CENTRAL EUROPEAN UNIVERSITY

THE TENSION BETWEEN TRANSPARENCY AND CONFIDENTIALITY IN INVESTMENT TREATY ARBITRATION

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ABSTRACT

Transparent investment arbitration is the road that should be followed. The question the thesis tries to answer is whether it is possible to establish a transparency regime suitable for all investment disputes regarding public hearings and access to documents. Protection of confidentiality within the realm of investment arbitration is often overshadowed by transparency to legitimize investment relationships in the eyes of the public. However, by insisting on transparency to prevail in any case, disputing parties' autonomy and the tribunal's discretion are being substantially limited. Insensitivity to the importance of confidentiality in investment disputes is a fertile ground for launching media campaigns against one of the parties, harming the reputation and ultimately driving the parties away from investment arbitration and investment itself. It is not surprising that high transparency standards set out in the recently adopted UNCITRAL Transparency Rules have not had much resonance yet with the states in their treaties and most successful arbitral institutions. Rather, legal and institutional frameworks and awards are adapting to the transparency trend carefully by saving parties' autonomy and tribunals' discretion. To resolve this tension between transparency and confidentiality in investment arbitration, the solution is to recognize the parties' autonomy in choosing the suitable standard for their procedural relationship and recognize the tribunal's discretion to decide on the existence of a public interest in case-by-case analysis.

1. INTRODUCTION

Investment treaty arbitration can touch upon public policy issues and lead to monetary liability of the Host State. Thus, there is an inherent public interest justifying the need for public scrutiny of the government's actions regarding these disputes. Transparency of proceedings is positioned as a tool to address concerns about this 'public' dimension of investment treaty arbitration and its legitimacy.[1] Procedural transparency refers to public access to documents and public hearings, which include third-party intervention.[2] More narrowly, the notion includes public registration of the dispute, information about the parties, proceedings being heard in an open court, public presentation of evidence, publication of parties' submissions and the content of the tribunal's decisions including the award.[3] The thesis focuses on this narrower part of the notion - publicity of the hearings and access to documents.

On the other hand, parties resort to arbitration to resolve their disputes confidentially as opposed to public state court proceedings. Confidentiality provides for private hearings and non-disclosure of documents to protect procedural integrity and efficiency, the investor's reputation, business interests and protection against media pressure.[4] Thus, publicity might cause backlash, escalation and consequently aggravation of the dispute resolution.[5]

[1] Shirlow Esme, "Dawn of a new era? The UNCITRAL Rules and UN Convention on Transparency in Treaty Based Investor-State Arbitration", in Meg Kinnear and Campbell McLachlan (eds), ICSID Review Foreign Investment Law Journal, Oxford University Press 2016, Volume 31 Issue 3, 647.
[2] Shirlow (n. 1), 624-625.
[3] Ribeiro João, Douglas Michael, "Transparency in Investor-State Arbitration: The Way Forward", Asian International Arbitration Journal, Singapore International Arbitration Centre (in co-operation with Kluwer Law International), Kluwer Law International 2015, Volume 11 Issue 1, 51.
[4] Montoya Lukas (Senior Associate at Lévy Kaufmann-Kohler), "Transparency", Last updated: 19 February 2024, Jus Mundi, available at: https://jusmundi.com/en/document/publication/en-transparency, para. 17; Born Gary B., "Chapter 20: Confidentiality in International Arbitration", Last updated: November 2023, in Gary B. Born, International Commercial Arbitration, 3rd edition, Kluwer Law International 2021; Sup-Joon Byun, Hyungkeun Lee, Shul Park "Procedural Issues in an Arbitration: Disclosure and Transparency", Global Arbitration Review, 21 December 2023.
[5] Euler Dimitrij, Gehring Markus, Scherer Maxi et. al., "Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration", Cambridge University Press, August 2015, 354, para. 9.

The concern for the lack of transparency and the public's 'right to know' has led to the erosion of the principle of confidentiality in international investment arbitration.[6] The solution was to narrow down justifications for confidentiality and thus make it harder for the parties to oppose and tribunals to reject disclosures of documents or to close the hearings.[7] The transparency trend led to the amendment of UNCITRAL Arbitration Rules[8] by introducing UNCITRAL Transparency Rules.[9] The Rules aim to solve the legitimacy crisis by equally imposing transparency obligations on the investor and the Host State.[10]

Chapter 2 Section 2 is dedicated to presenting the new UNICTRAL Transparency Rules. The Rules aim to become a universal standard of transparency and invite the countries to opt in. Further, Section 3 looks at whether the current transparency regimes within the rules of most prominent arbitral institutions reflect the globally proclaimed transparency trend. Also, Section 4 compares parties' agreements on transparency standards in provisions of the multilateral and bilateral investment treaties before and after the advent of the UNICTRAL Transparency Rules to see whether the amendments of the treaties are in line with the regime proposed by UNCITRAL. Chapter 3 aims to show the manifestation of transparency ideals by examining the tribunal's reasonings on disclosure requests in different cases before and after the advent of the Transparency Rules to see how tribunals perceive their discretionary powers and the value of parties' agreements on confidentiality. Based on the overview of different frameworks and

[6] Shirlow (n. 1), 622; Bernasconi-Osterwalder Nathalie, Johnson Lise, Bulletin #2, "Transparency in the Dispute Settlement Process: Country best practices", Best Practices Series, International Institute for Sustainable Development, February 2011, 1; Blackaby Nigel, Partasides Constantine et. al., "2. Agreement to Arbitrate", in "Redfern and Hunter on International Arbitration", Seventh Edition, Kluwer Law International, Oxford University Press 2023, 27; Keller Moritz, Kittelmann Caroline, "Introduction: Towards an EU investment protection law framework", in Moritz Keller (ed), "EU Investment Protection Law: Article-by-Article Commentary", Verlag C.H. Beck oHG 2023, para. 89.
[7] UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty Third Session (Vienna, 4–8 October 2010)", UN Doc A/CN.9/712, para. 30.
[8] United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (2021).
[9] Ribeiro/Douglas (n. 3), 59; United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration, New York, 2014.
[10] Euler/Gehring/Scherer (n. 5), 3, para. 6.

case law, the thesis aims to answer the question of the viability of reaching a globally acceptable transparency regime.

2. OVERVIEW OF TRANSPARENCY LEGAL FRAMEWORKS

2.1. Introduction

On an international level, the push for greater transparency resulted in the 2013 adoption of the UNCITRAL Rules on Transparency along with the 2014 Mauritius Convention[11] which further extends its application. First, the chapter discusses the new UNCITRAL regime which regulates in detail the exceptions to transparency. Second, the chapter presents how is the transparency trend tackled under the institutional rules, namely arbitration rules of the International Centre for Settlement of Investment Disputes, Singapore International Arbitration Centre and Stockholm Chamber of Commerce. Finally, the chapter examines the treatment of confidentiality within instruments of consent under which the disputes are brought under in practice. These are the regimes under the internationally significant multilateral investment treaties, namely the ex-North American Free Trade Agreement, which is today's United States-Mexico-Canada Agreement, recently concluded EU investment treaties and the transparency provisions within bilateral investment treaties.

2.2. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

2.2.1. Introduction

The first version of the Rules entered into force in April 2014 and applies to disputes arising from treaties concluded on or after 1 April 2014. The subsequent version, commonly known as Mauritius Convention, entered into force in October 2017 covers disputes arising from treaties concluded before 1 April 2014.[12] The parties need to opt out to exclude the application of the first version of the Rules to their future treaties[13] and opt in for the application

[11] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, New York, 2014 (the "Mauritius Convention on Transparency").
[12] UNCITRAL Arbitration Rules (n. 8), Art. 1(2).
[13] UNICTRAL Transparency Rules (n. 9), Art. 1(1).

of the Mauritius Convention to their existing treaties[14]. Thus, the Rules aim to establish a new transparency standard applicable to all investment treaties[15] and secure their prevalence in case of a conflict with other arbitration rules.[16]

The reasons behind the new transparency setting have been explained by the UNICTRAL Working Group at the time. The Working Group stated that investment treaty arbitration should not be left 'in the hands of the parties' and that the tribunals should be provided with guidelines on how to decide on disclosures to avoid lengthy debates on disclosures.[17] In addition to prescribing the criteria for deciding on disclosure, the Rules contain a general presumption favouring transparency. In particular, when exercising its discretion, the tribunals should be guided by the transparency objective of the Rules.[18] Also, besides motivating the parties to opt-in for the Rules, the parties are more than welcome to further increase transparency. The Rules do not aim at imposing a 'ceiling' on transparency but rather allow the disputing parties to go beyond the standard set by the Rules.[19] Some treaties have gone beyond this highly transparent regime, as it will be seen in the later chapters of the thesis. The next section examines the transparency regime under the Rules more closely.

[14] *Ibid*, Art. 1(2).
[15] UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Fourth Session (New York, 7–11 February 2011)", UN Doc A/CN.9/717, para. 29.
[16] UNCITRAL Transparency Rules (n. 9), Art. 1(7).
[17] UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Sixth Session (New York, 6–10 February 2012)", UN Doc A/CN.9/741, para 66; UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Seventh Session (Vienna, 1–5 October 2012)", UN Doc A/CN.9/760, para 78; Euler/Gehring/Scherer (n. 5), 256, para. 16.
[18] UNCITRAL Transparency Rules (n. 9), Art. 1 (3)(4).
[19] UNCITRAL Transparency Rules (n. 9), Art. 1(3)(7)(8); 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, para 33.

2.2.2. Transparency standard according to the Rules

Articles 3 and 6 of the Rules provide for the publication of benchmark information on the cases by enabling access to different documents used and produced in the course of the proceedings and setting open hearings as a default rule.

Right from the start**,** it is mandatory to publish certain basic information - the identity of the parties, the economic sector involved and the underlying treaty.[20] This obligation ensures the public awareness that the dispute exists.[21] As a compromise, it requires only to list the economic sector and not the subject matter of the dispute, which would provide more information.[22] Thus, the automatic publication of these three pieces of information is considered essential and non-contentious.[23]

During proceedings, there are three categories of documents to be published by the tribunal. First, parties' written statements and submissions, list of exhibits, transcripts of hearings, if available, and all tribunal's decisions shall be automatically published.[24] Second, expert reports and witness statements shall be made available upon a credible request by any person.[25] The request should be made in good faith without the intent to abuse the process.[26] This category of documents is considered more controversial and burdensome to be published automatically and the request mechanism has been introduced thus as a compromise.[27] Third, after consultation with the parties, the tribunal has the discretion to order the publication of exhibits and any other document produced not falling within the previous two categories, such

[20] *Ibid*, Art. 2.
[21] Euler/Gehring/Scherer (n. 5), 65, para. 4.
[22] Euler/Gehring/Scherer (n. 5), 71, para. 23; UNCITRAL Report (n. 15), para. 68.
[23] Euler/Gehring/Scherer (n. 5), 77, 78, 89.
[24] UNCITRAL Transparency Rules (n. 9), Art. 3(1).
[25] *Ibid*, Art. 3(2); Euler/Gehring/Scherer (n. 5), 112, 113.
[26] Euler/Gehring/Scherer (n. 5), 115, 116.
[27] UNCITRAL Report October 2012 (n. 17), para. 15.

as the tribunal's deliberations and other draft documents.[28] As hearings shall be open, the presentation of oral arguments or evidence is open to the public.[29]

The transparency regime laid down by the Rules is subject to the core provision of this analysis – Art. 7 entitled "Exceptions to transparency".[30] The provision lists the competing private interests and provides guidance to the tribunal in exercising its discretion to ensure balance.[31]

First, the Rules forbid the publishing of confidential or protected information as well as information whose publication could undermine the integrity of the proceedings.[32] The provision lists the possible sources protecting certain information or containing confidential information but leaves the designation of confidentiality to the tribunal's discretion.[33] Thus, confidential business information, information protected under the treaty or respondent state's law and information whose disclosure would impede law enforcement will remain confidential.[34]

Second, the criterion for the tribunal in deciding on the disclosure of information is also whether the publication would jeopardize the integrity of the proceedings or are there other comparably exceptional circumstances justifying non-publication, such as disturbance of collection or production of evidence or intimidation of witnesses, counsels, or arbitrators.[35] Thus, in this scenario, disclosure would have a disruptive effect on the proceedings.

[28] UNCITRAL Transparency Rules (n. 9), Art. 3(3); Euler/Gehring/Scherer (n. 5), 116, 118.
[29] *Ibid*, Art. 6(1).
[30] *Ibid*, Arts. 3 (2)(3)4), 6(2).
[31] *Ibid*, Art. 1(4).
[32] *Ibid*, Art. 7(1).
[33] *Ibid*, Art. 7(2); Euler/Gehring/Scherer (n. 5), 265, para. 48.
[34] *Ibid*, Art. 7(2).
[35] *Ibid*, Art. 7(6)(7); Euler/Gehring/Scherer (n. 5), 293, para. 148.

Third, the information will not be disclosed if it would jeopardise the essential security interests of the state.[36] Since states have discretion to define this notion and non-derogable national law prevails over the Rules, tribunals must ensure this exception is invoked in good faith.[37]

In these three scenarios, the tribunal decides whether the information contained in documents used or produced during proceedings should be protected from disclosure by making appropriate arrangements such as redaction of documents or closing the hearings to the necessary extent.[38] It takes into account time and costs to preserve efficiency and consults the parties to ensure fairness of the proceedings.[39] Finally, the Rules do not regulate sanctions in case of breach of the tribunal's transparency orders such as drawing adverse inferences or costs decision.[40] However, costs can be apportioned adequately in case of misconduct under UNICTRAL Arbitration Rules.[41]

2.2.3. Conclusion

Only 9 states have ratified the Mauritius Convention to date.[42] There are several possible factors behind states' unresponsiveness towards full application of the Rules. First, the opt-in approach for the treaties concluded before 2014 is too extensive. For the majority of states, it is not suitable to put all their existing treaties under the same umbrella or to amend them to reach a similar level of transparency, as is presented in Section 4 of this chapter. Second, even if parties agree on the Rules, they are still allowed to derogate the regime with their treaty since

[36] *Ibid*, Art. 7(5).
[37] *Ibid*, Art. 1(7)(8); Euler/Gehring/Scherer (n. 5), 288, 353.
[38] *Ibid*, Art. 7(3).
[39] *Ibid*, Art. 7(3); Euler/Gehring/Scherer (n. 5), 275, 277, 326.
[40] Euler/Gehring/Scherer (n. 5), 303, para. 178.
[41] United Nations Commission on International Trade Law Arbitration Rules, Vienna, 2021, Art. 42(2).
[42] UNCITRAL, Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014), available at https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status, last accessed: 13 June 2024.

the treaty prevails over the Rules. Third, the Working Group justified intrusion with the tribunal's discretion by stating that "*public interest issues may not always be readily apparent to the tribunal itself*".[43] The tribunal is not welcome to get into specific circumstances but is rather led in the direction of revealing all information which is portrayed as a desirable solution in every case. Finally, the tribunal shall consult the parties but does not need their consent to decide, which challenges one of the hallmarks of arbitration - party autonomy.[44] Thus, until states adapt their laws and treaties, the transparency as imagined by the UNICTRAL regime will not succeed.[45]

2.3. Institutional rules

At the institutional level, this section examines the approach to confidentiality of the three arbitration institutions under which most investment arbitrations take place. Institutions provide not only guidance and administrative support but also retain sensible, party-oriented approach when amending their rules to adapt to recent trends.

2.3.1. ICSID Regime

ICSID is a leading institution for investor-state arbitration having administered approximately 70% of all known investment arbitrations and more investment cases than all other organisations combined.[46]

Transparency within the ICSID framework is rather limited since its extent predominantly depends on the parties' agreement or any applicable provision contained in the instrument of consent. At the beginning of proceedings, ICSID Administrative and Financial Regulations[47]

[43] Shirlow (n. 1), 645; UNCITRAL Report (n. 15), para. 110.
[44] Euler/Gehring/Scherer (n. 5), 55, 234, 328, 329;
[45] Euler/Gehring/Scherer (n. 5), 61, 62.
[46] ICSID Annual Report 2023, 4, available at: https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR2023_ENGLISH_web_spread.pdf; UNCITRAL Report (n. 7), para. 34.
[47]ICSID Administrative and Financial Rules, 2022.

impose the publication of certain basic information regarding ongoing cases.[48] The names of the disputing parties, the economic sector involved, the subject matter of the dispute, the invoked instrument of consent, the applicable arbitration rules, and the status of the proceedings are automatically published.

Recently revised ICSID Arbitration Rules[49] allow parties to object not only to the publication of documents[50] and other information[51], but also to open hearings[52]. Also, the publication of the tribunal's decisions is within the parties' autonomy.[53] However, excerpts of the legal reasoning are mandatorily published.[54] The parties have a right to comment on whether the excerpts should be redacted. In case of disagreement on redaction, the tribunal should aim at ensuring confidentiality.[55] Nevertheless, in practice parties agree on publication of the award.[56]

The Rules provide a detailed list of confidential or protected information that will not be available to the public. Confidential or protected information is defined as information which is protected from public disclosure by one or more of the enumerated sources.[57] First, there are sources within the parties' autonomy, namely the instrument of consent, agreement, confidential business information or protected personal information and the applicable arbitration law or rules. Second, a designation that is within the tribunal's discretion, namely its orders and decisions due to possible aggravation or undermining the integrity of the proceedings. Third, sources related to the state's interests, the national law of the State party,

[48] *Ibid*, Arts. 25, 26.
[49] ICSID Arbitration Rules, 2022.
[50] *Ibid*, Art. 64.
[51] *Ibid*, Art. 63.
[52] *Ibid*, Art. 65.
[53] Arbitration Rules (n. 49), Art. 62(1).
[54] *Ibid*, Art. 62.
[55] Arbitration Rules (n. 49), Arts. 62, 63.
[56] Euler/Gehring/Scherer (n. 5), 335, para. 45.
[57] Arbitration Rules (n. 49), Art. 66.

impediment to law enforcement or in contravention of essential security interests. Similarly to the Transparency Rules, the tribunal is not expressly empowered to issue sanctions in case of breach of the transparency regime, but it can take misconduct into account when deciding on costs.[58]

Having in mind that parties feel more confident if they are granted more autonomy and control over the dispute, especially over the confidential or protected information they wish to keep non-public, it is understandable that the ICSID regime is the one they mostly resort to.

2.3.2. SIAC Investment Arbitration Rules

SIAC is one of the leading arbitral institutions in Southeast Asia and its Investment Arbitration Rules[59] are one of the few rules which openly set confidentiality as a default option.

Certain information about the proceedings is mandatorily published, however much less than in the ICSID regime. Information that is mandatorily published includes only parties' nationality, arbitrators' identity and nationality, instrument of consent, date of commencement, status of the proceedings and redacted excerpts of the tribunal's reasoning.[60] Thus, only with the parties' express consent is SIAC allowed to publish the parties' or counsels' identity, the contract, the industry concerned, the total sum in dispute, and details of any procedural steps or decisions of the tribunal during proceedings.[61]

Furthermore, the Rules impose an express obligation of confidentiality.[62] Namely, hearings, transcripts and any documents used or produced during proceedings will remain

[58] Euler/Gehring/Scherer (n. 5), 304, para. 183.
[59] SIAC Investment Arbitration Rules, 2017.
[60] *Ibid*, Art. 38(1)(2).
[61] *Ibid*, Art. 38(3).
[62] Savage John, Dunbar Simon, "SIAC Arbitration Rules, Rule 21 [Hearings]", in Loukas A. Mistelis (ed), "Concise International Arbitration", Second Edition, Kluwer Law International, 2015, 799.

private and confidential unless parties give their express consent.[63] The Rules do provide narrow exceptions. Transparency will prevail in cases of enforcement or challenge of the award, court order, pursuit or enforcement of legal right or claim and binding State law.[64] These exceptions resemble the third group of exceptions according to the ICSID regime. Finally, the rules expressly give the right to the tribunal to sanction the breach of these rules by ordering sanctions or costs to be paid.[65]

In conclusion, SIAC rules go even further in protecting confidentiality and set it as a default placing almost whole control of disclosure in the hands of the parties.

2.3.3. SCC Rules

SCC is the world's second-largest institute for investment disputes.[66] Its Arbitration Rules[67] include Appendix III entitled "*Investment Treaty Disputes*" as a supplement to address specifics of the investment arbitration. The Rules provide for a general obligation to keep arbitration and the award confidential, unless parties agree otherwise.[68] The hearings are also private unless parties agree otherwise.[69] This reveals an even stronger tendency for confidentiality than SIAC Rules since the parties can prevent the public from knowing that the arbitration even exists. Even though there is no specific sanction for breach of confidentiality obligation, arbitrators and administration can be liable for damages if they have caused financial loss wilfully or by gross negligence.[70] This is still a powerful tool against the participants to respect the transparency arrangement.

[63] Arbitration Rules (n. 59), Art. 21(4), 37(1)(3).
[64] *Ibid*, Art. 37(2).
[65] *Ibid*, Art. 37(4).
[66] SCC Arbitration Institute, Investment Disputes, available at: https://sccarbitrationinstitute.se/en/our-services/investment-disputes.
[67] The Stockholm Chamber of Commerce Arbitration Institute, SCC Arbitration Rules, 2023.
[68] *Ibid*, Art. 3.
[69] *Ibid*, Art. 32(3).
[70] *Ibid*, Art. 52.

In conclusion, the SCC Rules provide for the lowest transparency standard among the examined institutional rules which might pose a problem concerning the public interest in the potential proceedings when the parties opt for SCC arbitration.

2.4. Framework within investment treaties

Investment treaties embody states' autonomy to express their views on transparency and confidentiality applicable to their investment disputes. As stated in the Transparency Rules, the treaty prevails as a source of the ultimate parties' will in case of conflict. This chapter examines transparency standards set out in significant multilateral investment treaties and within bilateral investment treaties.

2.4.1. Multilateral Investment Treaties

2.4.1.1. North American Free Trade Agreement and United States-Mexico-Canada Agreement

NAFTA Agreement between the United States, Canada, and Mexico has been implemented from 1994 until 2020 when it has been replaced with the USMCA Agreement. The chapter examines the evolution of NAFTA towards more transparency and the regime imposed today by the USMCA.

In its beginnings, NAFTA contained minimal transparency measures. Its public registry contained only the request or notice of arbitration merely notifying the public that the arbitration exists.[71] Publication of the award was optional for US and Canada and Mexico's was governed by applicable arbitration rules.[72] The tribunal could order an interim measure to protect confidential information such as trade secrets, privileged information and exempted materials

[71] North American Free Trade Agreement (1994), Art. 1126(12)(13); Ribeiro/Douglas (n. 3), 54.
[72] *Ibid*, Art. 1137(4).

under the Party's domestic law.[73] The only confidentiality exceptions were the national and essential security.[74]

Soon, NAFTA parties realised that such a regime should be amended. In 2001 and 2003 NAFTA's Free Trade Commission issued the binding reform statements.[75] The 2001 Interpretative note[76] specified that NAFTA allows parties to publish documents but reiterated the need for the protection of confidential information.[77] It is addressed to the parties and does not intrude on the tribunal's discretion.[78] Thus, NAFTA aimed at balanced consideration of the public interest without infringing on the parties' interests and the tribunal's authority.[79] Nevertheless, since 2004, all three NAFTA members have committed to open hearings in their disputes.[80] With this significant reform, NAFTA made a push for other states and institutions to increase transparency in their frameworks.[81]

On the other hand, USMCA provides for even more transparent proceedings than NAFTA. It contains a detailed provision on transparency.[82] The notice of intent and notice of arbitration, any written submission, transcripts of hearings when available and decisions of the tribunal must be published. Hearings can be closed only to the extent necessary to protect confidential information. The disputing party can omit protected information but must provide a redacted

[73] *Ibid*, Art. 1721.
[74] *Ibid*, Arts. 2102., 2105.
[75] Shirlow (n. 1), 625.
[76] Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001.
[77] *Ibid*, para. 3-10.
[78] Teitelbaum Ruth, "Privacy, Confidentiality and Third-Party Participation: Recent Developments in NAFTA Chapter Eleven Arbitration", Law and Practice of International Courts and Tribunals 2, no. 2, August 2003, 256-257.
[79] Knahr Christina, "Transparency, Third Party Participation and Access to Documents in International Investment Arbitration", 23 Arb. Int'l 327, 2007, 344-345.
[80] NAFTA Free Trade Commission Joint Statement, "Decade of Achievement", Executive Office of the President of the United States, July 2004.
[81] Euler/Gehring/Scherer (n. 5), 30, para. 1.
[82] United States-Mexico-Canada Agreement (2020), Art. 14.D.8.

version of the documents. Also, the party does not have to disclose information contravening its essential security interests or impeding law enforcement.[83]

Overall, this transparency standard resembles the one adopted in the UNCITRAL Transparency Rules and thus the USMCA parties show their commitment to open investment arbitration proceedings.

2.4.1.2. EU investment agreements

Since 2009, when the Treaty of Lisbon entered into force, foreign direct investment is under the exclusive competence of the EU.[84] Thus, EU investment treaties will replace the EU member state BITs with these countries.

In 2013, the European Union and Canada concluded a political agreement on the key elements of the Comprehensive Economic and Trade Agreement.[85] It applies modified UNCITRAL Transparency Rules, and it will be the first agreement to apply the Rules 'in substance'.[86] It requires the publishing of an even broader scope of information, namely the list of all documents and decisions and additional procedural documents produced under CETA.[87] Also, exhibits can be included in the list upon request alongside expert reports and witness statements.[88] To protect confidential information, it provides for redaction of the documents and closing of the hearings.[89] These include confidential business information and information

[83] *Ibid*, Art. 32.2., 32.7.
[84] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/1, 1 December 2009; Treaty on the Functioning of the European Union, 25 March 1957, O.J. C 326/47, 2012, Arts. 3.1(e), 207.
[85]Comprehensive Economic And Trade Agreement between Canada and the European Union and its Member States, Official Journal of the European Union, 2018.
[86] *Ibid*, Art. 1.
[87] *Ibid*, Art. 8.36 (2)(3); Procedural documents in question are the request for consultations, the notice requesting a determination of the respondent, the notice of determination of the respondent, the agreement to mediate, the notice of intent to challenge a member of the tribunal, the decision on challenge to a member of the tribunal and the request for consolidation.
[88] *Ibid*, Art. 8.36(3).
[89] *Ibid*, Art. 8.1(4)(5).

protected by national law or under other applicable laws or the Rules.[90] However, the disclosure required by national law should enforced with a sense for the tribunal's designation of information as confidential.[91] The provision thus favours confidentiality as understood under CETA proceedings. The disclosing party could impose a confidentiality duty on the recipients of the information by obtaining an express undertaking.[92] In case of breach, the tribunal can order appropriate sanctions such as drawing adverse inferences or allocating additional costs if the disputing party breaches its confidentiality order.[93] This is a useful tool in the hands of the tribunal to discipline the parties.

The transparency regime under the EU-Singapore IPA[94] is in line with the Transparency Rules too.[95] It defines confidential information and mentions balancing criteria for the tribunal when deciding on disclosure.[96] The integrity of the proceedings is also stated as an obstacle to disclosure, and the IPA lists the same examples of such circumstances.[97] Finally, the EU-Vietnam IPA[98] applies UNICTRAL Transparency Rules.[99] The provision on access to documents goes beyond the Rules with additional CETA procedural documents. Unlike the Rules, the Agreement gives either party power to prevent disclosure of evidence.[100] However, the other party may request the joint Committee to apply Art. 3(3) of the Rules instead.[101]

[90] *Ibid,* Art. 8.1; UNCITRAL, "Report of United Nations Commission on International Trade Law: Forty first Session (16 June-3 July 2008)", UN Doc A/63/17, para. 314.
[91] *Ibid*, Art. 8.36(6).
[92] *Ibid,* Art. 8.37; Keller Moritz, Khan Azal, "Chapter Eight of CETA, Article 8.37 [Information sharing]", in Moritz Keller (ed), "EU Investment Protection Law: Article-by Article Commentary", Verlag C.H. Beck oHG, 2023, para. 15.
[93] Keller, (n. 92), para. 17.
[94] EU-Singapore Investment Protection Agreement, Annex 8 (2018).
[95] *Ibid*, Arts. 1(1), 2.
[96] *Ibid*, Arts. 4(2), 6.
[97] *Ibid*, Art. 4(10)(11).
[98] Investment Protection Agreement Between The European Union and its Member States and The Socialist Republic Of Viet Nam (2019).
[99] *Ibid*, Art. 3.46(1).
[100] *Ibid*, Art. 3.46(3)(4).
[101] *Ibid*, Art. 3.46(6), 4.1(1).

CETA sets the highest-ever transparency standards in investment dispute settlement.[102] However, it entered into force only provisionally in 2017, meaning it is not yet fully applicable, since not all Member States have approved it yet.[103] Also, both the EU-Singapore and the EU-Vietnam IPAs are pending ratification by all EU Member States.[104] Thus, it remains to be seen how these agreements will be accepted and applied in the future.

2.4.2. Bilateral Investment Treaties

The overview of BITs is divided into two parts, the treaties concluded or amended after the Transparency Rules came into force and the treaties concluded before the advent of the Transparency Rules.

2.4.2.1. Treaties concluded after the advent of UNCITRAL Transparency Rules

Even recently concluded treaties provide different levels of transparency, showing that there is no uniform standard yet that states wish to follow, but tailor the provision on transparency autonomously.

There are treaties which have aligned themselves with the UNICTRAL regime. The Republic of Korea-New Zealand FTA[105] requires publication of the same categories of documents and open hearings.[106] It allows disclosure only if required by domestic law or

[102] Keller (n. 92), para. 3.
[103] EU-Canada Comprehensive Economic and Trade Agreement (CETA), European Commission, EU trade relationships by country/region, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement_en; Lavranos Nikos, "Have Member State BITs Changed Since 2013?", Practical Law Arbitration Blog, 11 May 2020, http://arbitrationblog.practicallaw.com/have-member-state-bits-changed-since-2013/, accessed 11 April 2024.
[104] Keller (n. 92), para. 67; EU-Vietnam Investment Protection Agreement in "A Stronger Europe in the World", Legislative Train Schedule, European Parliament, available at: https://www.europarl.europa.eu/legislative-train/theme-international-trade-inta/file-eu-vietnam-ipa, accessed 11 April 2024; EU-Singapore Investment Protection Agreement (IPA) in "A Stronger Europe in the World", Legislative Train Schedule, European Parliament, available at: https://www.europarl.europa.eu/legislative-train/package-other-fta/file-eu-singapore-ipa, accessed 11 April 2024;
[105] Free Trade Agreement between New Zealand and The Republic Of Korea (2015).
[106] *Ibid*, Art. 10.27(1)(2).

judicial proceedings.[107] Thus, it seems to go beyond the UNICTRAL standard. Also, provisions of the Chile-Hong Kong BIT[108], are in line with the Rules.[109] In defining confidential information, the provision emphasises the business interests of the investor.[110] The Italy Model BIT[111] expressly opts in for the UNCITRAL Transparency Rules.[112] On the other hand, Colombia Model BIT[113] contains no provision on confidentiality or procedural transparency and thus leaves the matter entirely to the parties of individual BITs.

Further, there are treaties favouring transparency, but providing lower standards than the Rules. Under the Canada-Guinea BIT[114], parties can object to publication of all documents, except the award and the hearings are open as a rule.[115] On the other hand, the Australia-Peru FTA[116] allows publication of documents, except the award, but prevents public access to the hearing.[117] The provision sets many exceptions to transparency and mentions the legitimate commercial interests of enterprises and the importance of confidentiality even when disclosure is required by domestic law.[118] Nevertheless, the rule that domestic law prevails over the tribunal's designation is present in the majority of the examined treaties and agreements.[119] Under the India-Kyrgyzstan BIT[120], the award is subject to redaction and upon public interest, all other documents too.[121] However, the hearing can be closed to protect confidential

[107] *Ibid*, Arts. 10.27(5), 20.8.
[108] The Government of The Hong Kong Special Administrative Region of The People's Republic of China And The Government of The Republic of Chile (2015).
[109] *Ibid*, Arts. 1, 28(1)(2).
[110] *Ibid*, Art. 18(7)(d).
[111] The Italy Model BIT (2022).
[112] *Ibid*, Art. 25(1).
[113] The Colombia Model BIT (2017).
[114] Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea (2015).
[115] *Ibid.* Art. 31.
[116] Peru-Australia Free Trade Agreement (2018).
[117] *Ibid*, Art. 8.25(1)(2), 27.12(2)(6), 27.16(1).
[118] *Ibid*, Art. 28.5, 8.25(5).
[119] *Ibid*, Art. 31(5); Art. 16.1(2) of the Australia-China FTA (n. 126); Art. 28 (4)(6) of the Chile-Hong Kong BIT (n. 108); Art. 8.25(4)(5) of the Australia-Peru FTA (n. 116); Art. 1(1) of the India-Kyrgyzstan BIT (n. 120); Art. 9.24(4)(5) of the Israel-Republic of Korea FTA (n. 129); Art. 29(5) of the US Model BIT (n. 141).
[120] Bilateral Investment Treaty Between The Government of The Kyrgyz Republic and The Government of The Republic of India (2019).
[121] *Ibid*, Art. 22(3).

information under the applicable law.[122] Confidential information encompasses business confidential information, such as confidential commercial, financial or technical information whose disclosure would cause material loss or gain or prejudice a disputing party's competitive position.[123] The definition thus describes what is at stake for the business enterprises in case of disclosure, but does not mention procedural prejudice of disclosure. Similarly, the Hong Kong-Mexico BIT[124], comprehensively enables the redaction of all documents and provides for a detailed definition of confidential business information.[125]

Finally, there are still examples of treaties which favour confidentiality. The Australia-China FTA[126] sets confidentiality of hearings and documents as a rule.[127] The definition of confidential information is comprehensive and mentions the business interests of the enterprise and the concept of public interest.[128] Such low transparency standards can also be seen in the Israel-Republic of Korea FTA[129] which gives full control to the parties to close the hearings even though the documents can be redacted.[130] Party may withhold information whose disclosure would contravene its essential security interests, national law, law enforcement, public interest, or legitimate commercial interests.[131] There are also model treaties which favour confidentiality as a default rule. The Russian Federation Model BIT[132] expressly excludes the application of the Transparency Rules.[133] The Netherlands Model BIT[134] opts for the Rules only

[122] *Ibid*, Art. 22(1)(2).
[123] *Ibid*, Art. 1(1).
[124] Agreement between The Government of The Hong Kong Special Administrative Region of The People's Republic of China and The Government of The United Mexican States for The Promotion and Reciprocal Protection of Investments (2020).
[125] *Ibid*, Art. 25(1)(2)(3)(5).
[126] Free Trade Agreement between The Government Of Australia And The Government of the People's Republic of China (2015).
[127] *Ibid*, Art. 9.17(1)(2).
[128] *Ibid*, Arts. 9.10.(g), 16.1(1).
[129] Free Trade Agreement Between The Government Of The State Of Israel And The Government Of The Republic Of Korea (2021).
[130] *Ibid*, Art. 9.24(1)(2).
[131] *Ibid*, Art. 21.2., 21.4.
[132] The Russian Federation Model BIT (2016).
[133] *Ibid*, para. 53(f).
[134] The Netherlands Model BIT (2019).

regarding the constitution and functioning of the tribunal.[135] Moreover, the whole dispute can remain confidential, unless the parties agree otherwise.

2.4.2.2. Treaties concluded before the advent of UNCITRAL Transparency Rules

The UK Model BIT[136], France Model BIT[137] and Germany Model BIT[138] contain no provision regarding confidentiality or procedural transparency and thus leave the matter entirely to the parties of individual BITs. The Austria Model BIT[139] merely provides that the parties are not required to disclose information concerning investors or investments if that would impede law enforcement or contravene domestic laws and regulations.[140]

On the other hand, the US and Canada amended their Model BITs after NAFTA reforms resembling today's UNCITRAL regime. The US Model BIT[141] sets publicity as a rule.[142] At the commencement of the proceedings, parties need to publish a full notice of arbitration.[143] The party does not have to disclose information whose disclosure would impede law enforcement, contravene public or essential security interest or prejudice the legitimate commercial interests.[144] Canada's Model FIPA[145] allows confidentiality of documents, but the redacted award is mandatorily published.[146] The provision on the prevalence of domestic law mentions the need for a sensible approach of domestic law for the sake of proceedings.[147]

[135] *Ibid*, Art. 20(13).
[136] Model Agreement between The Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investment (2008).
[137] France Model BIT (2006).
[138] Germany Model BIT (2008).
[139] Austria Model BIT (2008).
[140] *Ibid.* Art. 6(3).
[141] United States Model BIT (2012).
[142] *Ibid*, Art. 29(1)(2).
[143] *Ibid*, Art. 29(1).
[144] *Ibid*, Art. 29(5), 18, 19.
[145] Canada's Model Foreign Investment Protection Agreement FIPA (2004).
[146] *Ibid*, Art. 38(1)(3)(4).
[147] *Ibid*, Art. 38(8).

2.4.3. Conclusion

Overall, the influence of the UNICTRAL regime cannot be denied. However, there are still treaties leaning towards confidentiality despite the potential legitimacy problems that might arise. However, introducing more transparency means that both parties have to be more careful - investors risk their reputation and viability and governments risk their power and legitimacy.[148] This explains why there are still many states and treaties deferring the heightened transparency as introduced by the Rules.

2.5. Conclusion

Overall, not many States nor investors have so far shown interest in applying the new UNICTRAL regime, but rather tailor the standard themselves and resort to institutional arbitration whose rules provide for more confidentiality and party autonomy.

After providing the overview of the various legal frameworks, institutional rules and investment treaties, the question is what is the position of the tribunals in addressing parties' freedom to agree on confidentiality and how do tribunals view their discretion when faced with disclosure requests?

[148] Euler/Gehring/Scherer (n. 5), 353, 354.

3. RESPONSES IN INTERNATIONAL INVESTMENT DISPUTE PRACTICE

3.1. Introduction

As arbitration is the creation of an agreement, the parties should be allowed to agree on the level of transparency of their dispute. This rationale is perceived as more challenging regarding investor-state arbitration.[149] The tribunal thus has a duty to navigate the proceedings and take appropriate measures to balance competing public and private interests. The analysis of the responses to the transparency trend is divided into two parts. The first part presents the significant early decisions in which the tribunals expressed their stance towards their powers and parties' autonomy. The second part looks into more recent decisions that reveal the positions in today's practice after the transparency trend got more attention on the international scene.

3.2. Tribunal's reasoning before the advent of the Transparency Rules

One of the earliest decisions where the tribunal reasoned on parties' autonomy to reveal their case to the public is *Amco v. Indonesia*[150]. The tribunal allowed the claimant to publish a newspaper article concerning the details of the case. It argued that the article would not have aggravated the dispute nor harmed the host state and rejected Indonesia's invoking of the "*spirit of confidentiality*".[151] It further held that the parties are free to reveal their case, but should not exacerbate an ongoing dispute and keep their public statements short and accurate.[152] Similarly, the tribunal in *World Duty Free v. Kenya*[153], reasoned that the parties must agree to publicly

[149] Ribeiro/Douglas (n. 3), 51.
[150] *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.
[151] *Ibid*, para. 4, 5.
[152] *Ibid*, para. 5.
[153] *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006.

discuss the case, but should nevertheless keep the discussion accurate and not aggravating.[154] In *Churchill v. Indonesia*[155], the tribunal stated that parties' freedom to speak publicly of the case must be exercised in good faith, i.e. not jeopardise the other parties' procedural rights.[156] The statements are not made in good faith if they exacerbate or affect the integrity of the dispute, but mere public statements of the party generally stating its claims do not meet this threshold.[157]

In *Metalclad v. Mexico*[158], the tribunal reasoned that unless the parties agree to limit the public discussion, they are free to discuss the case publicly.[159] However, it stated that it would be beneficial to the efficiency and maintenance of the parties' working relationship if public discussion during proceedings is exercised only to the extent required to satisfy such externally imposed legal obligation.[160] In the case at hand, Metalclad's CEO had an obligation under US legislation to disclose information on the case to its shareholders.[161] As the frameworks presented in the first part of this thesis set forth, the minimum level of transparency that the parties cannot circumvent stems from domestic regulations. Nevertheless, the case was perceived as rather controversial, since it extensively limited the transparency of the proceedings and ultimately led to NAFTA FTC publishing the interpretation of its Chapter 11 in 2001. Consequently, in *Methanex Corp. v. US*[162], the parties agreed to publish a redacted version of the documents.[163] Hearing in this case was the first NAFTA Chapter 11 open hearing.[164]

[154] *Ibid*, para. 16.
[155] *Churchill Mining PLC v. Republic of Indonesia*, ICSID Case No. ARB/12/14, Procedural Order No. 3 on Provisional Measures, 4 March 2013.
[156] *Ibid*, para. 46, 50.
[157] *Ibid*, para. 47.
[158] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.
[159] *Ibid*, para. 13.
[160] *Ibid*.
[161] *Ibid*.
[162] *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Procedural Order No. 1, 29 June 2000.
[163] *Ibid*, para. 15:2.
[164] Menaker Andrea, Eckhard R. Hellbeck, "9. Piercing the Veil of Confidentiality: The Recent Trend towards Greater Public Participation and Transparency in Investment Treaty Arbitration", in Katia Yannaca-Small (ed),

Two early cases against the US reveal the tribunal's aim at achieving the balance and recognising public interest concerns. In *Mondev v. US*[165] and *Loewen v. US*[166] tribunals relied on Art. 44(2) of the ICSID Additional Facility Rules which requires the consent of the parties for publishing minutes of the hearing. In *Mondev*, the tribunal did not allow publication of its order and interim decision because it was revealing the outcome of the hearing. It stated that the documents can be disclosed only if domestic obligation requires to do so.[167] Similarly, in *Loewen,* the tribunal rejected disclosure while the proceedings were pending stating that it has a responsibility to prevent "*potential inhibitions and unfairness*".[168] Nevertheless, it also stated that general restrictions on public discussion would conceal information about the government and its affairs.

One of the most significant reasoning on transparency in investment arbitration is found in the *Biwater Gauff v. Tanzania*[169] decision due to the tribunal's distinguishing of the categories of documents and emphasis on the timing of the disclosure. The issue was whether the parties were allowed to unilaterally publish documents during proceedings.[170] The tribunal had wide discretion to decide on the issue since there was no parties' agreement nor did ICSID Regime contain any position on transparency.[171] The tribunal stated that "*Parties are free, of course, to conclude any agreements they choose concerning confidentiality.*"[172] Even though it acknowledged the tendency towards transparency in investment arbitration and the public

"Arbitration Under International Investment Agreements: A Guide to the Key Issues", Second Edition), Oxford University Press, 2018, 213.

[165] *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Interim Decision Regarding Confidentiality of Documents, 13 November 2000.

[166] *Loewen Group v. U.S.A.*, Decision on Competence and Jurisdiction in ICSID Case No. ARB(AF)/98/3 (NAFTA), 5 January 2001.

[167] *Mondev v. United States*, Order and Further Interim Decision Regarding Confidentiality, 27 February 2001.

[168] *Ibid.*, para. 26; Loewen (n. 166), para. 145.

[169] *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006.

[170] *Ibid*, para. 12, 13.

[171] *Ibid*, para. 121, 125; The parties have only agreed to publish the award.

[172] Ibid, para. 115.

interest in the case[173], it emphasised the need to protect ongoing proceedings from media prosecution.[174] However, it acknowledged that transparency restrictions should be cautiously tailored each time as well as the aggravation risks should be identified.[175] In the case at hand, the tribunal concluded that there was sufficient risk of aggravation of the dispute due to a high level of media attention. Thus it limited the public discussion so as not to complicate the parties' relationship by pressure or antagonising.[176] It decided for the records of hearings, submissions, witness statements, expert reports and the other party's submissions to remain confidential.[177] On the other hand, it allowed the parties to publish its decisions and their own documents.[178] The Biwater tribunal was criticised for overly broad prohibition of disclosure.[179] The flexible and tailored test it provided seems easy to meet since when there is a public interest in the dispute, there is also pressure from the media. However, the tribunal should prevent parties from antagonising each other with media campaigns. The Biwater tribunal weighed the competing interests for different categories of documents and tailored the solution to balance the parties' and public interests.

The tribunal in *Beccara v. Argentina*[180] had a similar reasoning. It allowed disclosure of its decisions, but limited public discussion during the proceedings, also based on a risk of aggravation, procedural disorder, and public pressure.[181] Since there was also no parties' agreement, it acknowledged its power to decide on a case-by-case basis and try to achieve a

[173] *Ibid*, para. 114, 147.
[174] *Ibid*, para. 136, 140, 142, 146.
[175] *Ibid*, para. 141, 147; In its reasoning, the Biwater Tribunal agreed with the statements of the Metalclad and Loewen tribunals on the advantages of limiting public discussion to what is necessary, subject only to externally imposed legal obligations.
[176] *Ibid*, para. 163(d).
[177] *Ibid*, para. 163(a)(b).
[178] *Ibid*, para. 153.
[179] Calamita N. Jansen, "Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy Adopting the UNICTRAL Transparency Rules Approach", Journal of World Investment & Trade 15, 2014, 665.
[180] *Beccara v. Argentina*, Procedural Order No. 3 (Confidentiality Order) in ICSID Case No. ARB/07/5, 27 January 2010; *Abaclat v. Argentina*, Procedural Order No. 3 (Confidentiality Order) in ICSID Case No. ARB/07/5 of 27 January 2010.
[181] *Ibid*, para. 72-73, 88, 94.

balanced solution between "*...the general interest for transparency with specific interests for confidentiality of certain information and/or documents"*[182] It went on to conclude the parties do not have a *'carte blanche'* to disclose any information or document.[183] It stated that pleadings and memorials carry an inherent risk of presenting a one-sided story, potentially misleading the public and harming the parties' relationship.[184] Thus, it allowed the publication of general information about the case.[185] The decision was also criticised for establishing a low threshold of incorrect impressions as a danger to the proceedings.[186] Nevertheless, these two decisions are examples of a sophisticated and tailored approach.

The rising trend of transparency in investment arbitration was acknowledged by the tribunal in *Philip Morris v. Australia*[187] which relied on party autonomy when deciding on disclosure.[188] It allowed the publication of redacted pleadings and submissions and parties agreed to publish the tribunal's decisions.[189] On the other hand, in *Telefónica v. Mexico*[190], the tribunal has ordered significant transparency limitations. It only allowed a general discussion of the case and the parties agreed to publish the final award.[191] Thus, it did not allow for the publication of any documents or open hearings. The dissent stated that the decision establishes a presumption of confidentiality as it sets a low threshold for proving a risk for aggravation.[192] Such an approach might cause legitimacy concerns and should be cautiously implemented.

[182] *Ibid.*, para. 73.
[183] *Ibid*, para. 79.
[184] *Ibid*, para. 102.
[185] *Ibid*, para. 69.
[186] Nyegaard Mollestad Cristoffer, "See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement", PluriCourts Research Paper No. 14-20, 2014, 96.
[187] *Phillip Morris Asia Limited v The Commonwealth of Australia*, Procedural Order No. 5 Regarding Confidentiality, 30 November 2012.
[188] Nyegaard, (n. 186), 98; *Ibid*, para 48.
[189] *Phillip Morris v. Australia* (n. 187), para. 53E.
[190] *Telefónica S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/12/4, Procedural Order No. 1, 8 July 2013 (Unofficial English Translation).
[191] *Ibid*, para. 33, 35.
[192] Ricardo Ramírez Hernández, Dissenting Opinion in respect to Procedural Resolution No. 1, 24, para. 3-10.

3.3. Tribunal's reasonings after the advent of the Transparency Rules

The first case to apply the UNICTRAL Transparency Rules was *Iberdrola v. Bolivia*[193] under Spain-Bolivia BIT based on the opt-in approach.[194] However, the case lacks materials since it was soon settled. Also, the parties opted to apply the Rules in *BSG Resources v. Guinea*[195]. Written submissions and orders were published, physical attendance at the hearing was left to the tribunal's discretion and parties could request for a document to remain confidential. Similarly, in *Bear Creek Mining v. Peru*[196] and *Renco v. Peru*[197], the tribunal resorted to the clear and detailed regulation of transparency as provided in the Peru-Canada BIT and the Peru-US BIT.[198] The parties agreed to have open hearings and to publish all documents, subject to redaction if needed.[199] Thus, the decision shows how delays and further conflicts can be avoided by agreeing on the regime before the dispute arises.

Recently, in *EuroGas & Belmont v. Slovakia*[200], US company Eurogas invoked the 'more favourable treatment' principle as opposed to the regime provided in the Canada-Slovakia FIPA[201] to object to the publication of the tribunal's documents and open hearings.[202] The tribunal dismissed the objection on the ground that EuroGas submitted the claim jointly with

[193] *Iberdrola, S.A. & Iberdrola Energía, S.A.U. v. Plurinational State of Bolivia*, PCA Case No. 2015-05, Procedural Order, 7 August 2015.
[194] *Ibid*, para. 14.
[195] *BSG Resources Ltd., BSG Resources (Guinea) Ltd. & BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 2, 17 September, 2015.
[196] *Bear Creek Mining Corporation v. Republic of Peru*, Procedural Order No 1, para 21.6 (ICSID Case No ARB/14/21), 27 January 2015.
[197] *The Renco Group Inc v. Republic of Peru*, Procedural Order No 1 (ICSID Case No UNCT/13/1), 22 August 2013.
[198] Free Trade Agreement between Canada and the Republic of Peru (2009), Art. 835; The United States-Peru Free Trade Agreement (2009), Arts. 10.21, 22.2, 22.4.
[199] *Ibid*, Art. 835(1); *Bear Creek v. Peru* (n. 196), para. 21.6, 21.7.
[200] *EuroGas Inc. & Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 2, 16 April 2015.
[201] Canada–Slovak Republic FIPA (2010), Annex B.
[202] *EuroGas v. Slovakia* (n. 200), para. 3.

Canadian investor Belmont and thus accepted to be impacted by the said FIPA.[203] It reasoned that the express treaty provision on transparency cannot be disregarded and the right to object to public hearings is not per se more favourable.[204] On the other hand, the tribunal in *Rand Investments v. Serbia*[205] reasoned that although Cyprus–Serbia BIT was silent on the question of transparency, the transparency provisions of Canada–Serbia BIT[206] could be applied to the entire arbitration, noting that the tribunal's decision was corroborated by strong trends towards transparency in investor-state dispute settlement as manifested by the UNCITRAL Rules on Transparency.[207] The dissenting arbitrator placed the State's consent at the centre of attention, stating that the tribunal had exceeded its powers by extending the transparency standard on the other BIT.[208] He stated that "*efficiency cannot be achieved at the price of disregarding consent*".[209]

More recently, in *Tallinn v. Estonia*[210], the tribunal referred to *Biwater* stating that there is no presumption in favour of either transparency or confidentiality.[211] It allowed public discussion but warned the parties not to antagonise each other or disrupt the proceedings.[212] Furthermore, it ordered parties to refrain from publishing any arbitration documents.[213] It believed the decision on non-publication was justified in the case at hand since one of the parties was accused of launching a negative media campaign and there was a risk to integrity and

[203] *Ibid*, para. 4, 5.
[204] *Ibid*, para. 6.
[205] *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 5, 29 August 2019.
[206] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments (2014), Art. 31.
[207] *Rand v. Serbia* (n. 205), para. 1, 28(v).
[208] Procedural Order No. 5, Dissenting Opinion of Professor Marcelo G. Kohen, 29 August 2019, para. 12.
[209] *Ibid*, para. 10, 11.
[210] *United Utilities (Tallinn) B.V. & Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent's Application for Provisional Measures, 12 May 2016.
[211] *Ibid*, para. 81.
[212] *Ibid*, para. 112.
[213] *Ibid*, para. 114.

aggravation of the dispute.[214] Similarly, in *Ipek v. Turkey*[215], the tribunal did not allow disclosure of documents containing information not already in the public domain.[216] However, it stated that there is no presumption in favour of confidentiality[217], but that disclosure can be restricted to prevent exacerbation of the dispute and enable fair hearings.[218] Therefore, even in more recent cases, tribunals, although recognising the need for transparency, still dose and balance it to protect the integrity of proceedings and the parties.

3.4. Conclusion

As the decisions show, tribunals used their discretion to determine the appropriate transparency of the dispute before them. Indeed, tribunals should aim to get the most out of their discretion and mandate to look into all the possible risks and stumbling blocks, especially when there is no pre-agreed regime between the parties. In any case, parties should aim to regulate their approach towards transparency beforehand to avoid delays and deterioration of their relationship during proceedings.[219]

[214] *Ibid*, para. 91, 93, 94, 95.
[215] *Ipek Investment Limited v. Republic of Turkey*, Procedural Order No. 13 on Confidentiality in ICSID Case No. ARB/18/18, 13 March 2020.
[216] *Ibid*, para. 13.
[217] *Ipek v. Turkey*, Procedural Order No. 11 on Use of Arbitration Materials in ICSID Case No. ARB/18/18, 21 February 2020, para. 14(a).
[218] *Ibid*, para. 17, 18, 21.
[219] Euler/Gehring/Scherer (n. 5), 306, para. 189.

CONCLUSION

Aiming at a universally acceptable standard of transparency in investment arbitration is an ambitious goal. Imposing restrictions on the party autonomy and the tribunal's discretionary authority will be hard to welcome since each dispute and each country's relationship has its specifics. The parties should be left with enough autonomy to prevent excessive disclosure through their treaties and tribunals should not have *ex ante* tied hands by being obliged to favour transparency or confidentiality. To resolve the tension parties should be encouraged to define their position towards transparency within the instrument of consent to eliminate delays and additional issues during proceedings. Also, it is advisable to allow for the tribunal to resolve any potential questions that might arise having in mind the circumstances of individual cases. The parties should also be protected against launching media campaigns against each other and breaching the confidentiality obligations they agree on. In particular, for a state to remain an attractive investment destination, it should bear in mind both investor's and public interests when deciding on an applicable transparency framework for its investment disputes. Overall, a step forward can be seen in amendments of most frameworks and jurisprudence so it is safe to say that investment arbitration will carefully develop to be more and more transparent in the future.

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