Report, *supra* note 205 at 1; Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration, Note by the UNCITRAL Secretariat, A/CN.9/WG.II/WP.162 (9 December 2010), 10–20 (2010). [Hereinafter December 2010 UNCITRAL WG Working Paper]
[211] February 2011 UNCITRAL WG II Report, *supra* note 205 at 23.
[212] *Id.* at ¶24.

maintaining that "guidelines would not provide the certainty contemplated by the objective of UNCITRAL to harmonize international trade law."[213] Contrastingly, detailed rules of procedure was promoted as "an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such."[214] The insistence by some delegations to the Working Group on adopting guidelines was viewed as an effort to retain discretion as to when the standard on transparency would apply, rather than ensuring its widespread adoption.[215] Ultimately, and as is obvious from the final form of the text today, the Working Group agreed to push forward with drafting the legal standard on transparency in the form of Rules rather than guidelines.

As to the structure of the Rules on Transparency, the Working Group initially contemplated including a provision that laid out the structure of the Rules. The draft provision explained that Articles 2 to 6 of the Rules on Transparency were "substantive rules", which were "subject to the limited exceptions set out in Article 7."[216] While this explanatory provision did not make it into the final version of the text, the structure of the Rules on Transparency reflects this framework.

[213] *Id.* at 25.
[214] *Id.* at 25.
[215] Salasky and Montineri, *supra* note 206 at 594–595; February 2011 UNCITRAL WG II Report, *supra* note 205 at 26.
[216] Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fifth session (Vienna, 3-7 October 2011) A/CN.9/736, ¶ 38 (2011). A draft article appears in a Note by the Secretariat (29 July 2011), A/CN.9/WG.II/WP.166, ¶10: "2. Articles 2 to 6 of the Rules on Transparency contain rules relating to disclosure of the initiation of arbitral proceedings (article 2), publication of documents (article 3), publication of arbitral awards (article 4), submissions by third parties in arbitral proceedings (article 5), and [public/open] hearings and publication of transcripts (article 6). These rules are subject to the express exceptions set out in article 7. Where the Rules on Transparency provide for the exercise of a discretion by the arbitral tribunal, that discretion shall be exercised by the arbitral tribunal as it considers appropriate, taking into account all circumstances it deems relevant, including where applicable the need to balance (i) the legitimate public interest in transparency in the field of treaty-based investor-State arbitration and in the arbitral proceedings and (ii) the arbitrating parties' own legitimate interest in a fast and efficient resolution of their dispute."

1.4.1.2. Scope of the UNCITRAL Rules on Transparency

Article 1 of the UNCITRAL Rules on Transparency is entitled *Scope of application*. The nine paragraphs comprising this Article are divided into five parts: *Applicability of the Rules*; *Application of the Rules*; *Discretion and authority of the arbitral tribunal*; *Applicable instrument in case of conflict*; and *Application in non-UNCITRAL arbitrations*.

Significantly, a footnote appears at the outset of the Rules on Transparency, providing a definition of "treaty" as contemplated in the Rules:

> *For the purposes of the Rules on Transparency, a "treaty" shall be understood broadly as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty.[217]

The inclusion of this footnote "aimed at clarifying the understanding that investment treaties to which the rules on transparency would apply should be understood in the broad sense."[218] The Working Group deemed it fit that an explanatory footnote form part of the Rules, defining the ambit of investment treaties covered by the Rules.[219]

1.4.1.2.1. Applicability of the UNCITRAL Rules on Transparency

Consent to the application of a legal standard of transparency was a central issue during the drafting of the UNCITRAL Rules on Transparency.[220] Concomitant with that concern was the manner in which such consent would be expressed.[221] Indeed, a review of the drafting

[217] UNCITRAL Rules on Transparency, footnote to Article 1(1).
[218] Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-sixth session (New York, 6-10 February 2012), A/CN.9/741, ¶ 101 (2012).
[219] October 2011 UNCITRAL WG Report, *supra* note 216 at ¶ 37; February 2012 UNCITRAL WG Report, *supra* note 218 at ¶ 102.
[220] February 2011 UNCITRAL WG II Report, *supra* note 205 at 19.
[221] *Id.* at 19.

history of the Rules, contained in Reports of the Working Group II, reveal that the first section of Article 1 of the Rules, on the *Applicability of the Rules*, generated the most debate throughout the Working Group's sessions from 2011 until 2014. As acknowledged by the Working Group, the scope of the application of the Rules on Transparency is "a complex matter with important policy implications."[222] Several versions of the text were proposed, and those proposals then becoming subject of counterproposals, until compromise was reached amongst the delegations to arrive at this final version of the text:

> *Applicability of the Rules*
>
> 1. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") shall apply to investor-State arbitration 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.
>
> 2. In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when:
>
> (a) The parties to an arbitration (the "disputing parties") agree to their application in respect of that arbitration; or
>
> (b) 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.[223]

As mentioned earlier, the UNCITRAL Rules on Transparency came into force on 1 April 2014. Both of the paragraphs above cover investor-State arbitration initiated UNCITRAL Arbitration Rules. The difference in the two paragraphs quoted above relate to whether the investment treaties being invoked in such disputes were concluded prior to, or after, the UNCITRAL Rules on Transparency came into effect.

The first paragraph of Article 1 contemplates disputes arising under investment treaties

[222] February 2012 UNCITRAL WG Report, *supra* note 218 at 55. [Hereinafter "February 2012 UNCITRAL WG Report".]
[223] UNCITRAL Rules on Transparency, Article 1.

concluded *after* the Rules came into force. The provision provides for the prospective application of the Rules to such future disputes, unless the State parties to the investment treaty agree – in the investment treaty itself – not to apply the UNCITRAL Rules on Transparency. Considered in more practical terms, "a reference to the UNCITRAL Arbitration Rules would include a reference to the rules on transparency unless the State Parties agreed otherwise, which they would be able to do by choosing an earlier version of the UNCITRAL Arbitration Rules (i.e. the 2010 Rules)."[224] State Parties would thereby manifest consent to the application of the UNCITRAL Rules on Transparency by including a reference to the UNCITRAL Arbitration Rules in investment treaties, being on notice that the UNCITRAL Arbitration Rules includes the Rules on Transparency.[225] With the provision phrased this way, application of the Rules on Transparency would be understood as the norm, while still providing State Parties with the option to expressly exclude their application.[226]

The second paragraph of Article 1 provides the opposite in terms of the time that the investment treaty was concluded, and the manner of making the Rules applicable. For disputes brought under investment treaties concluded *before* the effectivity of the Rules on Transparency, two modes of consent can render the Rules applicable to the dispute. First, if the disputing parties (i.e. the claimant investor and the respondent State) in the already-initiated arbitration expressly agree to the application of the Rules to the proceedings. Second, if the State parties to the investment treaty have, after the Rules on Transparency came into force, agreed to apply the Rules on Transparency.

Summarizing the dichotomy above, investment treaties concluded *after* the Rules on Transparency came into force would automatically apply the UNCITRAL Rules on

[224] February 2012 UNCITRAL WG Report, *supra* note 218 at 54.
[225] October 2011 UNCITRAL WG Report, *supra* note 216 at 20.
[226] *Id.* at 20.

Transparency *unless* the State Parties thereto proactively "opt-out" of the application of the Rules, whereas the UNCITRAL Rules on Transparency would *not* apply to *existing* investment treaties *unless* either the parties to the dispute, or the State parties to the investment treaty "opt-in" to the application of the Rules.[227] "Existing" investment treaties refer to "treaties concluded before the date of adoption of the rules",[228] i.e. treaties concluded prior to 1 April 2014. Throughout the deliberations of the Working Group, the terms "opt-in" and "opt-out" served as informal shorthand for the modes of consent discussed above, when discussing the many varied revisions they assumed throughout the drafting of the Rules on Transparency.[229]

One notable point on the issue of consent to the UNCITRAL Rules on Transparency is that the drafters of the Rules considered only the consent of State parties to the investment treaties – and *not* the consent of the disputing parties in an investment arbitration – as the only consent that required elaboration and discussion. There was general agreement that "the disputing parties should not be entitled to exclude or vary their application" under an investment treaty that incorporated the application of the Rules on Transparency, underscoring the public interest rationale for transparency:

> There was broad support for the suggestion that there should not be a provision allowing the disputing parties to vary the offer for transparent arbitration for the policy reason that it would not be appropriate for the disputing parties to reverse a decision on that matter. In addition, the legal standard on transparency was meant to benefit not only the investor and the host State but also the general public, with the consequence that it was not for the disputing parties to renounce transparency provisions adopted by the States.[230]

There have been a number of bilateral investment treaties concluded after 1 April 2014.

[227] Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session (New York, 4-8 February 2013), A/CN.9/765, 17 (2013). [Hereinafter "February 2013 UNCITRAL WG Report".]
[228] February 2012 UNCITRAL WG Report, *supra* note 218 at 4–5.
[229] *See e.g.* February 2011 UNCITRAL WG II Report, *supra* note 205 at 19, et ; October 2011 UNCITRAL WG Report, *supra* note 216 at 18 et seq.; February 2012 UNCITRAL WG Report, *supra* note 218 at 14 et seq., 54 et ; February 2013 UNCITRAL WG Report, *supra* note 227 at 17–24.
[230] October 2011 UNCITRAL WG Report, *supra* note 216 at 33.

A review of the investment treaty database available on the UNCTAD website reveals that there have been 130 new investment treaties concluded between 3 April 2014 and 12 February 2018.[231] Meanwhile, UNCITRAL also maintains a database of investment treaties that have either: (1) incorporated a provision for the application of the UNCITRAL Rules on Transparency (i.e. by reference to the UNCITRAL Arbitration Rules); or (2) have specific treaty provisions on transparency that may have been modelled on the UNCITRAL Rules on Transparency.[232] Of the 46 treaties currently listed as of the first quarter of 2018, 44 are bilateral investment treaties, and 2 are multilateral trade agreements.

The provision concerning *existing* treaties ignited more debate than the provision on future treaties. Positions of delegations to the Working Group were initially "polarized" on "whether the possibility of dynamic interpretation of existing treaties should be left open".[233] Their concern was that the Rules of Transparency should utilize consent mechanisms that promoted transparency rather than restraining it. Specifically, a number of delegations[234] expressed the view "that applying the rules to existing treaties only when the parties expressly 'opted-in' to the rules by a subsequent agreement […] would thwart the reasonable expectations of those countries who intended to benefit from dynamic clauses in their treaties, and that it would send a negative message regarding the virtues of transparency."[235] By "dynamic interpretation", the proponents of this view explained that some investment treaties contained dynamic clauses regarding the applicable version of the UNCITRAL Arbitration Rules, i.e. the "Arbitration Rules as they might evolve over time".[236] Thus, if a dispute arises

[231] *See* investmentpolicyhub.unctad.org/IIA/MostRecentTreaties#iiaInnerMenu, last accessed on 9 March 2018.
[232] *See* www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html.
[233] February 2012 UNCITRAL WG Report, *supra* note 218 at 55.
[234] Proposal by Governments of Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States of America, A/CN.9/WG.II/WP.174, (2012). [Hereinafter "A/CN.9/WG.II/WP.174"]
[235] Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-seventh session (Vienna, 1-5 October 2012) A/CN.9/760, 140 (2012).
[236] A/CN.9/WG.II/WP.174, *supra* note 234 at 2.

after the UNCITRAL Rules on Transparency came into force, but under an investment treaty with a dynamic clause concluded *before* the Rules on Transparency became effective (and therefore forming part of the UNCITRAL Arbitration Rules), then no additional agreement to apply the Rules on Transparency would be required, because application of the same would reflect the consent of the State Parties to apply the UNCITRAL Arbitration Rules at the time the dispute arises.[237] Subsequent disagreement about the application of the Rules on Transparency could be resolved by tribunals in accordance with internationally accepted rules of treaty interpretation.[238] This view, however, did not muster support of the majority.

According to the UNCITRAL Transparency Registry, there is thus far only one case that has utilized Article 1(2)(a) in order to facilitate the application of the UNCITRAL Rules on Transparency to the proceedings therein. The case of ***Iberdrola, S.A. (España) and Iberdrola Energía, S.A.U. (España) v. The Plurinational State of Bolivia*** ("*Iberdrola v. Bolivia*")[239] is a case administered by the Permanent Court of Arbitration in The Hague under UNCITRAL Arbitration Rules. Initiated on 29 July 2014 pursuant to the 2001 bilateral investment treaty between Bolivia and Spain,[240] the parties agreed that the proceedings would be conducted in accordance with the UNCITRAL Rules on Transparency, specifically citing Article 1(2)(a) thereof, with the modification that the Permanent Court of Arbitration would act as the repository of information.[241]

While this development is promising, and demonstrates that Article 1(2)(a) of the UNCITRAL Transparency Rules is a useful provision for investment disputes brought under existing treaties, a review of the documents available on the website of the Permanent Court of

[237] *Id.* at 4.
[238] October 2012 UNCITRAL WG Report, *supra* note 235 at 140; A/CN.9/WG.II/WP.174, *supra* note 234 at 4.
[239] PCA Case No. 2015-05
[240] *Iberdrola v. Bolivia - Notificación de Arbitraje (29 July 2014)*
[241] *Iberdrola v. Bolivia – Orden de Conclusión* (16 February 2016), ¶1.9.

Arbitration reveals that only limited documents are available: (1) the 2014 notice of arbitration; (2) the 2015 *Acta de Constitución*, which is very similar in scope to what most ICSID cases would have as a "Procedural Order No. 1"; and (3) the 2016 *Orden de Conclusión*. A review of the final order, however, reveals that the case was ultimately settled by the parties, which is why there are no written submissions by the parties on the website.[242] The settlement agreement referenced in the final order was not among the documents made available to the public.

1.4.1.2.2. Application of the Rules and discretion of the arbitral tribunal

The second part of Article 1 is composed of the two provisions contained in Article 1(3), meant to provide flexibility in the application of the Rules of Transparency, and thereby allowing derogation from the transparency standards in the Rules through decisions of: (a) the disputing parties, and (b) the arbitral tribunal:

> 3. In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty:
>
> (a) The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty;
>
> (b) The arbitral tribunal shall have the power, besides its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case, after consultation with the disputing parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.

Although Article 1(1) contemplates only possible exclusion of the UNCITRAL Rules on Transparency if the State Parties to the investment treaty so agree, it is still possible for a treaty to contain language that provides a measure of latitude to the disputing parties, i.e. the investor and the respondent State. The clause in Article 1(3)(a), "unless permitted to do so by the treaty" essentially qualifies the host State's offer to arbitrate as the determining factor on

[242] *Id*., ¶1.13.

whether or not the Rules on Transparency will apply.[243]

An example is the Agreement between the Government of the Republic of Belarus and the Government of the Kingdom of Cambodia on the Promotion and Reciprocal Protection of Investments, signed by the State Parties on 23 April 2014. This treaty allows the disputing parties to tailor the UNCITRAL Arbitration Rules to their particular proceedings. The dispute resolution section of that treaty provides for ICSID arbitration, UNCITRAL arbitration, or *ad hoc* arbitration (presumably with the possibility of other arbitration rules).[244] The relevant provision of that investment treaty reads, with respect to UNCITRAL arbitration:

> Article 8
> Disputes Between a Contracting Party
> And an Investor of the Other Contracting Party
>
> *x x x*
>
> 2. If the dispute has not been settled within six (6) months from the date on which it was notified in writing, the dispute may, at the choice of the investor, be submitted to:
>
> *x x x*
>
> d) an ad hoc arbitration to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), as may be amended by the two parties to the dispute; *x x x*

The clause "as may be amended by the two parties to the dispute" in the treaty provision quoted above is the kind of stipulation envisioned by Article 1(3)(a) of the UNCITRAL Rules on Transparency. Thus, as can be seen from the example above, reference to the UNCITRAL Arbitration Rules in an investment treaty is not sufficient to ensure that the UNCITRAL Rules on Transparency will form part and parcel of the Arbitration Rules. Precisely because the Rules

[243] In discussing whether the investor would have the option to refuse the legal standard on transparency, "it was said that the investor would express acceptance to arbitrate under terms of an offer to arbitrate, as contained in the treaty, and that that offer could not be varied. Once the offer had been accepted, the investor was bound by the terms and conditions contained in that offer." February 2011 UNCITRAL WG II Report, *supra* note 205 at ¶ 49.

[244] Agreement between the Government of the Republic of Belarus and the Government of the Kingdom of Cambodia on the Promotion and Reciprocal Protection of Investments (Minsk, 2014), Article 8.

on Transparency have become incorporated into the UNCITRAL Arbitration Rules by virtue of the new Article 1(4) introduced into the 2010 version of the Arbitration Rules in 2013, any allowable modification of the Arbitration Rules impliedly includes the option of the disputing parties to reject all or part of the Rules on Transparency, as well.

As for the discretion allowed to the arbitral tribunal "to adapt the requirements of any specific provision" of the Rules on Transparency, this provision was deemed necessary because there could conceivably be "public policy" reasons for deviating from the Rules on Transparency.[245] This clause essentially replicates the provisions in the next part of the Article 1. Although sub-paragraph (b) contains the clause "besides its discretionary authority under certain provisions of these Rules", this sub-paragraph appears to be superfluous, and not much appears in the *travaux preparatoires* of the UNCITRAL Rules on Transparency to explain the utility of this sub-paragraph in light of other provisions dealing with the extent of the arbitral tribunal's discretion. Including a provision regarding the discretionary power of the arbitral tribunal may have been for the purpose of providing a counterpoint to the provision regarding derogation from the Rules on Transparency by the disputing parties. Text of the Working Group report on the structure of this provision reveals this consideration:

> As a matter of drafting, it was pointed out that paragraph (2) [paragraph (3) in the final text] dealt with the disputing parties, but did not refer to the arbitral tribunal. Attention was called to article 17(1) of the 2010 UNCITRAL Arbitration Rules, which provided that the arbitral tribunal might conduct the arbitration in such manner as it considered appropriate. It was suggested to clarify whether, and the extent to which, arbitral tribunals would be allowed to deviate from, or mitigate the effect of, the rules on transparency when such rules would operate in conjunction with the UNCITRAL Arbitration Rules.[246]

However, Article 1(3)(b) appears to be redundant when reviewed in conjunction with

[245] February 2012 UNCITRAL WG Report, *supra* note 218 at 68.
[246] *Id.* at ¶ 66.

the subsequent paragraphs that form the third part of Article 1. The considerations in including Article 1(3)(b) do not appear to be different from including the more discursive Article 1(4), 1(5) and 1(6):

> *Discretion and authority of the arbitral tribunal*
>
> 4. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account: (a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and (b) The disputing parties' interest in a fair and efficient resolution of their dispute.
>
> 5. These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons.
>
> 6. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

A review of the UNCITRAL Working Group Reports reveals that this provision did not provoke any debate among the delegations, and the revisions to the final version of the text were left to the UNCITRAL Secretariat.[247]

1.4.1.2.3. Applicable instrument in case of conflict

The fourth part of Article 1 establishes a hierarchy of legal instruments in the event of conflict of the Rules on Transparency with: (1) the applicable arbitration rules; (2) the investment treaty; or (3) the applicable law:

> *Applicable instrument in case of conflict*
>
> 7. Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.

[247] *Id.* at ¶¶ 82-85.

> 8. Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.

The first two sentences of Article 1(7) concern the relationship between the UNCITRAL Rules on Transparency and the arbitration rules applicable to an investment dispute. The *travaux preparatoires* of the UNCITRAL Rules on Transparency reveals that a large majority was in favor of allowing the relationship wherein the Rules on Transparency would supplement arbitration rules, and prevail in case of conflict. No debate on this matter appears in the relevant documents.[248]

With respect to a conflict between the Rules on Transparency and an investment treaty, however, the drafters at first considered giving preference to whichever text offered a higher level of transparency.[249] However, an issue was raised that "an assessment of the level of transparency" could prove problematic.[250] Ultimately, it was decided that prevalence of treaty provisions in case of conflict with the Rules on Transparency was the proper approach, even if the investment treaty provided for a less transparent regime than the Rules.[251]

It is important to note at this juncture, however, that the last sentence of Article 1(7) does not apply when the home State of the investor, and the respondent State in the investment dispute are both parties to the Mauritius Convention on Transparency *sans* reservations, as will be discussed in the section below on the Convention. In other words, if the State parties to the investment treaty being invoked in the dispute are also State parties to the Mauritius Convention, the provisions of the investment treaty do not prevail over the Rules of Transparency in the event of a conflict.

[248] *Id.* at ¶¶ 95-96.
[249] *Id.* at ¶ 86.
[250] *Id.* at ¶ 87.
[251] *Id.* at ¶¶ 87-89.

Article 1(8), regarding a conflict between the Rules on Transparency and the applicable arbitration rules, was modeled after Article 1(3) of the 2010 UNCITRAL Arbitration Rules.[252] The similarity in wording readily reflects this intention to allow applicable law to prevail, with the qualification that it must be a law "from which the parties cannot derogate".

1.4.1.2.4. Application of the UNCITRAL Rules on Transparency to non-UNCITRAL arbitrations

The last paragraph of Article 1 concerns the applicability of the UNCITRAL Rules on Transparency to investment arbitration proceedings that follow other institutional arbitration rules:

> *Application in non-UNCITRAL arbitrations*
>
> 9. These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings.

This provision is intended to promote the use of the UNCITRAL Rules on Transparency in other investor-State proceedings, not limiting its use to arbitrations that follow UNCITRAL Arbitration Rules. The intended effect is to enhance transparency in investor-State arbitration in general, and not simply the use of the Rules on Transparency *per se*. The lack of the qualifier "treaty-based" before "investor-State" in this provision underscores that goal.

The Working Group that drafted the UNCITRAL Rules on Transparency was comprised not only of country delegations. Relevant to the above-quoted provision, the presence and participation of the following arbitration institutions is worthy of note: ICSID, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the ICC International Court of Arbitration, and the Permanent Court of Arbitration at The Hague.[253] These

[252] *Id.* at ¶ 96.
[253] October 2011 UNCITRAL WG Report, *supra* note 216 at ¶28.

arbitration institutions "confirmed that, as a matter of principle, application of transparency rules in conjunction with their institutional rules was unlikely to create problems."[254]

The first reported use of the UNCITRAL Rules on Transparency in a non-UNCITRAL arbitration is in an ICSID case, and one that is *not* treaty-based.[255] The case of ***BSG Resources Limited v. Republic of Guinea***[256] is a case concerning a mining concession, and it was initiated by the claimant pursuant to the respondent State's domestic investment law.[257] The ICSID Tribunal (composed of Professor Gabrielle Kaufmann-Kohler, Professor Albert Jan van den Berg, and Professor Pierre Mayer) issued Procedural Order No. 2, dealing specifically with transparency.[258] The Order stated that "the Parties have agreed on the application of the Transparency Rules, expanded in their scope in some respects, and provided for specific rules for their implementation."[259]

One of the modifications is the designation of ICSID as the repository of published information and documents in relation to this particular arbitration case, instead of the UNCITRAL Secretariat, as discussed at the beginning of this section of this dissertation. ICSID, which already publishes arbitration documents on its website when the parties agree to such publication anyway, "confirmed its willingness […] to act as repository as defined in the Transparency Rules."[260] The Tribunal's Order then goes into meticulous detail outlining which provisions of the UNCITRAL Rules on Transparency are applicable verbatim, require modification to conform to the parties' agreement or applicable ICSID Rules, or are not

[254] *Id.* at ¶28.
[255] Luke Eric Peterson, *UNCITRAL Transparency Rules Begin to be Used by Parties in Investor-State Arbitrations, but with Some Notable Twists*, INVEST. ARBITR. REPORT. (2015), tinyurl.com/qbpx3lj.
[256] ICSID Case No. ARB/14/22.
[257] BSG Resources Ltd. v. Guinea - Request for Arbitration, ¶¶ 94-95 (2014).
[258] BSG Resources Ltd v. Guinea - Procedural Order No. 2: Transparency, (2015).
[259] *Id.* at ¶ 10.
[260] *Id.* at ¶ 10.

applicable at all because of their specificity to treaty-based arbitrations under UNCITRAL Rules.[261]

A review of the transparency measures put into place in this specific case, while most certainly laudable, begs the question of why the UNCITRAL Rules on Transparency had to be specifically employed in this instance. The Tribunal endeavored to make the necessary modifications to the UNCITRAL Rules on Transparency to tailor it to the non-treaty-based investment dispute, as well as declare some provisions of the ICSID Convention and Arbitration Rules as inapplicable to proceedings,[262] presumably because these provisions had been rendered moot because of the modified version of the UNCITRAL Rules on Transparency to which the disputing parties had agreed. For example, the Procedural Order states that Article 48(5) of the ICSID Convention does not apply to the proceedings.[263] This provision of the

---

[261] *See, e.g.* ¶12 of Procedural Order No. 2, which provides the following details:
The Transparency Rules shall apply to the present proceedings, subject to the following specifications or amendments:
(i) Articles 1(1)-(2), 1(3)(a), and 2 are not applicable;
(ii) Article 1(5) is modified to the extent that the Tribunal may exercise its authority to promote transparency in this case;
(iii) The following provision replaces Article 3 of the Transparency Rules:
1. Subject to Article 7, the following documents shall be made available to the public: the Claimant's request for arbitration, the Claimant's memorial, the Respondent's counter-memorial and any further written statements or written submissions by any Party, the exhibits, legal authorities, witness statements, expert reports (including any appended exhibits), transcripts of hearings, orders, decisions, and award of the arbitral tribunal. Legal authorities shall be made available to the public in the form of lists hyperlinked to the relevant documents; if the documents are publicly available online, the hyperlink shall be to the relevant source online and the documents shall not be submitted to the Repository in PDF format.
2. Subject to Article 7, the Tribunal may decide, on its own initiative or upon request from any person, and after consultation with the Parties, whether and how to make available to the public any documents provided to, or issued by, the Tribunal not falling within paragraph 1 above.
3. The documents to be made available to the public pursuant to paragraph 1 shall be communicated by the Tribunal to the Repository, subject to Section 15 below. The documents to be made available pursuant to paragraph 2 may be communicated by the Tribunal to the Repository as they become available and, if applicable, in a redacted form in accordance with Article 7. The Repository shall make all documents available to the public in a timely manner, in the form and in the language in which it receives them.
4. Any administrative costs of making those documents available to a person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the Repository (on the ICSID website), shall fall under ICSID Administrative and Financial Regulation 15.
[262] BSG Resources Ltd v. Guinea - Procedural Order No. 2: Transparency, *supra* note 258 at ¶ 13. "As a result of the foregoing, Article 48(5) of the ICSID Convention and ICSID Arbitration Rules 32(2), 37(2), and 48(4) do not apply to proceedings before this Tribunal."
[263] *Id.* at ¶ 13.

ICSID Convention prohibits ICSID from publishing the award without the consent of the parties.[264] It appears from a reading of the Procedural Order in its entirety that the Tribunal had to stipulate on the non-applicability of this provision of the ICSID Convention because the Tribunal's modification of Article 3 of the UNCITRAL Rules on Transparency, as stated in the Procedural Order, already specified that the award of the arbitral tribunal would be among the documents made available to the public.

Considering the text of Procedural Order No. 2 in ***BSG Resources Limited v. Republic of Guinea***, it is a fair argument to say that the transparency measures contained therein could very well have been accomplished under the ICSID Arbitration Rules. As expressed by the ICSID Tribunal in Procedural Order No. 3 in the case of ***Biwater Gauff v. Tanzania***, discussed earlier, "[t]here is no provision in the ICSID Arbitration Rules which expressly provides for the confidentiality of pleadings, documents or other information submitted by the parties during the arbitration."[265] For provisions in the ICSID Convention and Arbitration Rules that require party consent, it appears from this case that such consent would have been obtained anyway. It may be surmised that the Tribunal in ***BSG Resources Limited v. Republic of Guinea*** realized an opportunity to provide traction to the newly minted UNCITRAL Rules on Transparency, and adopted the same with modifications in its Procedural Order No. 2, even if outlining the very same transparency guidelines would have been entirely possible – and more straightforward – under the ICSID Convention and Arbitration Rules.

ICSID specializes in investor-State arbitration. ICSID already made significant changes in its Arbitration Rules in 2006 to enhance transparency in ICSID proceedings, as discussed earlier in this chapter. ICSID arbitration does not require a separate text in order to

[264] ICSID Convention, Article 48(5).
[265] Biwater Gauff v. Tanzania - Procedural Order No. 3, ¶ 125 (2006).

activate transparency measures; under its own Arbitration Rules, ICSID can accomplish the same level of transparency as promised by the UNCITRAL Rules on Transparency. The use of the UNCITRAL Rules on Transparency as described in Procedural Order No. 2 in ***BSG Resources Limited v. Republic of Guinea*** demonstrates the modifications that have to be accommodated when two transparency-oriented investor-State arbitration texts are made to apply in conjunction with one another.

A conclusion that may be drawn from the above-described experience is that Article 1(9) of the UNCITRAL Rules on Transparency was intended for importing transparency provisions into investor-State arbitration cases docketed in institutions that lean towards international commercial arbitration. The rules of most other arbitration centers – such as the International Court of Arbitration of the ICC, or the Stockholm Chamber of Commerce, or the London Court of International Arbitration – are crafted primarily for private parties that place a premium on confidentiality when they choose arbitration as a mode of dispute settlement. It is in investor-State arbitration cases before these institutions, or in cases that employ the UNCITRAL Arbitration Rules, that importing the UNCITRAL Rules on Transparency would be most beneficial and make the most impact.

1.4.2. UN Convention on Transparency in Treaty-Based Investor-State Arbitration

The idea for a treaty to facilitate the usage of the UNCITRAL Rules on Transparency was conceived of at the same time as the Rules themselves. At the point when the UNCITRAL Working Group II was still studying what form a legal standard of transparency should assume, the drafters were already considering the question of how States could express consent to the

application of the still-to-be-drafted transparency text.[266] They had already identified the problem posed by existing investment treaties, and the necessity of an approach that would obviate the need for a State to renegotiate and amend each of its already concluded international investment agreements.[267]

The Convention is thus intended to supplement *existing* investment treaties by providing a *mechanism* to facilitate the application of the UNCITRAL Rules on Transparency to investment disputes brought under such existing treaties.[268] The Mauritius Convention does *not* in itself contain transparency *standards*.[269]

With respect to investment arbitration proceedings, the Convention only applies to disputes involving the home and host States that are instituted after the Convention takes effect with respect to the State Party. Similarly, any reservations, or withdrawal of a reservation by a State only becomes applicable to disputes commenced after such has taken effect. Article 5 of the Mauritius Convention provides:

> This Convention and any reservation, or withdrawal of a reservation, shall apply only to investor-State arbitrations that are commenced after the date when the Convention, reservation, or withdrawal of a reservation, enters into force or takes effect in respect of each Party concerned.

The salient provisions of this Convention relate to the application of the Rules on Transparency, and to the reservations that State parties may make in respect of the Convention. The application of the Rules on Transparency is governed by Article 2 of the Convention, while reservations to the Convention are governed by Articles 3 and 4. While this order makes sense in respect of the treaty structure of the Mauritius Convention, it is humbly suggested that a

[266] December 2010 UNCITRAL WG Working Paper, *supra* note 210 at 23.
[267] *Id.* at 23.
[268] Neale H. Bergman, *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, 54 INT. LEG. MATER. 747–757, 747 (2015); Knieper, *supra* note 47 at 162.
[269] Knieper, *supra* note 47 at 162.

better understanding of the Convention can be attained if the subsections below reverse the order of discussion. Knowing beforehand what a State Party can carve out of the Mauritius Convention facilitates comprehension of the treaty provisions regarding applicability of the UNCITRAL Rules on Transparency. Thus, what immediately follows is the subsection dissecting the allowable reservations to the Mauritius Convention.

1.4.2.1. Reservations to the Mauritius Convention on Transparency

Article 3 of the Convention outlines the types of reservations that State Parties can make when ratifying or acceding to the treaty. Article 4 mandates when and how reservations can be made. Taken together, these provisions delineate the obligations that a State Party can carve out of the Mauritius Convention. In practical terms, the reservations determine to which potential future investment disputes the State has prospectively consented to apply the UNCITRAL Rules on Transparency, in relation to that State's universe of existing investment treaties.

Article 3 contains an exhaustive list of permissible reservations. A State party to the Mauritius Convention is allowed to: (1) exclude specific investment treaties from the application of the Rules on Transparency; (2) limit the application of the Rules on Transparency to disputes following certain arbitration rules; (3) reserve the right to reject the application of future versions of the Rules on Transparency,[270] thus:

> Article 3. *Reservations*
>
> 1. A Party may declare that:
>
> (a) It shall not apply this Convention to investor-State arbitration under a specific investment treaty, identified by title and name of the contracting parties to that investment treaty;

[270] *Id.* at 163.

(b) Article 2(1) and (2) shall not apply to investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules, and in which it is a respondent;

(c) Article 2(2) shall not apply in investor-State arbitration in which it is a respondent.

2. In the event of a revision of the UNCITRAL Rules on Transparency, a Party may, within six months of the adoption of such revision, declare that it shall not apply that revised version of the Rules.

3. Parties may make multiple reservations in a single instrument. In such an instrument, each declaration made:

(a) In respect of a specific investment treaty under paragraph (1)(a);

(b) In respect of a specific set of arbitration rules or procedures under paragraph (1)(b);

(c) Under paragraph (1)(c); or

(d) Under paragraph (2); shall constitute a separate reservation capable of separate withdrawal under article 4(6).

4. No reservations are permitted except those expressly authorized in this article.

The effect of the above reservations is to limit the scope of application of the Mauritius Convention with respect to the State Party making the reservation.[271] Article 4, meanwhile, strives to minimize the impact of reservations on diminishing the purpose of the Convention, by defining specific time frames and consequent effects of making reservations:[272] ¶

Article 4. *Formulation of reservations*

1. Reservations may be made by a Party at any time, save for a reservation under article 3(2).

2. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.

3. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.

4. Except for a reservation made by a Party under article 3(2), which shall take effect immediately upon deposit, a reservation deposited after the entry into force of the Convention for that Party shall take effect twelve months after the date of its deposit.

5. Reservations and their confirmations shall be deposited with the depositary.

[271] Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-ninth session (Vienna, 16-20 September 2013), A/CN.9/794, ¶ 117 (2013).
[272] Knieper, *supra* note 47 at 163.

> 6. Any Party that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect upon deposit.

Under the above provision, particularly paragraph 4 thereof, reservations can be made even after the State Party has ratified or acceded to the Mauritius Convention. However, the Convention includes a mechanism to prevent reservations to thwart the transparency objectives of the UNCITRAL Rules on Transparency. The twelve-month delay of effectivity of the reservation incorporated into paragraph 4 was drafted to address the concern that a State party could file a reservation in relation to a particular investment treaty in the scenario that a dispute under that treaty was impending or foreseeable.[273] This delay is not mandated for reservations made at the time of ratification or accession.

1.4.2.2. Application of the UNCITRAL Rules on Transparency by virtue of the Mauritius Convention on Transparency

The Convention effectively modifies investment treaties concluded prior to 1 April 2014 by making the UNCITRAL Rules of Transparency applicable to disputes arising under such investment treaties.[274] Rather than creating new obligations between the State Parties to the investment treaty, the Mauritius Convention should be viewed as a "successive agreement" between the State Parties, as provided in Article 30 of the Vienna Convention on the Law of Treaties (VCLT).[275] Article 30 of the VCLT provides guidance on the application of successive treaties relating to the same subject matter.[276] This rule of treaty interpretation seeks to resolve conflicts arising from earlier and later treaties that are both in force.[277]

[273] September 2013 UNCITRAL WG Report, *supra* note 271 at ¶ 124.
[274] Bergman, *supra* note 268 at 748.
[275] September 2013 UNCITRAL WG Report, *supra* note 271 at ¶ 18, 22.
[276] Alexander Orakhelashvili, *Article 30 of the 1969 Vienna Convention on the Law of Treaties: Application of the Successive Treaties Relating to the Same Subject-Matter*, 31 ICSID REV. - FOREIGN INVEST. LAW J. 344–365, 344 (2016).
[277] M.E. Villiger, *Article 30: Application Of Successive Treaties Relating To The Same Subject-Matter*, *in* COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 395–412, 395 (2008).

The Mauritius Convention contains provisions for the application of the UNCITRAL Rules on Transparency in two scenarios: (1) where both State Parties to the investment treaty being invoked in the investment dispute are also both State Parties to the Mauritius Convention; and (2) where only the respondent State in the investment dispute is a State Party to the Mauritius Convention.

Article 2(1) of the Mauritius Convention governs bilateral or multilateral application:

> *Bilateral or multilateral application*
>
> 1. The UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a relevant reservation under article 3(1)(a) or (b), and the claimant is of a State that is a Party that has not made a relevant reservation under article 3(1)(a).

Three conditions for the application of the UNCITRAL Rules on Transparency are required by this provision on bilateral/multilateral application: (1) the home State of the claimant-investor and the sovereign respondent are both parties to the Mauritius Convention; (2) neither of the State Parties has made a reservation to the Mauritius Convention that excludes the investment treaty being invoked from the scope of the Mauritius Convention; and (3) the sovereign respondent has not made a reservation in respect of the applicable arbitration rules, in the instance that the investment arbitration is not governed by the UNCITRAL Arbitration Rules, but another set of arbitration rules.[278]

The Convention also provides for a unilateral application of the Rules, with the result that it becomes the prerogative of the investor whether or not to accept the application of the UNCITRAL Rules on Transparency. Article 2(2) provides:

[278] Bergman, *supra* note 268 at 748.

Unilateral offer of application

> 2. Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), and the claimant agrees to the application of the UNCITRAL Rules on Transparency.

This "unilateral offer" mirrors the consent mechanism in investment arbitration, discussed earlier.[279] The Working Group considered the unilateral consent mechanism by States upon which most offers for treaty-based investment claims are made, and saw this as an opportunity to provide a wider application of the Rules on Transparency.[280] Under the above-quoted provision, the Rules on Transparency will apply to an investment arbitration even if the claimant-investor's home State is not a party to the Mauritius Convention, as long as the following requisites are met: (1) the respondent State is a party to the Mauritius Convention; (2) the respondent State has not made a reservation to the Mauritius Convention with respect to (a) the particular investment treaty being invoked in the investment claim, nor (b) the applicable arbitration rules if the proceedings are a non-UNCITRAL arbitration; and (3) the claimant accepts the respondent State's unilateral offer.[281]

As already mentioned earlier, in the discussion about the hierarchy of texts relating to transparency,[282] the Mauritius Convention contains a specific provision that disables the last sentence of Article 1(7) of the UNCITRAL Rules on Transparency:

Article 1(7) of the UNCITRAL Rules on Transparency

> 4. The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to investor-State arbitrations under paragraph 1.

Thus, the only instance in which the provisions of an investment treaty will not prevail

[279] *See* discussion, *infra*.
[280] September 2013 UNCITRAL WG Report, *supra* note 271 at ¶ 26.
[281] Bergman, *supra* note 268 at 748.
[282] *See* discussion, *infra*, 1.4.1.2.3.

over the Rules of Transparency in the event of conflict, is when the State Parties to that investment treaty are also State parties to the Mauritius Convention. By virtue of this provision in the Mauritius Convention, the State Parties have agreed to elevate the Rules of Transparency to supersede their existing investment treaty in relation to transparency standards.

Finally, the Mauritius Convention contains an explicit procedural bar to prevent a claimant from invoking a Most Favored Nation clause in relation to the application of the Rules on Transparency.[283] Article 2(5) declares:

> Most favoured nation provision in an investment treaty
>
> 5. The Parties to this Convention agree that a claimant may not invoke a most favoured nation provision to seek to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention.

The Working Group debated whether to include a specific provision regarding Most Favored Nation clauses. The rationale for this provision was that it would provide greater certainty as to the effect of these clauses, and it would be helpful to arbitral tribunals in determining the scope of Most Favoured Nation clauses.[284]

1.4.2.3. Status of the Mauritius Convention on Transparency

The Convention entered into force on 18 October 2017, after it was ratified by a third country, pursuant to Article 9 of the Convention which mandates its entry into force "six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession." On 18 April 2017, Switzerland was the third State to ratify the treaty, following the ratification by Mauritius in 2015 and Canada in 2016. Including these three States, the Convention has 23 signatories as of May 2018: Australia, Belgium, Benin, Bolivia, Cameroon,

[283] Bergman, *supra* note 268 at 748.
[284] Report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth session (New York, 3-7 February 2014), A/CN.9/799, ¶ 43 (2014).

Congo, Finland, France, Gabon, Gambia, Germany, Iraq, Italy, Luxembourg, Madagascar, Netherlands, Sweden, Syria, the United Kingdom, and the United States.[285]

1.5. Summary

As discussed in the introduction, defining the elusive concept of transparency often requires a juxtaposition with the concept most often considered its opposite: confidentiality. This chapter therefore began with a reexamination of confidentiality as a feature of international arbitration generally. An examination of ICSID jurisprudence demonstrated that ICSID does not mandate confidentiality, but neither does it promote transparency. Investment arbitration case law served as the jumping-off point for tracing the development of the transparency movement in investment arbitration. This was accompanied by a review of legal commentary regarding the features of investment arbitration that necessitate a different treatment of investor-State disputes. This review of the academic literature revealed three systemic differences that have propelled the transparency movement in investment arbitration: (1) the consent mechanism for arbitration; (2) government regulatory measures as the subject matter of the dispute; and (3) the impact of arbitral awards on the rights of non-parties. These differences were discussed in tandem with the concept of public interest, and its role as the rationale for the transparency movement.

After dissecting the concepts of transparency and confidentiality, this first chapter provided a retrospective on the developments relating to the transparency movement in investment arbitration, with an emphasis on treaty-based investor-State arbitration. This chapter traced the developments in enhancing non-party access to investment arbitration proceedings by examining the provisions of NAFTA Chapter 11, the NAFTA Free Trade

[285] The status of the Mauritius Convention is updated at least annually at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.

Commission's Notes of Interpretation, the ICSID Arbitration Rules, and the UNCITRAL Arbitration Rules. This chapter discussed how transparency-oriented rule amendments were shaped by arbitral practice, and that different arbitration regimes influenced each other as the investor-State dispute settlement system was evolving to accommodate enhanced transparency.

This retrospective served as a background for an examination of the 2014 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, which was the highlight of this chapter. This important legal instrument came into effect a few months before work on the present dissertation began. The UNCITRAL Rules on Transparency can be appreciated as the fruit of a transparency movement that took root at the beginning of this century and grew in the decade and a half since. Rather than looking at these Rules as the crux of the transparency movement, this dissertation views and portrays the UNCITRAL Rules on Transparency as the result of arbitration practice, jurisprudence, and amendments of arbitration rules in the years prior to the formulation of the UNCITRAL Rules on Transparency. An analysis of the form, structure and scope of the text of this instrument lays the groundwork for text-specific examination in the subsequent chapters.

This chapter ended with an overview of the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, which entered into force on 18 October 2017. Also known as the Mauritius Convention, this treaty serves as a mechanism to facilitate the application of the UNCITRAL Rules on Transparency to existing investment treaties and thereby obviate the need for a State to renegotiate and amend each of its already concluded international investment agreements. Unique provisions in the Convention, such as a rule concerning conflicts between legal texts, and an explicit procedural bar to prevent most favored nation clauses from subverting the Rules on Transparency, were also highlighted in this chapter. One of the more contentious provisions in the Mauritius Convention was the

system of reservations allowed under the Convention, and this chapter devoted special attention to those provisions.

Chapter 2

Non-Parties and Transparency

Treaty-based investor-State arbitration, as suggested by the term itself, relates to investment claims between an investor and a State. The two disputing parties in cases like these are the natural or juridical person that has made an investment in the host State, the latter being the other party. With the transparency movement gaining ground, more individuals and organizations beyond the disputing parties are becoming involved in these proceedings. This second chapter looks at the involvement – and concomitant expectations and obligations – of non-parties in investment treaty arbitration.

For the purposes of this dissertation, "non-parties" refer to observers or participants to the investment treaty arbitration process who are neither the investor or State involved in the dispute, nor their counsel, agents, representatives or witnesses. Non-parties are often referred to as "non-disputing parties" in the academic literature, as well as "third parties" in popular legal parlance; these terms will be used interchangeably throughout this chapter.

This dissertation posits that there are four categories of non-parties in relation to investment treaty arbitration: (1) non-disputing State Parties; (2) the general public; (3) *amici curiae*; and (4) third-party litigation funders. This chapter will examine transparency in relation to the latter three.

The first category, non-disputing State Parties, refer to the home State of the investor, i.e. the other State Party or Parties in the bilateral investment treaty or multilateral investment agreement being invoked in the investment claim. Their interests and role in the investment dispute, as a treaty partner of the sovereign respondent, will be discussed as part of Chapter 3 on State Parties and transparency.

The present chapter first takes a look at transparency in investment treaty arbitration in relation to the general public. The public, as discussed in Chapter 1, can be defined as "a non-

specific group of persons limited by no quantitative restrictions, and (often) no qualitative restrictions."[286] Because of the international nature of investment arbitration, the "public" refers not only to the population of the sovereign respondent, but the larger international community.[287] These concepts were discussed in greater depth in the section on public interest in the previous chapter.[288] As elaborated upon in Chapter 1, public interest is the rationale for increasing transparency in investment treaty arbitration.

Next, this chapter turns to *amici curiae*, referring to non-governmental organizations and specific members of the public seeking to participate in the arbitration proceedings. Much of the literature on transparency has focused on non-disputing party participation by civil society groups, and this dissertation will examine the role of these third parties in enhancing transparency in the investor-State dispute settlement system. A survey of cases examining participation by indigenous peoples and environmental protection groups will demonstrate the outcomes in particular investment treaty arbitration cases with respect to non-party participation of special interest groups.

Finally, the present chapter turns its attention to an emerging trend in investment treaty arbitration: third-party funding. Third-party funders, also called litigation financers, are juridical entities that provide the funds required to launch and sustain an investment claim. The current literature about transparency in investment arbitration has yet to discuss third-party funding in relation to the transparency regime in investment arbitration. This dissertation argues that third-party funders should be perceived as non-parties in investment arbitration cases who must also be subject to certain disclosure requirements, if the transparency regime is to be truly effective. In comparison with non-disputing parties, the issue of non-party access

[286] Alexander J. Bělohlávek, *supra* note 114 at 35.
[287] See generally Schreuer and Kriebaum, *supra* note 108.
[288] *See* Section 1.2.2., *infra*.

to the arbitration takes on a different quality with respect to litigation funders; this issue will also be discussed in the section on third-party funding.

This chapter and the following two chapters look at transparency from the perspective of the actors in the investor-State dispute settlement system: non-parties, State Parties, and investors. The examination through this paradigm commences with this chapter on non-parties, because the great bulk of the literature on transparency in investment arbitration has focused on non-party participation, with great emphasis on the role of *amici curiae*. Whereas the academic discussion on transparency has, heretofore, been focused on opening up the proceedings to the outside, with transparency obligations placed upon those acting from within, the current chapter underscores that transparency obligations are likewise expected of the parties coming from outside and seeking to intervene in the investment dispute. An effective transparency regime involves the actions of all actors. This implies concomitant expectations of disclosure for all concerned.

Before proceeding to the discussion on non-parties, attention must be drawn to a distinction between two concepts pertinent to the study of the transparency regime: "access" and "participation". Access to information about the decision-making process is a fundamental aspect of transparency.[289] Public access to documents in an investment arbitration or the possibility to attend oral hearings is related to the idea of accountability, because the disputing parties and the arbitrators will know that their actions are subject to public scrutiny.[290] Participation, on the other hand, can enhance the legitimacy of investment treaty arbitration by providing a mechanism by which the views of other parties beyond the claimant and respondent

[289] See VAN HARTEN, *supra* note 48 at 159–161.
[290] *Id.* at 161.

can be considered in the decision-making process.[291] The manner of involvement of non-parties in investment arbitration proceedings can be classified broadly under these two categories, and the particular operationalizations of these concepts will be illustrated in greater detail in the sections to follow.

2.1. General public

Following the concepts outlined above, transparency in investment arbitration in relation to the general public is achieved through access to information about the investment treaty arbitration process. The transparency measures that are intended for the general public are carried out by the arbitral institutions administering the investment treaty arbitration case. These measures involve publication of basic details about the investment dispute, and the arbitration award, or at least excerpts thereof. The idea is that anyone, without having to assert any specific interest in the case, can readily access key information about an investment arbitration case. What follows below is a discussion on the publication of basic case information. The publication of the award will be discussed together with access to other case documents, in the sub-section on access to documents in the following section on *amici curiae*.[292]

Chapter 11 of NAFTA mandates that the filing of an investment claim is made a matter of public record. Pursuant to NAFTA Article 1126(10), a Request for Arbitration must be filed with the NAFTA Secretariat, and the latter is required to maintain these documents in a public register.[293]

ICSID's Administrative and Financial Regulations mandate public access to basic

[291] See *Id.* at 159. However, as will be seen in the discussion below, minimal consideration has been accorded non-party participation.
[292] *See* sub-section 2.2.1.1., *infra*.
[293] Menaker, *supra* note 50 at 131.

information about conciliation and arbitration cases administered by ICSID. Since the first case was filed in 1972, key information about every ICSID case has been publicly available.[294] Administrative and Financial Regulation 23 provides:

> Regulation 23
> The Registers
>
> (1) The Secretary-General shall maintain, in accordance with rules to be promulgated by him, separate Registers for requests for conciliation and requests for arbitration. In these he shall enter all significant data concerning the institution, conduct and disposition of each proceeding, including in particular the method of constitution and the membership of each Commission, Tribunal and Committee. On the Arbitration Register he shall also enter, with respect to each award, all significant data concerning any request for the supplementation, rectification, interpretation, revision or annulment of the award, and any stay of enforcement.
>
> (2) The Registers shall be open for inspection by any person. The Secretary-General shall promulgate rules concerning access to the Registers, and a schedule of charges for the provision of certified and uncertified extracts therefrom.

As can be gleaned from the foregoing, basic procedural details of each conciliation and arbitration proceeding administered by ICSID should be made available to the public in the register.[295] Back in the days before the World Wide Web, this information was published in ICSID's annual reports, as well as other publications of the Centre, including the now-defunct biannual *News from ICSID*.[296] It was also possible to inspect the registers in person at ICSID's offices.[297]

The ICSID website now contains the information that used to be publicized via print media.[298] The website has a search function where any member of the public can find cases through a variety of search terms, such as the name of the investor, the sovereign party, nationality of parties, the economic sector involved in the dispute, the subject matter of the

[294] Kinnear, Obadia, and Gagain, *supra* note 143 at 112.
[295] *Id.* at 112.
[296] *Id.* at 112.
[297] *Id.* at 112.
[298] Located at the URL https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx.

dispute, the treaty or legal instrument being invoked in the dispute, the names of the arbitrators, the name of registered counsel, and even by date of registration of the proceeding or the date that the tribunal was constituted. Even without utilizing these search terms, a list of cases appears on the website, in chronological order by date of registration of the proceeding, with the latest case on top. Clicking on the link to a specific case reveals information about that case that corresponds to the searchable criteria mentioned above. In addition, procedural details of the proceeding are also listed for the cases, indicating the written submissions filed and their date of filing, dates of oral hearings, and the issuance by the tribunal of decisions, orders and awards.[299]

Similarly, the UNCITRAL Rules on Transparency mandate that the following information is made available to the public by the repository: "name of the disputing parties, the economic sector involved and the treaty under which the claim is being made."[300]

As regard to the immediacy with which this information should be available to the public, both the ICSID Administrative and Financial Regulations and the UNCITRAL Rules on Transparency require that information be made available to the public at the commencement of the proceedings. The ICSID Regulations require the ICSID Secretary-General "to publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding."[301] While a time frame is not explicitly indicated in the relevant regulation, in practice, ICSID publishes case information on its website within two weeks of the registry of the investment dispute.

[299] Kinnear, Obadia, and Gagain, *supra* note 143 at 113.
[300] UNCITRAL Rules on Transparency, Art. 2.
[301] ICSID Administrative and Financial Regulations, Regulation 22 on "Publication".

Meanwhile, the UNCITRAL Rules on Transparency contain wording to convey the urgency of publishing basic information. Article 2 thereof is entitled *Publication of information at the commencement of arbitral proceedings*. This provision mandates that the repository make the information described above available to the public "[u]pon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent."[302] In either of these scenarios, the repository is mandated to publish the information only after the sovereign respondent has already received the notice of arbitration.[303] This is a measure of procedural fairness, ensuring that the public does not have access to basic case information before the State party being sued has taken cognizance of the investment dispute.[304]

As can be gleaned from the foregoing, the maintenance of public registers for basic case information is a key component of the NAFTA, ICSID and UNCITRAL approaches to transparency. These registers facilitate access by the public to the information.

2.2. Amici Curiae

As discussed in Chapter 1 of this dissertation, the public interest inherent in investment treaty arbitration is the rationale for increasing the opportunities for participation therein by non-disputing parties, through civil society groups, non-governmental organizations, and other affected members of the public. These non-parties have become involved in investor-State arbitrations by being allowed by investment arbitration tribunals to participate as *amici curiae* in ongoing investment disputes. *Amici curiae*, a Latin term meaning "friends of the court" has

[302] UNCITRAL Rules on Transparency, Article 2.
[303] Giuseppe Bianco, *Article 2. Publication of information at the commencement of arbitral proceedings*, *in* TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNICTRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 64–90, 71 (Dimitrij Euler, Markus W. Gehring, & Maxi Scherer eds., 2015).
[304] *Id.* at 71.

a long history in the judicial system, in both national and international courts.[305] However, while this is a concept well established in domestic litigation in several jurisdictions, and traces its origin way back to ancient Roman law, the concept of *amici curiae* was unknown to international investment arbitration until the year 2000.[306]

Prominent arbitrator, practitioner and professor Dr. Stanimir A. Alexandrov and a co-author highlight the significance of how quickly the investor-State dispute settlement system has adapted to the practice of non-party participation. Writing in 2010, Alexandrov and Carlson astutely posit the following observation:

> What is notable […] is how quickly and with relatively little turmoil investment treaty arbitration has been able to accommodate that desire to be heard. In the span of less than ten years, we have seen investment treaty arbitration evolve from a system in which participation of any kind by non-parties was essentially unheard of, to one in which tribunals are unanimous in considering that they have the authority to hear from interested non-parties (at least in writing), and effectively unanimous in the criteria which they should apply in deciding whether and how those non-parties should be heard. While the accommodations to date might not go as far as some observers of the system (including the interested non-parties in particular cases) would prefer, they have been **adopted in short order, and without significant systematic upheaval – indeed, one might say that this has been an evolution of practice, rather than structure.** Moreover, the practice continues to evolve to this day, in directions that may yet be even more accommodating of interests outside the four corners of the parties' dispute.[307]

Non-governmental organizations and other civil society groups have sought to participate as *amici curiae* in investment treaty arbitrations from the year 2000 to the present. Human rights, environmental concerns, and the protection of cultural heritage have been common themes in petitions for these organizations asserting an interest in the outcome of the

[305] For a thorough but concise discussion on the history of *amici curiae* in various fora, *see* Katia Fach Gómez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 FORDHAM INT. LAW J. 510–564, 516–522 (2012).
[306] Stanimir A. Alexandrov & Marinn Carlson, *The Opportunity to Be Heard: Accommodating Amicus Curiae Participation in Investment Treaty Arbitration*, *in* LIBER AMICORUM BERNARDO CREMADES 49–64, 50–51 (Miguel Ángel Fernández-Ballesteros, Bernardo Cremades, & David Arias eds., 2010).
[307] *Id.* at 50. Emphasis supplied.

arbitration.[308] In the past two decades, investment arbitration tribunals and the drafters of arbitration rules have come to appreciate the added insight that these non-governmental organizations can bring to the table. As one commentator observes, these organizations "with particular human rights expertise may be better informed about the human rights legal framework and how it applies to the situation on the ground than governments, particularly those from developing countries with limited resources."[309]

While far from becoming a prevalent practice, the participation of *amici curiae* is no longer considered unusual or extraordinary in investment treaty arbitration. This is readily evinced by the specific rules crafted to accommodate non-parties in investment arbitration proceedings, as shown in Chapter 1. Before *amicus* participation became well-established as a recognized mode of non-party participation in investment treaty arbitration, however, civil society groups initially made attempts to intervene as parties to the investment disputes in two early cases: the NAFTA case ***United Parcel Service of America v. Government of Canada***, and the ICSID case ***Aguas del Tunari v. Republic of Bolivia***.[310] In these cases, non-governmental organizations sought standing as disputing parties, with an alternative prayer to participate as *amici curiae*.[311] The Tribunals rejected the possibility of standing as additional parties, because the consensual nature of arbitration – in these cases, consent conferred by

[308] Generally, non-party submissions have come from non-governmental organizations. There have been notable exceptions, including indigenous peoples, such as the Quechan Indian Nation in the *Glamis Gold* case discussed later in this chapter, and also intragovernmental bodies, such as the European Commission in the case of *Achmea B.V. v. The Slovak Republic* (PCA Case No. 2008-13), Final Award dated 7 December 2012, ¶23. Mariel Dimsey, *Article 4. Submission by a third person*, *in* TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNICTRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 128–195, 168 (Dimitrij Euler, Markus W. Gehring, & Maxi Scherer eds., 2015).
[309] James Harrison, *Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 396–421, 414 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni eds., 2009).
[310] ICSID Case No. ARB/02/3.
[311] Christina Knahr, *Transparency, Third Party Participation and Access to Documents in International Investment Arbitration*, 23 ARBITR. INT. 327–356, 332 (2007); Alexandrov and Carlson, *supra* note 306 at 54–55.

treaty – does not grant the Tribunal the power to join a non-party to the proceedings.[312]

This section will trace the development of *amicus* participation in notable investment cases, and the resultant rules that have been developed in the past decade specifically addressing non-party participation. It bears stressing at the outset that the phenomenon of *amicus curiae* participation is one where the "rules follow the practice".[313] Before the existence of explicit arbitration rules allowing for the participation of non-disputing parties in investment arbitration cases, Tribunals looked at the powers conferred upon them by the existing general legal framework to resolve the issue of whether or not to allow third parties to intervene in arbitral proceedings. These cases and the reasoning therein will be discussed below.

Before taking a focused look at three specific mechanisms of *amici curiae* participation in the subsections that follow, it will be useful to look at the investment treaty arbitration case that began it all: the NAFTA dispute of ***Methanex Corporation v. United States of America***. The *Methanex* Tribunal was the first investment arbitration tribunal to be confronted with the issue of *amicus curiae* submissions and to render a decision on this issue.[314] As will be seen later in this chapter, this case is frequently referenced by tribunals in the subsequent cases where *amici curiae* seek to participate – in NAFTA cases using UNCITRAL Arbitration Rules, as well as cases administered by ICSID. The case is mentioned in the other cases referenced

[312] In *UPS v. Canada*, the Tribunal cited NAFTA provisions and stated, "The disputing parties have consented to arbitration only in respect of the specified matters and only with each other and no other person. Canada, along with the other NAFTA Parties, has given that consent in advance in article 112 and the Investor has given it in the particular case by consenting under article 1121." *United Parcel Service of America v. Canada* - Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, ¶ 36 (2001).

In *Aguas del Tunari v. Bolivia*, the Tribunal pointed to the ICSID Convention and the bilateral investment treaty being invoked, and decided: "The interplay of the two treaties involved (the Convention on the Settlement of Investment Disputes and the 1992 Bilateral Agreement on the Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Bolivia) and the consensual nature of arbitration places the control of [the issues raised by the petitioner] with the parties, not the Tribunal. In particular, it is manifestly clear to the Tribunal that it does not, absent the agreement of the Parties, have the power to join a non-party to the proceedings […]." *Aguas del Tunari v. Bolivia* - Decision on Respondent's Objections to Jurisdiction, ¶ 17 (2005).

[313] Alexandrov and Carlson, *supra* note 306 at 56.

[314] Knahr, *supra* note 311 at 328.

in the subsequent discussions in this chapter, and thus a closer examination of the Tribunal's decision on *amicus* petitions in *Methanex* is warranted at this juncture.

The investment claim was launched pursuant to Chapter 11 of NAFTA in December 1999 by Methanex Corporation.[315] The Canadian corporation alleged treaty violations by the USA because of regulations introduced by the State of California banning the sales and use of a gasoline additive known as MTBE.[316] Methanex Corporation is the world's largest producer of methanol, a feedstock for MTBE,[317] and claimed losses due to the ban.[318] The Tribunal, composed of V.V. Veeder, J. William F. Rowley, and W. Michael Reisman, was formed on 18 May 2000.[319] The arbitration was carried out under UNCITRAL Arbitration Rules.

On 25 August 2000, the Tribunal received a *Petition to the Arbitral Tribunal* from the International Institute for Sustainable Development (IISD).[320] A second petition followed shortly thereafter on 6 September 2000, filed jointly by the Communities for a Better Environment and the Earth Island Institute,[321] later amended in October to include the Center for International Environmental Law.[322] These non-governmental organizations sought to participate as *amici curiae* in the *Methanex* arbitration.[323] Specifically, IISD requested for permission to: (i) file an *amicus* brief, and have access to the disputing parties written pleadings for the preparation thereof; (ii) make oral submissions; and (iii) to have observer status at oral hearings.[324] "Permission was sought on the basis of the immense public importance of the case

[315] *Methanex v. USA* - Final Award of the Tribunal on Jurisdiction and Merits, ¶ 1 (2005). [Hereinafter "Methanex Final Award".]
[316] *Id.* at ¶¶ 1-2.
[317] *Id.* at ¶ 1.
[318] Knahr, *supra* note 311 at 328.
[319] Methanex Final Award, *supra* note 315 at ¶ 3.
[320] Petition to the Arbitral Tribunal by the International Institute for Sustainable Development (Methanex v. USA), (2000), https://www.state.gov/documents/organization/3938.pdf.
[321] Methanex v. USA - Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," ¶ 1 (2001), https://www.state.gov/documents/organization/6039.pdf.
[322] *Id.* at ¶ 3.
[323] *Id.* at ¶ 1.
[324] *Id.* at ¶ 5.

and the critical impact that the Tribunal's decision will have on environmental and other public welfare law-making in the NAFTA region."[325] The scope of the intervention sought by the other three non-governmental organizations essentially mirrored IISD's.[326]

Both *amicus* petitions staked their legal basis for intervention on Article 15 of the UNCITRAL Arbitration Rules.[327] That rule provides for tribunal discretion on the conduct of the arbitral proceedings, stating "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."[328]

The non-disputing State Parties were given the opportunity to comment on the *amicus* petitions, with Canada supporting non-party participation by these non-governmental organizations, and Mexico opposing it.[329] As for the disputing parties, the Claimant opposed the intervention, arguing unsuccessfully that to grant the petitioners the status of *amicus curiae* "would be equivalent to adding them as parties."[330] Mexico and the Claimant both argued that Mexican courts had no legal basis to receive *amicus* briefs, and to accept *amicus* briefs in the NAFTA arbitration would be, in effect, recognizing a legal mechanism that existed for the other State Parties but not Mexico.[331] Conversely, the sovereign respondent, USA, supported the acceptance of the *amicus* petitions, maintaining that it was allowed under the procedural rules governing the arbitration, and that "*amicus* submissions were suitable when likely to assist the Tribunal."[332]

[325] *Id.*
[326] *Id.* at ¶ 7.
[327] Knahr, *supra* note 311 at 329.
[328] UNCITRAL Arbitration Rules, Article 15(1).
[329] Knahr, *supra* note 311 at 330.
[330] Methanex Amici Decision, *supra* note 321 at ¶ 13.
[331] *Id.* at ¶¶ 9, 15.
[332] *Id.* at ¶ 16.

Ultimately, the Tribunal declared that "it has the power to accept *amicus* written submissions" subject to procedural limitations.[333] However, it rejected the request of the non-governmental organizations to attend the oral hearings.[334]

On the issue of the written submissions, the Tribunal agreed with the petitioners' contention to the effect that "allowing a third person to make an *amicus* submission could fall within its procedural powers over the conduct of the arbitration, within the general scope of Article 15(1) of the UNCITRAL Arbitration Rules.[335]

On the issue of oral hearings, the Tribunal was constrained by Article 25(4) of the UNCITRAL Arbitration Rules when it considered the degree of privacy and confidentiality that should be accorded the oral hearings.[336] Article 25(4) of the 1976 UNCITRAL Arbitration Rules, which was the version in effect at the time, provides, in relevant part: "Hearings shall be held *in camera* unless the parties agree otherwise."[337] The Tribunal interpreted "*in camera*" to indicate that the general public should be excluded from the oral hearings unless both disputing parties agreed to allow non-parties to attend.[338] Without the consent of the claimant, the Tribunal concluded that the petitioners' request to attend oral hearings necessarily had to be rejected.[339]

Significantly, the Tribunal hinged its decision to allow the participation of *amici curiae* on the ground of public interest, and also in the interest of transparency – both with respect to the *Methanex* arbitration itself, and in investment treaty arbitration in general.[340] The tribunal

[333] *Id.* at ¶ 53.
[334] Knahr, *supra* note 311 at 331.
[335] Methanex Amici Decision, *supra* note 321 at ¶ 31.
[336] Knahr, *supra* note 311 at 331.
[337] 1976 UNCITRAL Arbitration Rules, Article 25(4), first sentence.
[338] Knahr, *supra* note 311 at 331.
[339] *Id.* at 331.
[340] *Id.* at 331.

made this important pronouncement that has since set the tone for allowing non-party participation:

> There is undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public importance than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 **arbitral process could benefit from being perceived as more open or transparent**; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.[341]

The passage quoted above highlights an important point about transparency that is relevant for the discussion in this chapter: transparency in the investor-State dispute settlement system is intended to improve public perception of the system. Chapter 1 discussed public interest as the rationale for increasing transparency in investment treaty arbitration. The operationalization of that rationale has focused on greater participation by non-parties (this dissertation challenges that hyperfocus on third parties in the succeeding chapters). However, it appears that the benefits of the transparency movement – as it is currently designed and implemented – are intended for the investor-State dispute settlement system and not necessarily the non-parties who are now allowed to participate in that system. The perspective propounded by the above-quoted landmark decision on *amicus* participation underscores that.

Whereas public interest is the rationale for increased transparency, improved public perception is its goal. Public perception as the goal of transparency, then, is to draw a bright-line separating transparency measures from the *impact* of those measures in a particular case.

[341] Methanex Amici Decision, *supra* note 321 at ¶ 49. Emphasis supplied.

As will be seen in the specific cases to be examined in the following sub-sections, the impact of written submissions by *amici curiae* on the outcome of investment treaty cases in which they have participated has been minimal, with Tribunals even explicitly stating that their final awards did not take into account the *amicus* submissions that it had allowed into the proceedings. Increasing transparency in the investor-State dispute settlement system involves opening the process *outwards* towards non-parties, but the benefits derived by the current transparency mechanisms are directed *inwards* towards the system.

The discussion below will examine what can be expected from increasing the participation of non-parties in investment arbitration.

2.2.1. Modes of Non-Disputing Party Participation

The increasing participation of *amici curiae* in investment treaty arbitration has been facilitated in recent years by amendments to arbitration rules explicitly allowing their involvement through three main paths: (1) access to arbitration documents; (2) written submissions; and (3) open hearings. The following subsections will look at relevant rules and arbitral jurisprudence that have facilitated the employment of these non-party participation mechanisms in investor-State arbitration.

2.2.1.1. Access to Documents

Looking at the various rules in place governing access to arbitral documents, three categories of documents emerge: (1) the arbitral award; and (2) documents submitted to and issued by the arbitral tribunal; and (3) witness statements, expert reports and exhibits. The degree to which non-disputing parties can access the aforementioned documents narrows in that order. As will be seen below, these distinctions are particularly significant under ICSID rules and practice.

Another distinction that can be drawn with respect to access to documents is the purpose for which access is sought. While the publication of awards is intended for the information of the general public, access to documents other than the awards, especially in the ICSID context, can be restricted to non-disputing parties seeking to make written submissions. Further discussion below shall demonstrate that access to documents is a transparency measure that is intertwined with the transparency measure of written submissions by non-parties: the standards for the acceptance and consideration of *amicus* submissions by investment arbitration tribunals require relevant and well-informed submissions by non-parties, characteristics upon which access to documents factor in greatly. As will be seen in the following section on the intervention of particular interest groups, the effectiveness of a non-disputing party's submission can hinge on sufficient access to arbitration documents.

At the outset of this section, the development of rules relating to non-party access to investment treaty arbitration was characterized as a process wherein the rules follow the practice.[342] The NAFTA and ICSID approaches to publication of documents exemplify this idea.

i. NAFTA

With respect to public access to documents, the text of NAFTA Chapter 11 contains provisions regarding the publication of two specific documents only: the Request for Arbitration,[343] and the Award.[344] Despite this, documents generated in the course of a NAFTA

[342] *See* introductory discussion of Section 2.2.
[343] *See* discussion in Section 2.1, above.
[344] Menaker, *supra* note 50 at 131.
Annex 1137.4 of NAFTA Chapter 11 sets out specific rules regarding the publication of Awards, respective of the three State Parties to NAFTA, with Mexico opting out of mandatory publication:
"Annex 1137.4: Publication of an Award
Canada
Where Canada is the disputing Party, either Canada or a disputing investor that is a party to the arbitration may make an award public.

Chapter 11 arbitration are subject to rather extensive public access. A note of interpretation issued by the NAFTA Free Trade Commission clarifies that the NAFTA parties are expected to make "all documents submitted to, or issued by, a Chapter Eleven tribunal" publicly available.[345] This note of interpretation, issued in July 2001, was preceded by petitions – filed in the latter half of the year 2000 – seeking *amici* participation in the *Methanex v. USA* and *United Parcel Service v. Canada* cases mentioned earlier, as well as the earlier NAFTA cases where publication of information and documents were put in issue.

Prior to the *Methanex* and *United Parcel Service* cases, NAFTA Tribunals were already faced with issues regarding the confidentiality of the documents generated during the arbitration. Because NAFTA Chapter 11 does not provide specific rules regarding documents other than the Request for Arbitration and the Award, the different NAFTA Tribunals employed their discretion with respect to the conduct of the arbitration in determining these issues, with varying results. Menaker, who has an extensive NAFTA arbitration experience representing the United States government, recounts that:

> In early Chapter 11 cases – governed in some cases by the ICSID Additional Facility Rules and in others by the UNCITRAL Rules – the parties frequently disagreed as to whether, absent any confidentiality agreement or order, a party was entitled to publicize aspects of the dispute and documents generated during the arbitration. In some cases it was the respondent State seeking to publish the information, while in other cases the claimant sought to do so.
>
> While tribunals generally recognized the Parties' obligations to comply with domestic disclosure laws, such as the Freedom of Information Act in the United States (FOIA), they differed on whether to permit the parties to disclose publicly arbitration materials where there was no legal duty to do so. In such cases, some tribunals ordered the parties to refrain from publishing them, while

Mexico
Where Mexico is the disputing Party, the applicable arbitration rules apply to the publication of an award.
United States
Where the United States is the disputing Party, the applicable arbitration rules apply to the publication of an award."

[345] NAFTA Notes of Interpretation of Certain Chapter 11 Provisions, *supra* note 132 at ¶A(2)(a).

others permitted such disclosure.[346]

In the case of ***Metalclad Corporation v. Mexico***,[347] the sovereign respondent requested the Tribunal "to issue a formal order declaring that the proceedings are confidential and that breach of such order would permit the Respondent to request the Tribunal to enforce sanctions.[348] The Government of Mexico complained primarily about the a telephone conference call by the corporation's Chief Executive Officer intended to provide information to shareholders, investment analysts and members of the public about the ongoing investment dispute.[349] The Tribunal's 1997 decision on Mexico's request was equivocal and noncommittal; it ultimately decided: "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 […]."[350] However, before ending with that softly-worded admonition, the Tribunal also made the following contemplative but unforceful observations about confidentiality:

> There remains nonetheless a question as to whether there exists any general principle of confidentiality that would operate to prohibit public discussion of the arbitration by either party. Neither the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties in this respect. Thought it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such limitation, each of them is still free to speak publicly of the arbitration. It may be observed that no such limitation is written into such major arbitral texts as the UNCITRAL Rules or the draft Articles of Arbitration adopted by the International Law Commission.[351]

[346] Menaker, *supra* note 50 at 132.
[347] ICSID Case No. ARB(AF)/97/1.
[348] *Metalclad v. Mexico* – Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information Regarding ICSID Case ARB/(AF)/97/1 (27 October 1997), ¶1.
[349] *Id.*, at ¶ 2.
[350] *Id*., at ¶ 10.
[351] *Id*., at ¶ 9.

In the case of ***The Loewen Group, Inc. and Raymond L. Loewen v. United States of America***,[352] the sovereign respondent requested the Tribunal to make all the filings in the arbitration case available to the public.[353] The Tribunal in this case echoed the *Metalclad* Tribunal, stating that "it would be of advantage to the orderly unfolding of the arbitral process if during the proceedings the parties were to limit public discussion to what is considered necessary."[354]

In the case of ***Mondev International Ltd. V. United States of America***,[355] the Tribunal cited Article 44(2) of the 1978 version of ICSID Additional Facility Rules (which was the version in force in the year 2000) in its *Interim Decision Regarding Confidentiality of Documents*, to restrict the United States from publishing a tribunal order and interim decision on its government website.[356] Under that rule, minutes of hearings could not be published without the consent of the parties.[357] By analogy, the Tribunal reasoned that the tribunal order and interim decision likewise could not be published without consent, as these documents revealed the outcome of the hearings referenced therein.[358] A few months later, in early 2001, the Tribunal issued another order reiterating that neither party could publish any documents generated in the arbitration other than those which were already public by virtue of their being maintained in a public register.[359] The Tribunal made a specific exception, however, for documents subject to a statutory obligation of disclosure, such as the Freedom of Information Act.[360]

[352] ICSID Case No. ARB(AF)/98/3.
[353] *Loewen v. USA* – Decision on Hearing of Respondent's Objection to Competence and Jurisdiction (5 January 2001), at ¶ 25.
[354] *Id*., at ¶ 26.
[355] ICSID Case No. ARB(AF)/99/2.
[356] Menaker, *supra* note 50 at 132.
[357] *Id.* at 132.
[358] *Id.* at 132.
[359] *Id.* at 132–133.
[360] *Id.* at 132.

After these multiple experiences with issues relating to public access to information and documents, the NAFTA Free Trade Commission issued notes of interpretation in July 2001. This note ultimately settled the issue of public access to documents in NAFTA Chapter 11 arbitrations.[361] The relevant part of that issuance reads as follows:

> A. Access to documents
>
> 1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.
>
> 2. In the application of the foregoing:
>
> (a) In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing access to documents submitted to, or issued by, Chapter Eleven tribunals, aprt from the limited specific exceptions set forth expressly in those rules.
>
> (b) Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
>
> (i) confidential business information;
>
> (ii) information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
>
> (iii) information which the Party must withhold pursuant to the relevant arbitral rules, as applied.
>
> (c) The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.
>
> (d) The Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information.
>
> 3. The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it may withhold

[361] *Id.* at 133.

in accordance with Articles 2102 or 2105.[362]

Subsequent to this FTC note of interpretation, the public has almost complete access to the documents generated in the course of a NAFTA Chapter 11 arbitration.[363] The referenced NAFTA provisions in the third paragraph of the note provide that a NAFTA Party is not required to disclose information where doing so would: (1) be contrary to its essential security interests; (2) impede law enforcement; or (3) be contrary to legal obligations to protect privacy or financial information.[364]

ii. ICSID

Procedures relating to access to documents under the ICSID framework are more stringent than NAFTA,[365] although ICSID's amended rules again reflect a definite movement towards increased transparency. Rule 48(4) of the ICSID Arbitration Rules previously provided: "The Centre shall not publish the award without the consent of the parties. The Centre may, however, include in its publications excerpts of the legal rules applied by the Tribunal."[366] This rule was amended in April 2006 with a notable shift from permissive to mandatory language with respect to the publication of excerpts of the award. The second sentence of Rule 48(4) now reads as follows: "The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal."[367] This amendment was made to facilitate the prompt publication of ICSID awards.[368]

In addition to the amendment of the rules regarding publication of awards, one of the

[362] NAFTA Notes of Interpretation of Certain Chapter 11 Provisions, *supra* note 132.
[363] Menaker, *supra* note 50 at 134.
[364] *Id.* at 134.
[365] Knahr and Reinisch, *supra* note 17 at 98.
[366] Rule 48(4) ICSID Arbitration Rules, version ICSID/15/Rev.1, January 2003.
[367] Rule 48(4) ICSID Arbitration Rules, version ICSID/15, April 2006.
[368] ICSID 2005 Working Paper, *supra* note 158 at 9; ICSID 2004 Discussion Paper, *supra* note 149 at 4.

first ICSID Tribunal decisions on document disclosure under the amended ICSID Arbitration Rules reflected a deliberate effort to increase transparency with respect to arbitral documents other than the final award. In Procedural Order No. 3 in the case of ***Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania***,[369] the ICSID Tribunal resolved the claimant's request for provisional measures on confidentiality.[370] The claimant filed this request alleging that Tanzania had unilaterally disclosed documents produced in the ICSID proceedings by publishing them on the Internet.[371] Tanzania defended its right to disclose documents by arguing that there should be not be any "curtailment of a sovereign State's right (and obligation) to inform the public about a matter of great public importance."[372] The Tribunal agreed with this position and further acknowledged "the public nature of this dispute and the range of interests that are potentially affected, including interests in transparency and public information."[373] In light of these concerns, the Tribunal stated that "any restrictions must be carefully and narrowly delimited."[374]

Mindful of achieving an "appropriate balance between the competing interests"[375] of "the need for transparency in treaty proceedings"[376] and "the need to protect the procedural integrity of the arbitration"[377] in resolving this preliminary matter, the Tribunal made a "nuanced conclusion differentiating between different aspects of transparency and confidentiality and different types of activities and documents involved"[378] by parsing its Order

[369] ICSID Case No. ARB/05/22 [hereinafter *Biwater Gauff v. Tanzania*].
[370] Biwater Gauff v. Tanzania - Procedural Order No. 3, *supra* note 265 at ¶ 6.
[371] *Id.* ¶ 13. The Minutes of the First Session of the Arbitral Tribunal, as well as the Procedural Order N°2 dated 24 May 2006 were published on the "Investment Treaty Arbitration" website (http://ita.law.uvic.ca/). Tanzania admitted that it was the source of these disclosed documents.
[372] Biwater Gauff v. Tanzania - Procedural Order No. 3, *supra* note 265 at ¶ 150 quoting UROT's submission of 18 August 2006, para. 15.
[373] *Id.* at ¶ 147.
[374] *Id*.
[375] *Id.* ¶ 148.
[376] *Id.* ¶ 112.
[377] *Id*.
[378] Knahr and Reinisch, *supra* note 17 at 107.

into the following categories: (i) general discussion about the case;[379] (ii) awards;[380] (iii) decisions, orders and directions of the tribunal (other than awards)[381]; (iv) minutes or records of hearings;[382] (v) documents disclosed in the hearings;[383] (vi) pleadings/written memorials;[384] and (vii) correspondence between the parties and/or the arbitral tribunal exchanged in respect of the arbitral proceedings.[385] The Tribunal arrived at distinct conclusions regarding the propriety of publication and distribution of these categories of documents.[386] The Tribunal veered towards greater transparency with respect to the first three categories, and towards restricting disclosure on the other types of documents.[387] The main concern of the Tribunal as it leaned towards confidentiality with respect to certain documents was the potential of such disclosure to aggravate or exacerbate the dispute while it was pending, or give a misleading impression about the proceedings.[388] It is worth noting that the Tribunal's concern for confidentiality is inextricably linked to the pendency of the case and the integrity of the proceedings, rather than being based on any assertion of a party's right to withhold disclosure of documents.

In the currently pending case of ***Infinito Gold Ltd. v. Republic of Costa Rica***,[389] the Tribunal reflected on its discretion to allow access to documents in light of the silence of the ICSID Arbitration Rules on the matter, as well as the extent to which access should be allowed. Considering a petition for *amicus curiae* status filed by the Asociación Preservacionista de

[379] Biwater Gauff, Procedural Order No. 3, *supra*, ¶ 149-150.
[380] *Id.* ¶ 151.
[381] *Id.* ¶¶ 152-154.
[382] *Id.* ¶ 155.
[383] *Id.* ¶¶ 156-157.
[384] *Id.* ¶¶ 158-160.
[385] *Id.* ¶ 161.
[386] Knahr and Reinisch, *supra* note 17 at 107.
[387] Sandra L. Caruba, *Resolving International Investment Disputes in a Globalised World*, 13 NZBLQ 128 (2007).
[388] *Biwater Gauff v. Tanzania* - Procedural Order No. 3, *supra* note 265 at ¶¶ 152, 158.
[389] ICSID Case No. ARB/14/5. A more extensive discussion of this case appears below in relation to environmental groups.

Flora y Fauna Silvestre ("APREFLOFAS"), a Costa Rican non-governmental organization for the promotion of the environment, the Tribunal reasoned as follows:

> APREFLOFAS further requests access to the "principal arbitration documents", including the Parties' pleadings, the Tribunal's decisions and orders, witness statements and transcripts of any witness examinations, and in general "[a]ny other documents issued or to be issued in the course of this proceeding."
>
> **The ICSID Convention and Rules are silent on the non-disputing party's access to the record.** On its website, ICSID states that "[t]he ICSID Convention and Arbitration Rules do not contain a general presumption of confidentiality or transparency applicable to the parties. Instead, the parties may tailor the level of confidentiality or transparency to their proceedings." ICSID adds that, **failing an agreement by the Parties or provisions in the applicable treaty, contract or law, the issue must be resolved by the Tribunal.**
>
> Here, the Parties have not agreed on any transparency or confidentiality provisions other than the publication of substantive decisions, the award and procedural orders (the latter after the conclusion of the proceedings). The BIT's transparency provision (Article XIV) does not address this matter. It thus falls within the **residual powers of the Tribunal** to resolve this matter.
>
> In the Tribunal's view, whether APREFLOFAS should be granted access to the record and to **what extent depends essentially on whether access is required to APREFLOFAS to effectively discharge its task**, i.e., provide the Tribunal with a useful and particular insight on facts or legal questions relevant to its jurisdiction. In order for APREFLOFAS to adequately meet this objective, it is undoubtedly **preferable that it knows what information has already been submitted to the Tribunal. Otherwise, there is a risk that the information that it may submit may be redundant and thus useless.** At the same time, the Tribunal must also ensure that no privileged information is disclosed to a third party which does not already have knowledge of it. It notes that while the Claimant has objected to the communication of documents to APREFLOFAS, it has not alleged that privileged information would thereby be disclosed.[390]

This is a fairly recent procedural order in an ongoing case, and it will be interesting to see whether this approach will be adopted by other tribunals in other cases.

iii. UNCITRAL Rules on Transparency

The UNCITRAL Rules on Transparency contain the most detailed provisions regarding

[390] *Infinito Gold v. Costa Rica*, Procedural Order No. 2 dated 1 June 2016, ¶¶ 40 – 43. Emphasis supplied.

public access to documents. During the drafting stage, the goal was to come up with text that specifically provided for the following: "(i) a list of documents made available to the public; (ii) discretionary power of the arbitral tribunal to order publication of additional documents or information; (iii) a right for third persons to request access to additional documents or information; and (iv) the publication of documents or information."[391]

Under the UNCITRAL Rules on Transparency, access to documents is essentially governed by Article 3 thereof. A reading of the paragraphs in Article 3, however, readily reveals that the provisions must be read together with Article 7 of the Rules, which details the exceptions to transparency. The exceptions under Article 7 will be discussed throughout this dissertation in the portions where they are relevant; certain exceptions can readily be categorized as pertaining to either the sovereign respondent or claimant, and those provisions will be discussed in Chapters 3 and 4, respectively. Other provisions under Article 7 relate to procedure, and those will be brought up where pertinent.

The first paragraph of Article 3 lists the specific documents for which public availability is mandated – in the words of the drafters during deliberation, "information to be 'automatically' disclosed".[392]

> Article 3. *Publication of documents*
>
> 1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; 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.

[391] October 2012 UNCITRAL WG Report, *supra* note 235 at ¶ 13.
[392] *Id.* at ¶ 14.

The documents listed here essentially appears in the chronological order that they would be generated in the course of the arbitration proceedings.[393] Whether or not to include the exhibits themselves in this mandatory list was the subject of debate during the drafting. Some delegations voiced apprehension that "automatic" production of exhibits would be "cumbersome", due to the "voluminous nature of exhibits" and the redactions that might be required.[394] It was therefore agreed that exhibits would be deleted from the provision, but would be subject to disclosure at the discretion of the tribunal.[395] Thus, the final version of Article 3(1) explicitly states, "not the exhibits themselves", but should be read together with Article 3(3), discussed below.

A closer reading of the mandatory list in this paragraph reveals that there are qualifiers included in the text. A table listing exhibits would be required to be published "if such table has been prepared for the proceedings."[396] Transcripts of hearings would be made available to the public "where available".[397] This is to avoid putting a burden on the parties. If a list of exhibits had not been prepared in the course of the arbitration proceedings, there would be no requirement to create one for the purposes of disclosure under Article 3.[398] Similarly, if hearing transcripts were not generated during the proceedings, there would be no requirement to produce transcripts.[399]

Public access to expert reports and witness statements were given a separate paragraph to subject these documents to different rules from paragraphs 1 and 3 of Article 3:

[393] Christopher Kee, *Article 3. Publication of documents, in* TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNICTRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 91–127, 109 (Dimitrij Euler, Markus W. Gehring, & Maxi Scherer eds., 2015).
[394] October 2012 UNCITRAL WG Report, *supra* note 235 at ¶ 15.
[395] *Id.* at ¶ 15.
[396] UNCITRAL Rules on Transparency, Art. 3(1).
[397] *Id.*
[398] October 2012 UNCITRAL WG Report, *supra* note 235 at ¶ 16.
[399] *Id.* at 24.

> 2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.

Whereas paragraph 1 provides for "automatic" disclosure, paragraph 3 provides for tribunal discretion. The documents under paragraph 2 are neither to be published automatically, nor subject to the discretion of the tribunal regarding its disclosure.[400] Rather, expert reports and witness statements should be made available to any person who requests access to these documents.

Paragraph 3 provides for an exercise of discretion by the Tribunal in relation to exhibits, as well as "any other documents" that are not covered by the first two paragraphs of Article 3:

> 3. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified site.

The Tribunal can act *motu proprio* or upon a request from a non-party, and is directed to consult with the disputing parties prior to exercising its discretion about providing non-party access to exhibits or other documents. However, the tribunal is under no obligation to defer to the disputing parties on the matter.[401]

As to the types of documents contemplated by this paragraph, one commentator notes that "[t]here is very little in the *travaux préparatoires* that provides guidance on whether electronic documents were intended to be included within the scope of this sub-article."[402]

[400] *Id.* at ¶ 20.
[401] Kee, *supra* note 393 at 116.
[402] *Id.* at 117–118.

During the deliberations on this provision, discussion among the delegations highlighted a distinction between "access" and "publication".[403] "[T]he Working Group considered that there were some categories of documents or information which would not lend themselves to publication, such that a right of access, rather than publication per se, would be more appropriate."[404]

Paragraph 4 prescribes when documents should be published or made available:

> 4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under article 7. The documents to be made available pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in a redacted form in accordance with article 7. The repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.

The wording of this paragraph connotes urgency, but does not define concrete time limits. The phrases "as soon as possible", "as they become available", and "in a timely manner" are hardly explicit with respect to the amount of time between the moment a document is received or generated and when it must become accessible by the public. An allowance for redactions and other necessary procedures is also provided for by the phrase "subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under article 7." Nonetheless, the idea is conveyed that the Tribunal and the repository should act promptly.

The "time limits" referenced in this paragraph refer to that provided for by Article 7(3)(a), which directs Tribunals to "make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place,

[403] *Id.* at 114.
[404] October 2012 UNCITRAL WG Report, *supra* note 235 at ¶ 27.

as appropriate: […] Time limits in which a disputing party, non-disputing Party to the treaty or third person shall give notice that it seeks protection for such information in documents."[405]

The last paragraph of Article 3 provides for allocation of costs with respect to access to documents:

> 5. A person granted access to documents under paragraph 3 shall bear any administrative costs of making those documents available to that person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the repository.

Paragraph 5 only imposes costs that will be incurred in relation to access sought pursuant to Article 3(3) if such access is not availed of through the repository.[406] The costs of preparing the documents for publication remain with the disputing parties, but a non-party requesting access to the documents must pay for incidental administrative costs.[407] This is to minimize the additional burden on the disputing parties, while avoiding placing the costs of preparation on the first non-party to request access.[408]

2.2.1.2. Written submissions

The link between third-party participation and increased transparency was enunciated by the NAFTA Tribunal in ***Methanex Corporation v. United States of America***, discussed earlier, with this portion of the ruling echoed by the ICSID Tribunal in ***Biwater Gauff*** in a 2007 Procedural Order:

> "the … arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm".[409]

[405] UNCITRAL Rules on Transparency, Article 7(3)(a).
[406] Kee, *supra* note 393 at 123.
[407] *Id.* at 123.
[408] *Id.* at 123.
[409] *Biwater Gauff* Procedural Order No.5, 2 February 2007, ¶ 51, citing *Methanex* Amici Decision, *supra*, at ¶ 49.

This ***Biwater Gauff*** Procedural Order quoting ***Methanex*** came soon after ICSID issued amended Arbitration Rules in April 2006, which, in addition to the shift in attitude towards access to documents already discussed above, also expressly allowed for the participation of third parties through the filing of written submissions.[410]

However, even prior to the applicability of the amended ICSID arbitration rules, the Tribunal hearing the case of ***Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic***,[411] issued an Order[412] which stated that "[n]either the ICSID Convention nor the Arbitration Rules specifically authorize or specifically prohibit the submission by nonparties of *amicus curiae* briefs or other documents."[413] In arriving at its decision to allow a group of five non-governmental organizations[414] to file *amicus curiae* briefs,[415] the Tribunal looked to the ***Methanex*** case in concluding that it had the power to admit *amicus curiae* submissions from suitable nonparties in appropriate cases.[416] The main reason that the ***Suez*** Tribunal considered in allowing *amicus curiae* participation was that the case was

---

[410] Rule 37 was amended to read as follows:
Rule 37
Visits and Inquiries;
Submissions of Non-disputing Parties
x x x
(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "nondisputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
(b) the non-disputing party submission would address a matter within the scope of the dispute;
(c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.
[411] ICSID Case No. ARB/03/19 [hereinafter *Suez*].
[412] *Suez*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005.
[413] *Id.* ¶ 9.
[414] *Id.* ¶ 1.
[415] *Id.* ¶ 33.b.
[416] *Id.* ¶¶ 14-16.

imbued with public interest.[417] The Tribunal stated, "[g]iven the public interest in the subject matter of this case, it is possible that appropriate nonparties may be able to afford the Tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision."[418]

The Tribunal cited its ruling in the ***Suez*** case in coming to a similar conclusion in the case of ***Aguas Provinciales de Santa Fe v. Argentina***.[419] In its Order in Response to a Petition for Participation as Amicus Curiae[420], the Tribunal used similar language in citing "public interest"[421] as the motivating factor in allowing a non-governmental organization and legal experts[422] to participate through filing submissions.[423] The Tribunal then went on to extol the virtues of third party participation and transparency:

> The 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.[424]

Of the three mechanisms of non-party participation, *amicus* submissions appear to be treated the most cohesively across investment arbitration rules. The 2014 UNCITRAL Rules on Transparency, the 2006 ICSID Arbitration Rules, and the 2003 Statement of the NAFTA Free Trade Commission on Non-Disputing Party Participation expressly allow written submissions by third parties, and contain textually similar guidelines for investment tribunals to follow in determining whether a non-party seeking to make a written submission in an investment arbitration should be allowed to do so. All these three instruments require that: (1)

[417] *Id.* ¶¶ 19, 20.
[418] *Id.* ¶ 21.
[419] ICSID Case No. ARB/03/17 [hereinafter *Aguas*].
[420] *Aguas*, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006.
[421] *Id.* ¶ 20.
[422] *Id.* ¶ 1.
[423] *Id.* ¶ 38(b). The Tribunal granted the petitioners "an opportunity to Petitioners to apply for leave to make amicus curiae submission if and when the Petitioners provide the Tribunal with convincing information and reasons that they qualify as amicus curiae."
[424] *Id.* ¶ 21.

the third person has a "significant interest" in the proceedings;[425] and (2) the submission would assist the arbitral tribunal "in the determination of a factual or legal issue related to" the arbitration "by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties."[426] (Words enclosed in quotation marks indicate language that is verbatim in all three texts.) Both the ICSID Arbitration Rules and the NAFTA Free Trade Commission advise tribunals to consider the extent to which the non-disputing party submission would address matters "within the scope of the dispute."[427] Meanwhile, this qualification of a third-party submission being "within the scope of a dispute" is phrased more like a requirement than a guiding principle in the UNCITRAL Rules on Transparency,[428] with the phrase appearing twice within the same rule.[429] The NAFTA guidelines add an additional qualification that "there is a public interest in the subject-matter of the arbitration."[430]

The NAFTA Free Trade Commission guidelines and the UNCITRAL Rules on Transparency go beyond these general substantive criteria, and also direct potential *amici* to disclose certain information in their petitions to participate in investment treaty arbitration proceedings. These two texts, go into a level of detail that the ICSID Arbitration Rules do not. As discussed in Chapter 1, the provision on non-disputing party submissions was inserted as paragraph 2 of Rule 37, not entirely seamlessly. The NAFTA guidelines has the leisure of being a standalone text, and the UNCITRAL Rules on Transparency has the benefit of being

[425] UNCITRAL Rules on Transparency, Art. 4(3)(a); ICSID Arbitration Rule 37(2)(c); Statement of the Free Trade Commission on Non-Disputing Party Participation dated 7 October 2003, ¶B(6)(c).
[426] UNCITRAL Rules on Transparency, Art. 4(3)(b); ICSID Arbitration Rule 37(2)(a); Statement of the Free Trade Commission on Non-Disputing Party Participation dated 7 October 2003, ¶B(6)(a).
[427] ICSID Arbitration Rule 37(2)(b); Statement of the Free Trade Commission on Non-Disputing Party Participation dated 7 October 2003, ¶B(6)(b).
[428] UNCITRAL Rules on Transparency, Art. 4(1) is phrased as follows: "[…]the arbitral tribunal may allow a person that is not a disputing party […] to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute."
[429] UNCITRAL Rules on Transparency, Art. 4(d) requires that "The submission filed by the third person shall … Address only matters within the scope of the dispute."
[430] Statement of the Free Trade Commission on Non-Disputing Party Participation dated 7 October 2003, ¶B(6)(d).

an entirely new set of rules. This may explain why the level of detail achieved here was not feasible for the revised ICSID Arbitration Rules, which had to take into account the overall format and tenor of the existing rules that were revised.

The NAFTA Free Trade Commission Statement on Non-Disputing Party Participation was issued to respond to a need to clarify NAFTA practice regarding *amicus* participation, in light of the *Methanex* and *United Parcel Service* cases.[431] According to one commentator, this text is additionally significant because it brought Mexico into a consensus with Canada and the USA regarding the role of *amicus* submissions in investor-State dispute resolution.[432] These NAFTA Free Trade Commission guidelines contains the following list of required disclosures for *amicus* petitions:

> 2. The application for leave to file a non-disputing party submission will:
> (a) be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;
> (b) be no longer than 5 typed pages;
> (c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);
> (d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;
> (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
> (f) specify the nature of the interest that the applicant has in the arbitration;
> (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
> (h) explain, by reference to the factors specified in paragraph 6, why the Tribunal should accept the submission; and
> (i) be made in a language of the arbitration.[433]

[431] Dimsey, *supra* note 308 at 136–137.
[432] *Id.* at 137.
[433] Statement of the Free Trade Commission on non-disputing party participation, *supra* note 138.

This detailed list served as a model for Article 4(2) of the UNCITRAL Rules on Transparency.[434] The UNCITRAL Working Group wanted a provision that was sufficiently "detailed, in order to provide guidance to parties and the arbitral tribunal, taking account of the fact that a number of States had little experience in the field."[435] In light of this desire for detail, the Working Group specifically highlighted the NAFTA Free Trade Commission Statement as a model text.[436] Ultimately, the drafters aimed for text that contained more guidance than ICSID Arbitration Rule 37(2), but was not as extensively detailed as the NAFTA Free Trade Commission Statement quoted above.[437] Article 4(2) of the UNCITRAL Rules on Transparency reads as follows:

> 2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:
>
> (a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);
>
> (b) Disclose any connection, direct or indirect, which the third person has with any disputing party;
>
> (c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually);
>
> (d) Describe the nature of the interest that the third person has in the arbitration; and
>
> (e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

A reading of the excerpt quoted above readily reveals several commonalities with the issuance of NAFTA Free Trade Commission regarding the requirements of petitions for *amicus*

[434] February 2011 UNCITRAL WG II Report, *supra* note 205 at ¶ 119 et seq.
[435] *Id.* at 119.
[436] *Id.* at ¶ 119.
[437] *Id.* at ¶ 121.

participation. In terms of form, both texts refer to page limits, with the NAFTA guidelines setting a maximum limit of five pages, and the UNCITRAL Rules on Transparency providing leeway for the arbitral tribunal regarding the number of pages.

Both texts require a description of the applicant, with both requiring the following disclosures: (1) membership; (2) legal status, with both providing "trade association" and "non-governmental organization" as the primary examples, but the NAFTA guidelines also contemplating a "company"; (3) the general objectives of the organization; (4) the nature of the organization's activities; and (5) the organization's parent organization or any organization that directly or indirectly controls the applicant. These disclosure requirements regarding the identity and control of the potential *amici* were crafted in response to criticism regarding the potential concealment of the intentions of third parties, as well as whose interests these third parties represent.[438] Particularly because of the substantive requirement that the non-party bring "a perspective, particular knowledge or insight that is different from that of the disputing parties,"[439] ascertaining the identity and interests of the non-party seeking to participate in the investment arbitration is particularly crucial.[440]

The two instruments also require disclosure of direct or indirect affiliations or connections that the *amici* may have with any of the disputing parties; this disclosure is sought to ensure that the entity applying to participate as *amici* is indeed a third party and not simply acting as an extension of one of the disputing parties.[441]

A crucial disclosure requirement contained in both instruments relates to financial

[438] Dimsey, *supra* note 308 at 168.
[439] UNCITRAL Rules on Transparency, Art. 4(3)(b); ICSID Arbitration Rule 37(2)(a); Statement of the Free Trade Commission on Non-Disputing Party Participation dated 7 October 2003, ¶B(6)(a).
[440] See Dimsey, *supra* note 308 at 168–170.
[441] *Id.* at 170.

assistance or other forms of assistance. The NAFTA guidelines are worded generally, requiring the non-party to identify "any government, person or organization that has provided any financial or other assistance in preparing the submission."[442] The UNCITRAL Rules on Transparency adopts this disclosure requirement, but goes further by adding a second disclosure requirement for "substantial assistance in either of the two years preceding the application by the third person under this article", and the provision even defines "substantial assistance" as "funding around 20 per cent of its overall operations annually".[443] Thus, where the NAFTA guidelines pertain to financial assistance for the limited purpose of preparing the written submission, the UNCITRAL Rules on Transparency provides a significant time period prior to the application to determine a non-party's financial dependence on an entity.

The provision also provides a threshold amount that would be considered *prima facie* as "substantial assistance". The specificity of this provision generated much debate during the drafting of the Rules on Transparency. The parenthetical description of "20 per cent" is notably preceded by an "e.g." to signify that this definition of substantial assistance was an "illustrative example" and not an absolute threshold.[444] Some drafters were of the view that an indicated percentage would "provide a relevant indication of whether the influence had been significant".[445] Other delegations were concerned that providing a specific percentage would be perceived as "a threshold amount under which disclosure was not required."[446] Ultimately, it was decided that a specific percentage should be indicated in the rules, but to indicate that such was only an example, it being understood that "whether assistance was substantial would

[442] Statement of the Free Trade Commission on Non-Disputing Party Participation dated 7 October 2003, ¶B(2)(e).
[443] UNCITRAL Rules on Transparency, Art. 4(2)(c)(ii).
[444] October 2012 UNCITRAL WG Report, *supra* note 235 at ¶¶ 49-50.
[445] *Id.* at ¶ 48.
[446] *Id.* at ¶ 50.

always depend on the particular facts."[447]

It is worth noting here that the UNCITRAL Rules on Transparency provide much more stringent disclosure requirements regarding financial assistance received by *amici curiae*, compared to the requirements set out by the NAFTA Free Trade Commission. The ICSID Rule on non-party participation makes no mention of this matter, although disclosure regarding financial aid was contemplated during the revision process.[448]

Setting parameters for non-party participation is in line with keeping the arbitral proceedings orderly and efficient, since additional submissions will necessarily entail additional time and costs for the parties to the dispute in responding to the third-party submissions, as well as for the tribunal to consider them. However, it is clear from the express provisions in the rules discussed above that third-party participation or *amicus* submissions have now been accepted as a regular part of investor-State dispute settlement.

2.2.1.3. Open Hearings

NAFTA Chapter 11 is silent on whether oral hearings should be open to the public. However, in 2003, Canada and the United States issued public statements to announce their consent to open all Chapter 11 arbitration hearings to the public; in 2004, Mexico followed suit.[449] Since then, the standard procedure has been to broadcast the hearing to a separate room or a separate location.[450] Members of the public are not present in the hearing room itself, to avoid issues that may arise relating to disruptive persons.[451]

[447] *Id.* at ¶ 50.
[448] ICSID 2004 Discussion Paper, *supra* note 149 at ¶ 13.
[449] Menaker, *supra* note 50 at 154–155.
[450] *Id.* at 155.
[451] *Id.* at 155.

ICSID Arbitration Rules provide that "(2) Unless either party objects, the Tribunal […] may allow other persons, besides the parties, […] to attend or observe all or part of the hearings […]," and that the Tribunal would "establish procedures for the protection of proprietary or privileged information" in addition to ensuring "appropriate logistical arrangements."[452] Apparent from this quoted provision is that the ICSID Rules work from the premise that it is the Tribunal that has the discretion to allow non-disputant parties to attend, unless either or both parties object to opening the hearing. Notably, ICSID's approach to open hearings is a development brought about by the revision of its arbitration rules in April 2006. Before the revision of this rule, the Tribunal required the affirmative consent of both parties before it could allow third parties to attend the hearings.[453] Consent is still required, in the sense that objection from either or both of the disputing parties would prevent public attendance at hearings.

A number of ICSID hearings have been open to the public in recent years. NAFTA Chapter 11 cases administered by ICSID made hearings public by broadcasting them to publicly accessible rooms in the World Bank.[454] Some ICSID hearings have been livestreamed via the Internet, allowing anyone in the world to watch the hearings, usually with a slight delay to allow for confidential portions to be removed from the webcast. The ICSID website announces in advance on its homepage when a hearing will be livestreamed. A livestreaming website currently hosts fifteen previous ICSID hearings, the earliest one available dating back to 2010.[455]

The UNCITRAL Rules on Transparency mandate that hearings shall be public,[456] with

[452] ICSID Arbitration Rule 32(2).
[453] Prior to the 2006 revisions, Rule 32(2) read as follows: The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal **may** attend the hearings. (Emphasis and underscoring supplied.)
[454] Menaker, *supra* note 50 at 156.
[455] The website can be found at URL https://livestream.com/ICSID.
[456] UNCITRAL Rules on Transparency, Art. 6(1).

the possibility of making arrangements in light of confidential information,[457] or logistical concerns.[458] Notably, the UNCITRAL Rules on Transparency do not instruct the arbitral tribunal to consult with the parties before opening the hearings to the public; the hearings are public by default, subject to exceptions.[459]

As mentioned in Chapter 1, the parties in the case of ***BSG Resources Limited v. Republic of Guinea***[460] agreed to adopt the UNCITRAL Rules on Transparency, modifying the Rules as necessary to adapt to the ICSID proceedings.[461] With respect to the matter of oral hearings, the Tribunal laid down the following guidelines:

> Pursuant to Article 6(3) of the Transparency Rules, the following logistical arrangements will be made to facilitate public access to the hearings:
>
> (i) The hearings will be broadcast and made publicly accessible by video link on the ICSID website. An audio-video recording will also be made of hearings. For logistical reasons, physical attendance by third persons at hearings shall be subject to the Tribunal's approval.
>
> (ii) In order to protect potential confidential or protected information, the broadcast will be delayed by 30 minutes […].
>
> (iii) At any time during the hearings, a Party may request that a part of the hearing be held in private and that confidential, that the broadcast of the hearing be temporarily suspended or that protected information be excluded from the video transmission. To the extent possible, a Party shall inform the Tribunal before raising topics where confidential or protected information could reasonably be expected to arise. The Tribunal will then consult the Parties. Such consultations shall be held *in camera* and the transcript shall be marked "confidential". After consultation with the Parties, the Tribunal will decide whether to exclude the information in question from the broadcast and the relevant portion of the transcript shall be marked "confidential". The transcript made public by the Repository shall redact those portions of the hearing marked "confidential".
>
> (iv) The ICSID Secretariat will make the necessary technical arrangements to broadcast the hearings through video link.[462]

[457] *Id.*, Art. 6(2).
[458] *Id.*, Art. 6(3).
[459] Klint Alexander, *Article 6. Hearings, in* TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNICTRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 227–248, 228 (Dimitrij Euler, Markus W. Gehring, & Maxi Scherer eds., 2015).
[460] ICSID Case No. ARB/14/22.
[461] *See* discussion in Section 1.4.1.2.4.
[462] BSG Resources Ltd v. Guinea - Procedural Order No. 2: Transparency, *supra* note 258 at ¶ 14.

The hearings are currently available for anyone in the world to watch anytime on the popular video-sharing website YouTube; a link to the online videos appears on the ICSID website where procedural details for this case are outlined.[463]

2.2.2. Survey of cases involving particular interest groups and attempts to intervene

This section is devoted to an in-depth survey of investment arbitration cases wherein two particular interest groups have petitioned to be non-disputing parties: (1) indigenous peoples' groups, and (2) environmental protection groups. Of potential intervenors in investment cases, these two groups stand out because of the number of cases involving these groups. While the numbers may seem small, they are significant considering that third-party participation is a relatively new phenomena, brought about by rule changes as discussed above. Furthermore, among the criticisms lodged against bilateral investment treaties are perceived restrictions on the regulatory sovereignty of the host State, thus interfering with governmental measures for the protection of human rights and the environment.[464]

While intervention was not allowed in some of the cases discussed below, an analysis of the outcomes in cases where intervention was allowed reveal that the written submissions of these third parties was disregarded by the tribunals. The ineffectuality of third-party participation is not a transparency issue *per se*; however, a look at the impact of third-party participation is necessary to understand the limits of what an increased transparency regime can realistically achieve.

[463] Hearing Day 1 in English is available at https://youtu.be/70r1k0E-JLE, with the subsequent hearing days appearing subsequently in a playlist.
[464] Jan Wouters & Anna-Luise Chané, *Multinational Corporations in International Law*, *in* NON-STATE ACTORS IN INTERNATIONAL LAW 225–251, 235 (Math Noortmann, August Reinisch, & Cedric Ryngaert eds., 2015).

2.2.2.1. Indigenous Peoples

In 2016, opposition against the construction of the Dakota Access Pipeline made news headlines in the United States and around the world. Protesters from the Standing Rock Sioux tribe were joined at the protest encampment by members of other Native American nations, campaigning against an oil project that potentially imperils indigenous sacred lands and poses a threat of contamination to the Missouri River. This massive demonstration has brought public attention to the clash between indigenous rights and the interests of extractive industries, as well as the government's role in mediating between these diverging concerns. While the Dakota Access Pipeline is a project of a US company and is therefore a domestic investment, the well-publicized conflict surrounding it is illustrative of past and prospective international investment disputes where the activities of foreign investors are met with opposition by indigenous groups, and the governmental actions in response become the subject of investment treaty claims. In investor-State disputes involving extractive activities near protected lands, indigenous peoples are not parties to a legal process that has an impact on their rights. Considering that their interests are often in direct conflict with those of claimant investors, and inadequately represented by the sovereign respondent, appropriate avenues must be identified through which indigenous peoples can protect their rights and be heard by investment tribunals.

Indigenous peoples have sought to avail of the participation mechanisms described in this chapter with limited success. Often at odds with foreign investors in extractive industries, indigenous groups have frequently insisted that mining activities in their ancestral lands have a detrimental impact on their heritage and way of life. Thus, these affected indigenous peoples assert an interest to participate in ongoing investment disputes, sometimes with the aid of non-governmental organizations.

In the investment arbitration cases in recent years wherein indigenous groups sought to make written submissions as non-disputing parties, the response of tribunals can be described as lukewarm or even dismissive. Requests to access to arbitration documents or attend hearings have generally been denied. By reviewing these particular cases, the present study will examine the reasoning of the arbitral tribunals to understand the considerations that factored into allowing or denying non-disputing party participation, with a view to assessing whether the promises of an increased transparency regime will eventually benefit indigenous peoples seeking to participate in these disputes, depending on how their requests for intervention are framed.

A review of cases involving indigenous peoples seeking to intervene in investor-State disputes reveals that the claimants in these cases are involved in extractive industries, particularly mining.[465] That extractive activities are at the core of these particular disputes is, perhaps, a direct function of indigenous peoples' rights and cultural heritage being inextricably linked to their sacred lands and ancestral domain. A significant development spurring the recognition of the rights of indigenous people under international law is the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.[466] This important international law instrument recognizes the "distinctive spiritual relationship" that indigenous peoples have with their territories, and accords them the "right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[467] Another relevant international law instrument is the International Labour

[465] Discussion, *infra*, Part 4.
[466] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), G.A. Res. 61/295, UN Doc. A/RES/61/295 dated 13 September 2007; Valentina Vadi, CULTURAL HERITAGE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (*Chapter 6: When cultures collide: Foreign direct investment, natural resources and indigenous heritage in international investment law*) (2014), p. 204; Christina Binder, *Investment, Development and Indigenous Peoples*, Chapter 15 in INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT – BRIDGING THE GAP, Stephan W. Schill, Christian J. Tams and Rainer Hofmann, eds. (2015), pp. 427 – 428.
[467] UNDRIP, Arts. 25, 26; Binder, *supra*, p. 427.

Organisation (ILO) Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, which recognizes the right of indigenous peoples to decide their development priorities in relation to their beliefs and their lands.[468] Indeed, cultural rights and land rights of indigenous peoples are interconnected and interdependent with each other.[469]

Because of this special relationship with their sacred lands, indigenous peoples should be deemed to meet the "significant interest" requirement[470] for being allowed to make non-party submissions in investment arbitration cases where the investment in dispute involves activity that impacts their lands. While some scholars have noted that the scope of investment disputes provides minimal opportunity for indigenous peoples to intervene, it is imperative that they be able to participate in decision-making processes that directly affect them.[471] That public interest is involved in investment activities proximal to sacred lands is underscored by the duty of States to undertake environmental and social impact assessments for activities that may potentially affect indigenous peoples, as well as share the benefits of these investment activities with indigenous peoples.[472]

To better understand the factors affecting tribunal decisions regarding the intervention of indigenous peoples or their representatives in investment arbitration cases, a review of past and pending cases may prove enlightening. Four investment arbitration cases are relevant to the discussion: (1) the NAFTA case *Glamis Gold v. USA*, decided in 2009; (2) The Permanent Court of Arbitration (PCA) case *Chevron v. Ecuador*, decided in 2011; (3) the ICSID Case *Von*

[468] Federico Lenzerini, *Foreign Investment in the Energy Sector and Indigenous Peoples' Rights*, Chapter 7 in FOREIGN INVESTMENT IN THE ENERGY SECTOR - BALANCING PRIVATE AND PUBLIC INTERESTS, Eric De Brabandere and Tarcisio Gazzini, eds. (2014), p. 194.
[469] *Id.*
[470] Discussion, *infra*, Part 2.2.
[471] Vadi, *supra*, at p. 206.
[472] Alessandro Fodella, *Indigenous Peoples, the Environment and International Jurisprudence*, in INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW – ESSAYS IN HONOUR OF TULLIO TREVES, Nerina Boschiero, Tullio Scovazzi, Cesare Pitea, Chiara Ragni, eds. (2013), p. 360.

Pezold v. Zimbabwe, decided in 2015; and (4) the currently ongoing ICSID case *Bear Creek v. Peru*. The first two cases were conducted pursuant to UNCITRAL Arbitration Rules, while the latter two were conducted under ICSID Arbitration Rules. Indigenous Peoples were allowed to participate as *amici curiae* in *Glamis Gold* and *Bear Creek*, whereas the tribunals in *Chevron v. Ecuador* and *Von Pezold v. Zimbabwe* ruled against allowing the Indigenous Peoples to intervene. Thus, we have here a sample of cases where intervention was allowed under the UNCITRAL Rules and the ICSID Rules, and also cases following those arbitration rules where third-party participation was not allowed.

2.2.2.1.1. *Glamis Gold v. USA*

The case of ***Glamis Gold, Ltd. v. United States of America*** (hereafter "*Glamis Gold v. USA*") was brought by a Canadian mining company pursuant to Chapter 11 of NAFTA,[473] in accordance with the UNCITRAL Arbitration Rules before the ICSID Additional Facility. The dispute involved a mining project on federal land in southeastern California, located "near to – but not a part of – designated Native American lands and areas of special cultural concern".[474] Claimant alleged violations of its rights as an investor under NAFTA because of regulations imposed by the State of California requiring backfilling and site recontouring of mining sites.[475] Glamis alleged that these regulations amounted to an indirect expropriation of its investment by the United States, because the economic value of its investment had been destroyed through these measures.[476]

This case is significant because it allowed an indigenous group to participate as *amicus curiae*. The Quechan Indian Nation (hereafter "Quechan") cited three reasons it should be

[473] *Glamis Gold v. USA*, Award dated 8 June 2009, at ¶1.
[474] *Id.*, at ¶10.
[475] *Glamis Gold v. USA*, Notice of Arbitration dated 9 December 2003, at ¶¶11 – 23.
[476] *Id.*, at ¶¶23, 25.

allowed to intervene in the investment dispute: (1) being constitutionally recognized as a sovereign government,[477] its interests cannot be adequately represented by another sovereign, i.e. the United States government, nor could its interests be represented by the Canadian claimant; (2) the claimant's interests are adverse to that of the Quechan, and the respondent's agencies may be biased in defending some of its actions; and (3) only the Quechan has the expertise and authority regarding the cultural, social and religious value of the indigenous sacred lands involved in the dispute, or the severity of impacts to the area and the Quechan.[478] In deciding to allow the Quechan to make a non-disputing party submission, the Tribunal relied heavily on the Free Trade Commission's Statement on Non-Disputing Party Participation, and also took into account that neither claimant nor respondent objected to such submission.[479]

Despite the participation of the Quechan, however, the Tribunal was rather categorical in stating that their submission had no bearing on the resolution of the issues. With respect to the *amicus* filings, the Tribunal declared at the outset of its Award that the Tribunal deemed its task to be limited to addressing those filings "to the degree that they bear on decisions that must be taken."[480] However, the Tribunal maintained that its holdings with respect to the claims in the dispute "does not reach the particular issues addressed" by the *amicus* submissions.[481] Ultimately, the Tribunal ruled that the measures adopted by California did not breach the obligations of the United States under NAFTA. Thus, while the resulting Award was favorable to the rights of the Quechan in that the California regulations according protection to their sacred lands were upheld, their concerns and asserted rights in their third-party submission did

[477] The United States Supreme Court has "consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory' *". California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), at 207, citing *United States v. Mazurie*, 419 U.S. 544, 557 (1975).
[478] *Glamis Gold v. USA*, Quechan Indian Nation Application for Leave to File a Non-Party Submission dated 19 August 2005, at pp. 3 – 4.
[479] *Glamis Gold v. USA*, Decision on Application and Submission by Quechan Indian Nation dated 16 September 2005, at ¶9.
[480] *Glamis Gold v. USA*, Award dated 8 June 2009, at ¶8.
[481] *Id*.

not impact the reasoning of the arbitral tribunal.[482]

2.1.2.1.2. *Chevron v. Ecuador*

Another case wherein representatives of an indigenous community tried to intervene is a case brought before the Permanent Court of Arbitration (PCA), *In the Matter of an Arbitration under the UNCITRAL Arbitration Rules between Chevron Corporation and Texaco Petroleum Company and the Republic of Ecuador* (hereafter "*Chevron v. Ecuador*").[483] The case was filed in 2009 by claimants Chevron Corporation ("Chevron") and Texaco Petroleum Company ("TexPet") alleging a breach of the BIT between Ecuador and the United States in relation to a class action litigation for environmental harm instituted by Ecuadorian plaintiffs against Chevron in the courts of Ecuador.[484] The US-based claimants in the investment arbitration alleged that the sovereign respondent colluded with the plaintiffs[485] in the court case, such that Ecuador's various State organs were involved in a coordinated effort to shift liability for environmental impact to Chevron, for harm caused by "government-sanctioned colonization and agricultural and industrial exploitation of the Amazonian region" resulting from previous activities carried out by a consortium comprised of Ecuador's state-owned oil company and TexPet, wherein allocation of liability had already been the subject of settlement agreements between TexPet and the Ecuadorian government.[486]

In 2010, the Fundación Pachamama and the International Institute for Sustainable Development (IISD) sought to participate as *amici curiae* in the case before the PCA.[487] The

[482] Binder, *supra*, at p. 432.
[483] PCA Case No. 2009-23.
[484] *Chevron v. Ecuador*, Claimant's Notice of Arbitration dated 23 September 2009, at pp. 1 – 2.
[485] The plaintiffs were purportedly affected citizens of Lago Agrio, Ecuador, who sued in a class action for alleged contamination resulting from crude oil production in the region.
[486] *Id*.
[487] *Chevron v. Ecuador*, Petition for Participation as Non-Disputing Parties dated 22 October 2010. The Tribunal in that case noted that communications from the NGOs, including the submission of the Petition and the accompanying written submission, was coursed through EarthRights International. (Procedural Order No. 8 dated 18 April 2011)

Fundación Pachamama is an Ecuador-based non-governmental organization (NGO) which assists indigenous communities in preserving traditional ways of life and asserting self-determination, while the IISD is an international NGO geared towards sustainable development.[488] In their petition to intervene, the NGOs sought leave to (1) "file a written submission with the Tribunal regarding matters within the scope of the dispute;" (2) attend the oral hearings and present their submission therein, or in the alternative, to attend as observers or reply to specific questions of the Tribunal regarding their written submission; and (3) access the key arbitration documents, subject to redaction of confidential or privileged information that is not relevant to the concerns of the NGOs as non-disputing parties.[489]

Since the arbitration at the PCA was instituted pursuant to UNCITRAL Arbitration Rules, the NGOs relied on Articles 15[490] and 25[491] thereof, noting that "[p]revious tribunals

---

[488] *Id*., at ¶¶ 1.2, 3.2, 3.3.
[489] *Id*.
[490] Because the case was initiated prior to the 2010 UNCITRAL Rules, the NGO Petition refers to the 1976 version, wherein Article 15 states as follows:
"1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.
2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.
3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party."
[491] The NGOs cited Article 25 in consideration of "the Tribunal's powers over oral hearings". The 1976 version of the UNCITRAL Rules provides as follows:
"1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.
2. If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.
3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least fifteen days before the hearing.
4. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.
5. Evidence of witnesses may also be presented in the form of written statements signed by them.
6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."

have interpreted Article 15(1) to allow such submissions," specifically referring to the *Methanex* case.[492] The NGOs conceded, however, that the UNCITRAL Arbitration Rules did not outline any procedure for making *amicus curiae* submissions.[493]

With respect to their interest in the arbitration, the NGOs expressed that the case presented "issues of vital concern to specific indigenous communities and peoples in Ecuador, and other indigenous communities and individuals living in areas potentially affected by foreign investments in Ecuador and elsewhere."[494] Citing the mandates and activities of their respective organizations, the NGOs asserted that they could advise the Tribunal on the implications of the BIT interpretation pushed by the claimants in the arbitration, including "the particular rights of indigenous peoples under international law to be able to access judicial remedies for environmental and human rights damages."[495]

The Tribunal allowed the parties to comment on the NGOs' petition to participate in the proceedings.[496]

In the meantime, since the hearing on jurisdiction and admissibility was a short time away, the Tribunal sent notice to the NGOs that it was declining their application to attend the oral hearings, as it was required to do so pursuant to Article 25(4) of the 1976 UNCITRAL Arbitration Rules which mandated that "[h]earings shall be held in camera" unless the Parties to the arbitration have "agreed otherwise".[497] During the hearing, which the NGOs were not allowed to attend, the Tribunal further discussed the amicus petition with the parties, which by

[492] *Chevron v. Ecuador*, Petition for Participation as Non-Disputing Parties, *supra*, at ¶ 2.1.
[493] *Id*., at ¶ 2.2.
[494] *Id*., at ¶ 3.1.
[495] *Id*., at ¶ 3.4.
[496] *Chevron v. Ecuador*, Procedural Order No. 8 dated 18 April 2011, at ¶ 4.
[497] *Id*., at ¶ 5.

then had submitted written comments on the petition.[498]

In its written comment, the claimants opposed the intervention of the NGOs, for both attendance at the hearing as well as the submission of an amicus brief, alleging that these two organizations "have a longstanding record of asserting baseless claims against Chevron", and thus "not genuine 'friends-of-the-court'".[499] The claimants also requested, in the event that the Tribunal would allow the intervention, a complete disclosure by the NGOs of their affiliations.[500] On the other hand, the sovereign respondent did not interpose any objections to the attendance of the NGOs at the hearing, and had no comment with respect to the substance of the amicus petition.[501] However, the respondent asserted that submissions by non-parties on purely legal issues regarding the scope of the tribunal's jurisdiction would unlikely assist the Tribunal.[502]

Ultimately, the tribunals did not allow the petitioners to participate in the jurisdictional phase of the proceeding, citing its discretion under Article 15(1) of the UNCITRAL Arbitration Rules.[503] In declining to allow intervention, the Tribunal noted that both parties "do not believe that the amicus submissions will be helpful to the Tribunal and neither side favours the participation of the petitioners during the jurisdictional phase of the arbitration, in which the issues to be decided are primarily legal and have already been extensively addressed by the Parties' submissions."[504]

[498] *Id*., at ¶¶ 4, 6, 16.
[499] *Id*., at ¶ 14.
[500] *Id*., at ¶ 14.
[501] *Id*., at ¶ 15.
[502] *Id*., at ¶ 13.
[503] *Id*., at ¶ 20.
[504] *Chevron v. Ecuador*, Procedural Order No. 8 dated 18 April 2011, at ¶ 18.

2.2.2.1.3. *Von Pezold v. Zimbabwe*

Another case involving an attempted intervention by indigenous peoples' groups is the case of ***Bernhard von Pezold and Others v. Republic of Zimbabwe***, an ICSID case filed pursuant to the BITs of Germany and Switzerland with Zimbabwe.[505] Initiated in 2010, this case falls under the revised ICSID Arbitration Rules which, as discussed earlier in this chapter, contain provisions allowing for the participation of *amici curiae*. This case involved a land dispute affected by land policies put into place following Zimbabwe's independence from colonial rule in 1980.[506] These land policies favored the "black indigenous population" of the country formerly known as Rhodesia, reversing the land policies of the colonial era which favored the white minority.[507]

The European Centre for Constitutional and Human Rights (ECCHR) and four indigenous communities of Zimbabwe petitioned to participate as *amici curiae* in the case, seeking to (i) file a written submission; (ii) access the key arbitration documents; and (iii) attend the oral hearings and reply to any specific questions of the Tribunal on the written submissions.[508] The ECCHR described itself as an "independent, non-profit legal and educational organization dedicated to protecting human rights,"[509] with an interest in the arbitration because of its "mission to develop the strategic use of legal actions for corporate human rights responsibilities."[510]

The indigenous communities were comprised of the Chikukwa, Ngorima, Chinyai and

[505] ICSID Case No. ARB/10/15 (hereafter "Von Pezold v. Zimbabwe").
[506] *Von Pezold v. Zimbabwe*, Award dated 28 July 2015, at ¶¶ 2 – 3.
[507] *Id*., at ¶¶ 2 – 3.
[508] *Von Pezold v. Zimbabwe*, Award dated 28 July 2015, at ¶ 36; Procedural Order No. 2 dated 26 June 2012, at ¶14.
[509] *Von Pezold v. Zimbabwe*, Procedural Order No. 2 dated 26 June 2012, at ¶17.
[510] *Id*., at ¶22.

Nyaruwa peoples, living in the areas on which the claimants' properties are located.[511] In the *amicus* petition, the indigenous communities asserted that they each have "a distinct cultural identity and social history which is inextricably linked to their ancestral lands."[512] Specifically, they submitted that the indigenous communities' "collective and individual rights" would be: (i) affected by any outcome of the arbitration that would determine rights and access to land inhabited by them, "which may impede their enjoyment of their internationally recognized rights to land and to consultation in relation to their ancestral lands; and (ii) prejudiced by not being able to participate in or contest the decisions of the arbitral Tribunal.[513]

In asserting that the indigenous communities have rights under international law in relation to the lands subject of the investor-State dispute, the petitioners posited that both claimant and respondent have incurred shared responsibilities toward the indigenous communities.[514] The petitioners urged the Tribunal to adopt the legal perspective that the "interdependence of international investment law and international human rights law" mandates the consideration of international human rights norms – in this case, the rights of the indigenous communities – in arriving at a decision in the dispute.[515] The petitioners cited Article 26 of the 2007 United Nations Declaration on the Rights of Indigenous Peoples, which requires States to give legal recognition and protection to the lands, territories and resources possessed by indigenous peoples by reason of traditional ownership and other traditional occupation or use, and upholds the right of indigenous peoples to own, use, develop and control these lands.[516]

[511] *Id*., at ¶17.
[512] *Id*., at ¶21.
[513] *Id*., at ¶21.
[514] *Id*., at ¶25.
[515] *Id*., at ¶26.
[516] *Id*., at ¶27.

The claimants opposed the petition on several grounds, arguing that: (1) the petitioners are not independent of the respondent, citing the appointing and dismissing authority of the country's President of the Chiefs of the indigenous groups, as well as a connection between the petitioners and an organization allegedly involved in "invasions" of the claimants' lands in dispute; (2) the submissions proposed by petitioners do not relate to the legal and factual issues in the proceedings; (3) the proposed legal submissions on the law of indigenous peoples does not concern the applicable law; (4) if the applicable law does include the law of indigenous peoples, the petitioners have not proven that they are "indigenous" peoples; (5) the petitioners will not provide knowledge or insight that is different from respondent; (6) human rights are not in issue the proceedings; and (7) "investment treaty tribunals should not adjudicate as to who are indigenous peoples, what are their rights, and what obligations they are owed (if any). States should be the first-line decision makers on these issues."[517]

Additionally, noting that the parties had previously agreed that no non-disputing party submissions would be made, the claimants argued that the Tribunal "had no residual discretion under Article 44 of the ICSID Convention to admit any such submissions into the record."[518] The respondent, on the other hand, admitted that the parties had agreed to the non-application of the ICSID Arbitration rule on *amici curiae*, but stated that it had not anticipated at the time that any person or organization other than the parties could have an interest in the case.[519] Thus, the respondent did not interpose any objection to the participation of the NGO and indigenous groups, provided that the written submissions "fell within the scope of ICSID Arbitration Rule 37(2), and did not impinge on or amount to a challenge to the sovereignty and territorial

[517] *Id*., at ¶¶29, 31 – 44.
[518] *Von Pezold v. Zimbabwe*, Award dated 28 July 2015, at ¶ 37.
[519] *Id*.

integrity of Zimbabwe."[520]

Disagreeing with the claimants' position regarding Rule 37(2) of the ICSID Arbitration Rules, the Tribunal maintained that it has the discretion, upon consulting with the parties, to allow a non-disputing party to make a submission, provided that the criteria outlined in said Rule were met.[521]

The Tribunal also disagreed with the averments of claimant that the indigenous communities were not independent of the State; the Tribunal reasoned that the functions of the Chiefs of the communities were not attributable to the Republic of Zimbabwe, and the appointment and dismissal power of the President of Zimbabwe over the Chiefs was constrained by criteria set out in the relevant domestic statute.[522]

However, the Tribunal took note of previous incidents cited by claimants wherein members of the indigenous communities allegedly "invaded" the claimants' lands and "wish to permanently occupy" parts of the estate.[523] The Tribunal opined that since the indigenous communities appear to lay claim over some of the lands which claimants' assert "a right to full, unencumbered legal title and exclusive control," the petitioner communities "appear to be in conflict with the claimants' primary position in these proceedings."[524] Also in relation to these "invasions", the Tribunal considered the claimants' allegation of support provided by the organization that instigated these acts, and the head of the latter organization's well-documented support for the respondent State's land reform policies.[525]

[520] *Id*.
[521] *Von Pezold v. Zimbabwe*, Procedural Order No. 2 dated 26 June 2012, at ¶48.
[522] *Id.*, at ¶¶52, 53.
[523] *Id.*, at ¶51.
[524] *Id.*
[525] *Id.*, at ¶¶54 – 56.

This conflict of interest and questionable independence led the Tribunal to deny the petition for the ECCHR and the indigenous communities to participate as *amici curiae*,[526] reasoning that legitimate doubts as to the independence or neutrality of the petitioners caused them to fall short of the criteria in Rule 37(2) for allowing non-disputing party participation.[527] In ruling this way, the Tribunal reasoned that independence of a non-party is "implicit" in Rule 37(2)(a), which requires that the potential *amicus* bring "a perspective, particular knowledge or insight that is different from that of the Parties."[528] The possibility of providing a different perspective is the rationale for allowing non-party participation as a transparency measure, because echoing the sentiments of one of the disputing parties would not enhance the arbitral process.

With respect to the potential contributions such a non-disputing party submission would have made, the Tribunal was of the view that the legal and factual issues subject of the petition to intervene were unrelated to the matters before the Tribunal. The Tribunal agreed with claimants' submission that "the reference to 'such rules of general international law as may be applicable' in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BITs."[529] The Tribunal went on to underscore the role of the Parties, in framing the issues to be considered by the Tribunal, to rule that the submission proposed by the petitioners would be outside the scope of the dispute: "neither Party has put the identity and/or treatment of indigenous peoples, or the indigenous communities in particular, under international law, including international human rights law on indigenous peoples, in issue in these proceedings."[530] The Tribunal also rejected the petitioners' view that

[526] *Id.*, at ¶56.
[527] *Id.*, at ¶56.
[528] *Id.*, at ¶49.
[529] *Id.*, at ¶57.
[530] *Id.*, at ¶57, 60.

international investment law and international human rights law are interdependent, maintaining that consideration of international human rights norms was not part of the Tribunal's mandate under either the ICSID Convention or the applicable BITs.[531]

Without explicitly stating so, it appears that the Tribunal in this case had reasoned that an independent non-party is not only independent from the disputing parties, but also independent from a specific interest in the outcome of the particular case in which they seek to participate – that is, freedom from a conflict of interest. In this particular case, the Tribunal emphasized that the specific claim that the would-be *amici* had over the contested lands impaired their independence as non-parties. It may be inferred that this conflict of interest regarding a very specific outcome in the dispute affected the Tribunal's interpretation of the indigenous group's supposedly loftier interests in international human rights law and indigenous peoples' rights.

2.2.2.1.4. *Bear Creek v. Peru*

Whereas the indigenous groups in the cases discussed above were denied the opportunity to participate in the arbitral proceedings, a new case that is still pending is significant for allowing an indigenous group to attend the hearing on the merits as well as make a written submission. The case of ***Bear Creek Mining Corporation v. Republic of Peru***[532] was filed pursuant to the Free Trade Agreement (FTA) between Canada and the Republic of Peru.[533] The Canadian mining company alleges that the aforementioned investment treaty was breached when the Peruvian government enacted a decree revoking claimant's concession to operate a mining project in Peru, resulting in cessation of its operations at the mine and a significant loss

[531] *Id.*, at ¶¶58 – 59.
[532] ICSID Case No. ARB/14/21 (hereinafter "*Bear Creek v. Peru*").
[533] *Bear Creek v. Peru*, Claimant's Memorial on the Merits dated 29 May 2015, at p. 1.

of its investment.[534] For its part, the respondent State alleges that the claimant unlawfully acquired its mining concession by violating nationality requirement laws for ownership; the respondent also attributed claimant's losses to its own failure to obtain community support for the mining project.[535]

The mining concession in dispute is located in the territories inhabited by the indigenous peoples called the Aymara and the Quechua.[536] In their *amicus* submission, the organization representing these indigenous groups aimed to demonstrate that "the negative impacts of mining, together with Bear Creek's poor management of the project and its relations with the communities, were the direct causes of the social conflict" in the area of the mining concession that led to the events subject matter of the investment arbitration between Bear Creek and Peru.[537] The new insight offered to the Tribunal by way of the intervention was "information on the events from the point of view of the Aymara peasant communities (indigenous peoples) as they consider it important that the Arbitral Tribunal should be aware of the perspective of those involved in the social movement regarding the Santa Ana project."[538]

In agreeing to allow the participation of the petitioners, the Tribunal looked to Art. 836.4(a) of the Canada – Peru FTA which provided that non-disputing party submissions could be allowed if such "would bring a perspective, particular knowledge or insight that is different from that of the disputing parties."[539] Notably, however, the Tribunal provided the caveat that allowing the petitioners to make a written submission was "[w]ithout prejudice as to whether

[534] *Bear Creek v. Peru*, Claimant's Memorial on the Merits dated 29 May 2015, at ¶¶ 6 – 12.
[535] *Bear Creek v. Peru*, Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction dated 6 October 2015, at pp. 9 – 32.
[536] *Bear Creek v. Peru*, Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment – Puno and Mr Carlos Lopez PhD, dated 9 June 2016, at p. 1.
[537] *Id*., at pp. 1 - 2.
[538] *Id*., at p. 2.
[539] *Bear Creek v. Peru*, Procedural Order No. 5 dated 21 July 2016, at ¶39.

the submissions of the Applicants will finally be considered relevant for the Tribunal in drawing its conclusions in this case".[540]

The case drew to a close on 30 November 2017. In its Award, the Tribunal devoted a significant number of pages summarizing the facts as presented in the *amici* submissions,[541] the claimant's response to the *amici* submissions,[542] and the respondent's response to the *amici* submissions.[543] However, the Tribunal expressly stated that these summaries were "presented without prejudice as to the relevance of these facts for the decisions of the Tribunal."[544] The Tribunal did make findings on the issue of social unrest – which was the focus of the *amici* submissions – and concluded that there was no proven causal link to claimant's conduct.[545] In reaching this conclusion, however, the Tribunal made absolutely no reference to the *amici* submissions. After the summary of the *amici* submission and the parties' responses thereto, no reference to the *amici* submission appears again for the remainder of the Award.

The *amici* submissions do get a nod of approval, however, in the Partial Dissenting Opinion of the respondent-appointed arbitrator, Philippe Sands. Partly disagreeing with the majority, the dissenting arbitrator was of the view that "the Claimant did not do all it could have done to engage with all the affected communities."[546] The arbitrator stated that "[t]his conclusion is confirmed by the helpful *amicus curiae* submission of DHUMA."[547] The arbitrator also went on to expound as follows:

> As an international investor the Claimant has the legitimate interests and rights under international law; local communities of indigenous and tribal peoples also have rights under international law, and these are not lesser rights. In my view,

[540] *Id*., at ¶40.
[541] *Bear Creek v. Peru,* Award dated 30 November 2017, ¶¶ 218 – 230.
[542] *Id*., at ¶¶ 231 – 250.
[543] *Id*., at ¶¶ 251 – 266.
[544] *Id*., at ¶ 217.
[545] *Id*., at ¶ 411, *et seq*.
[546] *Bear Creek v. Peru* – Partial Dissenting Opinion of Professor Philippe Sands QC dated 12 September 2017, at ¶ 35.
[547] *Id*., at ¶36.

> DHUMA assisted the Tribunal *"by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.*" Its participation in these proceedings was helpful and polite at all times, and added to perceptions of the legitimacy of ICSID proceedings of this kind.[548]

It is worth noting that Philippe Sands is a renowned human rights lawyer, and this perspective he brings to an investment arbitration tribunal may account for the greater accord he gives to the *amici* submissions than his colleagues in the majority did. In the excerpt quoted from the dissent above, the arbitrator highlights the parity between investor rights and indigenous rights. The issue of conflicting and co-equal international obligations will be discussed further later in this chapter.

2.2.2.2. Environmental Groups

2.2.2.2.1. *Pac Rim v. El Salvador*

In the fairly recently concluded case of ***Pac Rim Cayman LLC v. Republic of El Salvador***,[549] a public invitation for third-party participation was made in accordance with CAFTA,[550] to which the Center for International Environmental Law (CIEL) responded, accompanied by several community-based NGOs. The Tribunal in this case allowed CIEL *et al.* to participate and make written submissions in both the jurisdictional and merits phases of the dispute (for which the NGOs had to file separate applications). The Tribunal considered the arguments put forth by the *amici* in its Decision on Jurisdiction; however, it appears that the Tribunal did not rely on these arguments directly.[551] As for the merits, however, the

[548] *Id*., at ¶36.
[549] ICSID Case No. ARB/09/12 [hereinafter "*Pac Rim v. El Salvador*"].
[550] On 2 February 2011, the ICSID released a "news release" on its website, inviting non-disputing parties to make a written application to the Tribunal in the aforementioned case, for permission to file submissions as *amici curiae*, citing Article 10.20.3 of CAFTA, as well as ICSID Arbitration Rule 37(2). *Pac Rim v. El Salvador*, Procedural Order Regarding Amici Curiae dated 2 February 2011.
[551] Mariel Dimsey, *Article 4. Submission by a third person*, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION, Dimitrij Euler, et al., eds. (2015), at p. 157.

Tribunal explicitly stated in its October 2016 Award that it did not address the CIEL submission because (1) parties did not agree for CIEL to access the evidence or attend the hearing; and (2) the case could be decided on issues unrelated to the CIEL brief.

In its *Application for Permission to Proceed as Amici Curiae*, CIEL represented a number of member organizations of the Mesa Nacional Frente a la Mineria Metálica de El Salvador (the El Salvador National Roundtable on Mining), described as "a coalition of community organizations, research institutes, and environmental, human rights, and faith-based nonprofit organizations who collectively aim to improve public policy dialogue concerning metals mining in El Salvador."[552] The Application averred that these organizations were "uniquely qualified to offer the Tribunal a broad contextual understanding – and defense – of the substance and historical significance of the government's response to the democratic debate over metals mining and sustainable development in El Salvador."[553] Furthermore, CIEL alleged that the investment claim was not actually between Claimant and the Republic of El Salvador, but rather between the Claimant and the independently-organized communities who have risen up against Claimant's mining projects.[554]

The Claimant expressed that it had no objection to the submission of *amicus* briefs by the aforementioned applicants, but asked the Tribunal to establish procedural standards for the acceptance of these submissions.[555] Furthermore, Claimant opined that the allegations that the Applicants made regarding Claimant's activities have no connection to the issues to be decided by the Tribunal.[556]

[552] *Pac Rim v. El Salvador*, *Application for Permission to Proceed as Amici Curiae* dated 2 March 2011.
[553] *Id*.
[554] *Id*.
[555] *Pac Rim v. El Salvador*, Claimant's Response to the Amicus Curiae Application (18 March 2011).
[556] *Id.*

The Respondent, on the other hand, urged the Tribunal to accept the *amicus* submission, stating that the organizations are devoted to the protection of the environment and represent "a significant segment of civil society that lives in the vicinity of the proposed mine" subject of the arbitration, and thus "have genuine and unique concerns that the parties to the dispute are not in a position to convey to the Tribunal."[557]

The Tribunal allowed the *amicus* submission, stating that it should be limited to the jurisdictional issues raised by the Parties, and should not address the merits. The arbitration was in its jurisdictional stage, and the Tribunal stated that another application could be made if the case proceeded to the merits.[558]

The case did proceed to the merits phase. When CIEL made an application to make a written submission during this phase, the Tribunal again admitted CIEL.[559] This written submission was completely disregarded by the Tribunal, however, which stated:

> For two reasons, the Tribunal considers it unnecessary here to summarise or address CIEL's case more fully. First, in the absence of the Parties' joint consent, CIEL was not made privy to the mass of factual evidence adduced in this arbitration's third phase, including the hearing (which was not held in public […]). Second, the Tribunals' decisions in this Award do not require the Tribunal specifically to consider the legal case advanced by CIEL […].[560]

Ultimately, CIEL's participation did not contribute to the outcome of the case. Notably, the relevance of its participation – or rather, lack thereof, in the eyes of the Tribunal – was pinned to CIEL's lack of access to the arbitration documents.

This demonstrates the interplay between access to documents and the written

[557] Respondent's Response to the Amicus Curiae Application (18 March 2011).
[558] *Pac Rim v. El Salvador*, Procedural Order No. 8 dated 23 March 2011.
[559] *Pac Rim v. El Salvador*, Award dated 14 October 2016, ¶1.48.
[560] *Id*., at ¶3.30.

submission. For an *amicus* submission to provide utility to an arbitral tribunal, it should address relevant matters in the arbitration. If permission to submit a written submission is granted by the Tribunal, but the parties deny access to documents, then non-party participation becomes an exercise in futility, as it enhances the likelihood that the *amicus* submission will be disregarded.

2.2.2.2.2. *Infinito Gold v. Costa Rica*

The currently pending case of ***Infinito Gold Ltd. v. Republic of Costa Rica***[561] is an ICSID arbitration wherein the tribunal allowed an NGO to make a written submission, and granted the NGO's request to access arbitration documents – albeit with clearly defined limits. However, the tribunal denied the NGO's requests to attend the oral hearings.

In September 2014, the Asociación Preservacionista de Flora y Fauna Silvestre (APREFLOFAS) filed a "Petition for Amicus Curiae Status" in the aforementioned case.[562] The petitioner described itself as "a well-established Costa Rican non-governmental organization" with a mission to protect the environment,[563] particularly for "promoting the conservation of Costa Rican tropical forests."[564] In its Petition, APREFLOFAS disclosed that it has a history of legal disputes with the Claimant in the ICSID case.[565] The NGO averred that Costa Rican courts had determined that the open-pit metallic mining concession granted to Claimant was void and contrary to the laws of Costa Rica, as "apparent corrupt acts had occurred in granting permits to the Claimant.[566]

[561] ICSID Case No. ARB/14/5 [hereinafter "*Infinito Gold v. Costa Rica*"].
[562] *Infinito Gold v. Costa Rica*, APREFLOFAS Petition for Amicus Curiae Status, 15 September 2014.
[563] *Id*., p. 2.
[564] *Id.*, p. 3. The petition also states that the NGO's principal objectives are "the prevention of deforestation and illegal plant-trafficking, illegal hunting of wild animals and contamination of national rivers."
[565] *Id*., p. 4.
[566] *Id.* The petition also states that several criminal proceedings have been initiated thanks to the NGO's efforts, including criminal prosecutions against the former Minister of Environment and former President of Costa Rica.

Asserting that APREFLOFAS could contribute significantly to the ICSID arbitration proceedings as *amicus curiae*, the NGO stated that it possessed important information regarding the following "public interest concerns" involved in the ICSID case: (1) "the protection of the environment in Costa Rica," and (2) "the manner in which governmental processes were apparently corrupted to the detriment of the environment."[567] Most significantly, the petitioner NGO suggested that the Claimant failed to disclose relevant facts about the investment case to the Tribunal, arguing that "[t]here is no discussion in the Claimant's submissions to the Tribunal of the existing legal dispute between APREFLOFAS, the Claimant and the government of Costa Rica."[568] The petitioner pointed out that it was this very dispute that forms the underlying basis for the investment claim, since it was the proceeding that led the Costa Rican courts to find that the Claimant's concession rights were awarded illegally.[569] Thus, APREFLOFAS maintained that it was in a position to inform the Tribunal about this legal proceeding, and should be allowed to make an amicus submission.[570]

The Tribunal invited the Claimant and Respondent to file their submissions on APREFLOFAS's Petition.[571] The Parties filed their submissions on 29 April 2016.[572]

Infinito Gold opposed APREFLOFAS's request for non-disputing party status, anchoring its objection on three points: (1) the NGO did not meet the test for non-disputing party status; (2) its participation would disrupt the proceedings and unduly burden the Claimant; and (3) the request was premature.[573]

[567] *Id*., p. 4.
[568] *Id*., p. 6.
[569] *Id*., pp. 6 – 7.
[570] *Id*., p. 7.
[571] *Infinito Gold v. Costa Rica*, Procedural Order No. 2 dated 1 June 2016, at ¶2, citing Procedural Order No. 1 dated 17 February 2015.
[572] *Infinito Gold v. Costa Rica*, Procedural Order No. 2 dated 1 June 2016, at ¶6.
[573] *Id*., at ¶17.

Conversely, Respondent Costa Rica submitted that the Tribunal should grant APREFLOFAS's requests to make a written submission and to access the Parties' key submissions.[574] However, the Respondent suggested that the Tribunal defer decision on APREFLOFAS's request to attend the oral hearing.[575] Respondent argued that "[d]ue to its participation in the domestic judicial proceedings and given its environmental expertise, APREFLOFAS would provide information that could assist the Tribunal when ruling on Costa Rica's jurisdictional objections."[576]

The Tribunal accorded weight to the fact that APREFLOFAS was the plaintiff in cases in Costa Rican courts that resulted in the cancellation of Infinito Gold's concession, said cancellation being among the very measures upon which the Claimant anchors its BIT claims.[577] Noting that APREFLOFAS was the successful plaintiff against both the Claimant and Respondent in those domestic court cases, the Tribunal ruled that the NGO "may provide a perspective different from that of the parties" and ruled that APREFLOFAS's input may assist the Tribunal in understanding "certain factual and legal aspects which may impact its jurisdiction and possibly the merits of the claims."[578]

On the point that APREFLOFAS could provide information on ongoing corruption and criminal proceedings against former Costa Rican government officials, the Tribunal noted that neither Party has made any allegations of corruption.[579] However, the Tribunal pointed out that the BIT involved in the case contained the language defining a protected investment as that made in accordance with the laws of the host State.[580] Thus, the Tribunal stated that it

[574] *Id*., at ¶22.
[575] *Id*.
[576] *Id*., at ¶23.
[577] *Id*., at ¶31.
[578] *Id.*
[579] *Id*., at ¶33.
[580] *Id*.

cannot rule out the relevance of corruption allegations during the early stages of the ICSID proceeding, as it could possibly have some role in the Tribunal's assessment of the dispute.[581]

With respect to environmental matters, the Tribunal observed that APREFLOFAS "does not appear to seek to provide information regarding environmental law or environmental concerns", but that APREFLOFAS's submission may shed light on whether the measures disputed in the investment claim fall under a provision in an annex of the BIT that allows a host State to adopt, maintain or enforce a measure "to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."[582]

The Tribunal's discussion of its residual power to allow access to arbitration documents by third parties has been discussed earlier in this chapter, and this section will discuss points specific to this particular case.[583] Ruling on APREFLOFAS's request to be granted access to the principal arbitration documents, the Tribunal decided that the extent of such access depended on the information required for the NGO to effectively discharge its task of providing the Tribunal with "a useful and particular insight on facts or legal questions relevant to its jurisdiction."[584] To avoid a redundant or useless submission from APREFLOFAS, the Tribunal reasoned that the NGO ought to know what information has already been submitted to the Tribunal.[585] Thus, the Tribunal ordered that the Respondent's Memorial on Jurisdiction, selected portions of the Claimant's Memorial on the Merits, and the exhibit lists attached to these memorials be made available by the ICSID Secretariat to APREFLOFAS.[586] The Tribunal also ordered APREFLOFAS not to communicate these materials to third parties or

[581] *Id*.
[582] *Infinito Gold v. Costa Rica*, Procedural Order No. 2 dated 1 June 2016, at ¶34, citing Article III(1) of Annex 1 of the 1998 Costa Rica – Canada BIT.
[583] *See* discussion in Section 2.2.1.1.
[584] *Infinito Gold v. Costa Rica*, Procedural Order No. 2 dated 1 June 2016, at ¶43.
[585] *Id*.
[586] *Id*., at ¶44.

use them outside the ICSID arbitration.[587]

As for the NGO's request to attend the oral hearings, the Tribunal denied such request, citing ICSID Arbitration Rule 32(2), noting that the Claimant had expressly objected to APREFLOFAS's participation in any hearing.[588]

In its Decision on Jurisdiction of December 2017, the Tribunal made an express acknowledgement of the relevance of APREFLOFAS's submission, albeit stating that the contested matters would be more appropriately addressed during the merits phase of the proceedings. The Tribunal noted that both the Claimant and Respondent disagree with APREFLOFAS's submissions regarding the illegality of the investment for being procured through fraud and corruption.[589] The Tribunal declared that "whether the Concession was illegally granted is intertwined with the merits. Indeed, as this argument was raised by APREFLOFAS and not by the Parties, the latter have not addressed it in depth and will thus be given an opportunity to do so during the merits phase."[590] While the Tribunal refrained from commenting on the credence it would accord to APREFLOFAS's allegations of fraud and corruption, it did say that "the Tribunal cannot merely rely on the Parties' assessment and must engage its own inquiry on the basis of the evidence on the record."[591] Even if the Tribunal, in its future award, does not rely on the submissions of APREFLOFAS regarding these matters, the 2017 Decision on Jurisdiction was an acknowledgment that the non-party submission was taken into account, at the very least as a starting point for further inquiry by the Tribunal into the allegations of fraud and corruption. Compared with the other cases discussed, the Tribunal

[587] *Id.*
[588] *Id.*, at ¶47 – 48.
[589] Infinito Gold Ltd. v. Republic of Costa Rica (ICSID Case No. ARB/14/5), Decision on Jurisdiction dated 4 December 2017, ¶¶ 135-137 (2017).
[590] *Id.* at ¶ 140.
[591] *Id.* at ¶ 137.

in *Infinito Gold v. Costa Rica* appears to have accorded the most relevance to a non-party submission.

2.2.3. Legal perspectives affecting acceptance or denial of applications of non-disputing parties to participate as third parties in investment disputes

A review of the cases discussed above demonstrate that, even under a regime of increased transparency in investor-State arbitration, with rules and jurisprudence promoting the participation of third parties, tribunals still exert a hefty amount of discretion when deciding whether or not to grant applications for non-disputing party participation. The sections below distill the legal perspectives that affect the outcome of *amicus* petitions and written submissions.

2.2.3.1. Tribunal deference to disputing party opposition

While arbitration rules now offer much more support to non-party participation than they did in the past, the Tribunal is endowed with discretion under these rules to decide whether or not to grant an *amicus* petition. This gatekeeper function is supported even by the UNCITRAL Rules on Transparency, which, compared to the ICSID Arbitration Rules and NAFTA FTC guidelines, proposes the least hurdles to third-party participation. These three texts, examined earlier, still suggest or require consultation with the parties before allowing a third party to make a written submission. Notably, in the cases of *Chevron v. Ecuador* and *Von Pezold v. Zimbabwe*, where the parties expressed opposition to the participation of the indigenous groups, the Tribunals made special note of this fact in their decisions denying the applications for third-party participation.[592] In the cases of *Glamis Gold v. USA*, the Tribunal

[592] *Chevron v. Ecuador*, Procedural Order No. 8 dated 18 April 2011, at ¶8; *Von Pezold v. Zimbabwe*, Procedural Order No. 2 dated 26 June 2012, at ¶51.

took into account that neither claimant nor respondent objected to such submission.[593] In *Bear Creek v. Peru*, the claimant objected to the application for third-party participation, while the respondent supported it. The Tribunal addressed the claimants' concerns point by point in deciding to allow the written submission.[594]

Party opposition to other aspects of third-party participation also sway Tribunal decisions, such as access to documents, or attendance of hearings. The Tribunal in *Pac Rim v. El Salvador* essentially disregarded the written submission made by CIEL during the merits phase because CIEL could not address matters pertaining to the evidence or issues raised during the hearing, even if it was the Parties lack of consent to give access that put CIEL in this situation. In *Infinito Gold v. Costa Rica*, the Tribunal could not allow APREFLOFAS to attend the oral hearing over the objection of the Claimant in that case.

2.2.3.2. Non-recognition of indigenous rights as a "significant interest" or "perspective or insight different from that of the disputing parties"

With respect to intervention by indigenous peoples in particular, one obstacle that has not been overcome is the perception of tribunals of what might constitute a "significant interest"[595] in the proceedings, as well as "a perspective, particular knowledge or insight that is different from that of the disputing parties"[596] from an indigenous rights standpoint. In *Von Pezold v. Zimbabwe*, for example, the Tribunal rejected the notion that international human rights law was interdependent with international investment law, and maintained that its

[593] *Glamis Gold v. USA*, Decision on Application and Submission by Quechan Indian Nation dated 16 September 2005, at ¶9;
[594] *Bear Creek v. Peru*, Procedural Order No. 5 dated 21 July 2016, at ¶¶31 *et seq*.
[595] UNCITRAL Rules on Transparency, Art 4(3)(a); ICSID Arbitration Rule 37(2)(c); Statement of the Free Trade Commission on Non-Disputing Party Participation dated 7 October 2003, ¶B(6)(c).
[596] UNCITRAL Rules on Transparency, Art 4(3)(b); ICSID Arbitration Rule 37(2)(a); Statement of the Free Trade Commission on Non-Disputing Party Participation dated 7 October 2003, ¶B(6)(a).

mandate as an ICSID Tribunal did not include the consideration of international human rights norms.[597] In *Chevron v. Ecuador*, where the NGOs proposed lending their expertise on the particular rights of indigenous peoples in relation to the interpretation of the bilateral investment treaty, the Tribunal decided that the NGOs had nothing to contribute in the jurisdictional phase of the arbitration because only legal matters were involved.[598] It would appear that international law on indigenous rights was not deemed to be relevant by the Tribunals in these two cases. This leads to the observation that international investment law revolves exclusively around the economic impact of foreign investment, without regard to non-economic or cultural concerns.[599] However, the discussions of investment arbitration tribunals in the cases examined in this chapter offer hope that matters beyond economic interests are now on the table, since they have at least been put in issue and become the subject of deliberation.

2.2.3.3. Conflicting international obligations

As international law increases in complexity with the development of many specific areas of international lawmaking and adjudication, it becomes inevitable that various international obligations and sources of law may come into conflict with one another, or at least be irreconcilable.[600] As observed by Schreuer and a co-author, "investment law is presently being challenged by interactions with other, non-investment, obligations. These are raised by investors, states, and non-party actors alike."[601] This is reflected both in the difficulty of

[597] *Von Pezold v. Zimbabwe*, Procedural Order No. 2 dated 26 June 2012, at ¶¶58 – 59.
[598] *Chevron v. Ecuador*, Petition for Participation as Non-Disputing Parties, *supra*, at ¶2.1; Procedural Order No. 8, *supra*, at ¶18.
[599] Vadi, *supra*, at pp. 205 – 206.
[600] *See generally*, Mosche Hirsch, *Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY, Tomer Broude and Yuval Shany, eds. (2008), pp. 323 – 343.
[601] Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 82–117, 82 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni eds., 2009).

indigenous peoples to intervene in investment cases by asserting indigenous rights, as well as the conundrum faced by sovereign respondents caught between obligations under bilateral investment treaties on the one hand, and environmental and human rights treaties on the other.[602]

It is this latter scenario that paved the way for the participation of indigenous groups in the cases of *Glamis Gold v. USA* and *Bear Creek v. Peru*, where measures taken by the sovereign respondents to protect indigenous peoples and their lands became the basis for the filing of investment claims. Likewise, in *Infinito Gold v. Costa Rica*, the NGO was allowed to intervene in the event that it could shed light on the environmental protection dimensions of the governmental measures that gave rise to the investment claim.

Valentina Vadi, who has written extensively on the interaction of cultural heritage law and international investment law, remains hopeful that future arbitral decisions will be reflective of the multifaceted interests at stake in investment arbitration cases. She says:

> The increasing interplay between international investment law and other areas of law, including international cultural law and indigenous peoples' rights, serves as a laboratory of confrontation between different values, allowing one to shift the discussion about fragmentation from a static to dynamic and contextual perspective focusing on the interests protected by both bodies of law.[603]

Pierre-Marie Dupuy echoes this sentiment, positing that human rights and international investment law are two legal regimes that "belong to the same legal order, namely the international one" and that there are commonalities in these regimes because they both stem from that source.[604]

---

[602] Binder, *supra*, at pp. 430 – 431; Hirsch, *supra*, at p. 324.
[603] VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 229–230 (2014).
[604] Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW

2.2.3.4. Definition of the Issues in Dispute

In *Glamis Gold v. USA* and *Bear Creek v. Peru*, the submissions by the indigenous peoples touched on factual matters relating the sacred nature of the land involved in the dispute, as well as the activities carried out in the area of their sacred lands. In this sense, the participation of the indigenous peoples as third parties was limited by what the claimant and respondent had put in issue in the cases. The "perspective, particular knowledge or insight that is different from that of the disputing parties" is, ironically enough, circumscribed by the disputing parties' definition of the issues. Investment arbitration tribunals are endowed by the parties with jurisdiction over an investment dispute, and whether such jurisdiction can encompass human rights or other issues depends on the wording of the compromissory clause in the relevant bilateral investment treaty.[605]

Vadi, cited earlier, while acknowledging the recent efforts of arbitral tribunals to "be responsive to broader societal concerns",[606] concedes that international investment arbitration "may not structurally be the forum best equipped to adequately protect indigenous cultural entitlements due to the limited participatory tools granted to indigenous peoples and the limited mandate of arbitral tribunals which can only adjudicate on investment treaty claims."[607] More proactively, however, Dupuy suggests that arbitrators can utilize Article 31.3.c. of the Vienna Convention on the Law of Treaties as a "means to take into account the potential relevance of a specific human rights element to the substance of the investment dispute."[608] To recall, that provision mandates that the interpretation of treaties shall also take into account "any relevant rules of international law applicable in the relations between the parties."[609]

AND ARBITRATION 45–62, 61 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni eds., 2009).

[605] *Id.* at 55–56.

[606] VADI, *supra* note 603 at 234.

[607] *Id.* at 233.

[608] Dupuy, *supra* note 604 at 62.

[609] Article 31(3)(c), Vienna Convention on the Law of Treaties.

2.2.3.5. Lack of Obligation to Consider the Third-Party Submission

The prevailing practice appears to indicate that investment arbitration tribunals do not have any legal obligation to consider arguments put forward by *amici curiae*.[610] The Tribunal in *Glamis Gold* categorically stated that the submission by the Quechan did not factor into their decision in favor of the sovereign respondent.[611] In *Bear Creek*, the Tribunal has already stated that, while it has allowed the organization representing the Aymara and the Quechua to file a written submission, it was not obligated to consider the submission in drawing its conclusions in the case.[612] In *Pac Rim*, the Tribunal likewise stated that "the tribunal's decisions in this Award do not require the Tribunal specifically to consider the legal case advanced by CIEL."[613] By allowing interest groups to make a written submission in investment arbitrations, tribunals have already fulfilled the promise of transparency embodied in arbitral rules and jurisprudence, but are not constrained in their decision-making. Indeed, some commentators have expressed the view that allowing *amicus curiae* briefs is but a political response to the criticisms against the legitimacy of the investor-State dispute settlement system.[614] Schreuer and a co-author reach a similar conclusion, after considering the cases of *Methanex*, *Aguas Argentinas*, *Glamis Gold*, and *Biwater Gauff*: "On the basis of the reasoning provided by the tribunals, it appears that in permitting *amicus curiae* briefs, arbitral tribunals seem more moved by efforts to increase transparency and respond to public interest rather than by human rights considerations."[615] This reflects the observation stated at the outset of this dissertation section that the impact of non-party participation is a separate issue from transparency. Increasing

[610] Harrison, *supra* note 309 at 415.
[611] *Glamis Gold v. USA*, Award dated 8 June 2009, at ¶8.
[612] *Bear Creek v. Peru*, Procedural Order No. 5 dated 21 July 2016, at ¶40.
[613] *Pac Rim v. El Salvador*, Award dated 14 October 2016, ¶3.30.
[614] Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?* In THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY, Michael Waibel, et al., eds. (2010), at p. 274.
[615] Reiner and Schreuer, *supra* note 601 at 91–93.

transparency in investment treaty arbitration is intended for improved public perception of the investor-State dispute settlement system, thereby highlighting a difference between transparency measures from the impact of those measures in actual cases. Involvement of non-parties is distinctly different from the impact that those non-parties can exert in the cases wherein they participate.

2.2.4. The value of non-party participation

The minimal impact of non-party participation in particular investment treaty cases ought not to be perceived as a failure of the regime of increased transparency in investment treaty arbitration, although it does serve to circumscribe the limitations of the transparency movement. Increasing transparency in investment arbitration was a response to the backlash to investment arbitration as a confidential process for cases involving public interest; if transparency measures are seen as non-effectual, then there might be a backlash to the response to the backlash. It has been argued that being granted *amicus* participation is the be-all and end-all for non-governmental organizations. One commentator has proposed that publicity achieves a goal in itself:

> From the perspective of the *amici*, it is not necessarily important in the individual cases that their human rights arguments are not substantively engaged with. In both *UPS* and *Biwater*, the "right" decision was made from the perspective of those making the human rights arguments. For many NGOs, it is argued that the publicity they receive among their own constituencies in submitting the briefs may be as important as the extent to which they are able to influence the decision-making of the tribunal.[616]

Attempting to generalize the motives of civil society groups, however, is fraught with peril. The rules allowing non-party participation raises expectations for wider involvement of affected persons. Cognizance of the realistic degree to which *amici curiae* can actually

[616] Harrison, *supra* note 309 at 419.

contribute to arbitral rule-making is crucial for managing the expectations of the public that seeks to participate in investment treaty arbitration cases.

In this sense, it is more productive to evaluate the impact of non-party participation beyond the four corners of a particular investment dispute. Practitioner Epaminontas Triantafilou offers an insightful analysis of the rationale for allowing *amicus* participation:

> […] one can infer three important principles, beyond the subject matter of the arbitration itself, that further warrant the participation of *amici curiae*. First and foremost, transparency: the participation of *amici* draws the public's attention and helps citizens remain aware of the developments in proceedings that may impact significantly their vital interests, as well as the state's purse. Secondly, democratic accountability: a transparent arbitral process allows citizens to monitor actively the conscientiousness of the government's representatives in protecting the rights of the public and ensuring the sound disbursement of public money. Thirdly, informed public dialogue: the possibility of a large arbitral award being issued against a state is likely to trigger or influence legislative deliberations, which can be fruitful only when participants possess all the relevant information, and can have an important effect on a state's public policy. Hence, given its contribution to transparency, political accountability and policy formation, *amicus* participation is bound to enhance the legitimacy of the arbitral process, safeguard the public interests at stake, and ensure the sensitivity of legislatures towards important arbitral awards.[617]

Earlier in this chapter, it was proposed that the benefits of opening the arbitral process outwards were intended for benefits directed inwards towards the investor-State dispute settlement system. This was the perspective adopted by the Tribunal in *Methanex,* and given the subsequent cases that followed, it appears that the value of *amicus* participation is found in the larger sense of its impact on investment treaty arbitration in general, instead of the particular cases where *amici* are allowed to submit written briefs.

[617] Epaminontas E. Triantafilou, *Amicus Submissions in Investor-State Arbitration After Suez v. Argentina*, 24 ARBITR. INT. 571–586, 575–576 (2008).

2.3. Third-Party Funding: An Emerging Transparency Issue

The previous sections have discussed third parties from the perspective of *amici curiae*. Indeed, most of the present scholarship on the participation of third parties in investment treaty cases has thus far centered on enhancing access to arbitration proceedings by non-party stakeholders. The rationale for this focus on third-party participation rests on the premise that public interest is involved in cases where one of the parties is a sovereign State. The spotlight on non-disputing parties, however, should not be the sole determinant of the parameters of the transparency movement. An increasingly relevant, albeit indirect, participant in investment cases in recent years is the third-party funder, defined generally as follows:

> The term "third-party funder" refers to any natural or legal person who is not a party to the dispute but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party:
> (a) in order to provide material support for or to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and
> (b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.[618]

Third-party funding is now a regular occurrence in investment arbitration.[619] At present, there are no rules mandating the disclosure of third-party funding arrangements nor the identity of third-party funders. The question arises whether the measures adopted for increasing transparency in the investment regime must be deemed to apply to these oft-concealed actors operating within the investment arbitration regime, as well.

Third-party funding and the myriad of issues it brings to the world of international arbitration has been the subject of intense study and scrutiny in recent years. Most notable is

[618] Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, 50 (2018).
[619] *Id.* at 203.

the focused efforts of the joint task force formed between the International Council for Commercial Arbitration (ICCA) and Queen Mary University of London. The ICCA – Queen Mary Task Force on Third-Party Funding "set out to systematically study and make recommendations regarding the procedures, ethics and policy issues relating to third-party funding in international arbitration."[620] Acknowledging that third-party funding, albeit controversial, is a valuable mechanism that is here to stay, the task force notes that "discussion has largely moved beyond questions about whether third-party funding should be permitted, to evaluation of how to address specific issues implicated by third-party funding."[621]

The ICCA – Queen Mary Task Force looked at third-party funding in international arbitration generally, although certain portions of their study focused specifically on investor-State arbitration.[622] Third-party funding takes on an extra layer of controversy in this context because, as the Task Force acknowledges, "a business model that profits by suing governments, even in good faith, is simply problematic as it seeks to transfer wealth from the public to the private sector."[623] Heretofore, the discussion on third-party funding in the context of investment arbitration has looked at "its effect on caseloads and settlement rates, costs and cost awards, and investor rights."[624] This dissertation adopts a different approach by looking at third-party funding in investment treaty arbitration from a transparency perspective.

This dissertation argues that litigation funders must be deemed as third parties in an investment arbitration, upon whom transparency obligations must likewise be imposed if the transparency regime is to be fully effective. Specifically, this dissertation argues for minimum

[620] Project description at http://www.arbitration-icca.org/projects/Third_Party_Funding.html.
[621] Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, *supra* note 618 at 4.
[622] *See Id.* at 199, *et seq*.
[623] *Id.* at 9.
[624] *Id.* at 203.

mandatory disclosure requirements with respect to litigation financing in investment disputes. The discussion will first establish the place of third-party funding within the regime of increased transparency in the investor-State dispute settlement system, highlighting the two angles of access and disclosure from which third-party funding must be assessed. The dissertation will then outline the issues relating to disclosure of third-party funding on investment arbitration cases. Recent developments regarding third-party funding in relation to investor-State dispute settlement will be surveyed, to demonstrate how litigation financing is becoming an integral part of the dispute settlement process that must be regulated. Lastly, recommendations will be made for disclosure of third-party funding with respect to: (i) time of disclosure; and (ii) aspects of the funding arrangement to be disclosed.

2.3.1. Characterizing third-party funding as a transparency issue

The transparency movement has been characterized by opening the proceedings to non-parties, with obligations placed on the arbitral institutions and the disputing parties to provide more information about the dispute and greater access thereto to the public and third parties that seek to participate in the arbitration proceedings. Transparency is generally seen as a movement from within the arbitration, directed *outwards*. As can be seen from the discussion in the previous section, however, disclosure requirements for potential *amicus curiae* likewise place transparency obligations on the non-parties; outsiders trying to get into the proceedings must also provide information. The flow of information in this sense is directed *inwards* towards the proceedings, originating from the outsiders. Transparency in this section of the dissertation adopts the perspective of this latter model. Furthermore, an added dimension with respect to third-party funders is that their presence can be completely unknown unless their involvement is voluntarily divulged by the claimant, or, as will be suggested in this dissertation, mandatory disclosure requirements are adopted.

In other words, transparency regarding third-party funding is less about making the arbitration proceedings visible to outsiders, but making an outsider visible in the arbitration proceedings.

The identification of an outsider to the proceedings has important implications regarding access to information in an investment arbitration, i.e. determining which parties are entitled to view documents and otherwise learn of the developments in the arbitration proceedings. Even as the investor-State dispute settlement regime moves towards becoming more and more transparent, the documents generated during arbitration proceedings generally remain confidential, unless publication has been allowed. The access to arbitration case documents is usually limited to the parties and their counsel. Whether third-party funders are allowed to view documents remains a contentious issue. During a hearing in the case of ***EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic***,[625] the tribunal grappled with the issue of whether the identity of the third-party funder must be disclosed, and whether the claimant and the third-party funder must undertake a confidentiality obligation with respect to confidential information obtained during the arbitration proceedings.[626] The tribunal decided in the affirmative, but did not fully expound on their decision.[627] Notably, counsel for the respondent in this case had argued that provisions of the Canada – Slovak Republic BIT require that certain confidential information be kept from the public and third parties, and that a third-party funder should be deemed a third party.[628]

Transparency regarding third-party funding may be viewed as an obligation of the third-party funder and the party being funded towards the arbitral institution, the Tribunal, and the

[625] ICSID Case No. ARB/14/14.
[626] *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, *supra*, Transcript, First Session and Hearing on Provisional Measures, 17 March 2014, pp. 33 – 37.
[627] *Id.*, at pp. 144 – 145.
[628] *Id*., at p. 35.

other party. Compared with other transparency obligations which are directed outward – that is, from within the arbitral proceedings towards interested non-parties – the transparency obligations related to third-party funding can be considered as obligations within the proceedings, impacting among others, identification of entities that have access to the arbitration proceedings and record.

Third-party funding is becoming a publicized practice. On 29 December 2016, a claim was registered with ICSID pursuant to the Free Trade Agreement between Canada and Colombia in the case ***Eco Oro Minerals Corp. v. Republic of Colombia***.[629] Months before the ICSID case was actually filed, the Canadian mining firm already made a public announcement on its company website that it had secured litigation financing that would ensure "Eco Oro will be completely funded to the extent we are unable to resolve the dispute amicably with the Government of Colombia and, instead, decide to move forward with arbitration."[630]

This publicized approach regarding third-party funding, done prior to actually instituting an arbitration, seems to use the availability of litigation financing as a bargaining chip in negotiations for amicable settlement with a sovereign respondent.

Whereas third-party funding of investment disputes has been around for some time, there has been a notable increase in the visibility of this activity in the past couple of years. The openness of funders and funded parties to make known which investment claims have benefited or will potentially benefit from litigation financing has led to increased discussion not only in academic circles, but in the world of treaty negotiators and arbitral institutions as well. Third party funding is becoming an integrated practice in investment arbitration, and

[629] ICSID Case No. ARB/16/41, Request for Arbitration dated 8 December 2016.
[630] *Eco Oro Minerals Announces Investment by Tenor Capital*, 22 July 2016, *available at* http://www.eco-oro.com/s/NewsReleases.asp?ReportID=756943&_Type=News-Releases&_Title=Eco-Oro-Minerals-Announces-Investment-by-Tenor-Capital

actors within the system are responding with initial forays into regulation.

The involvement of third-party funders or litigation financers has not been squarely examined as a transparency issue in the current literature on investment arbitration. Although definitions in the current scholarship vary widely with respect to the scope of third-party funding,[631] litigation financing generally refers to "mechanisms by which a party to legal proceedings obtains all or a portion of the funds necessary to pursue the dispute from an unrelated third party."[632] Claimant-investors, rather than the sovereign respondents, are typically the parties in investment disputes which avail of third-party funding.[633] However, there have also been instances where the State party in has received financial assistance in defending itself in an investment treaty arbitration.[634] A famous example is the case of ***Philip Morris v. Uruguay***,[635] where a not-for-profit philanthropy with a public health mission provided litigation funding for the developing country respondent.[636]

Third-party funding of investment claims is positioned to be the next challenge for the transparency movement. The UNCITRAL Working Group II, which produced the Rules on Transparency and then proceeded to revise the *Notes on Organizing Arbitral Proceedings*, noted in September 2014 that the issue of third-party funding is of a "still-evolving nature" and

[631] For a recent survey of the various funding arrangements and new developments in the financial structuring of third-party funding transactions, *see* Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 Tul. L. Rev. 405 (2017).
[632] David P. Roney & Katherine von der Weid, *Third-Party Funding in International Arbitration: New Opportunities and New Challenges*, *in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2013 183, 184 (Christoph Müller & Antonio Rigozzi eds., 2013).
[633] *Id*.; *see also* Carolyn B. Lamm and Eckhard R. Hellbeck, *Third-Party Funding in Investor-State Arbitration Introduction and Overview* in THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 101, Dossiers of the ICC Institute of World Business Law, Volume 10 (Bernardo M. Cremades Román and Antonias Dimolitsa, eds., 2013).
[634] Lamm and Hellbeck, *supra* note 633, at 102.
[635] ICSID Case No. ARB/10/7.
[636] Victoria Shannon Sahani, *Revealing Not-for-Profit Third-Party Funders in Investment Arbitration*, available at http://oxia.ouplaw.com/page/third-party-funders

concluded that the *Notes* should refrain from addressing the issue at this point.[637]

To understand the concerns surrounding non-parties and their access to investment arbitration proceedings, the drafting history of Article 4(2) of the UNCITRAL Rules on Transparency can be an illustrative example. This provision sets forth requirements for the information to be disclosed by a third person wishing to make a submission in the arbitration. The rules require a description of the third person, including its membership and legal status, its general objectives, the nature of its activities, and identification of any parent organization, "including any organization that directly or indirectly controls the third person."[638] The rules also require disclosure of any direct or indirect connection that the third person has with any disputing party.[639] Financial or other forms of assistance to the third party must also be disclosed, with the Rules requiring information "on any government, person or organization" that has assisted the third person in preparing the submission to the arbitration, or provided "substantial assistance in either of the two years preceding the application by the third person" to make a submission in the arbitration.[640]

It is important to note that the details required by the aforementioned Article 4(2) were prompted by concerns of governments regarding third parties. Comprised of all State members of UNCITRAL, the Working Group II which crafted the Rules on Transparency received input from government delegations, and also had the participation of international non-governmental

[637] Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-first session (Vienna, 15-19 September 2014) (24 September 2014), A/CN.9/826 *available at* http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html. ¶77: "A question was raised as to whether the practice of third party funding should be referred to in the Notes. A diversity of practice in relation to third party funding was expressed and it was queried whether, if the Notes were unable to provide guidance as a result of the still-evolving nature of topic, it would nonetheless be useful to flag the existence of the practice and the possible procedural issues it might entail. After discussion, it was agreed that the Notes should not address the subject."

[638] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Art.4(2)(a).

[639] *Id*., Art.4(2)(b).

[640] *Id*., Art.4(2)(c).

organizations invited by the Commission to be observers, several of which were arbitral institutions.[641] The requirements of disclosure of any backers of third parties seeking to participate in the arbitration is a result of willingness – combined with a measure of wariness – by States in allowing *amici curiae* to make submissions.

In opting to be more elaborate about these disclosure requirements than the 2006 revision of the ICSID Arbitration Rules,[642] participants in the UNCITRAL Working Group II expressed a lack of experience with *amici curiae* and suggested that the detailed requirements of the NAFTA Free Trade Commission's "Statement on non-disputing party participation of 7 October 2004"[643] be used as a model for the provision on third party participation.[644] The resulting provision borrows heavily from the text of the Free Trade Commission.

Taking into account the several concerns that governments have about third parties participating as *amici curiae*, it may reasonably be inferred that information about a party funding the claimant's legal expenses in an investment treaty arbitration would be of particular importance to State parties as well. The drafting history of the provision discussed above illustrates that transparency works both ways when it comes to third-party participants: access to investor-State arbitration carries disclosure requirements for the third party as well. Just as the public interest in an investment arbitration necessitates transparency from within the dispute directed outwards toward the public, those seeking to intervene likewise owe

[641] United Nations General Assembly Resolution 68/109 (16 December 2013); Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (Vienna, 4-8 October 2010), (20 October 2010), A/CN.9/712, at pp. 4 – 5.
[642] Rule 37(2) of the ICSID Arbitration Rules do not require specific information from third persons, but rather provide general guidelines for the arbitral tribunal to consider in deciding whether to allow such third person to participate. The Working Group II specifically considered this provision of the ICSID Arbitration Rules and opted for more detailed requirements. Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (New York, 7-11 February 2011) (25 February 2011), A/CN.9/717, at ¶121.
[643] *Available at* www.naftalaw.org/commissionfiles/Nondisputing-en.pdf.
[644] Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (New York, 7-11 February 2011) (25 February 2011), A/CN.9/717, at ¶¶ 118 – 122.

information to the disputing parties about their interests in the arbitration.

This dissertation argues that litigation funders must be deemed as third parties in an investment arbitration, who are likewise subject to disclosure requirements in the interest of transparency. This argument proceeds from the premise that the funding of investment claims by third parties is a practice that is here to stay; the debate has moved beyond questions of its propriety or necessity.[645] The issues to be resolved now are whether third-party funding should be disclosed, and if so, what aspects of that funding should be subject to disclosure.

2.3.2. Problems arising out of a lack of a disclosure requirement

The questions of whether or not third-party funding should be disclosed by the funded party to the tribunal and the opposing party, and what exactly must be disclosed about the funding arrangement, characterize litigation financing as a transparency issue. As the tribunal in the case of ***Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan***[646] straightforwardly phrased it, an order for the disclosure of a third-party funding agreement would be justified for the following reasons: "to avoid a conflict of interest for the arbitrator, for transparency and to identify the true party to the case, and if there is an application for security for costs."[647]

This dissertation proposes that the disclosure requirements for non-disputing parties seeking to participate in investment arbitrations (i.e. *amici curiae*) may be a helpful paradigm

[645] One prominent arbitrator observes that "the phenomenon of third party funding in international arbitration is becoming increasingly important, particularly in investment protection arbitration. It is without doubt the market response to the needs of small and medium-sized companies to enable their access to arbitration, and indeed maybe the only the way." Bernardo M. Cremades, *Third Party Funding in International Arbitration* (23 September 2011), http://www.cremades.com/en/publications/third-party-funding-in-international-arbitration, last accessed on 16 December 2016, at p. 8. *See also* Aren Goldsmith & Lorenzo Melchionda, *Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask) Part 2*, 5 Int'l Bus. L. J. 221, 230 (2012).
[646] ICSID Case No. ARB/12/6.
[647] *Id*., Procedural Order No. 3, 12 June 2015, ¶1, citing Procedural Order No. 2, 23 June 2014.

upon which to model disclosure requirements regarding third-party funding. The issue of disclosure is the gateway to the other issues presented by litigation funding, and examining the impact of these issues on investment arbitrations is essential to understanding the relevance of disclosure. These include: (1) conflicts of interest; (2) implications for orders for costs; and (3) identification of parties that can access arbitration documents.

2.3.2.1. Third-Party Funders and Conflicts of Interest

The participation of litigation financiers has palpable implications for potential conflicts of interest involving members of the arbitral tribunal. Since many arbitrators hearing investment claims also act as counsel for parties in investment disputes and other types of litigation, a troublesome situation occurs in the event that a third-party financier is funding a claimant in a dispute where the arbitrator sits on a tribunal, and is also financially backing the claim wherein the arbitrator acts as counsel for claimant.[648] If there is no disclosure of the support of a third-party funder, the arbitrator will not have the occasion to assess any conflicts of interest which would make continued participation in the case tainted by impartiality.[649] This affects not only the particular arbitrator's credibility and independence, but also reflects on the legitimacy of the proceedings in general.[650]

The International Chamber of Commerce (ICC) recently published its *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*.[651] In providing guidance on disclosures of potential conflicts that must be indicated on the Statement of Acceptance, Availability, Impartiality and Independence that must be signed by

[648] Eric De Brabandere & Julia Lepeltak, *Third-Party Funding in International Investment Arbitration*, 27 ICSID Rev. 379, 395 – 396 (2012); Goldsmith & Melchionda, *supra* at 225 – 226.
[649] De Brabandere & Lepeltak, *supra* at 395 – 396; Goldsmith & Melchionda, *supra* at 226.
[650] De Brabandere & Lepeltak, *supra* at 395 – 396.
[651] 1 March 2017, *available at* https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/ICC-Note-to-Parties-and-Arbitral-Tribunals-on-the-Conduct-of-Arbitration.pdf.

all arbitrators hearing cases administered by the ICC, the *Note* advises arbitrators to also consider "relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case".[652] While the term "third-party funding" is not explicitly used, it can be readily interpreted from the language in the *Note* that such funding arrangements might cause a conflict of interest on the part of the arbitrator.

2.3.2.2. Third-Party Funders and Implications on Orders for Arbitration Costs

If third-party funding is concealed and the claimant subsequently becomes liable in the final award for the payment of the sovereign respondent's arbitration costs, it is uncertain whether the third-party funder shall shoulder this liability on behalf of an impecunious claimant, thereby rendering a costs award in favor of the respondent nugatory. Transparency regarding reliance of the claimant on a third-party funder to bring the investment claim thereby is a factor in helping a tribunal determine whether an order for security for costs should be made earlier in the proceedings.

"Funding costs" such as a "conditional fee" or a "litigation funder's return" are above normal legal costs.[653] Whether or not funding costs should be factored into the costs allocation at the end of an arbitration is a highly disputed issue.[654] The ICCA – Queen Mary Task Force summarized the issue, and the response to it, thus:

> […] the issue of whether the funded party should be able to recover funding costs, including success fees, attracted a large number of comments during the public consultation period. A numer of comments suggested that allowing a third-party funder to recover funding costs in exceptional circumstances only,

[652] *Id*., ¶24.
[653] Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, *supra* note 618 at 156–157.
[654] *Id.* at 157.

> typically when the respondent's conduct has been "egregious", was setting the bar too high, especially in investment arbitration. […] On the other hand, other comments suggested that awarding funding costs as part of arbitration costs would substantially and unfairly increase the amounts owed by the losing party and would unreasonably impose a huge risk of an adverse costs award on the respondent.[655]

Furthermore, whether or not a costs award in favor of a funded claimant will benefit the party protected by an investment treaty, and whether or not a costs award in favor of a State party might be enforced against an impecunious claimant, are issues that investment arbitration tribunals have had to face in cases where third-party funders were involved. The implications of the presence of litigation funders on orders for costs is an issue that has already faced ICSID tribunals; in one case, the tribunal had to decide whether to award costs, and in another, the tribunal considered the interim measure of security for costs. In a third case, an ICSID tribunal ruled on the issue of disclosure of a third-party funder in anticipation of an application for security for costs by the respondent.

In the case of ***Giovanni Alemanni and Others v. Argentine Republic***,[656] the tribunal was faced with a motion from the ICSID Acting Secretary-General to discontinue the proceedings because of non-payment by the parties of the costs of the arbitration.[657] A series of correspondence from the claimant and respondent to the tribunal both involved requests that the other party bear the costs of the arbitration.[658] Letters from the respondent further alluded to litigation funding arrangements on the part of the claimant,[659] which claimant asserted did not affect their right of control over the conduct of the arbitration.[660] The tribunal ultimately decided to refrain from making an order as to costs.[661] The rationale for this decision was based

[655] *Id.* at 157.
[656] ICSID Case No. ARB/07/8 (hereafter *Alemanni v. Argentina*).
[657] *Alemanni v. Argentina*, Order of the Tribunal Discontinuing the Proceeding dated 14 December 2015, at ¶11.
[658] *Id.*, at ¶¶10, 12, *et seq*.
[659] *Id.*, at ¶11.
[660] *Id.*, at ¶14.
[661] *Id.*, at ¶27.

primarily on procedural rules that provided that decisions on costs typically accompany the rendering of an award, which was not the situation in the discontinuance of the proceeding faced by the tribunal.[662] Notably, however, the arbitrators went on to express concern that "the Tribunal has no way of knowing whether the proceeds of any costs award would have found their way into the pockets of the Claimants themselves or the litigation funders."[663] The tribunal did not expound further on this matter, but it is clear from the inclusion of this statement in the tribunal's order that the presence of third-party funding presents an impact on a costs award. While the tribunal did not explicitly say so, it can be inferred that the tribunal was concerned about whether the claimant was the real party-in-interest in the case who would have received any awarded costs, had such an award been made.

Whereas mention of third-party funding might arguably be regarded as *obiter dictum* in the case discussed above, third-party funding made a front-and-center appearance in another recent decision by an ICSID tribunal in the case of ***RSM Production Corporation v. Saint Lucia***.[664] In deciding to grant the sovereign respondent's request for security for costs,[665] majority of the tribunal considered as a relevant factor that a third party was providing the funds for prosecuting the claim of the investor, reasoning as follows:

> "[T]he admitted third party funding further supports the Tribunal's concern that Claimant will not comply with a costs award rendered against it, since, in the absence of security or guarantees being offered, it is doubtful whether the third party will assume responsibility for honoring such an award. Against this background, the Tribunal regards it as unjustified to burden Respondent with the risk emanating from the uncertainty as to whether or not the unknown third party will be willing to comply with a potential costs award in Respondent's favor.".[666]

[662] *Id.*, at ¶25, *et seq*.
[663] *Id.*, at ¶26.
[664] ICSID Case No. ARB/12/10.
[665] Decision on Saint Lucia's Request for Security for Costs (13 August 2014).
[666] *Id.*, at ¶83.

Emphasizing the importance of disclosure, one of the arbitrators even went so far as to say that "once it appears that there is third party funding of an investor's claims, the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made."[667]

The tribunal's decision was met by a strong dissent from one of the arbitrators, who nonetheless highlighted that several questions about third-party funding need to be resolved. Asserting that it is the ICSID Administrative Council – and not an individual tribunal – that should provide guidance on how to deal with concerns about third-party funding,[668] the dissenting arbitrator propounded the following questions:

> The financing of ICSID arbitrations by persons or entities other than the parties themselves may well raise issues of general or particular concern. Should third-party funding ever be permitted? If so, under what conditions? Is such funding a legitimate tool allowing the pursuit of meritorious claims which otherwise could not be brought? Or is it a form of reprehensible barratry? What information about the nature of the funding or the identity of the funder should be relevant? What are the terms of the funding contract? Indeed, how is third-party funding defined? Would an insurance contract under which a State financed the defense of a case fit the definition?[669]

In the case of ***Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan***,[670] the tribunal noted that Respondent had indicated that it would be making an application for security for costs.[671] Without yet deciding on the appropriateness of such a security, the tribunal expressed that it was "sympathetic to Respondent's concern that if it is successful in the arbitration and a costs order is made in its favour, Claimants will be unable to meet these costs and the third-party funder will have disappeared as it is not a party to this

[667] Decision on Saint Lucia's Request for Security for Costs, *supra*, Assenting Reasons of Gavan Griffith, at ¶18.
[668] Decision on Saint Lucia's Request for Security for Costs, *supra*, Dissenting Opinion of Judge Edward W. Nottingham, at ¶20.
[669] *Id*., at ¶19.
[670] *Supra*.
[671] Procedural Order No. 3, *supra*, at ¶10.

arbitration."[672] Accordingly, the tribunal ordered claimants to confirm whether they are being funded by a third-party funder, and if so, to provide the names and details of the funders, as well as the nature of their funding arrangement, "including whether and to what extent it/they will share in any successes that Claimants may achieve in this arbitration."[673]

Perhaps anticipating similar issues as those already encountered by the ICSID tribunals discussed above, the Singapore International Arbitration Centre (SIAC) has provided in its new Investment Arbitration Rules that tribunals "may take into account any third-party funding arrangements" in: (1) "apportioning the costs of the arbitration";[674] and (2) "ordering in its Award that all or a part of the legal or other costs of a Party be paid by another Party."[675] Also notable is a specific provision in the Free Trade Agreement (FTA) between the European Union and Vietnam which provides that arbitration tribunals considering an application for security for costs "shall take into account whether there is third-party funding" and also whether mandatory disclosure requirements regarding such funding have been observed.[676] These nascent rules regarding third-party funding in investment arbitration in relation to costs and security for costs directs tribunals to "take into account" third-party funding, but does not clarify which direction these investment arbitration tribunals should take with respect to this matter.

2.3.3. Recent Developments

The previous section looked at issues which investment arbitration tribunals have to

[672] *Id.*, at ¶12.
[673] *Id.*, at ¶13.
[674] Investment Arbitration Rules of the Singapore International Arbitration Centre (1st Edition, 1 January 2017), Article 33(1).
[675] *Id.*, Article 35.
[676] EU-Vietnam Free Trade Agreement, Chapter 8 - Trade in Services, Investment and E-Commerce, Chapter II – Investment, Section 3 – Resolution of Investment Disputes, Article 11 – Third Party Funding, ¶3. (Note: negotiations between the State Parties concluded in 2016, but the treaty is not yet in force.)

resolve in relation to third-party funding. The current section will look at third-party funding beyond the realm of arbitral decisions. Whereas third-party funding of investment disputes has been around for some time, there has been a notable increase in the visibility of this activity in the past couple of years. The openness of funders and funded parties to make known which investment claims have benefited or will potentially benefit from litigation financing has led to increased discussion not only in academic circles, but in the world of treaty negotiators and arbitral institutions as well. Third party funding is becoming an integrated practice in investment arbitration, and actors within the system are responding with initial forays into regulation.

2.3.3.1. Provisions on third-party funding in international investment agreements

As already discussed above, the EU – Vietnam FTA provided specifically for third-party funding and its relation to an application for security for costs. Blazing a trail for future international investment agreements, the treaty is the first to provide a definition of third-party funding[677] as well as impose mandatory disclosure of third-party funding, as follows:

> 1. Where there is third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal the existence and nature of the funding arrangement, and the name and address of the third party funder.
>
> 2. Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement concluded or the donation or grant is made.[678]

The European Parliament voted in favor of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union on 15 February 2017. The treaty

[677] EU-Vietnam Free Trade Agreement, *supra*, Chapter 8 , Chapter II, Section 3, Article 2 – Definitions.
[678] *Id*., Article 11, ¶¶ 1 – 2.

provides a definition of third-party funding as follows: "third party funding means any funding provided by a natural or legal person who is not a disputing party but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute."[679]

2.3.3.2. Rules and issuances from international arbitral institutions regarding third-party funding

The Singapore International Arbitration Centre (SIAC) recently issued specialized rules for investment arbitration cases handled by the institution. In outlining the "additional powers" that arbitral tribunals have under these rules, the current draft empowers tribunals to "order the disclosure of the existence of a Party's third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability".[680] Specific provisions regarding costs awards were already discussed in the previous section of this paper.

Also, as already discussed above, the ICC recently published a *Note* wherein conflicts arising from a relationship with a third-party funder must be disclosed by arbitrators.

2.3.4. Recommendations for Disclosure Requirements

To recall, the issues that arise with respect to disclosure of third-party funding, pinpointed earlier in this section, are: (1) identifying the real party in interest; (2) conflicts of interest; (3) implications for orders for costs; and (4) identification of parties that can access

[679] Article 8.1, EU – Canada Comprehensive and Economic Trade Agreement.
[680] Investment Arbitration Rules of the Singapore International Arbitration Centre (1st Edition, 1 January 2017), Article 24(l).

arbitration documents.

The issues encountered by investment arbitration tribunals, the provisions in recent issuances and rules of arbitral institutions, and treaty provisions of recently concluded international investment agreements all point to a justification for minimum mandatory disclosure requirements of: (1) the ***existence*** of third-party funding; and (2) the ***identity*** of the third-party funder. Disclosure of these two aspects already sufficiently addresses the issues of: (i) potential conflicts of interest on the part of an arbitrator, for relationships with a third-party funder; and (ii) identifying parties that may have access to confidential documents and information generated in the arbitration proceeding.

The terms of the funding arrangement would only be relevant if an investment tribunal is faced with either an application for a security for costs (i.e. determining whether the respondent will have recourse in the event that an award for costs is subsequently made in its favor), or is considering whether to award costs in favor of the funded party (i.e. determining whether the real party in interest protected by the investment treaty will benefit from a costs award). As such, tribunals should exercise discretion in determining whether to require disclosure of the terms and/or structure of the third-party funding arrangement. However, there is insufficient rationale for making the terms of litigation financing form part of mandatory disclosure requirements.

As for the timing of disclosure, the existence of funding and the identity of the funder should be disclosed at the time the claim is filed. There should also be a continuing obligation for disclosure if funding is obtained or amended during the course of the arbitration.

As can be seen from recent developments, third-party funding is coming out of the shadows and is now even being publicized by claimants threatening to begin investment arbitration proceedings. The disclosure of the existence and identity of third-party funders at

the outset of an arbitration should not be considered a burdensome requirement. Rather, these mandatory minimum disclosure requirements should be seen as forestalling potential issues of conflict of interest and breaches of confidentiality of protected information, ensuring that the arbitral process is not hindered by procedural issues that can distract from the substantive claim.

2.4. Summary

This second chapter focused on non-parties and their relationship with the transparency movement in investment arbitration. This dissertation posits that there are four categories of non-parties in relation to investment treaty arbitration: (1) non-disputing State Parties; (2) the general public; (3) *amici curiae*; and (4) third-party litigation funders. The first category is part of the discussion in Chapter 3. The other three categories formed the sections of this second chapter.

The section devoted to the general public concretized the concept of public interest that Chapter 1 expounded upon in Section 1.2.2. as the rationale for the transparency movement in investment treaty arbitration. Transparency in investment arbitration in relation to the general public is achieved through the access to information about the investment arbitration process. Specific provisions aimed at access to information by the general public were identified in NAFTA Chapter 11, ICSID's Administrative and Financial Regulations, and the UNCITRAL Rules of Transparency.

Amici curiae and their role in enhancing the transparency of investment treaty arbitration formed a substantial section of this chapter. The current literature on transparency in investment arbitration has heretofore focused on the participation of non-disputing parties in the arbitral process. A review of the transparency measures undertaken in the past several years indicates that increasing transparency in investor-State dispute settlement is often equated

with non-disputing party participation in the arbitration proceedings. The major developments with respect to increasing transparency revolve around the three main modes of non-disputing party participation: (1) access to arbitration documents; (2) written submissions; and (3) open hearings. This chapter looked at the relevant provisions and practice in relation to NAFTA and ICSID arbitration, and the provisions of the UNCITRAL Rules on Transparency that evolved from prior rules and practice. A critique of the provisions of the UNCITRAL Rules on Transparency indicates where problems may arise in future cases.

Human rights, environmental concerns, and the protection of cultural heritage are common themes in *amicus* petitions filed by non-governmental organizations seeking to participate in investment treaty arbitration. In this regard, this chapter included a survey of cases that looked specifically at indigenous peoples' groups and environmental protections groups and how their *amicus* petitions and written submissions were handled by investment arbitration tribunals. This review of cases revealed that, even as strides are being made with respect to increased non-disputing party participation in investment arbitration through rule amendments and arbitral jurisprudence, tribunals still exert a hefty amount of discretion when deciding whether or not to grant applications for non-disputing party participation. Even where *amicus* petitions are granted, not much weight is accorded to the *amicus* submissions. This dissertation posits that certain legal perspectives affect tribunal acceptance or denial of applications for non-disputing party participation for these special interest cases: (1) tribunal deference to disputing party opposition; (2) non-recognition of indigenous rights as a "significant interest" or "perspective or insight different from that of the disputing parties"; (3) conflicting international obligations; (4) definition of the issues in dispute; and (5) lack of obligation to consider the third-party submission. Even with the minimal impact of *amicus* submissions on the outcome of investment treaty arbitration cases, however, this dissertation maintains that there is value in promoting non-party participation. Furthermore, there are

indications that investment arbitration tribunals in the future will be more receptive to the viewpoints presented by special interest groups participating as *amici curiae*.

The third section of this second chapter looked at third-party funding and framed this phenomenon within the transparency paradigm. While most of the present scholarship on third-party participation in investment arbitration has heretofore focused on access of non-party stakeholders to arbitration proceedings, there is as yet no scholarship that places third-party funding within the transparency movement. Disclosure of information is recommended with respect to third-party funders in the interest of a transparency regime that looks beyond *amici curiae* as the only outsiders seeking access to investment treaty arbitration proceedings. This dissertation proposes that disclosure requirements relating to third-party funding can be modelled on the disclosure of information required of potential *amici curiae*. The problems relating to third-party funding were identified in this chapter as the following: (1) conflicts of interest; and (2) implications on orders for arbitration costs. These problems can be addressed by mandatory disclosure of information regarding litigation financing arrangements.

Chapter 3

State Parties and Transparency

The introduction to this dissertation highlighted the specific ways that investment treaty arbitration – which by definition, involves a sovereign Party – differs from other types of arbitration. The public interest that is inherent in cases involving sovereigns imbues investor-State disputes with a significant impetus for greater transparency. The transparency movement – and the academic literature that it has inspired – has heretofore focused on opening up

investment arbitration proceedings to the public and/or specific non-parties. This was the vantage point examined in the first two parts of the previous chapter on Non-Parties and Transparency.[681]

The current chapter and the next one will shift the focus of discussion to disputing parties: the sovereign respondents and the investor-claimants. The impact of greater transparency has shifted the *status quo* for the parties to the dispute, for the benefit of non-parties and the investor-State dispute settlement system as a whole. These direct objects of the transparency movement deserve closer study, and the aim of the last two chapters of this dissertation is to highlight their perspective with respect to increased transparency. Because the discussion in the previous chapter on non-parties already examined the obligations of disputing parties towards non-parties in leveling the information asymmetry between disputants and non-disputants, these last two chapters on State Parties and investors will emphasize the effects of the transparency movement on these disputing parties and their possible reactions thereto.

This third chapter will examine the transparency concerns specific to State parties, put into perspective by the countervailing confidentiality requirements of governments that necessitate limits to the information that can or should be accessed by the general public.

This chapter will look at two types of State parties: (1) sovereign respondents; and (2) non-disputing State Parties. As noted at the beginning of the immediately preceding chapter, the latter is considered in this dissertation as one of the four categories of non-parties involved in investment treaty arbitration.[682] Including non-disputing State Parties in the present chapter, rather than the previous one, serves to highlight that non-disputing State Parties have interests

[681] *See* Chapter 2, Section 2.1. on "General Public", and Section 2.2. on "*Amici Curiae*".
[682] *See* introduction to Chapter 2: Non-Parties and Transparency

that align more closely to the sovereign respondent rather than non-disputing parties generally. Discussing these two types of State parties in the same chapter therefore provides a more cohesive picture of the interests of sovereign parties involved in investment disputes.

This chapter will also devote a section to an issue that is brought up with increasing frequency in investment arbitrations: corruption. As will be discussed in that specific section, the issue of corruption has transparency implications for the investor-State dispute settlement system.

3.1. State Parties in International Investment Law

The flow of investment from one country to another entails transactions that are appropriately regulated by international law. As noted by the eminent international investment law scholar M. Sornarajah, "[f]oreign investment attracts the greater attention of international law for the simple reason that it involves the movement of persons and property from one [S]tate to another and such movements have the potential for conflict between two [S]tates."[683] In the context of international investment law in general, and investment treaty arbitration in particular, there are certain roles assumed by State parties vis-à-vis other States, as well as investors. These roles will be explained briefly to facilitate further discussion.

3.1.1. Host States and home States

As with any bilateral convention, when speaking of investment treaties, there are always two States involved (and in *multilateral* investment treaties, more than two). These State parties are referenced as: (1) the "host State" wherein the investment is made, and (2) the "home State" of which the investor is a citizen.

[683] M. Sornarajah, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2004), p. 17.

The host State is the country into which tangible or intangible assets are transferred from another country (usually the home State of the investor, but not necessarily), "for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets."[684]

The "home State" is the country where said owner of the assets – whether a natural or a juridical person – is considered as a citizen. States enter into bilateral investment treaties with dispute resolution provisions allowing for investors to directly sue governments, as a means of securing rights and protections for their citizens engaging in investment abroad. This is an offshoot of the concept of diplomatic protection, which will be discussed further in a subsection of this chapter.

The terms "host State" and "home State" are utilized in investment *treaties* to outline the respective rights and obligations that the State parties have with respect to each other, and, more saliently, vis-à-vis citizens engaged in foreign investment. When an investor-State *dispute* arises, the terminologies applied to the relevant States pertain to the nature of their involvement in the dispute, i.e. as disputing or non-disputing State parties. These relationships with respect to the dispute derive from the status of States either as home or host States.

3.1.2. Disputing State parties and non-disputing State Parties

When a foreign investor brings a claim pursuant to an investment treaty between the investor's home State and the host State where the investment is made, then the home State becomes a non-disputing State Party in the investment arbitration. The State being sued, i.e. the disputing State party, is the sovereign respondent.[685]

---

[684] M. Sornarajah, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2004), p. 7.
[685] As this dissertation deals with investment treaty arbitrations, and not other investor-State disputes such as those brought about by an arbitral clause in a concession contract between a government and a private entity,

The transparency concerns of disputing and non-disputing State parties coincide at several points, but vary in others. While States come to treaty negotiations with parallel interests, once an investment claim has been launched against one of these treaty parties (by a national of the other party), the transparency issues with which these two States must grapple consequently diverge. This is attributable to their different levels of involvement in the investment dispute. This idea will be examined in greater detail in the section on non-disputing State parties later in this chapter.

In bilateral investment treaties, the "non-disputing State Party" is inevitably the home State of the investor. In multilateral treaties, however, there are automatically non-disputing State Parties that are not the home State. For example, in a NAFTA dispute between a Canadian investor and the United States of America, Canada would be the non-disputing State Party that is also the home State, while Mexico would also be a non-disputing State Party. Both Canada and Mexico would have an interest to participate in the dispute where the United States of America is the sovereign respondent. These interests would relate mainly to treaty interpretation, which shall be discussed in greater detail later in this chapter.

Mention must also be made of the hypothetical situation where a State, not party to the particular investment treaty being invoked in the dispute, might have an interest in treaty interpretation issues because it is a treaty partner of the sovereign respondent in an investment treaty with a "Most Favored Nation" clause.[686] The effect of Most Favored Nation clauses on the jurisdiction of an investment arbitration tribunal is one of the most heated debates in

States are always necessarily respondents in investment claims of this nature. This is because States give consent to be sued in the investment treaty, whereas investors only consent to arbitration through the filing of a request for arbitration, i.e. being the party to initiate the dispute as a claimant.

[686] Most Favored Nation clauses typically adopt the following formulation: "Each contracting Party shall accord to the investors of the other Contracting Party and to their investments treatment which is no less favorable than that which it accords to investors of any third State and their investments." Christopher Greenwood, *Reflections on "Most Favoured Nation" Clauses in Bilateral Investment Treaties*, *in* PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 556–564, 558 (David D. Caron et al. eds., First edition ed. 2015).

investment treaty arbitration, with a number of decisions on the issue that are inconsistent.[687] One view of Most Favored Nation clauses in investment treaties is that it would enable an investor to rely on the provisions of another bilateral investment treaty.[688] If that is the way that Most Favored Nation Clauses operate, then theoretically, a State that is not a party to the investment treaty invoked in the dispute would have an interest in the interpretation of those treaty provisions, in as far as it can claim that a Most Favored Nation clause in its own treaty would "incorporate" those provisions. However, considering that the effect of these clauses is far from settled, it is unlikely that a State would expend resources and exert effort to participate in an investment dispute where it is neither the home State of the investor nor a party to the investment treaty invoked by the claimant.

3.2. Sovereign Respondents and Transparency

3.2.1. Domestic laws and doctrines that affect treaty provisions on transparency in investment arbitration

Because of the unique concerns of State parties, sovereigns that find themselves as respondents in investment treaty arbitrations are pulled in opposite directions of a transparency – confidentiality spectrum. Governments are expected to disclose all information to a public that demands transparency, while at the same time maintaining confidentiality over privileged information in the interest of smooth functioning of government.[689] Additionally, because some government decisions are inherently political, governments may be constrained to take unbeneficial litigation positions influenced by pressure from certain constituencies if the arbitration is made totally public.[690] Domestic laws and doctrines designed to ensure

[687] *Id.* at 556.
[688] *Id.* at 559.
[689] *See* Note, *Mechanisms of Secrecy*, 121 Harv. L. Rev. 1556 (2008).
[690] Buys, *supra* note 42 at 134.

transparency in government transactions present State parties with additional transparency concerns that private entities do not have to deal with. On a related note, it bears stressing that investment arbitration tribunals do not possess the means to compel the compliance of a State party with discovery requests.[691]

Relevant to this discussion are the exceptions specific to State Parties provided in Article 7 of the UNCITRAL Rules on Transparency. In relevant part, that rule reads as follows:

> ***Article 7. Exceptions to transparency***
>
> *Confidential or protected information*
>
> 1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6.
>
> 2. Confidential or protected information consists of:
>
> *x x x*
>
> (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or
>
> (d) Information the disclosure of which would impede law enforcement.
>
> *x x x*
>
> 5. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers contrary to its essential security interests.

Article 7(2)(c) presents a dual standard to consider information as protected from public availability: (1) if the information came from the sovereign respondent, then the domestic law of the sovereign respondent determines whether such information should be protected; and (2) if the information came from any other party (i.e. the claimant or a non-disputing party), then

[691] Thomas W. Wälde, *"Equality of Arms" in Investment Arbitration: Procedural Challenges*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 161–188, 175 (Katia Yannaca-Small ed., 2010).

the tribunal has discretion to determine the applicable law or rules.[692]

During the drafting of this provision, some delegations expressed the view that "mandatory application by a State of its national law in relation to information provided by it would permit a State to circumvent the object of the rules by introducing legislation precluding the disclosure of all information in investor-State disputes."[693] This concern was quelled by "unanimous support" for the proposition that "it was not permissible for a State to adopt UNCITRAL rules on transparency and then use its domestic law to undermine the spirit (or the letter) of such rules."[694]

Article 7(2)(d) and Article 7(5) were also the subject of debate among the delegations of UNCITRAL Working Group II. These two provisions are intended to provide exceptions to public availability on matters which "a State could determine for itself" should be exempted from publication.[695] Some delegations were of the view that these provisions "were overly broad and that practically any meaning could be ascribed to them in order to justify withholding information."[696] Furthermore, several delegations objected to the idea that the respondent State itself would determine what information to withhold, instead of the matter being subject to tribunal discretion.[697] Proponents of these provisions, however, insisted that these provisions were necessary to strike a "balance" between confidentiality and transparency, noting that these matters were not always provided for in bilateral investment treaties and domestic laws.[698] It was additionally suggested that the Rules on Transparency were intended to serve the "public

[692] Thierry Ausburger, *Article 7. Exceptions to Transparency*, *in* TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNICTRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 249–306, 268 (Dimitrij Euler, Markus W. Gehring, & Maxi Scherer eds., 2015).
[693] October 2012 UNCITRAL WG Report, *supra* note 235 at ¶ 103.
[694] *Id.* at ¶ 103.; February 2013 UNCITRAL WG Report, *supra* note 227 at ¶ 62.
[695] October 2012 UNCITRAL WG Report, *supra* note 235 at ¶ 106.
[696] *Id.*
[697] *Id.* at ¶ 107.
[698] *Id.* at ¶ 109.

interest", and offering these protections were in the public interest.[699]

What follows in the subsections below are the domestic laws and legal principles which are contemplated in the determination of what can be considered as confidential or protected information from the vantage point of the sovereign respondent: freedom of information legislation, executive process privilege, and deliberative process privilege.

3.2.1.1. Freedom of information legislation

Freedom of information legislation is becoming increasingly common throughout various jurisdictions, as more and more governments are putting laws in place to ensure transparency of governmental actions and enhance public accountability. Even without freedom of information legislation, there are expectations that governments will disclose information which the public deems it has the right to know.

When States respond to the public's expectation of full disclosure, this can be met with objection by a claimant-investor that is not concerned with accountability to the public, wishing to keep the proceedings confidential. This was the case in an ICSID case involving Tanzania, where the sovereign respondent had unilaterally disclosed documents relating to the arbitral proceeding, when all that was agreed by the parties to be disclosed was the final award. The decision of the ICSID Tribunal in this instance has reflected a deliberate effort to increase transparency with respect to arbitral documents other than the final award. In ***Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,***[700] the ICSID Tribunal resolved the claimant's request for provisional measures on confidentiality.[701] The claimant filed this request alleging that Tanzania had unilaterally disclosed documents produced in the ICSID proceedings by

[699] *Id.* at ¶ 106.
[700] ICSID Case No. ARB/05/22 [hereinafter *Biwater Gauff v. Tanzania*].
[701] *Biwater Gauff v. Tanzania*, Procedural Order No. 3, 29 September 2006 ¶6.

publishing them on the Internet.[702] Tanzania defended its right to disclose documents by arguing that there should be not be any "curtailment of a sovereign State's right (and obligation) to inform the public about a matter of great public importance."[703] The Tribunal agreed with this position and further acknowledged "the public nature of this dispute and the range of interests that are potentially affected, including interests in transparency and public information."[704] In light of these concerns, the Tribunal stated that "any restrictions must be carefully and narrowly delimited."[705] Ultimately, the Tribunal identified documents that could and could not be released pending the final outcome of the arbitration, in the interest of protecting the integrity of the process.

Another dimension of this issue is the State's need to disclose documents obtained in the arbitration, but is constrained from doing so because of confidentiality agreements. When parties to an investment arbitration comply with document requests and/or tribunal orders for the disclosure of documents, parties can negotiate confidentiality agreements that would preclude the use of such documents obtained in the proceedings for purposes beyond the investment arbitration.

One of the aspects of the first award in the case of ***Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines***[706] was the finding by the ICSID Tribunal that the claimant had violated certain laws of the respondent sovereign relating to foreign

[702] *Id.* ¶ 13. The Minutes of the First Session of the Arbitral Tribunal, as well as the Procedural Order N°2 dated 24 May 2006 were published on the "Investment Treaty Arbitration" website (http://ita.law.uvic.ca/). Tanzania admitted that it was the source of these disclosed documents.
[703] *Biwater Gauff v. Tanzania*, Procedural Order No. 3, *supra* note 19, ¶ 150, quoting UROT's submission of 18 August 2006, para. 15.
[704] *Biwater Gauff v. Tanzania*, Procedural Order No. 3, *supra* note 19, ¶ 147.
[705] *Id*.
[706] ICSID Case No. ARB/03/25 [hereinafter Fraport], Award, 16 August 2007, *available at* http://ita.law.uvic.ca/documents/FraportAward.pdf. Note that this Award was subsequently annulled after the claimant initiated an annulment proceeding, and a new Award was rendered, still in favor of the sovereign respondent, in December 2014.

ownership of corporations, thereby rendering its investment invalid and therefore putting the case outside the jurisdiction of the ICSID Tribunal. In challenging the finding of this violation, the claimant argued that the violations had not been successfully prosecuted in the Philippines. With respect to that argument, the Tribunal made the following observation:

> The timing of the initiation of criminal action by the host state in the instant case is particularly complex. A detailed confidentiality agreement was negotiated by the parties to this arbitration and noted by the Tribunal. At the insistence of the Claimant, it precluded the Philippines from using material which might be produced in the course of document exchange in criminal proceedings in the Philippines.[707]

While the submissions and procedural orders in this case are not available to the public, one can glean from the above-quoted ruling that a confidentiality agreement between the parties prevented the sovereign respondent from using damaging evidence obtained in the course of the arbitral proceedings for the purpose of criminal prosecutions. The Tribunal in this instance appears to have recognized the constraint placed on the sovereign respondent in the enforcement of its criminal laws.

A publicly available procedural order on confidentiality can shed light to this discussion. In the case of ***United Parcel Service of America Inc. v. Government of Canada***,[708] the Tribunal in its Order outlining the confidentiality restrictions governing the case[709] also placed the confidentiality governing the arbitration proceedings at a superior position over national laws of the sovereign respondent or public interest. This is evident in pronouncements such as the following:

> Any request to the Government of Canada for documents under the *Access to Information Act*, including documents produced to Canada in these proceedings, will be governed by the provisions

[707] *Id*. ¶ 388.
[708] ICSID Case No. UNCT/02/1. (Hereinafter *UPS v. Canada*.)
[709] *UPS v. Canada*, Procedural Directions and Order of the Tribunal dated 4 April 2003.

> of that Act, except that no information designated by United Parcel Service of America, Inc. as confidential shall be disclosed to any requestor unless prompt notice of such request has been made and United Parcel Service of America, Inc. has been afforded the opportunity to make representations concerning such disclosure.[710]

The above-quoted text illustrates that confidentiality asserted by the claimant will prevail over a sovereign respondent's statutes granting public access to documents in government possession, *if* such possession has been obtained through an investment dispute. A key distinction here is that the confidentiality covers documents produced by the claimant, when the claimant has designated such document as confidential, and *not* documents already in the possession of the State party to begin with.

It is not disputed that confidentiality agreements are voluntary contracts. However, the evidence to prove one's case often lies in the hands of the opposing party. Although obtainable through discovery procedures, parties may press for confidentiality agreements to prevent the use of such documents outside the arbitration proceedings, precisely because they are aware of its damaging impact.

This dissertation argues that Tribunals have the power, citing overriding public interest, to shape the extent of coverage of allowable confidentiality agreements. ICSID Tribunals have residual power to interpret and apply arbitration rules in the absence of clear-cut provisions. In assessing the scope of its authority to interpret the ICSID Convention and arbitration rules, the Tribunal in the case of ***Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic***,[711] examined Article 44 of the ICSID Convention[712] and

[710] *Id*. ¶ 11.
[711] ICSID Case No. ARB/03/19. (Hereinafter *Suez v. Argentina*.)
[712] Article 44 of the ICSID Convention states: "Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises

declared that the last sentence of that provision granted tribunals "residual power" to decide procedural questions.[713] Following this reasoning, it would be appropriate for ICSID tribunals to step in and shape the allowable coverage of confidentiality agreements in line with public interest concerns, including those relating to the statutory obligations of governments to their constitutents.

3.2.1.2. Executive process privilege and deliberative process privilege

Parties to an investment arbitration can be required to produce evidentiary documents at the request of the Tribunal or at the request of the other party.[714] This can be problematic for State parties because many governmental entities typically enjoy a privilege against disclosure of confidential documents.[715] Although FOI legislation, discussed in the previous section, mandates disclosure of certain classes of governmental documents, papers documenting intra-governmental communication prior to the finalization of an official documents retains its privilege of confidentiality.

As noted by eminent investment law scholar Thomas W. Wälde, "[g]overnments sometimes invoke 'crown' or 'executive privilege' to refuse to comply with discovery requests."[716] He notes the balance that tribunals must strive to achieve when assessing governmental claims of privilege, "between reasonable accommodation of the special nature of government and tolerating abuse of the dual role of government as both arbitration party and sovereign."[717]

---

which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."

[713] *Suez v. Argentina*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae dated 19 May 2005, ¶10.

[714] *See, e.g.* ICSID Arbitration Rule 34(2).

[715] Barry Leon & John Terry, *Special Considerations When a State is a Party to International Arbitration*, 61 Disp. Resol. J. 69, 73 (2006).

[716] Thomas W. Wälde, *supra* note 691 at 174.

[717] *Id.* at 174.

Tribunals have generally rejected the sovereign parties' position that the determination of what is protected by executive privilege should be "self-judging" on the part of the State.[718] While an investment tribunal lacks the judicial power to compel compliance with discovery requests, tribunals can take "secondary sanctions" such as the drawing of adverse inferences against a party that refuses to produce requested documents.[719]

The case of ***Glamis Gold Ltd. v. United States of America***[720] illustrates how the rules on document production remain imprecise in delineating the scope of documents that a party can be compelled to produce, and much leeway is given to arbitration tribunals in determining what documents should be produced. The parties in that case had filed their respective objections to document production requests, necessitating the Tribunal to rule on their various objections.[721] In its Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, one of the asserted privileges that the Tribunal had to dispose of was deliberative process privilege.[722] The Tribunal put forward the observation that "The Tribunal observes that the law of the United States, both as to production of documents or to the privilege enjoyed by some set of documents, is not directly applicable to this arbitration. Rather document production in this arbitration is governed by Article 24[723] of the UNCITRAL

---

[718] *Id.* at 174.
[719] *Id.* at 175.
[720] This was an arbitration under Chapter 11 of NAFTA in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, and administered by ICSID. (Hereinafter *Glamis Gold v. USA*.)
[721] *Glamis Gold v. USA*, Decision On Parties' Requests For Production Of Documents Withheld On Grounds Of Privilege, 17 November 2005, ¶¶ 3-15.
[722] *Id.* ¶ 34 *et seq.* Deliberative process privilege "exempts from disclosure 'opinions, recommendations or advice offered in the course of the executive's decision making processes.'"
[723] Article 24 of the UNCITRAL Arbitration Rules provides:
"1. Each party shall have the burden of proving the facts relied on to support his claim or defence.
"2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.
"3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine."

Arbitration Rules and guided by the Parties' own agreements to production […]."[724]

Deliberative process privilege was also at issue in the case of ***United Parcel Service of America, Inc. v. Canada***,[725] where the Tribunal said that Canada's claim for cabinet privilege "would have to be assessed not under the law of Canada but under the law governing the Tribunal", and concluded that the governing law did not refer the Tribunal to national law.[726] From the vantage point of State parties, conclusions like this can be problematic because it essentially divests a sovereign respondent from making its own conclusive determination on whether a document is privileged, with an *ad hoc* tribunal making a final assessment on this matter.

In the case of ***ADF Group Inc. v. United States of America***,[727] the respondent filed a general objection to the claimant's motion for production of documents, with respect to documents "protected from disclosure by applicable law, including without limitation, documents protected by the attorney-client and government deliberative and pre-decisional privileges."[728] Although the Tribunal ruled that a determination of whether a document could be withheld on the ground of privilege would have to be determined at the point that the respondent claimed that a particular document was privileged,[729] it would seem that the Tribunal outlined a procedure that may be considered burdensome on sovereign respondents. The Tribunal required the respondent "to specify the documents in respect of which one or more privilege is claimed and the nature and scope of the particular privilege claimed, and

[724] *Glamis Gold v. USA*, Decision On Parties' Requests For Production Of Documents Withheld On Grounds Of Privilege, ¶ 20.
[725] *Supra.*
[726] *United Parcel Service of America Inc v Canada* [hereinafter *UPS*], Decision Relating to Canada's Claim of Cabinet Privilege, Ad hoc—UNCITRAL Arbitration Rules, IIC 267 (2004), 8 October 2004, ¶7.
[727] ICSID Case No. ARB(AF)/00/1 [hereinafter *ADF Group*].
[728] *ADF Group*, Award, 9 January 2003, ¶ 38.
[729] *Id.*

show the applicability of the latter to the former."[730]

In practice, this has the potential of translating into a contentious argument between claimant and respondent over *each* document asserted as privileged, requiring the sovereign respondent to defend its own determination of privilege every single time.

Indeed, it has been astutely noted that privileges which a government claims over its internal documents, "which may be taken for granted by states in domestic situations, are becoming less effective in the context of international arbitration. It is increasingly evident that attempts by a state party to avoid producing information on the basis of these kinds of privileges will meet resistance on the international stage."[731]

3.2.2. Corruption in investment treaty arbitration: two concepts of transparency

This section examines the relationship of transparency (the focus of this dissertation) with wider notions of transparency in the investment arbitration sphere.

As mentioned earlier, the recent literature regarding transparency in investment arbitration has fixated on the access of third parties to the dispute resolution process, i.e. procedural transparency. Transparency as a general concept, however, extends across a wider gamut of concerns.[732] Calls for greater transparency in government transactions, in particular, is a direct response to the problem of corruption. The United Nations Convention Against Corruption (UNCAC), to give an example of the most prominent international instrument aimed toward combating corruption, exhorts State parties "to adopt, maintain and strengthen

[730] *Id.*
[731] Barry Leon & John Terry, Special Considerations When a State is a Party to International Arbitration, 61 Disp. Resol. J. 69, 73 (2006).
[732] *See* Introduction.

systems that promote transparency and prevent conflicts of interest,"[733] and "take appropriate measures to promote transparency and accountability in the management of public finances."[734] Similarly, the well-known international non-governmental organization Transparency International defines its mission as follows: "Our Mission is to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society. Our Core Values are: transparency, accountability, integrity, solidarity, courage, justice and democracy."[735] In this context, Transparency International defines transparency as follows:

> Transparency is about shedding light on rules, plans, processes and actions. It is knowing why, how, what, and how much. Transparency ensures that public officials, civil servants, managers, board members and businesspeople act visibly and understandably, and report on their activities. And it means that the general public can hold them to account. It is the surest way of guarding against corruption, and helps increase trust in the people and institutions on which our futures depend.[736]

The link between transparency and the fight against corruption is therefore an established one. Meanwhile, as some authors have noted, "[m]ost international arbitrations deal with the bribing of public officials in their position as decision-makers"[737] and that "[i]t is now common for a tribunal to be faced at the outset with a host State objection that the investor committed bribery or fraud."[738] Considering that corruption in cases brought to investment arbitration has gained attention in recent years, these underexplored facets of transparency, with respect to corruption in investment arbitration, in particular, demands further attention.

[733] United Nations Convention Against Corruption (hereinafter "UNCAC"), 2349 UNTS 41 (entry into force 14 December 2005), Art. 7(4).
[734] UNCAC, Art. 9(2).
[735] Transparency International, at https://www.transparency.org/whoweare/organisation/mission_vision_and_values/0
[736] Transparency International, at https://www.transparency.org/what-is-corruption#what-is-transparency
[737] Hilmar Raeschke Kessler in collaboration with Dorothee Gottwald, *Corruption*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, Peter Muchlinski, et al., eds. (2008), at p. 588.
[738] Aloysius Llamzon and Anthony Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct*, in LEGITIMACY: MYTHS, REALITIES, CHALLENGES (ICCA CONGRESS SERIES NO. 18), Albert Jan Van den Berg, ed. (2015) at p. 451.

Examining transparency in investment arbitration must not be limited to evaluating the mechanisms that make the arbitral process more visible and accessible; a wholistic view demands that the wider aspects of transparency also be discussed in this dissertation, even briefly.

While corruption in cases brought to investment arbitration could be the subject of an entirely separate dissertation altogether, this particular section of this dissertation aims only to provide an overview of the intersection between: (1) transparency in investment treaty arbitration and (2) transparency as a tool for fighting corruption. As discussed in the introduction to this dissertation, public interest is the rationale spurring the transparency movement in investment treaty arbitration. Public interest has a direct link with the public's interest in ensuring the proper use of government resources. Corruption is directly related to the issue of the proper utilization of government funds and approval mechanisms for public service projects, many of which have a foreign investment element. Exposing the corruption that occurs in relation to these investment activities is one of the aims of increased transparency in investment arbitration.

Corruption is relevant to the State Parties in an investment arbitration case because allegations of corruption pertain to government officials and their actions. In recent years, the occurrence of corruption during investment-related activities has been raised with increasing frequency by States to mount a defense against investment claims.[739] As a defense, sovereign respondents have cited corruption to (1) contest the jurisdiction of the investment tribunal; (2) dispute the admissibility of the claims put forth by the investor; or (3) seek an annulment of the underlying investment agreement.[740] While corruption allegations have sometimes been

[739] Aloysius P. Llamzon, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION (2014), pp. 198, *et seq*.
[740] Aloysius P. Llamzon, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION (2014), p. 198.

raised by the claimants, especially when they allege solicitation of bribes by government officials, the attention brought to corruption in investment treaty arbitration has largely been due to its role as an element of a jurisdictional objection raised by State Parties, as will be seen in the immediately following section. This aspect of corruption, however, is not the focus of this dissertation, and the following sections will maintain a transparency perspective in relation to corruption in investment treaty arbitration.

3.2.2.1. Brief survey of investment treaty cases dealing with corruption

The procedural transparency that is the subject of this dissertation complements the wider transparency movement pushed forward by international non-governmental organizations like Transparency International. With the goal of making governmental dealings more accessible to public scrutiny, the transparency movement in investment treaty arbitration has the potential to make citizens aware of government transactions that have been affected by corrupt activities. This sub-section aims to provide a brief overview of investment treaty cases where arbitration tribunals had to deal with corruption issues. The purpose of this sub-section is to demonstrate that corruption is an issue that investment tribunals are routinely dealing with, and is possibly one of the areas of governance that can maximally benefit from the intensified public scrutiny brought about by the transparency movement.

Metal-Tech Ltd. V. Republic of Uzbekistan[741] is the first investment treaty arbitration where the investor's claims were dismissed due to corruption.[742] The investment claim was

[741] ICSID Case No. ARB/10/3 (hereafter *Metal-Tech v. Uzbekistan*).
[742] Carolyn B. Lamm, Brody K. Greenwald & Kristen M. Young, *From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption*, 29 ICSID REV. - FOREIGN INVEST. LAW J. 328–349, 329 (2014). One of the notable cases where corruption was the basis for dismissing an investment claim was *World Duty Free v. Kenya* (ICSID Case No. ARB/00/7); however, that claim was brought on the basis of an arbitration clause in a concession contract, and not pursuant to a bilateral investment treaty. *Id.*

brought against Uzbekistan by a ceramic and metal manufacturing company organized under the laws of the State of Israel,[743] pursuant to the 1994 bilateral investment treaty[744] between Israel and Uzbekistan.[745] In its oral and written submissions, the sovereign respondent argued that the ICSID Tribunal lacked jurisdiction over the investment dispute "because the Claimant's investment was 'implemented', i.e. made *and* operated, in violation of Uzbek law. In particular, the Claimant engaged in corruption and made fraudulent and material misrepresentations to gain approval for its investment."[746] The facts presented and considered by the ICSID Tribunal centered around lucrative "consultancy contracts" with three individuals who had no known expertise in claimant's industry, had known ties to government officials,[747] and had undisclosed payees for secretive transactions.[748] Giving credence to the evidence presented demonstrating corruption, and noting substantive Uzbek laws in relation to bribery,[749] the ICSID Tribunal held that it lacked jurisdiction over the investment claim because the investment was not made in accordance with the laws of the host State.[750] The Tribunal made the following statement regarding the nature of the dismissal of the claims:

> While reaching the conclusion that the claims are barred as a result of corruption, the Tribunal is sensitive to the ongoing debate that findings of corruption often come down heavily on claimants while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the

[743] *Metal-Tech v. Uzbekistan* - Award dated 4 October 2013, 7.
[744] ("Agreement between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Promotion and Reciprocal Protection of Investments", 4 July 1994.)
[745] *Metal-Tech v. Uzbekistan* - Award dated 4 October 2013, *supra* note 743 at 30.
[746] *Id.* at 30–31.
[747] One of the "consultants" was the brother of Uzbekistan's Prime Minister, while another "consultant" was a government official at the beginning of his consultancy arrangement with the claimant. Metal-Tech v. Uzbekistan – Award dated 4 October 2013, at 109 – 113.
[748] *Metal-Tech v. Uzbekistan* - Award dated 4 October 2013, *supra* note 743 at 69–72; Lamm, Greenwald, and Young, *supra* note 742 at 340–342.
[749] As summarized by the Tribunal, "The Respondent alleges that, in making its investment in Uzbekistan, the Claimant violated Articles 210-212 of the Uzbek Criminal Code. Those articles prohibit the giving or taking of bribes, directly or through an intermediary, in exchange for the performance or non-performance of an action." *Metal-Tech v. Uzbekistan* Award, at 93.
[750] *Metal-Tech v. Uzbekistan* - Award dated 4 October 2013, *supra* note 743 at 128.

> other, but rather to ensure the promotion of the rule of law, which entails that a court of tribunal cannot grant assistance to a party that has engaged in a corrupt act.[751]

The Tribunal stated at the outset of its analysis of the facts that their findings of corruption would rely on circumstantial evidence, noting that "corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence."[752] Thus, the Tribunal in *Metal-Tech* focused on the "red flags"[753] of corruption evinced by the questionable consultancy contracts, but did not make specific findings about which particular government officials actually received bribes from the claimant's "consultants".[754]

Metal-Tech is significant because it is the only investment treaty arbitration case to date wherein the investment claims were dismissed because of the corruption allegations.[755] Highlighting this case is important because it demonstrates how a tribunal can base its decision on jurisdiction on allegations of corruption. However, there have been a number of investment treaty claims where allegations of corruption were brought to the tribunals' attention, without being the deciding factor in an investment arbitration. What follows is a quick run-through of the kinds of corruption allegations that have surfaced in various investment treaty arbitration cases. In the interest of remaining focused on the topic of transparency, the overview below will mention only the corruption allegations and not delve into the tribunals' resolution of jurisdictional objections. Also, the quick survey below is limited to investment cases filed pursuant to bilateral investment treaties, excluding cases brought on the basis of an arbitration clause in a contract.

---

[751] *Id.* at 132–133.
[752] *Id.* at 79.
[753] *Id.* at 98–99.
[754] *Id.* at 98 et seq.
[755] Lamm, Greenwald, and Young, *supra* note 742 at 329.

In the case of ***Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines***,[756] which reached ICSID three times,[757] the sovereign respondent submitted evidence to show that the investor and its local business partner "engaged in a range of illicit activities" including: hiring a "consultant" to bribe government officials to issue government approvals, "engaging in an elaborate kickback scheme of overbilling" the Philippine government, allowing the investor's local partner to profit from sub-standard work, and laundering funds "to conceal their actual destinations and uses".[758] In the case of ***TSA Spectrum de Argentina SA v. Argentine Republic***,[759] the sovereign respondent alleged that the investor facilitated the payment of bribed to local public officials in order to guarantee the claimant "tailor-made bidding terms and conditions for the privatization of the management, control and administration of the radio-electric spectrum" that was subject of its investment.[760] In the case of ***Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt***,[761] the claimant's bribery of embassy officials to attain nationality documents came to light.[762] In the case of ***EDF (Services) Ltd v. Romania***,[763] the claimant alleged that a State agency acting on the behalf of Romania's prime minister solicited a bribe to approve an extension of claimant's business operations at the Bucharest airport, and when the claimant refused to offer such a bribe, its request to extend its service contract was denied.[764] In the case

[756] ICSID Case No. ARB/11/12 ("*Fraport v. Philippines*"). Invoked was the 1997 bilateral investment treaty between Germany and the Philippines.
[757] The first iteration of the Fraport case was an investment claim launched in 2003 (ICSID Case No. ARB/03/25) decided in favor of the sovereign respondent on 16 August 2007. This prompted claimant to file an annulment proceeding in 2008 decided in claimant's favor on 23 December 2010, thus paving the way for a second investment claim involving the same transactions, which however, was ultimately decided once again in favor of the sovereign respondent on jurisdictional grounds.
[758] *Fraport v. Philippines* – Award dated 10 December 2014 at ¶471.
[759] ICSID Case No. ARB/05/5 ("*TSA Spectrum v. Argentina*"). Invoked was the 1992 bilateral investment treaty between the Netherlands and Argentina.
[760] *TSA Spectrum v. Argentina* – Award dated 19 December 2008 at ¶166.
[761] ICSID Case No. ARB/05/15 ("*Siag v. Egypt*"). Invoked was the 1989 bilateral investment treaty between the Arab Republic of Egypt and Italy.
[762] *Siag v. Egypt* – Award dated 1 June 2009 at ¶330 *et seq*.
[763] ICSID Case No. ARB/05/13 ("*EDF v. Romania*"). Invoked was the 1995 bilateral investment treaty between the United Kingdom and Romania.
[764] *EDF v. Romania* – Award dated 8 October 2009, at ¶¶ 221 – 237.

of ***RSM Production Corp. v. Grenada***,[765] the claimant alleged that it was denied an offshore exploration license in favor of another company that had bribed high-ranking government officials and also paid for the legal defense of the Government of Grenada in a prior arbitration launched by the claimant.[766] The allegations of corruption in these cases were not the basis of the tribunals' ultimate conclusions in these cases regarding the admissibility of claims. However, it is important to note the kind of corrupt activities that can occur in relation to foreign investment activity, to fully understand what enhanced transparency in investment arbitration can shed light upon, beyond the investment activity *per se*.

While the arbitral awards in the aforementioned ICSID cases are available on the internet, some are not directly available on the ICSID website and instead appear on the website italaw.com. The other documents in these cases are also generally unavailable. The nature of the allegations described above, however, are of the kind that merit greater public scrutiny into the actions of public officials. The next section examines the possible effects of an enhanced transparency regime on the treatment of corruption allegations in investment treaty arbitration cases.

3.2.2.2. Analysis of impact/potential impact of an increased transparency regime on corruption allegations

Increased procedural transparency in investment arbitration proceedings, allowing for third parties and the public to obtain information about the dispute, may potentially change the approach that State parties will accord the corruption defense in challenging tribunal jurisdiction.

[765] ICSID Case No. ARB/10/6. Invoked was the 1986 bilateral investment treaty between the United States of America and Grenada.
[766] *RSM Production Corp. v. Grenada* – Award dated 10 December 2010 at ¶¶ 5.2.1. – 5.2.9.

We may infer such changes from the trends so far seen with respect to the outcomes of raising this defense. A scholar who has intensely studied the effects of corruption allegations on the outcomes of investment disputes has highlighted the following issues, among others: (1) evidentiary standards required for asserting the existence of corruption; (2) tribunal inquiry into whether the public officials involved in corruption were prosecuted in the host State; (3) the hesitancy of investment arbitration tribunals to dig too deeply into corruption allegations.[767]

These observations stem from cases with no third party intervention. If third parties become more involved in investment cases and are privy to written submissions and oral hearings where the corrupt activities are presented for the tribunal's consideration, then a public clamor for prosecution may be a likely result.

Increased pressure from public scrutiny might also make tribunals adhere to stricter standards of determining the veracity of corruption allegations, at the risk of exposing public officials of the host State to unwarranted prosecution in an effort to substantiate corruption as a host State defense against jurisdiction. Carolyn Lamm, a prominent investment arbitration practitioner who has dealt with corruption issues as counsel for sovereign respondents in three of the cases mentioned above, makes the following observation along with her associates and co-authors:

> […] there is considerable debate regarding the burden and standard of proof for allegations of corruption, fraud and illegality. Specifically there is a divergence of opinion regarding whether the standard of proof should be heightened thus requiring the party alleging corruption or other illegality to make a stronger showing, and whether the burden of proof may shift under certain circumstances, thus requiring the party accused of corruption or illegality to proffer evidence to rebut the allegations against it.[768]

As non-party participation and publication of investment treaty arbitration documents

[767] Aloysius P. Llamzon, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION (2014), pp. 201, *et seq*.
[768] Lamm, Greenwald, and Young, *supra* note 742 at 331.

increase as the transparency movement progresses, corrupt practices by government officials that may have otherwise gone unreported may draw increased public scrutiny. The jurisprudence in these cases with respect to corruption allegations will have to develop some measure of consistency as the tribunal's handling of these allegations will likewise come under scrutiny.

3.3. Non-Disputing State Parties and Transparency

As discussed earlier, the home State of the investor is involved in the investment dispute not as a party in the arbitration proceedings but rather as the investment treaty partner of the host State, which is the sovereign respondent. While this dissertation considers the non-disputing State Party as one of the four categories of non-parties in the transparency regime (as discussed at the outset of Chapter 2), transparency issues relating to non-disputing State Parties are examined in the current chapter on State Parties; as a State itself, the concerns of the sovereign respondent's investment treaty partner mirrors that of the disputing State Party more than they do that of the non-governmental non-parties discussed in the previous chapter. It is important to distinguish non-disputing State parties from non-sovereign entities that seek to intervene in investment disputes, and highlight that a distinct set of rules should apply to these entirely separate categories of non-parties.

The participation of non-disputing State Parties in the investor-State dispute resolution process is relevant for the following reasons: (1) its proposals and observations during the treaty negotiation process are reflected in the *travaux preparatoires* of the relevant investment agreement; (2) submissions in the form of *amicus curiae* briefs may be allowed by the investment arbitration tribunal with respect to issues of treaty interpretation; and (3) the facilitation of enforcement of arbitral awards rendered in favor of their investors at the

conclusion of the investment dispute.[769] Because this dissertation is concerned with transparency in investment treaty arbitration, discussion in this section will focus on the second mode of participation only. On a related point regarding access to the arbitral proceedings, issues regarding notification about ongoing investment treaty disputes will also be discussed.

In a thought-provoking book chapter, prominent arbitrator Gabrielle Kaufmann-Kohler has cautioned that non-disputing State party submissions "pose risks that NGO submissions do not raise."[770] She points out that written submissions by an investor's home State should address matters of treaty interpretation only, as "a home State submission defending a position on factual issues in aid of its own national would *de facto* equate, or at least come very close, to diplomatic protection."[771] The following sections will discuss diplomatic protection and its relationship to investor-State dispute settlement, then proceed to discuss the existing parameters for non-disputing State Party participation in investment treaty arbitration.

3.3.1. Diplomatic protection: Why non-disputing State Party participation is problematic

Diplomatic protection is highlighted in the UNCITRAL Rules on Transparency as a danger to watch out for in allowing submissions from the non-disputing party to the investment treaty. Article 5 of the Rules on Transparency emphasizes "the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection."[772] This sub-section explains why diplomatic protection is a concern in relation to

[769] Loretta Malintoppi and Hussein Haeri, *The Non-Disputing State Party in Investment Arbitration: An Interested Player or the Third Man Out?*, in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION, David D. Caron, et al., eds. (2015), at p. 566.
[770] Gabrielle Kaufmann-Kohler, *Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?*, in DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT 307–326, 319 (Laurence Boisson de Chazournes, Marcelo Kohen, & Jorge Vinuales eds., 2012).
[771] *Id.*
[772] UNCITRAL Rules on Transparency, Article 5(2).

the transparency measure of allowing submissions from the non-disputing State Party.

Before the advent of investment treaty arbitration, diplomatic protection was the method by which a dispute between a State and a private party could be resolved.[773] As succinctly summarized by Dolzer and Schreuer, prominent commentators on the investor-State dispute settlement system:

> Under traditional international law, investors did not have direct access to international remedies to pursue claims against foreign states for violation of their rights. They depended on diplomatic protection by their home states. A state exercising diplomatic protection espouses the claim of its national against another state and pursues it in its own name."[774]

Diplomatic protection is considered by scholars of investment arbitration as the predecessor for the investor-State dispute settlement system.[775] The creation of a mechanism by which investors have direct recourse against host States without having to seek diplomatic protection from their home States was intended to *de-politicize* investment disputes,[776] by bringing these "within the realm of law rather than of politics and diplomacy."[777] With direct access to international arbitration against host States, investors have been freed from "the often politically motivated discretion of states whether or not to exercise diplomatic protection."[778]

This objective of de-politicization is embodied in an express prohibition on diplomatic protection contained in Article 27 of the ICSID Convention:

> (1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have

[773] August Reinisch and Loretta Malintopi, *Methods of Dispute Resolution*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, Peter Muchlinski, et al., eds. (2008), at p. 712.
[774] Rudolf Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008), at p. 211.
[775] Kaufmann-Kohler, *supra* note 770 at 305, citing *inter alia* Ben Juratowitch, *The Relationship between Diplomatic Protection and Investment Treaties,* 23(1) ICSID Review – Foreign Investment Law Journal 10 (2008).
[776] Malintoppi and Haeri, *supra* at 565; Kaufmann-Kohler, *supra* at 305 – 6.
[777] Kaufmann-Kohler, *supra* note 770 at 306.
[778] Reinisch, *supra* note 33 at 259.

> submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.
>
> (2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

The ***Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)***, decided by the International Court of Justice in 1970,[779] is often cited as a prime example of a State-to-State dispute that was initiated to resolve an investment claim. In that case, the Belgian government stepped in to bring a claim on behalf of its nationals, who were shareholders in the Canadian company subject of the case, lodging a case against Spain, seeking reparation for damage done to the Barcelona Traction, Light and Power Company by the Spanish government.[780]

The interests of a home State in espousing a claim of its nationals was viewed by the International Court of Justice as follows:

> […] the Belgian Government would be entitled to bring a claim if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty or a general rule of law. The opinion has been expressed that a claim can accordingly be made when investments by a State's nationals abroad are thus prejudicially affected, and that **since such investments are part of a State's national economic resources, any prejudice to them directly involves the economic interest of the State**.[781]

Bilateral (and multilateral) investment treaties now represent the protection extended by a home State over its nationals, achieved through the negotiation of these treaties to ensure that the rights of its citizens are protected abroad. States no longer have to espouse the claims of its nationals to seek redress from the State where the investment was made, since investors

[779] Award dated 5 February 1970.
[780] *Id.*, ¶1, *et seq*.
[781] *Id.*, at ¶86. Emphasis supplied.

now have direct recourse against host States for investment treaty violations.

3.3.2. Comparison of transparency issues between sovereign respondents and non-disputing State Parties

The transparency concerns of non-disputing State parties diverge at a certain degree from the concerns of sovereign respondents, and are generally limited to: (1) the proper interpretation of the investment treaty pursuant to which the investment claim was filed; and (2) its duties and obligations with respect to its nationals that are claimants in the dispute.

Procedurally, the differences begin at the initiation of the investment claim. Sovereign respondents are notified, as a matter of due process, that a request for arbitration has been filed against it by an investor. In contrast, whether the home State of the investor of a pending claim will be notified depends on the existence of provisions in the applicable investment treaty or specific arbitration rules mandating such notification, or if one of the parties voluntarily informs the non-disputing State party regarding an ongoing dispute. Neither the ICSID Convention nor Arbitration Rules contain a specific provision mandating notification of the home State of the investor regarding the initiation of an investment claim. (However, when ICSID registers a case, the names of the parties, as well as the particular investment treaty being invoked, are among the basic case information that is made publicly available.) Some treaties, however, mandate such notification, as well as the requirement to provide the non-disputing State party with the written submissions, transcripts, arbitral awards, and other documents produced during the arbitration proceedings. Notably, NAFTA and CAFTA-DR contain provisions that direct the sovereign respondent to inform the non-disputing State parties that an investment claim has been filed, and to furnish the other State parties with copies of

submissions and awards, among others.[782] The US – Model Bilateral Investment Treaty also contains a similar provision which has been adopted in some of its bilateral investment treaties.[783]

The filing of an investment claim by one its nationals against one of its treaty partners has a potential impact on the non-disputing State party, and more mechanisms should be put in place to ensure that the non-disputing State party has access to the proceedings and is informed about the case from the very beginning.

If the interpretation of provisions in the bilateral investment treaty is in issue, then the non-disputing State parties should be given every opportunity to present its views on interpretation, as the outcome of the arbitration proceeding with respect to these provisions has the potential to impact the interpretation of similar provisions in that State's bilateral investment treaties with other countries. An extended discussion appears in separate section below, arguing that non-disputing State parties should be allowed – as a matter of right – to file written submissions on matters of treaty interpretation.

---

[782] NAFTA Article 1127: "Notice – A disputing Party shall deliver to the other Parties: (a) written notice of a claim that has been submitted to arbitration no later than 30 days after the date that the claim is submitted; and (b) copies of all pleadings filed in the arbitration."
DR-CAFTA Article 10.21: "Transparency of Arbitral Proceedings
1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:
(a) the notice of intent;
(b) the notice of arbitration;
(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 10.20.2 and 10.20.3 and Article 10.25;
(d) minutes or transcripts of hearings of the tribunal, where available; and
(e) orders, awards, and decisions of the tribunal."

[783] U.S. Model BIT Article 29: "Transparency of Arbitral Proceedings – 1. […] the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:
(a) the notice of intent;
(b) the notice of arbitration;
(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [Amicus Submissions] and Article 33 [Consolidation];
(d) minutes and transcripts of hearings of the tribunal, where available; and
(e) orders, awards, and decisions of the tribunal."

Another aspect pointing to the necessity of providing information to the non-disputing Party relates to allegations made in the course of the arbitral proceedings relating to the conduct of the home State's nationals in the host State. As will be discussed below, corruption is increasingly common in investment arbitration (or, arguably, has always been common, but is only now being highlighted for purposes of launching a jurisdictional defense). A non-disputing Party has a duty and an interest in monitoring the actions of its nationals abroad, especially if those actions involve criminal activity. One salient example embodying this duty is the legislation in the United States known as the Foreign Corrupt Practices Act,[784] which renders unlawful any bribery of foreign officials committed by U.S. nationals abroad.

An ongoing investment dispute has potential implications on the home State of the suing investor with respect to various aspects of governance, and the access of the non-disputing State party to the proceedings should be treated as standard procedure.

3.3.3. Non-disputing State Party participation as part of the transparency movement in investment treaty arbitration

Examining the key international legal instruments designed specifically for investment treaty arbitration – NAFTA Chapter 11, the ICSID Convention and Arbitration Rules, and the UNCITRAL Transparency Rules – reveals that there is as yet no uniform approach to dealing with the participation of non-disputing State parties. NAFTA expressly allows the practice but provides no guidelines, ICSID makes no distinction between non-governmental third parties and non-disputing State Parties, while the UNCITRAL Transparency Rules devotes an entire article to the matter.

[784] 15 U.S.C. § 78dd-1, et seq.

3.3.3.1. NAFTA and non-disputing State party participation

Article 1128 of NAFTA Chapter 11 provides: "On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement." The wording of this provision makes it clear that the non-disputing State Parties have a *right* to be heard on an issue of NAFTA interpretation.[785] The scope of this provision notably does not extend towards addressing issues of fact.[786] This treaty provision is crafted in a way that limits non-disputing State parties to issues of treaty interpretation.

Commentators have noted that Article 1128 provides no guidance or procedure to operationalize this provision.[787] The rule does not mandate written submissions nor proscribe oral submissions, but non-disputing State Parties in NAFTA cases have thus far made written submissions only.[788] The provision also does not specifically provide for the right of a non-disputing State Party to attend the oral hearings in the case, although tribunals have generally allowed the presence of non-disputing State Parties at NAFTA hearings.[789] The right of non-disputing State Parties is arguably implied in the provision because to deny them the ability to apprise themselves of issues raised during the hearings would effectively render their participation right nugatory.[790]

3.3.3.2. ICSID and non-disputing State party participation

As mentioned above, diplomatic protection is explicitly prohibited in the ICSID

[785] Meg Kinnear, TRANSPARENCY AND THIRD PARTY PARTICIPATION IN INVESTOR-STATE DISPUTE SETTLEMENT 8 (2005), http://www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf.
[786] Andrea K. Bjorklund, *NAFTA Chapter 11*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 465–532, 517 (Chester Brown ed., 1. ed., 1. impr ed. 2013); Kinnear, *supra* note 785 at 8.
[787] Kinnear, *supra* note 785 at 8; Bjorklund, *supra* note 786 at 517.
[788] Bjorklund, *supra* note 786 at 518; Kinnear, *supra* note 785 at 8.
[789] Bjorklund, *supra* note 786 at 517–518.
[790] *Id.* at 518.

context. However, the ICSID Arbitration Rules concerning third-party submissions fail to draw clear parameters regarding the content of written submissions by non-disputing State parties. Rule 37(2) of the ICSID Arbitration Rules, discussed in the previous chapter as the rule that allows Tribunals to accept written submissions from third parties, does not distinguish between non-disputing State parties and non-governmental organizations. As such, sub-paragraph "(a)" of that rule mandates the Tribunal to consider the extent to which "the non-disputing party submission would assist the Tribunal in the determination of a *factual* or legal issue related to the proceeding".[791] As already mentioned above, allowing a non-disputing State party to present arguments regarding the facts of a particular dispute, in support of its national that is the claimant in that dispute, runs the risk of being *de facto* diplomatic protection.[792] However, it may be argued that Tribunals will construe Rule 37(2) with deference to Article 27 of the ICSID Convention.[793]

During the rule amendment process that led to the 2006 version of the ICSID Arbitration Rules, the initial proposal for Rule 37(2) was worded as allowing a "person or State" to make a written submission.[794] However, some commentators during the revision process considered this phrase too restrictive, so the current wording reads "person or entity".[795]

As a result of having one rule applicable to non-parties, whether sovereign or not, the ICSID Arbitration Rules have no specific rule limiting the submissions of non-disputing State Parties to matters of interpretation of the investment treaty.

[791] ICSID Arbitration Rules, Rule 37(2)(a).
[792] Kaufmann-Kohler, *supra* note 770 at 319.
[793] *Id.*
[794] Eloïse Obadia, *Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration*, 22 ICSID REV. - FOREIGN INVEST. LAW J. 349–379, 368 (2007).
[795] *Id.* at 368.

3.3.3.3. UNCITRAL Rules on Transparency and non-disputing State Party participation

The imprecision of Rule 37(2) of the ICSID Convention may have inspired the drafters of the UNCITRAL Transparency Rules to create separate rules for third-party participation by non-governmental entities and non-disputing State parties. Article 4 of the UNCITRAL Transparency Rules govern "Submission by a third person", which, as discussed in the previous chapter, refers to "a person that is not a disputing party, and not a non-disputing Party to the treaty."[796] Meanwhile, Article 5 governs "Submission by a non-disputing Party to the treaty":

> Article 5. *Submission by a non-disputing Party to the treaty*
>
> 1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.
>
> 2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.
>
> 3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.
>
> 4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.
>
> 5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.

A reading of the above provision reveals that the UNCITRAL Rules on Transparency contemplate two types of submissions from non-disputing State Parties: (1) submissions on issues of treaty interpretation; and (2) submissions on matters within the scope of the dispute.

[796] UNCITRAL Transparency Rules, Article 4(1).

The first type of submission is treated as a matter of right in Article 5(1), with the use of the word "shall". Acceptance of a submission from a non-disputing State Party is required when requested by the non-disputing State Party referred to. The second part of Article 5(1) contemplates inviting the non-disputing State Party to make a submission when it has not *motu proprio* sought such participation. In the latter scenario, the Rules on Transparency instruct the tribunal to consult the disputing parties before extending such an invitation.

The second type of submission, provided in Article 5(2), gives the tribunal the discretion to accept submissions relating to other issues. Using the language "matters within the scope of the dispute", this provision appears to be an attempt to place non-disputing State Parties on equal footing with the non-disputing parties covered by Article 4, and also makes a cross-reference to the factors listed in Article 4(3). Mindful of a significant difference between the non-parties contemplated in Articles 4 and 5, the provision also cautions Tribunals regarding "the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection."[797]

3.3.3.4. Survey of investment treaty arbitration cases with non-disputing State Party participation

Kaufmann-Kohler points out that, unlike NAFTA cases, there is as yet no practice of non-disputing State submissions made pursuant to a provision in a bilateral investment treaty.[798] However, there are a few significant examples of non-disputing State party involvement in the context of bilateral investment treaties. Below are three examples where the non-disputing State party provided comments on the proper interpretation of the BIT invoked in the dispute. Each case presents a different scenario as to the timing of the

[797] UNCITRAL Transparency Rules, Article 5(2).
[798] Kaufmann-Kohler, *supra* note 770 at 314.

interventions, the party that initiated the involvement of the non-disputing State party, and the outcome of the non-disputing State party's participation.

3.3.3.4.1. *Aguas del Tunari v. Bolivia*

The case of ***Aguas del Tunari S.A. v. Republic of Bolivia***[799] was initiated in 2002 pursuant to the 1992 BIT between Bolivia and the Netherlands.[800] Aguas del Tunari, S.A. identified itself as "a legal person constituted in accordance with the laws of Bolivia", and that it could bring a claim pursuant to the Netherlands – Bolivia BIT because it was "controlled directly or indirectly by nationals of the Netherlands".[801] Referring to two entities incorporated under Dutch law that owned shares in a Luxembourg corporation which directly owned 55% of the shares in Aguas del Tunari, S.A.,[802] the claimant argued that corporate structure of the Bolivian *sociedad anónima* made it a national of the Netherlands, as defined under the BIT.[803] This was the basis for claimant's assertions that the ICSID Tribunal had jurisdiction over the dispute. For its part, Bolivia presented objections to the Tribunal's jurisdiction, arguing primarily that Bolivia did not consent to the jurisdiction of ICSID.[804] The sovereign respondent also argued that Aguas del Tunari, S.A. was not a national of the Netherlands as defined under the BIT, since Aguas del Tunari, S.A. was not "controlled directly or indirectly" by Dutch nationals.[805]

[799] ICSID Case No. ARB/02/3. (Hereinafter "*Aguas del Tunari v. Bolivia*".)
[800] *Aguas del Tunari v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, dated 21 October 2005, ¶79.
[801] *Id*., at ¶81, *cf.* ¶80. One of the provisions defining "nationals" that could bring a claim under the BIT enumerated "legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party."
[802] *Id*., at ¶¶70 – 72, *cf.* ¶81.
[803] *Id*., at ¶82.
[804] *Id*., at ¶84.
[805] *Id*., at ¶85.

The interpretation of the BIT was at the crux of all issues presented by the parties in the jurisdictional phase of the arbitration. Claimant introduced documents into the proceedings that were written exchanges between members of the legislative and executive branches of the Dutch government, with the former seeking a response from the latter on the question of whether multinational corporations could invoke the BIT.[806] The claimant argued through its expert witness that the intragovernmental communications contradicted each other and indicated "confusion as to the facts."[807] The sovereign respondent, on the other hand, seized upon these documents introduced by the claimant to argue that the interpretation of the government of the Netherlands about who can invoke the BIT was the same as its own interpretation, such that both State parties to the treaty "are on record as saying that [the BIT] does not apply to this case."[808]

In its Decision on Respondent's Objections to Jurisdiction, the Tribunal devoted a considerable amount of discussion to a "unique aspect of this proceeding, namely its consideration of the relevance of several statements of the Netherlands, the non-disputing State party to the BIT."[809] The Tribunal decided to reach out to the non-disputing State party for further elucidation on the disputed intra-governmental communications. In a 2004 letter described by the Tribunal in its decision as "the first inquiry of a non-disputing State Party to a BIT," the Tribunal wrote to the Legal Advisor of the Foreign Ministry of the Netherlands "to secure the comments of the Netherlands as to specific documentary bases for written responses which the Dutch government provided to parliamentary questions."[810] Kaufmann-Kohler notes

[806] *Id*., at ¶¶252 – 257.
[807] *Id*., at ¶256.
[808] *Id*., at ¶249.
[809] *Id*., at ¶248.
[810] *Id*., at ¶258.

that the Tribunal "was mindful not to trigger the Netherlands' diplomatic protection" by using specific language to that effect and highlighting Article 27 of the ICSID Convention.[811]

The Tribunal also delineated the parameters of the reply sought from the Netherlands as a non-disputing State party. The Tribunal wrote in its letter:

> […] Given that the Government of the Netherlands is not a party or otherwise present in this arbitration, the Tribunal concludes that information from the Government of the Netherlands would assist the work of the Tribunal. Given further the above quoted Article 27 of the ICSID Convention and the fact that the Netherlands is not a party to this arbitration, the Tribunal is also of the view that such questions must be **specific and narrowly tailored, aimed at obtaining information supporting interpretative positions of general application rather than ones related to a specific case**.[812]

The Netherlands replied through the Legal Advisor of the Foreign Ministry with a cover letter describing the intra-governmental communications as "based on information from the press" which "may not necessarily have been correct",[813] and which had as an attachment a document from 1992 entitled "Interpretation of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Bolivia."[814] Ultimately, the Tribunal concluded that the response from the Netherlands provided no additional information that would be relevant in shedding light on the "general interpretative position" of the Netherlands on the BIT provisions at issue.[815]

[811] Kaufmann-Kohler, *supra* note 770 at 314. The letter sent by the Tribunal was quoted in its 21 October 2005 Decision on Respondent's Objections to Jurisdiction at ¶258; with respect to diplomatic protection, the Tribunal wrote: "The Tribunal recognizes the obligation of the Netherlands under [Article 27 of] the ICSID Convention to not provide diplomatic protection to its nationals in the case of investment disputes covered by the Convention. In this sense, the Tribunal wishes to emphasize that it does not seek the view of the Netherlands as to the Tribunal's jurisdiction in this matter, rather it seeks only to secure the comments of the Netherlands as to specific documentary bases for written responses which the Dutch government provided to parliamentary questions."

[812] *Aguas del Tunari v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, dated 21 October 2005, ¶258. (Emphasis supplied.)

[813] *Id*., at ¶261.

[814] *Id*., at ¶259.

[815] *Id*., at ¶262.

3.3.3.4.2. *CME v. Czech Republic*

The case of ***CME Czech Republic B.V. v. The Czech Republic*** was an UNCITRAL arbitration proceeding initiated in the year 2000 by a Dutch corporation pursuant to the 1991 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic ("Netherlands – Czech Republic BIT").[816] In 2001, the Tribunal issued a Partial Award finding the sovereign respondent liable for violations of the BIT.[817] After the issuance of this Partial Award, the Czech Republic called for consultations with the Netherlands, pursuant to Article 9 of the BIT.[818] This treaty provision allows either State party to "propose the other Party to consult on any matter concerning the interpretation or application" of the BIT.[819] The Czech Government expressed "its concern over a number of aspects of the Partial Award which were in its view inconsistent with the Treaty."[820] Specifically, the Czech Republic sought to consult with the Netherlands about: (1) the correct interpretation of the BIT provision which specifies the applicable law for resolving an investment dispute; (2) the manner in which the BIT should be applied to claims of predecessors of an investment bringing claims in an investment dispute; and (3) the application of the BIT to investment disputes which had previously been raised by an indirect holder of the same investment of different nationality under a comparable BIT.[821]

After a series of meetings between representatives of the Czech and Dutch governments, their "Common Positions" on these three issues were recorded in Agreed

[816] *CME v. Czech Republic*, Final Award dated 14 March 2003, at ¶¶ 1 – 3. In ¶3, state succession is clarified: "The Treaty entered into force in the Czech and Slovak Federal Republic on October 1, 1992 and, after the Czech and Slovak Federal Republic ceased to exist on December 31, 1992, the Czech Republic succeeded to the rights and obligations of the Czech and Slovak Federal Republic under the Treaty."
[817] *CME v. Czech Republic*, Partial Award dated 13 September 2001, at ¶624.
[818] *CME v. Czech Republic*, Final Award dated 14 March 2003, at ¶87.
[819] Netherlands – Czech Republic BIT, Art. 9.
[820] *CME v. Czech Republic*, Final Award dated 14 March 2003, at ¶87.
[821] *Id*., at ¶88. On the third point, note that the *CME v. Czech Republic* case is often discussed in relation to the topic of parallel proceedings in investment arbitration, since the UNCITRAL case of *Ronald S. Lauder v. Czech Republic* was brought concerning the same investment, but under the Czech Republic – USA BIT.

Minutes dated 1 July 2002.[822] In providing these Agreed Minutes to the Tribunal, the sovereign respondent put forward the view that the Common Positions of the contracting State parties to the BIT should bind the Tribunal on these issues. The Tribunal summarized the Czech Republic's position as follows:

> The Respondent's position in respect to the agreed minutes on the Common Position of the delegates of The Netherlands and the Czech Republic is that the two contracting States reserved to themselves the exclusive competence to decide on how the Treaty should be interpreted and applied. **The Tribunal has not more competence to state how the Treaty shall be interpreted and applied than any one of the State parties unilaterally.** To the extent that a tribunal makes an incorrect interpretation or misapplies the Treaty, the States parties can overrule the tribunal's mistake. […]
>
> **The common positions, representing the interpretations and application of the Treaty agreed between its contracting parties, are conclusive and binding on the Tribunal.**[823]

In arriving at the Final Award, however, the Tribunal did not expressly state, how much deference, if any, should be accorded to the Common Positions agreed upon by the State parties with respect to interpretation of the treaty provisions at issue. Instead, the Tribunal stated that the Common Positions "support the Tribunal's view" with respect to one issue,[824] "confirms" the Tribunal's analysis with respect to another,[825] and was contrary to the respondent's position on another issue.[826]

In refraining to use the Common Positions as a source of interpretation and instead use it as a reference point to either support or confirm its own analysis, the Tribunal appeared to assert its own analysis over that of the Contracting Parties to the BIT, without explaining to what extent it paid attention to the Common Positions.

[822] *CME v. Czech Republic*, Final Award dated 14 March 2003, at ¶89.
[823] *Id*., at ¶216 – 217. (Emphasis supplied.)
[824] *Id*., at ¶437.
[825] *Id*., at ¶400.
[826] *Id*., at ¶504.

3.3.3.2.3. *SGS v. Pakistan*

The case of ***SGS Société Générale de Surveillance, S.A. v. Islamic Republic of Pakistan***[827] was an ICSID case initiated in 2001 pursuant to the Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments ("Switzerland – Pakistan BIT"). This case is significant because it is the first time that an investment arbitration tribunal examined the scope of an umbrella clause in a BIT.[828] In its Decision on Objections to Jurisdiction,[829] the Tribunal rejected the claimant's argument that Article 11 of the Switzerland – Pakistan BIT elevated breaches of a contract to the status of breaches of the investment treaty.[830] The Tribunal ultimately ruled that, although it had jurisdiction over SGS's claims pursuant to the BIT, it did not have jurisdiction over claims based on breaches of contractual commitments in the Pre-Shipment Inspection Agreement signed between SGS and the government of Pakistan.[831] In its discussion on the proper interpretation of Article 11 of the BIT, the Tribunal noted that it had heard Pakistan's views, and faulted claimant for not submitting evidence about Switzerland's interpretation of the provision that would support claimant's position:

> The Tribunal is not saying that States may not agree with each other in a BIT that henceforth, all breaches of each State's contracts with investors of the other State are forthwith converted into and to be treated as breaches of the BIT. What the Tribunal is stressing is that in this case, **there is no clear and persuasive evidence that such was in fact the intention of both Switzerland and Pakistan in adopting Article 11 of the BIT**. Pakistan for its part in effect denies that, in concluding the BIT, it had any such intention. SGS, of course,

---

[827] ICSID Case No. ARB/01/13. (Hereinafter "*SGS v. Pakistan*".)
[828] *SGS v. Pakistan*, Decision of the Tribunal on Objections to Jurisdiction dated 6 August 2003, ¶164; Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, OECD Working Papers on International Investment, 2006/03, OECD Publishing. http://dx.doi.org/10.1787/415453814578 (2006), at pp. 15 – 16.
[829] *SGS v. Pakistan*, Decision of the Tribunal on Objections to Jurisdiction dated 6 August 2003.
[830] Yannaca-Small, *supra* note 828, at 13, citing *SGS v. Pakistan*, Decision of the Tribunal on Objections to Jurisdiction dated 6 August 2003 at ¶166. Article 11 of the Switzerland – Pakistan BIT states: "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party." *SGS v. Pakistan*, Decision of the Tribunal on Objections to Jurisdiction dated 6 August 2003, at ¶53
[831] Decision of the Tribunal on Objections to Jurisdiction dated 6 August 2003, at ¶190.

> does not speak for Switzerland. But it has not submitted evidence of the necessary level of specificity and explicitness of text. We believe and so hold that, in the circumstances of this case, SGS's claim about Article 11 of the BIT must be rejected.[832]

After the publication of this decision, the Swiss government sent a letter to ICSID to express its disagreement with the Tribunal's "very narrow interpretation" of the umbrella clause provided in Article 11 of the Switzerland – Pakistan BIT, and explaining the State's intentions upon entering the treaty.[833] The letter from the Swiss authorities inquired as to "why the Tribunal has not found it necessary to enquire about their view on the meaning of Article 11 in spite of the fact that the Tribunal attributed considerable importance to the intent of the Contracting Parties in drafting this Article and indeed put this question to one of the Contracting Parties (Pakistan)."[834] The letter from the Swiss government also strongly expressed its dismay at the Tribunal's interpretation: "[…] the Swiss authorities are alarmed about the very narrow interpretation given to the meaning of Article 11 by the Tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions."[835] However, since this letter was a reaction to the already-rendered Decision of the Tribunal on Objects to Jurisdiction, it had no influence on the outcome of the case.[836]

[832] *Id*., at ¶173. (Emphasis supplied.)
[833] Kaufmann-Kohler, *supra* note 770 at 315; Katia Yannaca-Small, *supra* note 828, at 15 – 16.
[834] Note on the Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13 SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, attached to the Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy Secretary-General dated 1 October 2003 (hereinafter "2003 Swiss Note on Interpretation", quoted in Kaufmann-Kohler, *supra*, at 315, citing Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW, Todd Weiler, ed. (2005).
[835] 2003 Swiss Note on Interpretation, *supra*, quoted in Yannaca-Small, *supra*, citing Gaillard, *supra.*
[836] Kaufmann-Kohler, *supra* note 770 at 315.

3.3.4. A matter of right: non-disputing State Party participation with respect to investment treaty interpretation

Non-party participation is a key aspect of transparency. The cases discussed in the previous sub-section demonstrate the different outcomes for non-disputing State Parties. In the ICSID case of ***Aguas del Tunari v. Bolivia***, the Tribunal initiated communication to the non-disputing State Party in seeking clarificatory comments regarding intragovernmental communications on treaty provisions. In the UNCITRAL case of ***CME v. Czech Republic***, the sovereign respondent initiated consultations with its treaty partner, but it is unclear what deference, if any, the Tribunal applied to the common positions of the treaty parties. In the ICSID case of ***SGS v. Pakistan***, the non-disputing State party was effectively excluded from the proceedings by not being informed, and thus did not have the opportunity to participate. The inconsistent jurisprudence and arbitral practice reveals that there is a long way to go in establishing non-disputing State Party participation as a right of the sovereign respondent's investment treaty partner.

Kinnear presents three key reasons why non-disputing State Parties should be allowed to participate in investment treaty disputes. "The first and most obvious reason for non-disputing States to participate," she says, "is that they are party to the treaty that is being interpreted. As such, these States have the experience of having negotiated the treaty and have a unique perspective on how the treaty should be interpreted."[837] Obadia similarly points out that a non-disputing State Party could file submissions "concerning the treaty's *travaux préparatoires* and the interpretation of the treaty's provisions in relation to jurisdictional matters."[838]

[837] Kinnear, *supra* note 785 at 8.
[838] Obadia, *supra* note 794 at 368.

Second, non-disputing State Parties, as parties to the investment treaty, are also potential respondents in future disputes under that treaty. "States thus may be subject to numerous challenges and will be living with and interpreting the treaty obligations at issue in numerous contexts for many years to come."[839]

A third reason highlights how much congruence a non-disputing State Party has with the sovereign respondent with respect to its interests vis-à-vis the investment treaty being invoked in the dispute:

> Third, a State Parties' interest in disputes is not just defensive. Rather, States have compelling interest to ensure that an investment treaty actually provides investor protection and promotes foreign investment in the host State. Investment protection and promotion is the *raison d'être* for States' entrance into such treaties and thus States have an interest in seeing that BITs are interpreted coherently, logically and consistently. Consistency in BIT interpretation is especially key because there is no formal system of *stare decisis* or precedent within this treaty regime. The credibility of the entire investor-State dispute settlement system is undermined when irreconcilable decisions are issued. […] State party participation is one way that States can ensure cohesive jurisprudence and the continued integrity of the arbitral system.[840]

Just as the doors have opened for non-governmental organizations to participate as *amici curiae* in investor-State disputes, so too must participation by non-disputing State Parties become an established norm in investment treaty cases. Transparency must be inclusive for all actors in the investor-State dispute settlement system, and there are cogent reasons to support the participation of non-disputing State Parties as a matter of *right* with respect to issues of treaty interpretation, and not a matter subject to the discretion of an investment arbitration tribunal.

[839] Kinnear, *supra* note 785 at 8.
[840] *Id.* at 8.

3.4. Summary

Like the previous chapter, this third chapter examined transparency in investment treaty arbitration from the perspective of parties to the investment treaty dispute. Chapter 3 honed in on State Parties, of which there are two categories: (1) the disputing State Party, i.e. the sovereign respondent; and (2) the non-disputing State Party, i.e. the investment treaty partner of the sovereign respondent.

This dissertation maintains that sovereign parties involved in an international investment dispute have special concerns that set them apart from ordinary private entities in arbitration. This dissertation also presented the observation that non-disputing State Parties, often the home State of the investor that launched the investment treaty claim, have interests that align more closely with that of the sovereign respondent rather than its own national acting as claimant in the dispute.

The response of sovereign respondents to a regime of increased transparency in investment treaty arbitration is necessarily constrained by domestic laws and doctrines that affect treaty provisions on transparency in investment arbitration. These were identified in this chapter as the following: freedom of information legislation, executive process privilege, and deliberative process privilege. The manner in which these sovereign constraints affect actual disputes were presented in a survey of investment arbitration cases.

The problematic issue of corruption was also confronted in this third chapter, relating transparency in investment treaty arbitration with wider notions of transparency in the international regulatory sphere more generally. This chapter discussed how investment activities tainted with bribery and fraud have presented jurisdictional issues in investment arbitration cases. Chapter 3 included a brief survey of investment treaty arbitration cases where corruption was an issue, and presented an analysis of the impact or potential impact that an

increased transparency regime would have on corruption allegations presented in the course of an investment dispute.

A substantial section of Chapter 3 looked at the specific concerns of non-disputing State Parties in relation to transparency in investment treaty arbitration, comparing and contrasting these with that of the sovereign respondent. To place these concerns in context, this chapter presented a discussion on diplomatic protection in relation to the development of investor-State dispute settlement. In proposing that non-disputing State Parties should be able to participate in investment treaty disputes as a matter or right with respect to issues of investment treaty interpretation, this dissertation surveyed investment treaty arbitration cases as well as relevant provisions relating to NAFTA and ICSID arbitration, and the UNCITRAL Rules on Transparency.

Chapter 4

Foreign Investors and Transparency

The increased transparency regime in investment treaty arbitration has practical implications on foreign investors bringing a claim against the State that hosts their investment. As private entities, the concerns of foreign investors with respect to transparency are different from that of State parties. This chapter will look at the practical burdens imposed upon claimants as a result of non-disputing party participation, the protection of confidential business information, the interplay of transparency and criminal proceedings launched against foreign investors, and the issue of corporate nationality planning.

This dissertation submits that the arc of the transparency movement can be traced in parallel to the paradigm shift in international investment law. The immediately following section will expound on this position, to provide a basis for understanding the new expectations placed upon the investor-State dispute settlement system from the vantage point of investor-claimants.

4.1. The paradigm shift from confidentiality to transparency as a parallel movement with the shift from investor protection to balancing of interests in investor-State dispute settlement

The status of the investor in international law in general, and international investment law in particular, is an important point starting point for the discussion on the treatment of investors, and the paradigm shift that has occurred alongside the transparency movement. The discussion in this section looks at the substantive aspects of international investment law in relation to the protection of investments, as the basis for the procedural shifts in investment arbitration towards increased transparency.

Before the development of the investor-State dispute settlement system through bilateral investment treaties and the ICSID Convention, foreign investors did not have access to international methods of dispute settlement.[841] As discussed in the previous chapter on State parties, investors had to rely on diplomatic protection by their home State.[842] When the ICSID Convention was being crafted, international arbitration was seen as "an attractive alternative to the settlement of investment disputes by national courts or through diplomatic protection."[843] Investment arbitration has allowed investors to take control of the arbitration process, liberating them from dependence on the politically-motivated decisions of their home States on whether

[841] CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 6 (2nd ed. 2001).
[842] *See discussion* in Chapter 3. Schreuer, *supra*, at 6. *Id.* at 6.
[843] *Id.* at 7. (Schreuer)

or not to espouse their claims.[844] Indeed, during the negotiations for the ICSID Convention, drafters rejected a suggested provision requiring authorization by the home State for the initiation of an investment claim.[845] That investors act independently from their home States is further underscored by the fact that investor-claimants bear the costs of the arbitration, not its home State,[846] and that any possible compensation is due to the investor-claimant only.[847]

One scholar proposes the dual interest that investors serve in contributing to the development of international investment law: "The investor makes a direct claim for the implementation of treaty standards in international law primarily out of self-interest; however, at the same time, the investor also indirectly serves the public interest in the effective application and enforcement of international law."[848]

There are two types of investors: natural persons and legal persons.[849] While there have been a number of investor-claimants who are natural persons, the overwhelming majority of investment claims are brought by corporations,[850] and in several instances, multinational corporations. International investment law has developed rapidly in the past two decades, such that in the various spheres of international law where multinational corporations operate, "international investment law grants [multinational corporations] the most robust rights."[851] Looking at the rights directly conferred upon foreign investors by the ICSID Convention and the international investment agreements that make up the investor-State dispute settlement

[844] Reinisch, *supra* note 33 at 258–259.
[845] Tillmann Rudolf Braun, *Globalization-Driven Innovation: The Investor as a Partial Subject in Public International Law*, 15 J. WORLD INVEST. AMP TRADE 73–116, 91 (2014).
[846] Reinisch, *supra* note 33 at 259.
[847] Braun, *supra* note 845 at 91.
[848] *Id.* at 76.
[849] INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS, 10, 17 (OECD ed., 2008).
[850] ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW 282 (2016).
[851] Wouters and Chané, *supra* note 464 at 234.

system, a number of scholars have argued that investors have been elevated to the status of a partial subject of international law, and are regarded as more than mere holders of derivative rights vis-à-vis their home State.[852] Not an exclusive development in international investment law, this movement towards the recognition of the rights and interests of investors reflects the general trend in international law regarding the status of the individual.[853]

The rights granted to investors in international investment agreements have led to the observation that the so-called "first-generation" bilateral investment treaties were exclusively oriented towards investment protection.[854] Up until the late 1990s, the objective of investment agreements "was only, or at least predominantly, to protect foreign investors and their investments against illegitimate actions of the host State, most notably expropriations without compensation."[855] Because these features are embodied in treaties, the "apparent bias in favor of claimants and against respondent States" is attributed to "structural features" of the investor-State dispute settlement system.[856]

Wälde discusses the "asymmetry" in investment arbitration, that is viewed both as a necessity and a criticism: in treaty-based arbitration in particular, "private investors can sue

---

[852] PETERS, *supra* note 850 at 306–308; Braun, *supra* note 845 at 96–98; Reinisch, *supra* note 33 at 260. Peters examines the scholarship on the debate between direct and derivative rights and maintains that "the better arguments are in favor of acknowledging, as a matter of principle, the possibility of investors enjoying autonomous substantive rights, arising from investment protection treaties under international law." Braun makes an affirmative argument for the status of investors as a partial subject of international law. Reinisch makes a survey of the arguments propounded in favor of and against considering investors as partial subjects of international law without proposing the adoption of one view over the other.

[853] Steffen Hindelang & Markus Krajewski, *Conclusion and Outlook: Whither International Investment Law?*, *in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED , 379 (Steffen Hindelang & Markus Krajewski eds., 2016). *Citing* A Peters, *Jenseits der Menschenrechte – Die Rechstellung des Individuums im Völkerrecht* (Mohr Siebeck 2014) 257 et seq.

[854] Peter Muchlinski, *Corporations and the Uses of Law: International Investment Arbitration as a "Multilateral Legal Order,"* 1 OÑATI SOCIO-LEG. SER., 23 (2011), http://opo.iisj.net/index.php/osls/article/view/61 (last visited Sep 30, 2017); SORNARAJAH, *supra* note 9 at 540.

[855] Hindelang and Krajewski, *supra* note 853 at 379.

[856] Gus Van Harten, *Perceived Bias in Investment Treaty Arbitration*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 433–453, 433 (Michael Waibel et al. eds., 2010).

governments, but governments cannot sue private investors."[857] Wälde notes that this feature of investment treaty arbitration is "sometimes decried as indication of the one-sidedness (in favor of the investor) of investment treaties."[858] Another commentator echoes this thought, noting that "[s]cholars are in unison to consider the host States' consent to arbitrate incorporated in those treaties as a unilateral offer to arbitrate. […] This power to accept the offer to arbitrate, vested solely in the figure of the foreign investor, has introduced an asymmetry between host States and investors that has become the hallmark of investment arbitration."[859] Similarly, Van Harten offers the following observations about the investor's consent:

> […] in investment treaty arbitration, an investor decides whether to resort to arbitration only after a dispute with the state has arisen. The consent is thus retrospective: it is specific to a dispute arising from the regulatory relationship. Unlike the state, the investor does not agree to the compulsory arbitration of future disputes with the host state or with individuals affected by the investor's business activities. Tribunals do not have general jurisdiction to award damages against multinational firms for violations of treaty standards that regulate international investors. Generally speaking, only states are sanctioned and only investors are compensated.[860]

Wälde points out, however, that this perceived asymmetry was brought about by the rationale for investment protection in the first place: reverse mirroring the "inherent structural asymmetry" in which private investors are exposed to the regulatory and adjudicatory powers of the sovereign State.[861] The protection of foreign investments in international investment agreements was borne from the concern that unrestrained governmental power was a potential

---

[857] Thomas W. Wälde, *The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research*, *in* LES ASPECTS NOUVEAUX DU DROIT DES INVESTISSEMENTS INTERNATIONAUX: NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 63–154, 76 (Centre for Studies and Research in International Law and International Relations ed., 2006).
[858] *Id.* at 77.
[859] Gustavo Laborde, *The Case for Host State Claims in Investment Arbitration*, 1 J. INT. DISPUTE SETTL. 97–122, 105 (2010).
[860] VAN HARTEN, *supra* note 48 at 68–69.
[861] Wälde, *supra* note 857 at 77–78.

threat to the security of investments, and that national laws and procedures of the host State would be inadequate protection.[862] Van Harten also points out that investors, as private parties, are subject to the State's exercise of public authority, whereas "the reverse is never true."[863]

Looking towards current trends in international investment law, however, Sornarajah highlights a dramatic yet tentative shift in this treaty paradigm: "There has been an obvious movement away from the model of the investment treaty which emphasizes only protection of the foreign investment. The effect has been to bring about a balance in such a manner as to preserve the regulatory function of the state. Yet, in the tussle between these competing interests, primacy was still attached to investment protection."[864] Investment arbitrations filed pursuant to these first-generation investment treaties resulted in awards that demonstrated that investment treaty obligations could encroach on the regulatory power of the State to act in the public interest.[865] These developments ushered in the new era of "balanced treaties", which sought equilibrium between the State's protection of the public interest, and investment protection.[866]

The public interest sought to be better represented in the "balanced treaties" refer to the substantive defenses that States may raise against investment claims when governmental regulatory power is alleged to amount to a treaty violation.[867] The public interest involved as substantive issues is the same public interest that brings about demands for transparency in the arbitral process as a procedural issue.

Wälde's portrayal of the foreign investor being in an "unequal, hostage-like position

---

[862] Peter Muchlinski, *Social Responsibility and International Law, in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE 223–244, 230 (Todd Weiler & Freya Baetens eds., 2011).
[863] VAN HARTEN, *supra* note 48 at 69.
[864] SORNARAJAH, *supra* note 9 at 262.
[865] *Id.* at 263.
[866] *Id.* at 263.; Muchlinski, *supra* note 854 at 23.
[867] SORNARAJAH, *supra* note 9 at 263.

subject to the domestic law and government control over the judicial process"[868] has fallen out of fashion with the paradigm shift away from an investment treaty regime focused on investment protection. The media has portrayed investor-State dispute settlement to the general public as a system skewed in favor of multinational corporations suing developing countries for billions of dollars.[869] This public perception of investment arbitration has given more leverage to the criticisms lodged against the investor-State dispute settlement system.

The concern about foreign investors suing States is not limited to developing countries, however. In a recent development, more than two hundred academics from universities in the United States penned an open letter to the U.S. President, urging the removal of investor-State dispute settlement from NAFTA and its exclusion from future international investment agreements in which the United States is a State party.[870] Citing the dissent of U.S. Supreme Court Chief Justice John Roberts in the case of *BG Group PLC v. Republic of Argentina*,[871] these academics oppose investment arbitration because tribunals "hold the alarming power to review a nation's laws and 'effectively annul the authoritative acts of its legislature, executive, and judiciary.'"[872] More than the issue of sovereignty, however, the academics see it as unjust that foreign investors can opt out of domestic courts. The "central problem" with investor-State dispute settlement, these academics argue, is that it establishes "a parallel and privileged

[868] Thomas W. Wälde, *Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Pro-actively, the Equality of Arms*, 26 ARBITR. INT. 3–42, 15 (2010).
[869] *See e.g.* Claire Provost & Matt Kennard, *The obscure legal system that lets corporations sue countries | Claire Provost and Matt Kennard*, THE GUARDIAN, June 10, 2015, http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid (last visited Oct 25, 2017).
[870] *230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement from NAFTA and Other Pacts*, (2017), https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf (last visited Oct 31, 2017). [Hereinafter "US Academics Open Letter Against ISDS".]
[871] US Supreme Court Case No. 12-138, Writ of Certiorari to the United States Court Of Appeals for the District of Columbia Circuit, Decision and Dissenting Opinion dated 5 March 2014, 572 U.S. __, available at https://www.supremecourt.gov/opinions/13pdf/12-138_97be.pdf (last visited 31 October 2017).
[872] US Academics Open Letter Against ISDS, *supra* note 870.

set of legal rights and recourse for foreign economic actors."[873] They also decry a lack of non-disputing party participation, arguing that "[t]here are no mechanisms for domestic citizens or entities affected by ISDS cases to intervene or meaningfully participate in the disputes."[874]

Critics of investor-State dispute settlement hone in on the advantages granted to foreign investors, and portray the system as skewed in favor of the investor. The rationale of first-generation BITs wherein foreign investors were viewed as being at a disadvantage compared to the all-powerful State – and therefore in need of protection – has been neglected, at least by critics of investment arbitration.

Simultaneous with this shift away from bilateral investment treaties focused on the protection of investments is the movement reducing the confidentiality of proceedings, a holdover from the international commercial arbitration model upon which investment arbitration was initially based. With increased transparency comes non-disputing party participation. The next section will look at the impact of this development on investor-claimants.

4.2. Investor-claimants and third parties: the new relationships brought about by the transparency movement

Arbitration is regarded as a consensual procedure. In investment treaty arbitration, the host State being sued gives its consent through the dispute resolution provisions of an international investment agreement. The foreign investor gives consent by initiating the proceedings with a request for arbitration. In the commercial arbitration model upon which

[873] *Id.*
[874] *Id.*

investment treaty arbitration was initially based, the only parties in the arbitration were the opposing parties who had consented to arbitration.

With the transparency movement in investment arbitration, non-disputing parties have joined the fray, as discussed in Chapter 2. Likewise discussed in that chapter was the underexamined implications of third-party funding in investment treaty arbitration. The following section looks at the impact of third-party participation from the perspective of the investors that initiated the investment claim.

4.2.1. The added burden of non-disputing party participation on investor-claimants

Chapter 2 provided a look at third parties, and the jurisprudence surveyed in that previous chapter has revealed that non-disputing parties that seek to participate in investment arbitrations are typically non-governmental organizations that represent a particularized interest, sector, or concern. As Wälde has noted, *amicus* briefs filed by non-governmental organizations in investment arbitrations always oppose the Claimant.[875] This has likewise been a complaint by investors themselves.[876] This situation places an additional burden on Claimant, who effectively has two contrary positions to contend with in the arbitration: that of the sovereign respondent, and that of the *amicus curiae* – or *amici* if there are more than one.

There are additional burdens of delays and cost associated with allowing non-disputing party participation.[877] Merely granting access to *amici curiae* to some of the arbitral documents

[875] Thomas W. Wälde, *supra* note 691 at 178.
[876] Fach Gómez, *supra* note 305 at 551.
[877] Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT. LAW 200–224, 219 (2011).

already imposes the practical burden on claimant of redacting documents to ensure the confidentiality of confidential business information.[878]

When allowing non-disputing parties to file written submissions, arbitral tribunals grant the disputing parties the opportunity to respond to these submissions. It would be very foolish for a disputing party to allow these third-party submissions to go without comment. Further complicating matters for the investor is that the alignment of an additional party with the position of the sovereign respondent might boost the State's arguments in the arbitration.[879] The investor then incurs additional costs for the review and rebuttal of these amicus briefs.[880]

4.2.2. Disclosure requirements for third-party funders

An important cross-reference must be pointed out at this juncture. The section on third-party funding in Chapter 2 contains intersecting concepts with the matters of disclosure to be discussed in the present section. In that previous chapter, this dissertation argues that third-party litigation funders must be deemed as a particular class of non-party to investment arbitrations, with concomitant transparency obligations. Third-party funders become involved with investment disputes because they provide the litigation financing for investor-claimants. In that sense, the transparency obligations with respect to third-party funding are shared by the funder and the investor-claimant.

As the party to the investment arbitration, the onus is upon the investor to disclose the existence of the third-party funding arrangement to the tribunal and to the sovereign respondent.

[878] *Id.* at 220.
[879] Fach Gómez, *supra* note 305 at 551.
[880] Thomas W. Wälde, *supra* note 691 at 178.

4.3. Confidential business information as an exception to transparency

Article 7 of the UNCITRAL Rules on Transparency states that "confidential or protected information" is deemed an exception to transparency.[881] Article 7(2)(a) indicates that "confidential business information" falls under this broad exception, the only item in the list under Article 7(2) that appears to apply specifically to foreign investors. The other items in that provision[882] seem tailored for the sovereign respondent.

During the drafting of the UNCITRAL Rules on Transparency, the Working Group considered utilizing the phraseology "confidential and sensitive information".[883] Ultimately, however, the word "sensitive" was deleted,[884] and the final version "confidential or protected information" was adopted as the first sub-heading of Article 7.[885] With respect to "confidential business information", there were concerns within the Working Group as to whether this terminology was sufficiently broad:

> A concern was expressed that that phrase could be understood as not covering, for instance, industrial or financial information, or personal data. It was suggested that a list of situations where information would need to be protected could be elaborated that would include business, political, institutional sensitive information, personal data and legal impediments under a law. That list could be preceded by a general formulation which would define confidential and sensitive information in abstract terms, along the lines, for instance, of article 19 (2) of the Norwegian Model Bilateral Investment Treaty. It was suggested that subparagraph (a) should be deleted because the protection of "confidential business information" would fall under subparagraph (b) as being protected by applicable law. In response,

[881] UNCITRAL Rules on Transparency, Art. 7.
[882] i.e. Article 7(2), paragraphs (b),(c), and (d), respectively list the following sub-categories: Information that is protected against being made available to the public under the treaty; Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or Information the disclosure of which would impede law enforcement. *See* discussion in Chapter 3 of this dissertation.
[883] October 2011 UNCITRAL WG Report, *supra* note 216 at ¶¶ 110, 117.
[884] October 2012 UNCITRAL WG Report, *supra* note 235 at ¶ 83.
[885] February 2013 UNCITRAL WG Report, *supra* note 227 at ¶ 75.

> it was said that some jurisdictions did not have laws protecting that information.[886]

Ultimately, no specific definition of "confidential business information" was provided in the UNCITRAL Rules on Transparency.[887] Under Article 3, the arbitral tribunal is given the prerogative to determine whether information is confidential or protected, after consulting the disputing parties.[888] Guidance from previous NAFTA jurisprudence indicates that the following have been deemed as "confidential business information":

> - trade secrets;
> - financial, commercial, scientific or technical information that is treated consistently in a confidential manner by the disputing party or third party which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or detailed accounting or financial records not otherwise disclosed in the public domain;
> - information the disclosure of which could result in financial loss or gain to the disputing party or third party to which it relates;
> - information the disclosure of which could interfere with contractual or other negotiations of the disputing party or third party to which it relates; and
> - other communications treated as confidential in furtherance of settlement between the disputing parties.[889]

Because the tribunal has the discretion to decide whether information falls under the exceptions provided in Article 7 of the UNCITRAL Rules on Transparency, a claimant that seeks to retain the confidentiality of certain information must convince the tribunal regarding its position. This entails further legal costs for the claimant because written submissions will have to be made on the matter.

[886] October 2011 UNCITRAL WG Report, *supra* note 216 at ¶ 118.
[887] Ausburger, *supra* note 692 at 265.
[888] UNCITRAL Rules on Transparency, Art. 3.
[889] Ausburger, *supra* note 692 at 265–266.

4.4. Criminal proceedings and foreign investors: an added dimension to the transparency rhetoric

A notable item listed under the exceptions to transparency in Article 7 of the UNCITRAL Rules on Transparency is "information the disclosure of which would impede law enforcement."[890] Because the exception speaks of law *enforcement*, this provision clearly speaks to the concerns of the State involved in the dispute, as a foreign investor would not be involved in law enforcement. On the contrary, the foreign investor is the *subject* of law enforcement in the host State. A number of investment cases have involved arrests of foreign investors in the host State; this fact is known because investor-claimants have brought these matters to the attention of investment arbitration tribunals by way of requests for provisional measures.

In the case of ***Quiborax S.A., et al. v. Plurinational State of Bolivia***,[891] the three claimants (Quiborax, Allan Fosk, and Non Metallic Minerals S.A.) requested the ICSID tribunal for provisional measures to order Bolivia and its agencies to discontinue criminal proceedings relating to the arbitration, as well as to return the sequestered corporate administration of Non Metallic Minerals to the claimants.[892] The request for provisional measures related to criminal complaints filed by Bolivian authorities against a number of individuals that had participated in some of claimants' business transactions, after a corporate audit had revealed purported forged documents.[893] The ICSID Tribunal ordered the sovereign respondent to suspend the criminal proceedings until the completion of the arbitration, and to refrain from initiating any other criminal proceedings, stating that "[t]he Tribunal has been

[891] ICSID Case No. ARB/06/2. [Hereinafter *Quiborax v.Bolivia*]
[892] *Quiborax v. Bolivia*, Decision on Provisional Measures dated 26 February 2010, at ¶¶ 1 - 2.
[893] *Id*., at ¶ 23 *et seq*.

convinced that there is a very close link between the initiation of this arbitration and the launching of criminal cases in Bolivia."[894]

In the case of ***Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia***,[895] the claimants asked the ICSID Tribunal to recommend that Indonesia "refrain from threatening of commencing any criminal investigation or prosecution against the Claimants, their witnesses in [the ICSID arbitration], and any person associated with the Claimants' operations in Indonesia."[896] The tribunal in this case denied the Claimants' application for provisional measures, and distinguished the circumstances from those in the *Quiborax* case, stating that *Quiborax* had actual criminal investigations ongoing, whereas in the case of *Churchill Mining*, "the impairment of the Claimants' procedural rights is speculative and hypothetical."[897]

In the case of ***Hydro S.r.l. and others v. Republic of Albania***,[898] the Claimants alleged that Albanian authorities "sought to undermine its investments in Albania in a number of ways", including the launching of tax audit proceedings and money laundering investigations against the Claimants' Albanian entities and the individual claimants.[899] The Claimants requested the ICSID Tribunal to order Albania to suspend criminal proceedings and refrain from initiating any other proceedings, criminal or otherwise, directly or indirectly related to the ICSID arbitration.[900] The Tribunal recommended that the Republic of Albania suspend the

[894] *Id*., at ¶164.
[895] ICSID Case No. ARB/12/14 and 12/40. [Hereinafter *Churchill Mining v. Indonesia*]
[896] *Churchill Mining v. Indonesia*, Procedural Order No. 9 (Provisional Measures) dated 8 July 2014, at ¶ 1.
[897] *Id*., at ¶ 99.
[898] ICSID Case No. ARB/15/28. [Hereinafter *Hydro v. Albania*]
[899] *Hydro v. Albania*, Order on Provisional Measures dated 3 March 2016, at ¶ 1.4.
[900] *Id*., at ¶ 1.5.

criminal proceedings until the issuance of a Final Award in the ICSID arbitration, and to suspend extradition proceedings directed towards individual claimants.[901]

These cases are representative of a number of investment arbitration cases wherein the sovereign respondent has deployed law enforcement measures against claimants in investment disputes. Whereas the UNCITRAL Rules on Transparency exempt from disclosure any information which would "impede law enforcement",[902] no comparable protection is provided to the foreign investor to resist the production of documents that could be used against it by sovereign authorities in criminal proceedings or other types of cases. Considering that there has been at least one case (*Quiborax*, discussed above), where the Tribunal made a categorical observation about the correlation between the initiation of investment claim and the institution of criminal proceedings, it may be concluded that the situation wherein a sovereign respondent will use its governmental power against a foreign investor is a real possibility. Increased transparency should not be used to cause the investor to produce documentary evidence that may, in turn, be used against it outside the arbitration proceeding. There is no provision in the UNCITRAL Rules on Transparency which specifically addresses this situation from the perspective of the foreign investor.

4.5. A procedural solution to a substantive law problem: Looking at corporate nationality planning as a transparency issue

As explained in the introduction to this dissertation as well as in the chapter on State parties, the access of investors to investment treaty arbitration is conditioned on nationality. As observed by a noted commentator, "[t]he investor's nationality remains decisive for the

[901] *Id*., at ¶ 5.1.
[902] UNCITRAL Rules on Transparency Art. 7(2)(d).

jurisdiction of an arbitral tribunal, and it is also key to the application of substantial protection standards."[903]

While determining the nationality of a natural person is fairly straightforward, the nationality of a juridical entity is a more complicated matter. Determination of nationality is addressed in different ways in different investment treaties. The Investment Division of the Organisation for Economic Co-operation and Development (OECD) conducted a large sample survey of dispute settlement provisions in international investment agreements. With respecgt to corporate nationality, the study made the following findings:

> Some treaties' ISDS clauses contain delimitations of possible claimants which complement other language regarding *ratione personae* of the treaty protections. Two types of language were found in ISDS clauses in the treaty sample: One addresses the possible claimant status of companies that are established in the host state but are majority-owned or controlled by foreign investors; the other concerns the standing of foreign natural persons that have been residing in the host State at a given point in time.
>
> Close to 20% of the treaties address, in the ISDS clauses, the standing of foreign-controlled companies established in the host State. This is an issue because these companies' establishment in the host State may preclude their status as "foreign", which may in turn affect their standing under the ISDS mechanism. Article 25(2)(b) of the ICSID Convention, for instance, recognises this issue and, for the purpose of the ICSID Convention, makes the standing of such legal persons dependent on whether the host State has agreed to treat such legal person "as a national of another Contracting State for the purposes of the [ICSID] Convention". In the treaties addressing this issue, States consent to treat foreign-owned companies established in the host State as nationals of another contracting party entitled to bring their dispute to ISDS.
>
> One other ISDS provision in relation to claimants is found in the Argentina-United Kingdom BIT (1990): this treaty excludes access to ISDS under the BIT for foreign natural persons who were residents of a State party to the dispute; instead, it imposes an obligation to consult in order to settle disputes.[904]

[903] Dupuy, *supra* note 604 at 48–49.
[904] Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD WORK. PAP. INT. INVEST., 20 (2012), https://www.oecd-ilibrary.org/finance-and-investment/dispute-settlement-provisions-in-international-investment-agreements_5k8xb71nf628-en (last visited Jun 12, 2018).

Specific treaty provisions notwithstanding, the United Nations Conference on Trade and Development (UNCTAD) has observed that "complex corporate structures have become increasingly notorious in recent years."[905] UNCTAD illustrates the difficulty in pinning down corporate nationality:

> Firms, and especially affiliates of multinational enterprises (MNEs), are often controlled through hierarchical webs of ownership involving a multitude of entities. More than 40 per cent of foreign affiliates are owned through complex vertical chains with multiple cross-border links involving on average three jurisdictions. Corporate nationality, and with it the nationality of investors in and owners of foreign affiliates, is becoming increasingly blurred.[906]

The present section of this chapter shall explore a topic that has received much attention in recent years: corporate restructuring to meet nationality requirements, i.e. corporate nationality planning. This is an issue that has been quite thoroughly examined in current academic literature, as well as in arbitral jurisprudence, in relation to the admissibility of claims and the jurisdiction of an investment tribunal hearing the claims.[907] However, it has not heretofore been analyzed from the perspective of transparency. The goal of the present section is to propose a possible procedural approach to address this substantive law issue.

4.5.1. Understanding the substantive issues brought about by corporate nationality planning

The practice that will be examined in the current section has been alternately called

[905] INVESTOR NATIONALITY: POLICY CHALLENGES, 124 (UNCTAD ed., 2016).
[906] *Id.* at 124.
[907] *See e.g.* JORUN BAUMGARTNER, TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW (2016); Tania Voon, Andrew Mitchell & James Munro, *Legal Responses to Corporate Manoeuvring in International Investment Arbitration*, 5 J. INT. DISPUTE SETTL. 41–68 (2014); John Lee, *Resolving Concerns of Treaty Shopping in International Investment Arbitration*, 6 J. INT. DISPUTE SETTL. 355–379 (2015); Stephan Schill, *The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds*, II TRADE LAW DEV. 59–86 (2010); William Lawton Kirtley, *The Transfer of Treaty Claims and Treaty-Shopping in Investor-State Disputes*, 10 J. WORLD INVEST. AMP TRADE 427–461 (2009); Yael Ribco Borman, *Treaty Shopping Through Corporate Restructuring of Investments: Legitimate Corporate Planning or Abuse of Rights?*, HAGUE YEARB. INT. LAW 359–389 (2011).

"treaty shopping", "treaty planning", "nationality planning" and "corporate maneuvering".[908] These terms refer to the act of corporate structuring (or in some cases, the alteration of the existing corporate structure) of a multinational enterprise, or the transfer of the investment to a corporate entity in another country, with the aim to qualify for more favorable investment protection under an international investment agreement by virtue of corporate nationality.[909] A corporation can acquire or change its nationality with relative speed and minimal cost by establishing itself, or setting up a corporate subsidiary, in a country of its choice.[910] An investor can also seek protection under a bilateral investment treaty by transferring its investment to a legal entity in another country.[911] By establishing corporate nationality in a country that has a preferential bilateral investment treaty with the country where the investment activity is to be carried out, corporations utilize corporate restructuring for enhanced investment protection.[912]

While corporate structuring of an investment for the purpose of investment protection is not an illegal act, there have been a number of investment treaty arbitration cases where the respondent State has argued that the investor-claimant has committed an abuse of process by doing so, positing that the investment claim should be deemed inadmissible.[913] Treaty shopping has been criticized by State parties, and is one of the practices that has threatened the legitimacy of the investor-State dispute settlement system.[914] In challenging the investment tribunal's jurisdiction or the admissibility of the investor's claims, sovereign respondents have argued that the corporate entity seeking to invoke the bilateral investment treaty has no real

---

[908] BAUMGARTNER, *supra* note 907 at 7–8; Voon, Mitchell, and Munro, *supra* note 907 at 42–43.
[909] BAUMGARTNER, *supra* note 907 at 10–12; Lee, *supra* note 907 at 355; Eric De Brabandere, *"Good Faith", "Abuse of Process" and the Initiation of Investment Treaty Claims*, 3 J. INT. DISPUTE SETTL. 609–636, 621 (2012); Hervé Ascensio, *Abuse of Process in International Investment Arbitration*, 13 CHIN. J. INT. LAW 763–785, 771 (2014).
[910] Schill, *supra* note 907 at 73–74.
[911] Kirtley, *supra* note 907 at 427; Voon, Mitchell, and Munro, *supra* note 907 at 42.
[912] BAUMGARTNER, *supra* note 907 at 10; Schill, *supra* note 907 at 74.
[913] See De Brabandere, *supra* note 909; Ascensio, *supra* note 909; John P. Gaffney, *Abuse of Process in Investment Treaty Arbitration*, 11 J. WORLD INVEST. TRADE 515–538 (2010).
[914] Lee, *supra* note 907 at 356–357.

connection with the purported home State.[915] In these cases, sovereign respondents have portrayed claimants as shell corporations, "operating merely as a front for the real party in interest, an entity or natural persons with the nationality of a third State or sometimes the host State."[916]

Schill, who has written about the multilateralization of international investment law, notes that the practice of "treaty shopping" through corporate restructuring "undermines an understanding of BITs as expressions of bilateral bargains, because an investor can easily opt into almost any BIT regime it wishes."[917] As explained by another commentator, the practice "opens the doors to claims from multinational corporations substantially beyond what many State parties expected when they signed these investment agreements."[918]

Schill further notes that the practice "effectively allows investors to change their nationality for purposes of investment protection by hiding behind the corporate veil."[919] Other scholars have also noted that the term "piercing the corporate veil" has been utilized throughout the academic literature "to describe the possibility of a tribunal: (i) looking behind a company's State of incorporation to its shareholders and managers in identifying its nationality; (ii) involving in the dispute an entity that is not a party to the relevant treaty or proceedings; or (iii) investigating the ownership or control behind a company's incorporation in order to prevent the benefits of a treaty from accruing to investors of non-parties."[920]

---

[915] Rachel Thorn & Jennifer Doucleff, *Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of "Investor," in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 3–28, 4 (Michael Waibel et al. eds., 2010).
[916] *Id.* at 4.
[917] Schill, *supra* note 907 at 74.
[918] Lee, *supra* note 907 at 356.
[919] Schill, *supra* note 907 at 74.
[920] Voon, Mitchell, and Munro, *supra* note 33 at 43–44, *citing the following sources*: Katherine Lyons, *Piercing the Corporate Veil in the International Arena* (2006) 33 Syracuse J Int' L & Commerce 523; Yaraslau Kryvoi, *Piercing the Corporate Veil in International Arbitration* (2010) 1 Global Business LR 169; Stephan Schill, *The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment*

The scholarly instinct to use the terminology of "piercing the corporate veil" in the existing literature – language borrowed from corporation law referring to the liability of corporate shareholders for the actions of the corporate entity – points to the transparency dimension of corporate restructuring that has yet to be fully examined. A survey of the jurisprudence, which follows, will elucidate how corporate restructuring has been examined by tribunals in relation to jurisdiction and admissibility of claims. The trend in analysis will be used to suggest transparency-based procedural measures to address these substantive issues.

4.5.2. Jurisprudence on corporate nationality planning

With respect to corporate nationality planning, a.k.a. "treaty shopping", the significant number of cases where investment tribunals have dealt with this issue means that "a constant jurisprudence has emerged, because of the coherence of the views expressed in a series of arbitral decisions, and has reached a high level of refinement."[921]

The most famous example of cases dealing with corporate nationality is ***Tokios Tokeles v. Ukraine***,[922] brought pursuant to the 1994 bilateral investment treaty between the Republic of Lithuania and Ukraine.[923] The claimant in this case was a corporation organized in 1989 under the laws of Lithuania.[924] However, the companies involved in the events giving rise to the ICSID arbitration were its two wholly-owned Ukrainian subsidiaries, which were under the control and management of two brothers who were Ukranian citizens, residing in Ukraine.[925]

Protection on Bilateral Grounds (2010) 2(1) Trade Law & Development 59, 75–77; Rachel Thorn and Jennifer Doucleff, *Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of "Investor"* in Michael Waibel and others (eds), THE BACKLASH AGAINST INVESTMENT ARBITRATION (KLUWER LAW INTERNATIONAL (2010) 3; Robert Wisner and Nick Gallus, *Nationality Requirements in Investor State Arbitration* (2004) 5 J World Investment Trade 928, 941.

[921] Ascensio, *supra* note 909 at 771.

[922] ICSID Case No. ARB/02/18.

[923] *Agreement Between the Government of Ukraine and the Government of the Republic of Lithuania for the Promotion and Recprocal Protection of Investments* dated 8 February 1994.

[924] *Tokios Tokeles v. Ukraine*, Award dated 26 July 2007, at ¶ 2.

[925] *Id.*

Ukraine raised objections to the jurisdiction of the ICSID Tribunal, arguing that the claimant is not a "genuine investor" from Lithuania,[926] and that allowing the case to proceed would "be tantamount to allowing Ukranian nationals to pursue international arbitration against their own government".[927] The sovereign respondent asked the ICSID Tribunal to "pierce the corporate veil" and to disregard the Claimant's state of incorporation.[928] Looking to the language of the Ukraine – Lithuania BIT,[929] the majority of the Tribunal concluded that the Claimant is an "investor" of Lithuania and therefore entitled to bring a case against Ukraine.[930]

A factual matter that led the majority to decide in favor of jurisdiction was the incorporation of the Claimant's enterprise in Lithunia six years before the bilateral investment treaty between Ukraine and Lithuania even existed.[931] Based on this, the majority concluded that the "Claimant manifestly did not create Tokios Tokeles for the purpose of gaining access to ICSID arbitration under the BIT against Ukraine."[932]

The case of ***Phoenix Action, Ltd. v. Czech Republic***[933] was initiated pursuant to the bilateral investment treaty between the Czech Republic and Israel.[934] This case marks the first time that an ICSID claim was dismissed for lack of jurisdiction because of an abuse of process.[935] The companies involved in the dispute were "two companies established under Czech law and owned by a Czech citizen."[936] The shares of the companies were transferred to an Israeli company created and controlled by the same Czech individual; the Tribunal in this

[926] *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction dated 29 April 2004, at ¶ 21.
[927] *Id*., at ¶ 22.
[928] *Id.*
[929] Specifically, Article 1(2)(b) of the Ukraine – Lithiania BIT.
[930] *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction dated 29 April 2004, at ¶ 71.
[931] *Id*., at ¶ 56.
[932] *Id*.
[933] ICSID Case No. ARB/06/5.
[934] *Agreement between the Government of the Czech Republic and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments* of 16 March 1999.
[935] Ascensio, *supra* note 909 at 772.
[936] *Id.* at 772.

case concluded that the sole purpose of the corporate restructuring was to utilize the bilateral investment treaty to sue the Czech Republic.[937]

Following the reasoning in these notable cases, subsequent tribunals have looked at: (1) timing, and (2) motivation for corporate structuring/restructuring as the essential elements to determine whether corporate nationality planning constitutes an abuse of process that merits a dismissal of the investment claim on the grounds of lack of jurisdiction.[938] The *Tokios Tokeles* case "illustrates the importance tribunals place on the express terms of the treaty. Where the contracting States have not chosen to define investor using such criteria as the origin of capital, the effective seat, ownership, control, or corporate structure, tribunals have, on the whole, refused to give these factors any dispositive weight. Rather, they have observed that the contracting States could have crafted the definition of investors more narrowly had that been their intent. In several cases, moreover, the tribunals have observed that the more recent treaties concluded by the host State use a more limited construction of investor."[939]

It is important to note, however, that "[s]everal investor-State tribunals have rejected attempts by respondents to look beyond the text of the applicable investment treaty for limits on corporate nationality planning. In each instance, those tribunals emphasized that the express terms of the applicable treaty provided the necessary and sufficient criterion for determining corporate nationality: a company's place of incorporation."[940] In contrast, as some scholars have noted, "[w]here the investor's nationality hinges on control (usually because the investment is made through an entity incorporated in the host state), tribunals have used this as an opening to look beyond the corporate form and to evaluate more closely how the investment

[937] *Id.* at 772–773.
[938] *Id.* at 773.
[939] Thorn and Doucleff, *supra* note 915 at 14.
[940] M. Feldman, *Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration*, 27 ICSID REV. 281–302, 285 (2012).

has been structured. In these cases, the treaty language has been interpreted to permit (and require) a more searching inquiry into the nationality of the entity with the ultimate control or ownership interest in the investment."[941]

4.5.3. Transparency-based solutions to the issue of corporate nationality planning

As can be seen by the above survey of jurisprudence, the language of the bilateral investment treaty is one of the determining factors on whether corporate nationality planning will bar the admissibility of an investment claim.

The principal means, therefore, to prevent an abuse of process through corporate restructuring, is through carefully crafted treaty language. As one author points out, "States have the power to prevent treaty shopping by explicitly restricting it when negotiating the relevant treaty text, for example, through the use of the 'seat' or 'control' tests in defining what constitutes an eligible investor."[942] However, several treaties do not specifically address these issues through provisions defining protected investors and investments, thereby allowing investors "to qualify for protection through mere incorporation in a contracting State."[943]

Aside from treaty language, this dissertation submits that disclosure of corporate structure can be a transparency obligation incorporated in the rules of arbitral institutions. The UNCITRAL Rules on Transparency are silent with respect to nationality, as the nationalities of the disputing parties are not among the information to be published at the commencement of the arbitral proceedings. However, "the treaty under which the claim is being made" is among such information to be published, and nationality can therefore be inferred.[944] The

[941] Thorn and Doucleff, *supra* note 915 at 15.
[942] Lee, *supra* note 907 at 356.
[943] *Id.* at 356.
[944] UNCITRAL Rules on Transparency, Art. 2.

ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules)[945] already requires that "if the party is a juridical person which on the date of consent had the nationality of the Contracting State party to the dispute," then the Request for Arbitration should indicate "the agreement of the parties that it should be treated as a national of another Contracting State for the purposes of the Convention."[946]

These existing provisions can be further refined to require additional information from the claimant with respect to nationality, such as the date of acquisition of the nationality relevant to the invocation of the bilateral investment treaty by virtue of which the investment claim is brought. Requiring this information at the very outset of the investment dispute can forestall lengthy exchanges between the parties on an abuse of process issue. Highlighting dates of the acquisition of nationality can immediately signal to an investment arbitration tribunal whether corporate restructuring was done exclusively to obtain access to a bilateral investment treaty.

4.6. Summary

This fourth and final chapter looked at the concerns of foreign investors in relation to a regime of increased transparency in investment treaty arbitration. To contextualize this analysis, this chapter first presented a discussion regarding the paradigm shift in investor-State dispute settlement from confidentiality to transparency as a parallel movement with the shift from investor protection to balancing of interests in the investment treaty arbitration regime.

Part of the discussion in Chapter 4 was related to the issues presented in Chapter 2. The new relationships brought about by the transparency movement were examined in this final

[945] Note: not to be confused with the ICSID Arbitration Rules.
[946] ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, Rule 2(1)(iii).

chapter, specifically the added burden of non-disputing party participation on investors that bring investment treaty claims to arbitration, and the disclosure requirements proposed for third-party funding arrangements.

Because the UNCITRAL Rules on Transparency contain a specific provision classifying confidential business information as an exception to transparency, this chapter also dissected the development of this provision that is intended specifically for the investor-claimants in investment treaty arbitration.

The particular concerns of foreign investors as potential subjects of criminal proceedings in the host State was discussed in this chapter by way of a survey of cases wherein the sovereign respondent deployed law enforcement measures against claimants in investment disputes. This dissertation presented the observation that the relevant provision in the UNCITRAL Rules on Transparency fails to address the concerns of the foreign investor in this regard.

This chapter also presented corporate nationality planning as a transparency issue. Heretofore examined in academic literature and actual investment treaty arbitration cases as a jurisdictional issue, this dissertation proposes that transparency measures offer a procedural solution to this substantive law problem. This dissertation proposes that arbitration rules can be refined to require additional information from the claimant with respect to nationality.

Summary

Defining the elusive concept of transparency often requires a juxtaposition with the concept most often considered its opposite: confidentiality. Chapter 1 therefore began with a reexamination of confidentiality as a feature of international arbitration generally. An examination of ICSID jurisprudence demonstrated that ICSID does not mandate confidentiality, but neither does it promote transparency. Investment arbitration case law served as the jumping-off point for tracing the development of the transparency movement in investment arbitration. This was accompanied by a review of legal commentary regarding the features of investment arbitration that necessitate a different treatment of investor-State disputes. This review of the academic literature revealed three systemic differences that have propelled the transparency movement in investment arbitration: (1) the consent mechanism for arbitration; (2) government regulatory measures as the subject matter of the dispute; and (3) the impact of arbitral awards on the rights of non-parties. These differences were discussed in tandem with the concept of public interest, and its role as the rationale for the transparency movement.

After dissecting the concepts of transparency and confidentiality, Chapter 1 provided a retrospective on the developments relating to the transparency movement in investment arbitration, with an emphasis on treaty-based investor-State arbitration. The first chapter traced the developments in enhancing non-party access to investment arbitration proceedings by examining the provisions of NAFTA Chapter 11, the NAFTA Free Trade Commission's Notes

of Interpretation, the ICSID Arbitration Rules, and the UNCITRAL Arbitration Rules. Chapter 1 discussed how transparency-oriented rule amendments were shaped by arbitral practice, and that different arbitration regimes influenced each other as the investor-State dispute settlement system was evolving to accommodate enhanced transparency.

This retrospective served as a background for an examination of the 2014 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, which was the highlight of the first chapter. This important legal instrument came into effect a few months before work on the present dissertation began. The UNCITRAL Rules on Transparency can be appreciated as the fruit of a transparency movement that took root at the beginning of this century and grew in the decade and a half since. Rather than looking at these Rules as the crux of the transparency movement, this dissertation views and portrays the UNCITRAL Rules on Transparency as the result of arbitration practice, jurisprudence, and amendments of arbitration rules in the years prior to the formulation of the UNCITRAL Rules on Transparency. An analysis of the form, structure and scope of the text of this instrument lays the groundwork for text-specific examination in the subsequent chapters.

Chapter 1 concluded with an overview of the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, which entered into force on 18 October 2017. Also known as the Mauritius Convention, this treaty serves as a mechanism to facilitate the application of the UNCITRAL Rules on Transparency to existing investment treaties and thereby obviate the need for a State to renegotiate and amend each of its already concluded international investment agreements. Unique provisions in the Convention, such as a rule concerning conflicts between legal texts, and an explicit procedural bar to prevent most favored nation clauses from subverting the Rules on Transparency, were also highlighted in this chapter. One of the more contentious provisions in the Mauritius Convention was the

system of reservations allowed under the Convention, and this chapter devoted special attention to those provisions.

Chapter 2 focused on non-parties and their relationship with the transparency movement in investment arbitration. This dissertation posits that there are four categories of non-parties in relation to investment treaty arbitration: (1) non-disputing State Parties; (2) the general public; (3) *amici curiae*; and (4) third-party litigation funders. The first category is part of the discussion in Chapter 3. The other three categories formed the sections of this second chapter.

The section devoted to the general public in Chapter 2 concretized the concept of public interest that Chapter 1 expounded upon in Section 1.2.2. as the rationale for the transparency movement in investment treaty arbitration. Transparency in investment arbitration in relation to the general public is achieved through the access to information about the investment arbitration process. Specific provisions aimed at access to information by the general public were identified in NAFTA Chapter 11, ICSID's Administrative and Financial Regulations, and the UNCITRAL Rules of Transparency.

Amici curiae and their role in enhancing the transparency of investment treaty arbitration formed a substantial section of the second chapter. The current literature on transparency in investment arbitration has heretofore focused on the participation of non-disputing parties in the arbitral process. A review of the transparency measures undertaken in the past several years indicates that increasing transparency in investor-State dispute settlement is often equated with non-disputing party participation in the arbitration proceedings. The major developments with respect to increasing transparency revolve around the three main modes of non-disputing party participation: (1) access to arbitration documents; (2) written submissions; and (3) open hearings. Chapter 2 looked at the relevant provisions and practice

in relation to NAFTA and ICSID arbitration, and the provisions of the UNCITRAL Rules on Transparency that evolved from prior rules and practice. A critique of the provisions of the UNCITRAL Rules on Transparency indicates where problems may arise in future cases.

Human rights, environmental concerns, and the protection of cultural heritage are common themes in *amicus* petitions filed by non-governmental organizations seeking to participate in investment treaty arbitration. In this regard, Chapter 2 included a survey of cases that looked specifically at indigenous peoples' groups and environmental protections groups and how their *amicus* petitions and written submissions were handled by investment arbitration tribunals. This review of cases revealed that, even as strides are being made with respect to increased non-disputing party participation in investment arbitration through rule amendments and arbitral jurisprudence, tribunals still exert a hefty amount of discretion when deciding whether or not to grant applications for non-disputing party participation. Even where *amicus* petitions are granted, not much weight is accorded to the *amicus* submissions. This dissertation posits that certain legal perspectives affect tribunal acceptance or denial of applications for non-disputing party participation for these special interest cases: (1) tribunal deference to disputing party opposition; (2) non-recognition of indigenous rights as a "significant interest" or "perspective or insight different from that of the disputing parties"; (3) conflicting international obligations; (4) definition of the issues in dispute; and (5) lack of obligation to consider the third-party submission. Even with the minimal impact of *amicus* submissions on the outcome of investment treaty arbitration cases, however, this dissertation maintains that there is value in promoting non-party participation. Furthermore, there are indications that investment arbitration tribunals in the future will be more receptive to the viewpoints presented by special interest groups participating as *amici curiae*.

The third section of the second chapter looked at third-party funding and framed this phenomenon within the transparency paradigm. While most of the present scholarship on third-party participation in investment arbitration has heretofore focused on access of non-party stakeholders to arbitration proceedings, there is as yet no scholarship that places third-party funding within the transparency movement. Disclosure of information is recommended with respect to third-party funders in the interest of a transparency regime that looks beyond *amici curiae* as the only outsiders seeking access to investment treaty arbitration proceedings. This dissertation proposes that disclosure requirements relating to third-party funding can be modelled on the disclosure of information required of potential *amici curiae*. The problems relating to third-party funding were identified in Chapter 2 as the following: (1) conflicts of interest; and (2) implications on orders for arbitration costs. These problems can be addressed by mandatory disclosure of information regarding litigation financing arrangements.

Like the previous chapter, the third chapter examined transparency in investment treaty arbitration from the perspective of parties to the investment treaty dispute. Chapter 3 honed in on State Parties, of which there are two categories: (1) the disputing State Party, i.e. the sovereign respondent; and (2) the non-disputing State Party, i.e. the investment treaty partner of the sovereign respondent.

This dissertation maintains that sovereign parties involved in an international investment dispute have special concerns that set them apart from ordinary private entities in arbitration. This dissertation also presented the observation that non-disputing State Parties, often the home State of the investor that launched the investment treaty claim, have interests that align more closely with that of the sovereign respondent rather than its own national acting as claimant in the dispute.

The response of sovereign respondents to a regime of increased transparency in investment treaty arbitration is necessarily constrained by domestic laws and doctrines that affect treaty provisions on transparency in investment arbitration. These were identified in Chapter 3 as the following: freedom of information legislation, executive process privilege, and deliberative process privilege. The manner in which these sovereign constraints affect actual disputes were presented in a survey of investment arbitration cases.

The problematic issue of corruption was also confronted in the third chapter, relating transparency in investment treaty arbitration with wider notions of transparency in the international regulatory sphere more generally. This chapter discussed how investment activities tainted with bribery and fraud have presented jurisdictional issues in investment arbitration cases. Chapter 3 included a brief survey of investment treaty arbitration cases where corruption was an issue, and presented an analysis of the impact or potential impact that an increased transparency regime would have on corruption allegations presented in the course of an investment dispute.

A substantial section of Chapter 3 looked at the specific concerns of non-disputing State Parties in relation to transparency in investment treaty arbitration, comparing and contrasting these with that of the sovereign respondent. To place these concerns in context, this chapter presented a discussion on diplomatic protection in relation to the development of investor-State dispute settlement. In proposing that non-disputing State Parties should be able to participate in investment treaty disputes as a matter or right with respect to issues of investment treaty interpretation, this dissertation surveyed investment treaty arbitration cases as well as relevant provisions relating to NAFTA and ICSID arbitration, and the UNCITRAL Rules on Transparency.

The fourth and final chapter looked at the concerns of foreign investors in relation to a regime of increased transparency in investment treaty arbitration. To contextualize this analysis, Chapter 4 first presented a discussion regarding the paradigm shift in investor-State dispute settlement from confidentiality to transparency as a parallel movement with the shift from investor protection to balancing of interests in the investment treaty arbitration regime.

Part of the discussion in Chapter 4 was related to the issues presented in Chapter 2. The new relationships brought about by the transparency movement were examined in this final chapter, specifically the added burden of non-disputing party participation on investors that bring investment treaty claims to arbitration, and the disclosure requirements proposed for third-party funding arrangements.

Because the UNCITRAL Rules on Transparency contain a specific provision classifying confidential business information as an exception to transparency, this last chapter also dissected the development of this provision that is intended specifically for the investor-claimants in investment treaty arbitration.

The particular concerns of foreign investors as potential subjects of criminal proceedings in the host State was discussed in this chapter by way of a survey of cases wherein the sovereign respondent deployed law enforcement measures against claimants in investment disputes. This dissertation presented the observation that the relevant provision in the UNCITRAL Rules on Transparency fails to address the concerns of the foreign investor in this regard.

Chapter 4 also presented corporate nationality planning as a transparency issue. Heretofore examined in academic literature and actual investment treaty arbitration cases as a jurisdictional issue, this dissertation proposes that transparency measures offer a procedural

solution to this substantive law problem. This dissertation proposes that arbitration rules can be refined to require additional information from the claimant with respect to nationality.

This dissertation aimed to evaluate and critique the transparency movement in investment treaty arbitration by looking at current rules and the present state of jurisprudence. Issues not previously considered from the perspective of transparency were presented in this dissertation in the interest of a more comprehensive transparency regime that goes beyond non-party access to information.

Bibliography

LEGAL INSTRUMENTS

Treaties

Agreement between the Government of the Republic of Belarus and the Government of the Kingdom of Cambodia on the Promotion and Reciprocal Protection of Investments (Minsk, 2014)

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965)

Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada (2017)

Dominican Republic–Central America Free Trade Agreement (CAFTA-DR) (2004)

Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (pending entry into force)

North American Free Trade Agreement (NAFTA), Chapter 11 (1994)

Vienna Convention on the Law of Treaties (Vienna, 1969)

United Nations Convention Against Corruption (UNCAC), 2349 UNTS 41 (2005)

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)

Rules and Regulations

Deutsche Institution für Schiedsgerichtsbarkeit (DIS) Arbitration Rules (2018)

International Centre for Settlement of Investment Disputes (ICSID) Administrative and Financial Regulations (2006)

International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (2003)

International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings (1967)

International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings (2003)

International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings (2006)

Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes

Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules (2017)

United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (1976)

United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (2010)

United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (2013)

United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration (2014)

Declarations, Guidelines and Interpretative Notes

International Chamber of Commerce (ICC) International Court of Arbitration, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (Paris, 30 October 2017)

NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (2011)

NAFTA Free Trade Commission, *Statement of the Free Trade Commission on Non-Disputing Party Participation* (2003)

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UN G.A. Res. 61/295 (2007)

DOCUMENTS

International Centre for Settlement of Investment Disputes (ICSID), *ICSID Secretariat Discussion Paper: Possible Improvements of the Framework for ICSID Arbitration* (2004)

International Centre for Settlement of Investment Disputes (ICSID), *List of Topics for Potential ICSID Rule Amendment* (2016)

International Centre for Settlement of Investment Disputes (ICSID), *The ICSID Caseload – Statistics* (Issue 2017-2) (Washington, D.C., 2017)

International Centre for Settlement of Investment Disputes (ICSID), *The ICSID Rules Amendment Process* (2016)

International Centre for Settlement of Investment Disputes (ICSID), *Working Paper of the ICSID Secretariat: Suggested Changes to the ICSID Rules and Regulations* (2005)

International Council for Commercial Arbitration (ICCA), *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (2018)

Schöll, Michael, *Address to the Sixth Committee of the General Assembly by the Chairman of the Forty-sixth session of UNCITRAL* (New York, 2013)

United Nations, UN General Assembly Resolution 68/109 (16 December 2013)

United Nations Commission on International Trade Law (UNCITRAL), *Note by the UNCITRAL Secretariat*, A/CN.9/WG.II/WP.162 (9 December 2010)

United Nations Commission on International Trade Law (UNCITRAL), *Proposal by Governments of Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States of America*, A/CN.9/WG.II/WP.174, (2012)

United Nations Commission on International Trade Law (UNCITRAL), *Report of the Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session (Vienna, 15-19 September 2008)*, A/CN.9/665 (30 September 2008)

United Nations Commission on International Trade Law (UNCITRAL), *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (Vienna, 4-8 October 2010)*, A/CN.9/712 (20 October 2010)

United Nations Commission on International Trade Law (UNCITRAL), *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (New York, 7-11 February 2011)*, A/CN.9/717 (25 February 2011)

United Nations Commission on International Trade Law (UNCITRAL), *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fifth session (Vienna, 3-7 October 2011)*, A/CN.9/736 (17 October 2011)

United Nations Commission on International Trade Law (UNCITRAL), *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-sixth session (New York, 6-10 February 2012)*, A/CN.9/741 (16 February 2012)

United Nations Commission on International Trade Law (UNCITRAL), *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-seventh session (Vienna, 1-5 October 2012)*, A/CN.9/760 (12 October 2012)

United Nations Commission on International Trade Law (UNCITRAL), *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session (New York, 4-8 February 2013)*, A/CN.9/765 (13 February 2013)

United Nations Commission on International Trade Law (UNCITRAL), *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-ninth session (Vienna, 16-20 September 2013)*, A/CN.9/794 (26 September 2013)

United Nations Commission on International Trade Law (UNCITRAL), *Report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth session (New York, 3-7 February 2014)*, A/CN.9/799 (13 February 2014)

United Nations Conference on Trade and Development (UNCTAD), *Transparency: UNCTAD Series on Issues in International Investment Agreements II* (New York and Geneva, 2012)

United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2017: Investment and the Digital Economy* (New York and Geneva, 2017)

CASES

International Court of Justice

Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)

- Award dated 5 February 1970

International Centre for Settlement of Investment Disputes (ICSID)

Aguas del Tunari v. Republic of Bolivia, ICSID Case No. ARB/02/3

- Decision on Respondent's Objections to Jurisdiction, 21 October 2005

Aguas Provinciales de Sante Fe v. Argentina, ICSID Case No. ARB/03/17

- Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006

Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1

- Decision on Provisional Measures, 9 December 1983 (1 ICSID Reports 410)

Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21

- Claimant's Memorial on the Merits, 29 May 2015
- Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, 6 October 2015
- Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment – Puno and Mr Carlos Lopez PhD, 9 June 2016
- Procedural Order No. 5, 21 July 2016
- Partial Dissenting Opinion of Professor Philippe Sands QC, 12 September 2017
- Award, 30 November 2017

Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15

- Procedural Order No. 2, 26 June 2012
- Award, 28 July 2015

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22

- Procedural Order No. 3, 29 September 2006
- Procedural Order No. 5, 2 February 2007

BSG Resources Limited v. Republic of Guinea, ICSID Case No. ARB 14/22

- Request for Arbitration, 1 August 2014
- Procedural Order No. 2: Transparency, 17 September 2015

Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40

- Procedural Order No. 9 (Provisional Measures), 8 July 2014

Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41

- Request for Arbitration, 8 December 2016

EDF (Services) Ltd v. Romania, ICSID Case No. ARB/05/13

- Award, 8 October 2009

EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic, ICSID Case No. ARB/14/14

- Transcript, First Session and Hearing on Provisional Measures, 17 March 2014

Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25

- Award, 16 August 2007

Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/11/12

- Award, 10 December 2014

Giovanna Beccara and Others v. The Argentine Republic, ICSID Case No. ARB/07/5

- Procedural Order No. 3 (Confidentiality Order), 27 January 2010

Giovanni Alemanni and Others v. Argentine Republic, ICSID Case No. ARB/07/8
- Order of the Tribunal Discontinuing the Proceeding, 14 December 2015

Hydro S.r.l. and others v. Republic of Albania, ICSID Case No. ARB/15/28
- Order on Provisional Measures dated 3 March 2016

Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5
- APREFLOFAS Petition for Amicus Curiae Status, 15 September 2014
- Procedural Order No. 2, 1 June 2016
- Decision on Jurisdiction, 4 December 2017

Metal-Tech Ltd. V. Republic of Uzbekistan, ICSID Case No. ARB/10/3
- Award, 4 October 2013

Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6
- Procedural Order No. 3, 12 June 2015

Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12
- Procedural Order Regarding Amici Curiae, 2 February 2011
- Application for Permission to Proceed as Amici Curiae, 2 March 2011
- Claimant's Response to the Amicus Curiae Application, 18 March 2011
- Procedural Order No. 8, 23 March 2011
- Award, 14 October 2016

Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5

Quiborax S.A., et al. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2
- Decision on Provisional Measures dated 26 February 2010

RSM Production Corp. v. Grenada, ICSID Case No. ARB/10/6
- Award, 10 December 2010

RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10
- Decision on Saint Lucia's Request for Security for Costs, 13 August 2014
- Assenting Reasons of Gavan Griffith
- Dissenting Opinion of Judge Edward W. Nottingham

SGS Société Générale de Surveillance, S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13
- Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003

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, 19 May 2005

Telefónica S.A. v. Estados Unidos Mexicanos, ICSID Case No. ARB(AF)/12/4
- *Resolución Procesal* No. 1, 8 July 2013

Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18

- Decision on Jurisdiction, 29 April 2004
- Award, 26 July 2007

TSA Spectrum de Argentina SA v. Argentine Republic, ICSID Case No. ARB/05/5

- Award, 19 December 2008

Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15

- Award, 1 June 2009

World Duty Free Company Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7

- Award, 4 October 2006

North American Free Trade Agreement (NAFTA) *(ICSID Additional Facility and UNCITRAL)*

ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1

- Award, 9 January 2003

Glamis Gold, Ltd. v. United States of America

- Notice of Arbitration, 9 December 2003
- Quechan Indian Nation Application for Leave to File a Non-Party Submission, 19 August 2005
- Decision On Parties' Requests For Production Of Documents Withheld On Grounds Of Privilege, 17 November 2005
- Decision on Application and Submission by Quechan Indian Nation, 16 September 2005
- Award, 8 June 2009

Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1

- Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information Regarding ICSID Case ARB/(AF)/97/1, 27 October 1997

Methanex Corporation v. United States of America

- Petition to the Arbitral Tribunal by the International Institute for Sustainable Development, 25 August 2000
- Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001
- Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005

Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2

- Interim Decision Regarding Confidentiality of Documents

United Parcel Service of America v. Government of Canada, ICSID Case No. UNCT/02/1

- Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001

- Procedural Directions and Order of the Tribunal, 4 April 2003
- Decision Relating to Canada's Claim of Cabinet Privilege, Ad hoc—UNCITRAL Arbitration Rules, IIC 267 (2004), 8 October 2004

The Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3

- Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001

Permanent Court of Arbitration

Achmea B.V. v. The Slovak Republic, PCA Case No. 2008-13

- Final Award, 7 December 2012

Iberdrola, S.A. (España) and Iberdrola Energía, S.A.U. (España) v. The Plurinational State of Bolivia, PCA Case No. 2015-05

- *Notificación de Arbitraje*, 29 July 2014
- *Orden de Conclusión*, 16 February 2016

In the Matter of an Arbitration under the UNCITRAL Arbitration Rules between Chevron Corporation and Texaco Petroleum Company and the Republic of Ecuador (Chevron v. Ecuador), PCA Case No. 2009-23

- Claimant's Notice of Arbitration, 23 September 2009
- Petition for Participation as Non-Disputing Parties, 22 October 2010
- Procedural Order No. 8, 18 April 2011

UNCITRAL ad hoc

CME Czech Republic B.V. v. The Czech Republic

- Partial Award, 13 September 2001
- Final Award, 14 March 2003

Domestic Courts

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)

BOOKS AND BOOK CHAPTERS

Alexander, Klint, *Article 6. Hearings*, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 227–248 (Dimitrij Euler, Markus W. Gehring, & Maxi Scherer eds., Cambridge University Press, 2015)

Alexandrov, Stanimir A. & Marinn Carlson, *The Opportunity to Be Heard: Accommodating Amicus Curiae Participation in Investment Treaty Arbitration*, in LIBER AMICORUM BERNARDO CREMADES 49–64 (Miguel Ángel Fernández-Ballesteros, Bernardo Cremades, & David Arias eds., Kluwer Law International, 2010)

Ausburger, Thierry, *Article 7. Exceptions to Transparency*, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 249–306 (Dimitrij Euler, Markus W. Gehring, & Maxi Scherer eds., Cambridge University Press, 2015)

Baumgartner, Jorun, TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW (Oxford University Press, 2016)

Bělohlávek, Alexander J., *Confidentiality and Publicity in Investment Arbitration, Public Interest and Scope of Powers Vested in Arbitral Tribunals*, in RIGHTS OF THE HOST STATES WITHIN THE SYSTEM OF INTERNATIONAL INVESTMENT PROTECTION 23–45 (Alexander J. Bělohlávek & Rozehnalová Naděžda, eds., Juris Publishing, 2011)

Berglund, Tom, *Corporate Governance and Optimal Transparency*, in THE OXFORD HANDBOOK OF ECONOMIC AND INSTITUTIONAL TRANSPARENCY 359–370 (Jens Forssbæck & Lars Oxelheim, eds. Oxford University Press, 2015)

Bernardini, Piero, *International Commercial Arbitration and Investment Treaty Arbitration: Analogies and Differences, in* PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 52–68 (David Caron et al. eds., Oxford University Press, 2015)

Bianchi, Andrea & Anne Peters (eds.), TRANSPARENCY IN INTERNATIONAL LAW (Cambridge University Press, 2013)

Bianco, Giuseppe, *Article 2. Publication of information at the commencement of arbitral proceedings,* in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 64–90 (Dimitrij Euler, Markus W. Gehring, & Maxi Scherer eds., Cambridge University Press, 2015)

Binder, Christina, *Investment, Development and Indigenous Peoples*, in INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT – BRIDGING THE GAP, (Stephan W. Schill, Christian J. Tams and Rainer Hofmann, eds., Elgar Publishing, 2015)

Bjorklund, Andrea K. *NAFTA Chapter 11*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 465–532 (Chester Brown ed., Oxford University Press, 2013)

Blackaby, Nigel & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 253–274 (Michael Waibel et al. eds., Wolters Kluwer, 2010)

Dupuy, Pierre-Marie, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 45–62 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni eds., Oxford University Press, 2009)

Dimsey, Mariel, *Article 4. Submission by a third person*, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 128–195 (Dimitrij Euler, Markus W. Gehring, & Maxi Scherer eds., Cambridge University Press, 2015)

Dolzer, Rudolf and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (Oxford University Press, 2008)

Fodella, Alessandro, *Indigenous Peoples, the Environment and International Jurisprudence*, in INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW – ESSAYS IN

HONOUR OF TULLIO TREVES (Nerina Boschiero, Tullio Scovazzi, Cesare Pitea, Chiara Ragni, eds., Springer Publishing, 2013)

Forssbæck, Jens & Lars Oxelheim, *The Multifaceted Concept of Transparency*, in THE OXFORD HANDBOOK OF ECONOMIC AND INSTITUTIONAL TRANSPARENCY 3 – 30 (Jens Forssbæck & Lars Oxelheim, eds. Oxford University Press, 2015)

Gehring, Markus W. & Dimitrij Euler, *Public Interest in Investment Arbitration*, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 7 – 27 (Dimitrij Euler, Markus W. Gehring, & Maxi Scherer eds., Cambridge University Press, 2015)

Greenwood, Christopher, *Reflections on "Most Favoured Nation" Clauses in Bilateral Investment Treaties*, in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 556–564 (David D. Caron et al. eds., Oxford University Press, 2015)

Harrison, James, *Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 396–421 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni eds., Oxford University Press, 2009)

Hindelang, Steffen & Markus Krajewski, *Conclusion and Outlook: Whither International Investment Law?*, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED 379 (Steffen Hindelang & Markus Krajewski eds., Oxford University Press, 2016)

Hirsch, Mosche, *Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY (Tomer Broude and Yuval Shany, eds., Bloomsbury/Hart Publishing, 2008)

Kaufmann-Kohler, Gabrielle, *Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?*, in DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT (Laurence de Boisson de Chazournes, et al., eds., Brill, 2013)

Kee, Christopher, *Article 3. Publication of documents*, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 91–127 (Dimitrij Euler, Markus W. Gehring, & Maxi Scherer eds., Cambridge University Press, 2015)

Kessler, Hilmar Raeschke in collaboration with Dorothee Gottwald, *Corruption*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, Peter Muchlinski, et al., eds. (Oxford University Press, 2008)

Kinnear, Meg, Eloïse Obadia & Michael Gagain, *The ICSID Approach to Publication of Information in Investor-State Arbitration*, in THE RISE OF TRANSPARENCY IN INTERNATIONAL ARBITRATION: THE CASE FOR THE ANONYMOUS PUBLICATION OF ARBITRAL AWARDS 107–122 (Alberto Malatesta & Rinaldo Sali eds., JurisNet Publishing, 2013)

Lamm, Carolyn B. and Eckhard R. Hellbeck, *Third-Party Funding in Investor-State Arbitration Introduction and Overview* in THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 101, Dossiers of the ICC Institute of World Business Law, Volume 10 (Bernardo M. Cremades Román and Antonias Dimolitsa, eds., ICC Paris, 2013)

Llamzon, Aloysius P., CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION (Oxford University Press, 2014)

Llamzon, Aloysius and Anthony Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct*, in LEGITIMACY: MYTHS, REALITIES, CHALLENGES (ICCA Congress Series No. 18, Albert Jan Van den Berg, ed., 2015)

Lenzerini, Federico, *Foreign Investment in the Energy Sector and Indigenous Peoples' Rights*, in FOREIGN INVESTMENT IN THE ENERGY SECTOR - BALANCING PRIVATE AND PUBLIC INTERESTS (Eric De Brabandere and Tarcisio Gazzini, eds., Brill Nijhoff, 2014)

Malintoppi, Loretta and Hussein Haeri, *The Non-Disputing State Party in Investment Arbitration: An Interested Player or the Third Man Out?*, in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION (David D. Caron et al. eds., Oxford University Press, 2015)

Maupin, Julie, *Transparency in International Investment Law: The Good, the Bad and the Murky*, in TRANSPARENCY IN INTERNATIONAL LAW 142–171 (Andrea Bianchi & Anne Peters eds., Cambridge University Press, 2013)

Menaker, Andrea J., *Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 129–160 (Katia Yannaca-Small ed., Oxford University Press, 2010)

Muchlinski, Peter, *Social Responsibility and International Law*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE 223–244 (Todd Weiler & Freya Baetens eds., Brill, 2011)

Peters, Anne, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW (Cambridge University Press, 2016)

Reiner, Clara & Christoph Schreuer, *Human Rights and International Investment Arbitration*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 82–117 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni eds., Oxford University Press, 2009)

Reinisch, August, *Investors*, in NON-STATE ACTORS IN INTERNATIONAL LAW 253 – 271 (Math Noorman, August Reinisch & Cedric Ryngaert, eds., Bloomsbury/Hart Publishing, 2015)

Reinisch, August and Loretta Malintopi, *Methods of Dispute Resolution*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Peter Muchlinski, et al., eds., Oxford University Press, 2008)

Roney, David P. & Katherine von der Weid, *Third-Party Funding in International Arbitration: New Opportunities and New Challenges*, *in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 2013 183, (Christoph Müller & Antonio Rigozzi eds., Schulthess Publishing, Zurich, 2013).

Salasky, Julia & Corinne Montineri, *UN Commission on International Trade Law and Multilateral Rule-making: Consensus, Sovereignty and the Role of International Organizations in the Preparation of the UNCITRAL Rules on Transparency*, in RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 584–596 (Jean Kalicki & Anna Joubin-Bret eds., Brill Nijhoff, 2015)

Schefer, Krista Nadakavukaren, *Article 1. Scope of Application*, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 28–63 (Dimitrij Euler, Markus W. Gehring, & Maxi Scherer eds., Cambridge University Press, 2015)

Schreuer, Christoph H., et al., THE ICSID CONVENTION: A COMMENTARY (Cambridge University Press, 2010)

Schreuer, Christoph & Ursula Kriebaum, *From Individual to Community Interest in International Investment Law*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 1079–1096 (Ulrich Fastenrath et al. eds., Oxford University Press, 2011)

Smeureanu, Ileana M., CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION (Wolters Kluwer, 2011)

Sornarajah, M., RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (Cambridge University Press, 2015)

Sornarajah, M., THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (4th ed., Cambridge University Press, 2017)

Thorn, Rachel & Jennifer Doucleff, *Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of "Investor,"* in THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 3–28 (Michael Waibel et al. eds., Wolters Kluwer, 2010)

UNCTAD, INVESTOR NATIONALITY: POLICY CHALLENGES (2016)

Vadi, Valentina, CULTURAL HERITAGE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Cambridge University Press, 2014)

Van Harten, Gus, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (Oxford University Press, 2007)

Van Harten, Gus, *Perceived Bias in Investment Treaty Arbitration*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 433–453 (Michael Waibel et al. eds., Wolters Kluwer, 2010)

Várady, Tibor, et al., INTERNATIONAL COMMERCIAL ARBITRATION – A TRANSNATIONAL PERSPECTIVE (6th ed., West Academic Publishing, 2015)

Vaughn, Robert G. & Padideh Ala'i, eds., RESEARCH HANDBOOK ON TRANSPARENCY (Elgar Publishing, 2014)

Villiger, M.E., *Article 30: Application Of Successive Treaties Relating To The Same Subject-Matter*, in COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 395–412 (Brill Nijhoff, 2008)

Waibel, Michael, et al. (eds.), THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Wolters Kluwer, 2010)

Wälde, Thomas W., *"Equality of Arms" in Investment Arbitration: Procedural Challenges*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 161–188 (Katia Yannaca-Small ed., Oxford University Press, 2010)

Thomas W. Wälde, *The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research*, IN LES ASPECTS NOUVEAUX DU DROIT DES INVESTISSEMENTS INTERNATIONAUX: NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 63–154, (Centre for Studies and Research in International Law and International Relations ed., 2006)

Wouters, Jan & Anna-Luise Chané, *Multinational Corporations in International Law*, in NON-STATE ACTORS IN INTERNATIONAL LAW 225–251, 235 (Math Noortmann, August Reinisch, & Cedric Ryngaert eds., Bloomsbury/Hart Publishing, 2015)

JOURNAL ARTICLES

Alexandrov, Stanimir A., *The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction Ratione Temporis*, 4 The Law & Practice of International Courts and Tribunals 19–59 (2005)

Alvarez, Jose, *Are Corporations "Subjects" of International Law?*, 9 Santa Clara J. Int. Law 1 (2011)

Antonietti, Aurélia, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Rev. – Foreign Invest. Law J. 427–448 (2006)

Ascensio, Hervé, *Abuse of Process in International Investment Arbitration*, 13 Chinese J. Int. Law 763–785 (2014)

Bergman, Neale H., *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, 54 Int. Leg. Mater. 747–757 (2015)

Boisson de Chazournes, Laurence & Rukia Baruti, *Transparency in Investor-State Arbitration: An Incremental Approach*, 2 Bahrain Chamb. Dispute Resolut. Int. Arbitr. Rev. 59–76 (2015)

Borman, Yael Ribco, *Treaty Shopping Through Corporate Restructuring of Investments: Legitimate Corporate Planning or Abuse of Rights?*, Hague Yearb. Int. Law 359–389 (2011)

Braun, Tillmann Rudolf, *Globalization-Driven Innovation: The Investor as a Partial Subject in Public International Law*, 15 J. World Invest. Amp Trade 73–116 (2014)

Buys, Cindy Galway, *The Tensions between Confidentiality and Transparency in International Arbitration*. 14 Am. Rev. of International Arbitration, 121 (2003)

Caruba, Sandra L. *Resolving International Investment Disputes in a Globalised World*, 13 NZBLQ 128 (2007)

Coe, Jack J. Jr., *Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership*, 54 U. Kan. L. Rev. 1339 (2006)

Cook, Jeffrey T., *The Evolution of Investor-State Dispute Resolution in NAFTA and CAFTA: Wild West to World Order*, 34 Pepperdine L. Rev. 1085 (2007)

De Brabandere, Eric, *"Good Faith", "Abuse of Process" and the Initiation of Investment Treaty Claims*, 3 J. Int. Dispute Settl. 609–636 (2012)

De Brabandere, Eric & Julia Lepeltak, *Third-Party Funding in International Investment Arbitration*, 27 ICSID Rev. 379, 395 – 396 (2012)

Feldman, M. *Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration*, 27 ICSID Rev. 281–302 (2012)

Feldman, Mark, *State-Owned Enterprises as Claimants in International Investment Arbitration*, 31 ICSID Rev. – Foreign Investment Law J. 24 – 35 (2016)

Feliciano, Florentino P., *The Ordre Public Dimensions Of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration*, 87 Philippine L. J. 1–20

Gaffney, John P., *Abuse of Process in Investment Treaty Arbitration*, 11 J. World Investment & Trade 515–538 (2010)

Goldsmith, Aren & Lorenzo Melchionda, *Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask) Part 2*, 5 Int'l Bus. L. J. 221 (2012)

Gomez, Katia Fach, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 Fordham Intl. L. J. 510 (2012)

Kirtley, William Lawton, *The Transfer of Treaty Claims and Treaty-Shopping in Investor-State Disputes*, 10 J. World Invest. Amp Trade 427–461 (2009)

Knahr, Christina, *Transparency, Third Party Participation and Access to Documents in International Investment Arbitration*, 23 Arbitr. Int. 327–356 (2007)

Knahr, Christina & August Reinisch, *Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise*, 6 Law Pract. Int. Courts Trib. 97 – 118 (2007)

Knieper, Judith, *The UNCITRAL Transparency Standards in ISDS as a Result of Multi-lateral Negotiation*, 1 European Investment Law and Arbitration Review 155–167 (2016)

Lamm, Carolyn B., Brody K. Greenwald & Kristen M. Young, *From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption*, 29 ICSID Rev. - Foreign Invest. Law J. 328–349 (2014)

Lee, John, *Resolving Concerns of Treaty Shopping in International Investment Arbitration*, 6 J. Int. Dispute Settl. 355–379 (2015)

Leon, Barry & John Terry, *Special Considerations When a State is a Party to International Arbitration*, 61 Disp. Resol. J. 69, 73 (2006)

Levine, Eugenia, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 Berkeley J. Int. Law 200–224 (2011)

Maupin, Julie A., *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 Va. J. Int. Law 367 – 436 (2013)

Muchlinski, Peter, *Corporations and the Uses of Law: International Investment Arbitration as a "Multilateral Legal Order,"* 1 Oñati Socio-Leg. Ser., 23 (2011)

Notes by Editorial Board, *Mechanisms of Secrecy*, 121 Harv. L. Rev. 1556 (2008)

Obadia, Eloïse, *Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration*, 22 ICSID Rev. - Foreign Invest. Law J. 349–379, (2007)

Orakhelashvili, Alexander, *Article 30 of the 1969 Vienna Convention on the Law of Treaties: Application of the Successive Treaties Relating to the Same Subject-Matter*, 31 ICSID Rev. – Foreign Invest. Law J. 344–365 (2016)

Paulsson, Jan, *Arbitration Without Privity*, 10 ICSID Review 232–257 (1995)

Sahani, Victoria Shannon, *Reshaping Third-Party Funding*, 91 Tul. L. Rev. 405 (2017)

Schill, Stephan, *The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds*, II Trade Law Dev. 59–86 (2010)

Sornarajah, M., *International Investment Law as Development Law: The Obsolescence of a Fraudulent System*, 7 Eur. Yearb. Int. Econ. Law 224 (2016)

Triantafilou, Epaminontas E., *Amicus Submissions in Investor-State Arbitration After Suez v. Argentina*, 24 Arbitration Int. 571–586 (2008)

Van Harten, Gus, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 Int. Comp. Law Q. 371–393, 379 (2007)

Voon, Tania, Andrew Mitchell & James Munro, *Legal Responses to Corporate Manoeuvring in International Investment Arbitration*, 5 J. Int. Dispute Settl. 41–68 (2014)

Thomas W. Wälde, *Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Pro-actively, the Equality of Arms*, 26 Arbitr. Int. 3–42, 15 (2010)

INTERNET SOURCES

230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement from NAFTA and Other Pacts (2017), https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf

Cremades, Bernardo M., *Third Party Funding in International Arbitration* (23 September 2011), http://www.cremades.com/en/publications/third-party-funding-in-international-arbitration,

Eco Oro Minerals Announces Investment by Tenor Capital, 22 July 2016, http://www.eco-oro.com/s/NewsReleases.asp?ReportID=756943&_Type=News-Releases&_Title=Eco-Oro-Minerals-Announces-Investment-by-Tenor-Capital

Kinnear, Meg, *Transparency and Third Party Participation in Investor-State Dispute Settlement* (2005), http://www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf.

ICC Court amends its Rules to enhance transparency and efficiency (4 November 2016), https://iccwbo.org/media-wall/news-speeches/icc-court-amends-its-rules-to-enhance-transparency-and-efficiency/

International Institute for Sustainable Development (IISD) and Center for International Environmental Law (CIEL), *Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations* (2007), http://www.iisd.org/pdf/2008/investment_revising_uncitral_arbitration_dec.pdf

Peterson, Luke Eric, *UNCITRAL Transparency Rules Begin to be Used by Parties in Investor-State Arbitrations, but with Some Notable Twists*, Investment Arbitration Reporter (2015), tinyurl.com/qbpx3lj

Pohl, Joachim, Kekeletso Mashigo & Alexis Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD Work. Pap. Int.

Invest., 20 (2012), https://www.oecd-ilibrary.org/finance-and-investment/dispute-settlement-provisions-in-international-investment-agreements_5k8xb71nf628-en

Sahani, Victoria Shannon, *Revealing Not-for-Profit Third-Party Funders in Investment Arbitration*, http://oxia.ouplaw.com/page/third-party-funders

Transparency International, at https://www.transparency.org/whoweare/organisation/mission_vision_and_values/0

Transparency International, at https://www.transparency.org/what-is-corruption#what-is-transparency

Yannaca-Small, Katia, *Interpretation of the Umbrella Clause in Investment Agreements*, OECD Working Papers on International Investment, 2006/03, OECD Publishing. http://dx.doi.org/10.1787/415453814578 (2006)