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Master Thesis

Principle of Transparency in Arbitration

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LIST OF ABBREVIATIONS

UNCITRAL - United Nations Commission on International Trade Law

ICSID - International Centre for Settlement of Investment Disputes

LCIA - The London Court of International Arbitration

HKIAC - Hong Kong International Arbitration Centre

ICC - International Chamber of Commerce

NAFTA - The North American Free Trade Agreement

FTC - NAFTA Free Trade Commission

CAM - Milan Chamber of Arbitration

SMA - Society of Maritime Arbitrators

CAAI - Chinese Arbitration Association International

SIAC - Singapore International Arbitration Centre

SCC - Stockholm Chamber of Commerce

BIT - Bilateral investment treaty

CETA - EU-Canada Comprehensive Economic and Trade Agreement

EVFTA - EU-Vietnam Free Trade Agreement

ESIPA- EU-Singapore Investment Protection Agreement

GDPR - General Data Protection Regulation

ISDS - Investor-State dispute settlement

INTRODUCTION

One of the main advantages of dispute resolution in the arbitration process is confidentiality, which is granted to the parties under an arbitration agreement that the parties conclude previously or in accordance with the rules of the arbitration institution designated by the parties to the arbitration clause.

Confidentiality is one of the three pillars (next to speed and low cost) that the arbitration concept is based on. Ideally, the fact of the arbitration between the parties and the details of the case are unknown to anyone except the direct participants in the proceedings, not to mention the composition of the arbitral tribunal and the lawyers who take part in it. Such closeness led to the fact that arbitration began to be perceived as a "closed system", in which a small number of people have access, and a decision on it is made even by a smaller group of specialists. This led to doubts about the legitimacy of arbitration. The condition of closed oral proceedings in the arbitration process and the lack of public access to the register of arbitral awards are also a manifestation of confidentiality, however, may be seen as a limitation of transparency, although there is no clear definition of transparency in international law. At the same time, parties may use self-serving privacy tool, wishing to conceal business cooperation from public disclosure.

The international arbitration community has recognized this risk, therefore, it is trying to address related challenges and adapt to life in new realities. It is clear that arbitration cannot become completely public by definition. Indeed, as the concept of arbitration is built on the freedom of the parties, therefore, if the parties want the dispute to remain confidential, it will.

However, steps to increase transparency, in addition by all participants in the process are being taken. Arbitral institutions play perhaps the most important role in this. Being the carriers of a huge array of information on arbitration proceedings that take place under their auspices the arbitral institutions began to consolidate, analyse and publish this information in the form of statistics. First, on the number, size of cases and nationality of the parties, then on the size of arbitration fees and expenses, and finally, on the appointment of arbitrators. Arbitral institutions impose more strength requirements on appointed arbitrators for independence, impartiality and employment.

At the same time, the arbitrators are forced to disclose all cases and circumstances that may create a conflict of interest for them or affect impartiality. Such data are not published, but distributed among participants of the proceedings.

The parties themselves often disclose information about arbitration, in particular in press releases, stock market announcements or through the transfer of arbitral awards to courts for recognition and enforcement. The world learns more and more about arbitration and begins to understand how this system functions. This cannot but affect the perception of arbitration as a full, legitimate and reliable way to resolve disputes.

However, the notion of transparency is not so clear. The concept of transparency and confidentiality in international commercial and investment arbitration has no clear boundaries, due to the multiplicity of regulations of arbitration institutions and the specificity of the presentation of confidentiality provisions. It is worth mentioning the problems with the confidentiality of investment arbitration. The prevailing view is that investment arbitration is of such great and weighty public interest at least for the state involved in the case that such cases cannot be confidential. These considerations are part of calls for the creation of an investment Tribunal that would replace the investment arbitration system that operates today.

The relevance and originality of this topic is explained by the widespread concern of the public and the parties about the lack of transparency in arbitration in recent years. This problem has led to the fact that the question of the legitimacy of arbitration is widely raised, namely its closeness, inviolability and confidentiality, concealment of public information, financing of arbitration proceedings by third parties, fraudulence, etc. All these factors have led to the crisis of arbitration at this stage of history.

The motivating factor for choosing this topic for my research is a deep interest in the field of arbitration in general, as well as my own experience in participating in models of the arbitration process.

The main object of the present work is transparency in arbitration, its relationship with principle of confidentiality in arbitration and future perspectives of development of such concept.

The aim of the research paper is to examine the legal nature and purpose of transparency in international arbitration.

Considering the aim of the thesis the following tasks of research should be performed:

- to analyse the historical development of the concept of transparency in arbitration;
- to analyse the concept of transparency in investment arbitration
- to consider the concept of transparency in international commercial arbitration;
- and to discuss current issues regarding transparency in arbitration within the EU

The first chapter of my work is devoted to an overview of the concept of transparency. It covers the history of the concept of transparency, the role and meaning of the UNCITRAL Transparency Rules, and provides a comparative analysis of the concepts of transparency and confidentiality.

The entire content of Chapter two focuses on the analysis of the concept of transparency in investment arbitration, how it is regulated, its advantages and disadvantages. Also, a very large layer of work is focused on the involvement of third parties (amicus curiae), as a major aspect of transparency. The chapter concludes with a part which describing future development prospects in this area

The third section raises the issue of transparency within the international commercial arbitration system and is very similar to the second section with the distinction of a need to implement the concept of transparency into such system.

The last fourth section focuses on the EU legislative and, as well as the European scientific approach on transparency and crisis of the investment arbitration within the framework of the EU.

For the purpose of my research, I apply logical analyses for describing the main elements of the transparency in international arbitration also it was used for comparison of different approaches towards the regulation of transparency in investment and commercial arbitration, historical method, for describing and analyze development of transparency within ICSID and others, legal documents review process also have been applied.

The main sources used for this work are various books, articles and monographs; the UNCITRAL Transparency rules, the Mauritius Convention, the ICSID Convention, the analysis of these documents have made it possible to understand how transparency functions in investment arbitration; numerous provisions of various arbitration institutions such as LCIA, HKIAC, ICC, etc., have made it possible to analyse the trend of transparency in international commercial arbitration and how the rules of arbitration institutions have changed in the pursuit of transparency; bilateral and multilateral investment agreements, case law and the EU regulatory framework have helped to analyse the current stage of arbitration in the EU, and why it is now experiencing a crisis.

I. GENERAL ASPECTS OF TRANSPARENCY

1.1 History of developing Transparency

The tendency for transparency in international arbitration can be said to have originated in the investor-state arbitration and, in the main, has until recently been confined to the same system. This trend began on July 31, 2001, when the Free Trade Commission (hereinafter FTC or Commission) of the North American Free Trade Agreement (hereinafter NAFTA) published its vision on the interpretation of the NAFTA arbitration regime aimed at protecting public interests. The FTC's 2001 report[1] stated that the public should be able to use the documents created during the arbitration dispute almost without interruption. This interpretation of the issue of transparency came from the fact that nothing in the NAFTA text referred to the issue of confidentiality, so the Commission concluded that the documents could be made public. However, in practice, the consequences of interpretation were limited, as arbitration disputes conducted under the NAFTA arbitration regime were still subject to the rules of the arbitral institutions chosen by the parties, and many of these rules were much stricter than the FTC`s interpretation.

The next step in the development of the transparency trend is the decision taken by ICSID after 5 years aimed at maintaining greater transparency in investor-state arbitration and amending its 2006 Arbitration Rules[2]. The revised rules conferred on the tribunal the power to make the hearing public unless the parties to the dispute have no objections. The rules also stipulated that legal arguments and extracts from them should also be immediately published by the courts. However, an arbitral award cannot be published without the unanimous consent of the parties, and the unilateral decision of a party to prohibit the publication of the decision itself greatly diminishes the practical application of transparency measures. ICSID had on several occasions broadcasted some arbitration proceedings in real-time, with significant public interest implications. The revised ICSID's Rules helped to prepare the ground for the adoption of the UNCITRAL`s Transparency Rules, in which UNCITRAL promoted a transparency trend by

[1] North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions. [reviewed on 26 September 2019]. Available at: http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp

[2] A Brief History of Amendment to the ICSID Rules and Regulations. [reviewed on 26 September 2019]. Avaliable at: https://icsid.worldbank.org/sp/amendments/Pages/Resources/A-Brief-History-of-Amendment-to-the-ICSID-Rules-and-Regulations.aspx

incorporating the Transparency Rules into the UNCITRAL 2013 Arbitration Rules, but not all arbitration institutions fully supported this trend. Transparency is not always clearly defined in the context of international arbitration, but some scholars believe that transparency consists of three main and related elements: (1) public access; (2) public disclosure; and (3) transparency as such[3]. The third concept of transparency, however, is narrowly defined and involves the willingness of parties to familiarize themselves with the rules governing the arbitration. Besides, UNCITRAL's Transparency Rules support a broad definition of transparency, since its provisions that make arbitration hearings public and require the publication of arbitration documents relate to public access and public disclosure. Thus, the tendency for transparency in international arbitration is primarily related to the increased public access to arbitration hearings and broadening of public disclosure of arbitral awards and other documents.

The ICC also revised its arbitration rules in 2012, but these changes did not improve the already existing trend of transparency[4]. Instead, ICC issued a report on investor-state arbitration under the 2012 ICC Arbitration Rules, which provides recommendations on how to achieve greater or less transparency. This report emphasizes that States and their private counterparties can agree on greater transparency by stating in the arbitration clause that the arbitral award or arguments of the parties will have to be made public.

1.2 The role of UNCITRAL Arbitration Rules of Transparency

In 2014, the United Nations adopted the UNCITRAL transparency rules, which set procedural rules and ensure transparency and public access to investor-state arbitration. The UNCITRAL transparency rules apply to those arbitration disputes covered by the UNCITRAL Arbitration rules. That is why in 2014 the provisions of UNCITRAL were also revised and supplemented with new articles.[5]

According to previous versions of the UNCITRAL arbitration rules, disputes between investors and States were often not made public, even if important public policy measures were taken that had an impact on the public, or illegal corrupt business practices

[3] LEVANDER, S. *Resolving Dynamic Interpretation, An Empirical Analysis of the UNCITRAL Rules on Transparency*. Columbia Journal of Transnational Law, 52(2), June 2014.

[4] ICC Commission Report States. State Entities and ICC Arbitration, 2012, p.5/ Available at:https://iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities.pdf

[5] *UNCITRAL adopts Transparency Rules for treaty-based investor-State arbitration and amends the UNCITRAL Arbitration Rules*. UNIS. [reviewed on 26 September 2019]. Available at: http://www.unis.unvienna.org/unis/en/pressrels/2013/unisl186.html

were discovered. [6] The new Transparency Rules now replace the previous UN standard, which regularly allowed for the confidentiality of disputes between investors and the state. The new Transparency Rules apply by default to UNCITRAL arbitration proceedings conducted under agreements entered after the new rules entered into force on 1 April 2014. However, contracts concluded before the date of entry into force of the new rules falling under the previous standard, which have previously been applied in UNCITRAL arbitration, unless States or parties to the dispute expressly incorporate the new rules.

1.2.1 Positive and Negative impacts of the UNCITRAL Arbitration Rules of Transparency

As stated above, the UNCITRAL Rules on Transparency of Arbitration between Investors and States based on Contracts apply to arbitration between investors and states initiated by the UNCITRAL Arbitration Rules under the Agreement on the Protection of Investments or Investors concluded on or after April 1, 2014, unless otherwise agreed by the Parties to the contract.[7]

This means that the UNCITRAL Rules on Transparency are not applicable to investment agreements concluded before its adoption, however, they automatically apply to arbitrations involving the investor-state, initiated in accordance with the UNCITRAL Arbitration Rules and arising from investment disputes based on agreements concluded after 1 April 2014. In the case of the mutual understanding of the parties, the UNCITRAL Rules on transparency can be applied to contracts concluded before April 1, 2014, and, in the opinion of scholars, these provisions of the Law UNCITRAL transparency significantly reduce its efficiency and eliminates the possibility of dynamic interpretation. According to the findings of Professor Julie Lee, "dynamic interpretation of treaties is thus unacceptable under international law, and UNCITRAL, as an intergovernmental body, will step over its powers if it applies retroactively new standards to existing treaties. Therefore, this approach of mutual agreement, which preserves the intention of the parties, should prevail over existing agreements. Otherwise, UNCITRAL may face legal

[6] JOHNSON, L., BERNASCONI-OSTERWALDER, N. *New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps*. [reviewed on 26 September 2019]. Available at: https://www.iisd.org/itn/2013/09/18/new-uncitral-arbitration-rules-on-transparency-application-content-and-next-steps-2/

[7] The United Nations. UNCITRAL Rules on Transparency, January 2014. Article 1, para. 1. [reviewed on 26 September 2019]. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf

problems for violating the terms of existing treaties and for improper application of international law".[8] This is the most controversial part of the UNCITRAL Transparency Rules. UNCITRAL Transparency rules raise three main topics. The first sets the rules for the publication of documents, the second sets standards for the participation of amicus curiae, and the third main group covers mandatory open hearings.[9]

Article 3 clearly states that certain arbitration documents should be automatically published. Such documents include 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 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 to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.[10] However, a different standard applies to expert opinions and testimonies, and such documents should be made public only at the request of the arbitral tribunal[11]. Article 2 states that certain information regarding the start of the procedure should also be disclosed to the public, for example, the identity of the parties to the dispute, the relevant sector of the economy and the contract based on which the claim is made.[12] Thus, parties to international commercial arbitration concluded under the UNCITRAL Transparency Rules cannot hide their dispute from the public. This is one of the features that the parties could not get used to for a long time, and which was not applied in international commercial arbitration until the trend of transparency has been raised.

Articles 4 and 5 of the UNCITRAL Transparency Rules address amicus curiae. The situation with representations of amicus curiae varies from jurisdiction to jurisdiction. Nevertheless, as a universal definition, amicus curiae are non-disputant third parties (for example, some NGOs involved in mass arbitration disputes that affect a wide circle of the public to provide knowledge or experience on a specific issue, but we will raise such issue at the second part of thesis) that have been granted the right to participate in this

[8] LEE, J. *UNCITRAL's Unclear Transparency Instrument, Fashioning the Form and Application of a Legal Standard Ensuring Greater Disclosure in Investor-State Arbitrations*. Northwestern Journal of International Law and Business, 2013, Volume 33, Issue 2. 470.
[9] SZALAY, G. *Arbitration and Transparency: Relations Between a Private Environment and a Fundamental Requirement.* Tilburg University, 2015.
[10] UNCITRAL Rules on Transparency. Article 3, para. 1.
[11] UNCITRAL Rules on Transparency. Article 3, para. 2.
[12] UNCITRAL Rules on Transparency. Article 2.

procedure by providing briefs.[13] Article 4 provides the right to intervene and sets standards in this regard for parties not involved in a dispute or are not parties to the agreement within the framework of the dispute. However, Article 5 sets different standards for parties to a dispute that are both parties to a contract in a dispute.[14] The main difference between them is that in the case of amicus curiae, which is a party to a contract in a dispute, the arbitral tribunal has less authority when it needs to decide whether to allow a third party to participate in the arbitration. This approach shows that the rights of a party to a treaty are more fundamentally related to arbitration concerning this contract than the rights of a third party that is not a party to the contract.

Article 6 of the UNCITRAL Transparency Rules defines the rules for holding hearings. As a rule, by default, it establishes that all hearings should be open, which was previously unusual in international arbitration, and is a result of increased transparency. Moreover, article 6 defines the obligation of the tribunal to take logistical measures to gain public access to the hearings, for example, by video channels or broadcastings. However, the Tribunal may, at its discretion, hold hearings privately if protection of confidential information or the integrity of the arbitration process is required[15]. Article 7 sets out exceptions to the principle of transparency, based on which the tribunal, if necessary, appoints hearings behind closed doors. The arbitral tribunal may, on its own initiative or at the request of the party that disputes, after consulting with the parties that they are arguing, take appropriate measures to deter or delay the publication of information if such publication threatens the integrity of the arbitration process, as this may interfere with the collection or production of evidence, lead intimidation of witnesses, lawyers, advocating disputes of the parties, or members of the arbitral tribunal[16]. The controversial aspect of these exception clauses is how they were drafted. The vague wording of the grounds, such as confidential business information, significant security interests or integrity of the arbitration process, allows investment arbitrators to expand them to use broad interpretations that can cover a wide range of situations. Thus, this will become the right to exclusion of transparency. If, for example, the tribunal considers its procedural integrity to be potentially threatened by demonstrations provoked by the disclosure of unpopular information, it may decide to maintain confidentiality. In this case, empowering the tribunals themselves to establish the applicability of the exceptions may lead to undermining the overall scope of the Transparency Rules, namely

[13] LEVINE, E. *Amicus Curiae in International Investment Arbitration, The Implication of an Increase in Third Party Participation*. Berkeley Journal of International Law, 2011, Volume 29, Issue 1. p. 200-201.
[14] UNCITRAL Rules on Transparency. Articles 4-5.
[15] UNCITRAL Rules on Transparency. Article 6, paras. 1-3.
[16] UNCITRAL Rules on Transparency. Article 7.

universal access. The resulting situation will be the same as before, in which states and corporations conduct their own business on the shoulders of uninformed people, leaving the problem untouched, with the difference that this time around the general rule will be paradoxically resolved by the Rules[17]. Summing up, it can be highlighted that the implementation of the Transparency Rules has led to more improvements than any negative aspects. I would highlight, one of the main drawbacks is that these rules were developed explicitly for investor-state arbitration, which causes certain difficulties when trying to use these rules in commercial arbitration. To the advantages, I would note precisely the establishment of open investor-state arbitration, which was not previously available neither by ICSID Convention nor NAFTA.

1.3 Transparency vs. confidentiality

Confidentiality and transparency are common values of international arbitration. They have been described as competing values, but some scholars have seen the possibility of adapting to one another on a case-by-case basis.[18]

Transparency embodies the prevailing customs in our society and becomes the standard of political, moral, and sometimes legal judgments about human behaviour. In contrast to the rapid development of transparency, concepts such as privacy and confidentiality have a negative nuance. Although in many respects they remain the result of constant paradigms and approaches, in some cases, they are seen as manifestations of power and its abuse. Therefore, current legal thought shares two approaches to the distinction between confidentiality and transparency: the conservative, in which a greater proportion is given to the principle of confidentiality, and the progressive, where transparency is at the forefront.[19]

It is well-known in international commercial arbitration that, even if this is not the root cause, transnational corporations prefer international arbitration because their business secrecy and confidential information are better protected. Some international

[17]ZUCCHERMAGLIO, S. *The UNCITRAL Rules on Transparency in Investor-State Arbitration: a Critical Perspective*, 2014-2015.
[18] BUYS, C.G. *The Tensions between Confidentiality and Transparency in International Arbitration*. [reviewed on 08 October 2019]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1330243
[19] BIANCHI, A. *On Power and Illusion: The Concept of Transparency in International Law*. Cambridge University Press, 2013. [reviewed on 08 October 2019]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3218221.

arbitration experts prefer to uphold this standard as they consider it one of the attractions of arbitration in the eyes of arbitration users.[20]

Proponents of this view also emphasize that not only the arbitration procedure should be confidential but also its outcome, thereby preventing the publication of the arbitration awards.[26] Confidentiality in international investment arbitration is considered to be an even more sensitive issue. While it is true that international economic relations between the investing-state relations regularly challenge public interests, most investment treaties have been concluded in an era when transparency of procedures was not considered a topical issue in international arbitration. Besides, most treaties refer to mechanisms inspired by international commercial arbitration as the main option for settling disputes between an investor and a state that is inherently based on the confidentiality of litigation. [21]

This is not surprising since the procedure of investment arbitration is not very different from commercial arbitration process. Amongst arbitration institutions, the London International Court of Arbitration (hereinafter LCIA) has adopted more conservative arbitration confidentiality rules, with the presumption that the entire arbitration process is confidential[22]. Article 30 states that all decisions, materials and documents, as well as discussions of the arbitral tribunal are confidential. That means, the decision is not published[23] and hearings are held privately unless all parties agree in writing. If the parties agree to the publication of the decision, the rules require that the arbitral tribunal also be favourable to it.[24] Similar provisions are found in the Swiss Rules of International Arbitration[25], which provide for private hearings[26] and the full confidentiality of decisions and materials if the parties disagree in writing. Unlike the LCIA Rules, the Arbitral Tribunal is always confidential and no exception is established.[27] As regards the publication of the decision, the procedure requires both parties to agree to it, and the final decision relies on the Secretariat of the Chambers of Swiss Arbitral Tribunal. With the increasing arbitration of investor states, civil society

[20] TUNG S., LIN B. *More Transparency in International Commercial Arbitration: To Have or Not to Have?* [reviewed on 31 May 2018]. Contemporary Asia Arbitration Journal, Vol. 11, No. 1, pp. 21-44, May 2018. Available at : https://ssrn.com/abstract=3188001

[21]RUSCALLA, G. *Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?* Groningen Journal of International Law, 2015, vol. 3(1).

[22] LCIA Arbitration Rules. London Court of International Arbitration (LCIA), effective 1 October 2014 (LCIA Rules).

[23] LCIA Rules, Article 19(4).

[24] LCIA Rules, Article 30(1.2.3).

[25] Swiss Rules of International Arbitration. Swiss Chambers' Arbitration Institution, effective 1 June 2012 (Swiss Rules).

[26] Swiss Rules, Article 25(6).

[27] Swiss Rules, Article 44(1.2).

and other entities of the international investment regime have begun to demand greater openness and transparency in arbitration proceedings. [28]In particular, the general public has shown an interest in participating at such system and monitoring their enforcement, public functions in their economic relations with foreign investors, etc. However, transparency is not only a matter of investment arbitration. International commercial arbitration has also been affected by the tension between transparency and privacy, since commercial arbitration is usually conducted between private parties, one of the parties to the dispute may be a state or a government agency. The state can act both under the public international law in its sovereign capacity and to participate in international commercial arbitrations in its private capacity.[29] In the latter case, the public interest may be involved in purely commercial international arbitration. Also, due to the existence of issues of public interest, the outcome of commercial arbitration can be influenced by the society in several ways. Examples of public interest relating to commercial arbitration may include cases relating to national defence, economic, rural. environmental issues, etc.

Moreover, transparency is the basis in commercial arbitration cases where crimes or illegal activities such as corruption, bribery, money laundering and fraud were conducted by public officials or officials of foreign transnational corporations. In such cases, the public policy prevails over confidentiality. Confidentiality is also considered to be a threat to arbitration. As a consequence, one party or even the arbitral tribunal may miss the broader picture of the case. In line with this tendency to reduce confidentiality in international arbitration, some scholars have argued that the principle of confidentiality in international arbitration should not be viewed in the light of current law, and even when the principle exists, its application depends on the particular circumstances of the case.

National courts followed the same approach. Only a few countries recognize the obligation of confidentiality in international arbitration. On the contrary, most jurisdictions provide for confidentiality only when it is established by applicable law, a law applicable or with the consent of both parties.[30] For example, the English Arbitration Act 1996 does not address the issue of confidentiality. As a result, despite general English law that regards confidentiality as the hidden term of each arbitration agreement, experts advise the parties to explicitly establish confidentiality in the arbitration agreement[31]. In

[28] SCHREUER, C., MALINTOPPI, L., REINISCH, A. AND SINCLAIR, A., *The ICSID Convention: A Commentary, 2nd ed*. Cambridge University Press, Cambridge, 2009, p. 697–698.
[29] HEISKANEN, V. *State as a private: The participation of States in international commercial arbitration*. Transnational Dispute Management, 2010, vol. 7(1).
[30] BERNARDO M. CREMADES. *The Principle of Confidentiality in Arbitration: A Necessary Crisis*. Journal of Arbitration Studies, Vol. 23 No. 3 2013.
[31] GERBAY, R. *Confidentiality vs Transparency in International Arbitration: The English Perspective*. Transnational Dispute Management, 2010, vol. 9(3), p.1, 3.

France, confidentiality in international arbitration is no longer a general rule under French law. The new law on arbitration in France distinguish internal arbitration from international arbitration. The confidentiality of arbitration proceedings applies only to internal arbitration. The only requirement of confidentiality in international arbitration concerns the discussions of the arbitral tribunal. As in English law, the French arbitral tribunal attorneys recommend that the parties include, if they wish, a reference to confidentiality in any arbitration agreement.[32]

As a result, it can be clearly stated that confidentiality is not a prevailing principle of international commercial arbitration, since most arbitration charters and arbitration rules do not provide for a general principle of confidentiality, and so the parties themselves have to take care of it. Progressive arbitration rules include rules established by the American Arbitration Association, by the International Chamber of Commerce (hereinafter ICC), by the Milan Arbitration Tribunal (hereinafter CAM Rules) and the Association of Naval Arbitrators (hereinafter SMA Rules) confidentiality is still a general rule in all aspects of litigation, hearings are held in private, and decisions are not published unless otherwise agreed by the parties.[33] However, the publication of arbitration awards permits an institution to publish selected decisions, orders and decisions edited to conceal the names of parties and identifying details, unless the parties decide otherwise. Concerning the ICC Rules, although proceedings are not open to third parties, access is granted, if the parties and the arbitral tribunal agree on it. An important innovation of the ICC Rules is that the privacy rule changes over LCIA and Swiss rules[34]. Article 22 (3) states that, at the request of either party, the arbitral tribunal may order the confidentiality of the arbitral proceedings or any other matter relating to the arbitration and may take measures to protect the confidentiality and confidentiality of the information.[35]

This means that privacy is not a common presumption in the ICC Rules. If the party does not request confidentiality, the arbitral tribunal may not apply this principle. The CAM rules do not contain any provisions regarding the participation of third parties in hearings. However, the original is Article 8 (2), which allows an institution for research

[32]BAILLY, A., HARANGER, X., LEWIS, M. *Arbitration procedures and practice in France*. [reviewed on 12 October 2019]. Available at: https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1

[33] International Dispute Resolution Procedures. American Arbitration Association (Including Mediation and Arbitration Rules), effective 1 June 2014; ICC Rules of Arbitration. International Chamber of Commerce, effective 1 January 2012 (ICC Rules); Arbitration Rules. Chamber of Arbitration of Milan, effective 1 January 2010; Society of Maritime Arbitrators, Maritime Arbitration Rules, effective 23 October 2013.

[34] RADJAI, N. Confidentiality in International Arbitration. ASA Bull 27 (1), 2009.

[35] ICC Rules, Article 22(3).

purposes to publish an award in an anonymous format. The parties' objections can only be raised during the trial before the decision is rendered. [36]The SMA Arbitration Rules demonstrate the most liberal approach: no privacy clause is contained in the text. Regarding third party access to hearings, section 17 states that persons having a direct interest in arbitration are entitled to participate in the hearings. Lastly, the institution publishes the decision unless both parties object to the publication before the decision is rendered.[37] The approach is even more transparency-oriented than in CAM rules. If the CAM Rules require only one objection to the publication of the award, the SMA Rules state that both parties must object to prevent publication of the final decision.

Summarizing this section, it can be said that in almost 20 years the concept of transparency has evolved and every year this issue is raised even more. Privacy is increasingly losing positions in front of transparency, even in commercial arbitration, and is increasingly distrustful of the public and parties alike.

[36] CAM Rules, Article 8(2). [reviewed on 12 October 2019]. Available at: https://www.camera-arbitrale.it/upload/documenti/arbitrato/2019-cam-arbitration-rules.pdf
[37] SMA Rules, Section 17. [reviewed on 12 October 2019]. Available at: http://www.smany.org/arbitration-rules-mar-14-2018.html

II. TRANSPARENCY IN INVESTMENT TREATY ARBITRATION

2.1 Reasons why investment treaty arbitration should be public

The very presence of a state as a party to the arbitration is of public interest since the citizens and residents of that state are interested in how the government acts during arbitration and as a result of arbitration. In general, public interest concerns the areas for which the state is responsible.

One of the major problems in any society is that communities affected by investment or development projects often lack awareness of the dispute between government and investor. As such, they rarely get the chance to participate in dispute resolution protect their rights and hold the government accountable. More transparency will alleviate this problem since at least the existence of the dispute would be public knowledge. Also, access to the details of the dispute would make public involvement more meaningful, thereby providing greater assistance to the tribunal in determining the real issues of the case. Public participation through amicus briefs may give rise to arguments that are not raised by the parties themselves, which is particularly relevant in the defence of the public interest.[38]

Higher transparency and participation in the arbitration process can also lead to governments being held responsible for their actions. The concept of accountability involves two distinct stages: accountability and implementation and accountability refer to the obligation of the government to justify its decisions to the public and to those institutions that exercise control. Law enforcement requires that the public or accountable institution may sanction the offending party or correct any contradictory behaviour. [39]

As more and more disputes between the investor-state are resolved through arbitration, the reliability or legality of the system becomes an important issue. The rules and regulations on transparency and public participation can vary greatly from forum to forum, so third parties are usually not sufficiently clear what rules apply, in which order, and what procedural time limits the parties must follow if they submit amicus curiae briefs. Lack of openness and clarity leads to a lack of legitimacy for the whole system. As suggested by Christoph Schreuer, in order to regard international dispute settlement systems as legitimate, they must act in a predictable manner, be consistent with historical

[38] SVOBODA, O. *Current State of Transparency in Investment Arbitration: Progress Made But Not Enough*. January 2017

[39] CALAMITA, N.J. *The Changing Landscape of Transparency in Investor-State Arbitration.* Austrian Yearbook on Int'l Arbitration, January 2016, pp. 271-288.

practice and incorporate community-based fundamental values. In terms of predictability, it must be acknowledged that investor-state arbitration has come a long way since the early 1960s.[40]

Increasing investment activity around the world has forced dispute settlement procedures to adapt to the growing number of claims. Today, investors have access to a wide variety of institutional and specialized tribunals that apply both basic and procedural rules that are essentially clear and predictable. The same cannot be said for the rules on transparency and public participation. For example, in the Piero Foresti v. South Africa[41] case, the parties to the dispute were given broad access to the documents and evidence sent to the tribunal to focus their submissions on the issues involved and to see what position the parties had taken regarding these issues. On the contrary, in the case of Biwater v. Tanzania[42], the tribunal limited the disclosure of its own documents to the parties and refused to allow the publication of protocols, documents submitted by the opposing party and correspondence between the parties and the tribunal. Obviously, with so many powers that are in the hands of litigants to determine the extent and content of transparency and public participation, it is difficult to make progress towards a more predictable environment in terms of openness and outside participation.

Of course, the level of expectation depends strongly on the level of public participation and the culture of accountability in each society. More developed societies tend to have a higher degree of public control, whereas less developed societies tend to have a lower degree. Therefore, the standards set by arbitration procedures are usually higher than those that an investor may face in the domestic courts of the receiving State.[43] The argument in favour of establishing a uniform standard of transparency in investor arbitration is that, unlike court rulings, judgments are subject to judicial reviews only on very narrow grounds, such as procedural errors or inconsistency with public policy. Thus, greater openness is likely to facilitate implementation as the public is eager to perceive the outcome of the process in which they have been able to participate fully. Increasing transparency is likely to lead to improved decision-making in investor-state arbitration. The publication of awards, court rulings or procedural orders is a prerequisite for the development of a consistent case, which provides legal certainty that all cases are

[40] SCHREUER, C. *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*. Transnational Dispute Management, Vol. 3, No. 2, 2006.
[41] International Centre for Settlement of Investment Disputes (ICSID). 04 August 2010. Award *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa Case* No. ARB(AF)/07/01.
[42] Ibid, ICSID Case No. ARB/05/22.
[43] TEITELBAUM, R. *A Look at the Public Interest in Investment Arbitration: Is it Unique? What Should We do About It?'*. Berkeley Journal of International Law Publicist, Vol.5, 2010, p. 54, 56.

handled on an equal basis. It, in turn, will increase litigation confidence in the system's predictability and provide arbitration as a viable alternative to other forms of dispute settlement[44].

The publicity of documents and decisions is particularly useful in investment arbitration when arbitrators are often called upon to interpret substantive and procedural rules of general and imprecise nature. Of course, this should not mean that past cases are regarded as precedents, but rather a benchmark for how other tribunals have interpreted such provisions. At present, the reliability of the system as a whole, as well as of individual rewards, is compromised by opacity which depends on confidentiality and inconsistent results.[45]

More standardized provisions can also help parties to make excessive demands or protections if it means to dispute against well-settled case law. Conversely, parties may benefit from award publications as they contain arguments and considerations that may be relevant to their own case.

Public involvement also contributes to a higher level of decision-making, as amicus curiae briefs may provide facts and legal arguments that neither party would provide. Usually, amicus briefs are relevant to the tribunal because they provide the context for disputes. In addition, amicus curiae may already have all the information regarding the dispute, which can take weeks, if not months, for the tribunal to assemble on its own, thus helping the tribunal to make a more informed case. [46]

However, interference with the transparency of the proceedings and full public disclosure can pose a serious risk to the integrity of the procedural dispute. The fear is that greater openness to third parties may take the proceedings vulnerable to media and political pressure. This was evident in Biwater v Tanzania[47], where Biwater complained about the behaviour of non-governmental organizations and the media, which threatened procedural integrity of the dispute and threatened exacerbation. The Tribunal issued a confidentiality order drawing the line between legitimate and inappropriate use of mass media. It acknowledged the parties' right to publish their own documents and tribunal decisions as long as they did not contain any reinforcing dispute information, but noted that it had been given a clear mandate to settle the case without pressure or media

[44] HAFNER-BURTON, E. M., & VICTOR, D. G. *Secrecy in International Investment Arbitration, An Empirical Analysis*. Journal of International Dispute Settlement, Volume 7, 2016, Issue 1.
[45] LAZO, R. P. *International Arbitration in Times of Change, Fairness and Transparency in Investor-State Disputes*. American Society of International Law Proceedings, Volume 104, 2010, pp. 591-596. 593-594.
[46] RAGNI C. *Role of Amicus Curiae in Investment Disputes: Striking a Balance Between Confidentiality and Broader Policy Considerations*. Foreign Investment. International Law and Common Concerns, 2014.
[47] Ibid, ICSID Case No. ARB/05/22.

interference. Amicus request was rejected when it was revealed that they raised concerns about the integrity and fairness of the arbitration proceedings. It was noted that many of the petitioners were advocating for NGOs, which initially opposed investment projects but petitioned the tribunal to disrupt or delay the proceedings.[48]

In the case of Methanex v. United States[49], the Tribunal was concerned about the unequal procedural protection afforded to the parties and held that the claimant who did not have amicus support should be entitled to additional protection. Allowing amicus also means that the parties cannot control what facts are brought to court. Amicus records often refer to facts in addition to those, which were brought up by the parties. This is particularly problematic because it does not allow the opportunity for parties to prove confidently the facts, which were submitted to the court by amici. This often creates a burden for the parties if they choose to refute such facts and the legal arguments presented in the summary. Confidentiality is generally regarded as one of the features of arbitration and is one of the main reasons why parties prefer arbitration over other forms of dispute resolution. Proponents of confidentiality refer to the benefits it has over transparency as it protects confidential business and commercial information and preserves the public image and reputation of companies and governments.[50]

Confidentiality can also help reduce tensions between the parties and can facilitate early-stage settlement negotiations. Opposite, greater transparency can lead to significant negative consequences for the investor, and possibly for the government. One of the drawbacks of transparency is that it can affect any prospect of resolving the dispute better, as it opens the door to political pressure, cold calculations and media interference. The second drawback is the greater risk of unintentional disclosure of business and government secrets to third parties, which could have serious consequences for the safety of both investors and states. To address the latter, states and international organizations have sought ways to protect parties from disclosing information that would endanger their security.[51] For example, the proposed UNCITRAL Rules limits the amount of information that parties must disclose, stating that nothing in these Rules requires the defendant to disclose public information for disclosure that they deem to be crucial to

[48] DUMBERRY P, LABELLE-EASTAUGH, E. *Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration, Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*. Jean D'Aspremont, ed., pp. 360-371, Routledge-Cavendish, 2011.

[49] Decision of the tribunal *Methanex Corp v United States* on Petitions from Third Persons to Intervene as 'Amici Curiae'(NAFTA Ch 11 Arb Trib 15 January 2001).

[50] SARAVANAN A., DR. SUBRAMANIAN, S.R. T*he Participation of Amicus Curiae in Investment Treaty Arbitration*. Journal Civil Legal Science, 2016

[51] MISTELIS, L. *Confidentiality and Third Party Participation*. Arbitration International. Voi.21, 2005, p. 211.

their essential security interests. Thus, finding the right balance between the need to disclose relevant information and the need to protect sensitive information is a key point to achieving real progress in establishing an international legal standard on transparency and public participation in investor arbitration. Initially, the choice of international arbitration to consider investor cases was motivated by the perception that arbitration was faster, less expensive, more flexible and more familiar to companies. Contrary to expectations, it appears that the cost of investor arbitration has increased dramatically in recent years. Thus, opening the arbitration process to the public will further increase the administrative costs of tribunals and dispute resolution agencies providing tribunal assistance.[52]

In the same way, public participation will increase the costs for parties as much as they seek to respond to amicus memos, as well as to the tribunal, as much as they will have to consider procedural issues regarding amicus status, amicus request, examining legal arguments in resumes and using them in preparing the final decision. In the case of Methanex v. United States, the tribunal noted that adopting amicus applications could significantly add to the overall cost of the arbitration and impose an additional burden on one or both parties to the dispute, forms of dispute settlement, the increased cost of litigation can deter future litigation from resorting to it. For many years, institutions and tribunals have implemented various cost-cutting techniques that require, for example, limiting amicus to a specific range of pages established by the tribunal or other institutional bodies.[53] For example, the NAFTA Free Trade Commission has set a limit of five and twenty pages for statements and summaries submitted by amici.[54] Other methods include reducing the amount of material and evidence that the tribunal and parties will have to consider. NGOs may also be asked to submit a joint request on behalf of all interested parties to litigate as non-contradicting parties, as in the case of Biwater v. Tanzania, where the Tribunal restricted a third party to a single summary of no more than 50 pages.

[52] SARAVANAN, A. *Transparency and confidentiality requirements in investment treaty arbitration.* BRICS Law Journal, 2018;5(4), pp.114-138.
[53] SCHILL S., DJANIC V. *Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law*, ICSID Review, Vol. 33, No. 1 (2018), pp. 29–55 Available at: https://academic.oup.com/icsidreview/article/33/1/29/4898138
[54] MANN, H., KONRAD VON MOLTKE. *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment.* International Institute for Sustainable Development, 1999.

2.2 Transparency and public access in investment treaty arbitration under ICSID, Mauritius Convention and other legal instruments

ICSID

ICSID is an independent forum for the reconciliation and arbitration of international investment disputes. This Centre was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[55].

The history of the Convention began in 1962. The draft working document contained several articles, with explanatory comments on conciliation and the arbitration system, but focused on the definitions of the terms and function of the parties to the proceedings under the Convention, including arbitrators, parties and their lawyers. The overriding purpose of defining the wording of the ICSID Convention considered by drafters in a working document was to enable a private party to bring an action against a foreign state before an international arbitration tribunal.[56]

The previous draft was concluded in 1963 and contained 11 articles divided into 65 sections, of which concerned the consolidation, organization and jurisdiction of ICSID and the importance of the arbitration awards. Art. IV (9) and IV (10) stated that the tribunal had the discretionary power to decide on the just circumstances of the case and at the same time apply the rule of law, which is a fundamental approach even today.

In 1964, the First Draft concluded, containing the preamble and 78 numbered articles in ten main chapters,[57] which also established the official name International Centre for Investment Dispute Resolution, as it remains today. A new article was added to it that allowed the tribunal to require the parties to submit documents or any other information it deemed necessary. This was a very important article on transparency for two reasons. Firstly, it allowed the tribunals to urge the parties to provide documents or any other relevant information that the tribunal considered necessary for the case. Secondly, this article gives the tribunal the power to decide on its own when a party must provide further documents or information, relying on the exact case. The First Draft also contained two important aspects of transparency, regarding disclosure and participation of third parties.[58]

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[55] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965.
[56] PARRA, ANTONIO R. *The History of ICSID. Second ed.* Oxford, United Kingdom: Oxford University Press, 2017. Chapt.3. p. 28.
[57] Ibid., Chapter 5.
[58] Ibid., Chapter 6, p.101; History of the ICSID Convention. ICSID Publication [reviewed on 16 October 2019]. Available at:

The next stage was the creation of Provisional Rules concerning the establishment of a conciliation commission and the arbitration tribunals, depending on the particular case, and the different phases within each arbitration process. In other words, and following the confidential nature of reconciliation and arbitration, these rules stipulated that discussions would be held privately and would remain secret, but the final word would still be left to the parties. According to the Provisional Arbitration Rules, the public could only participate in hearings if the Tribunal decided so and both parties agreed to the decision. In the Provisional Rules, the parties' agreement was very crucial, where the parties and the tribunal together had to address important issues not only of the proceedings but also of the interaction of any other elements, such as transparency and confidentiality during arbitration.[59]

In 1968, final rules and regulations were approved, but no amendments to the tribunal's powers were made and the result was very similar to the Provisional Rules. Concerning transparency and confidentiality, the result was in the same sense as before, no relevant discussion had been conducted on these issues. There was only one amendment to the Administrative and Financial Regulations on Transparency, which concerned the publication of reports, arbitration awards, records and other records of proceedings which allowed the Secretariat to publish these documents only when it had obtained the agreement of the parties. Again, particular attention was given to the consent of the parties, especially concerning the disclosure of information and documents of proceedings.

In the early 1970s, ICSID gained recognition among states and investors worldwide. The increasing trust has enabled the Centre to provide additional administrative services and has allowed ICSID to act as a body in certain proceedings that were not within the jurisdiction of the Centre. This is how the Additional Payments Rules were created[60]. The first additional payment rules in 1978, Art. 41 (2) was silent on the involvement of third parties in the proceedings but allowed the tribunal to urge the parties to produce documents, witnesses and experts. This provision remained in the subsequent Supplementary Rules of 2003. However, in the Second Amendment of 2006, Art. 41 (3) was the first time that the Additional Payment Rules recognized non-participating

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https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-2.pdf

[59] PARRA, ANTONIO R. *The History of ICSID. Second ed.* Oxford, United Kingdom: Oxford University Press, 2017. Chapter 6, p.106.

[60] Ibid., Chapter 7. p.136.

parties.[61] It is important to note that initially, the tribunal had to consult with both parties to allow a third party to submit a written submission, it should be emphasized that the involvement of these third parties should only be related to factual or legal issues of the proceedings, and the tribunal should ensure that such participation was not infringed the proceedings or wrongfully impeded or unfairly harmed either party. In other words, third parties who are not interested in the dispute or intend to initiate proceedings, and to create prejudice regarding to one of the parties should not be considered by a court. This is sometimes overlooked today, as the frequent involvement of third parties is more political than legal and hides the agenda for its own interests.

In early 1984, it was proposed to revise ICSID Regulations and Rules. This was the first amendment to the Rules and Regulations since their adoption in 1968. Most of the proposals concerned administrative issues, such as a single contribution from applications to the Centre. The main idea behind these new proposals was to create greater flexibility and clarity in the management of the proceedings.[62]

The most important amendment to Art. 48 (2) of the Convention, on the publication of award without the consent of the parties. The proposal was to add a provision that would allow the Centre to publish excerpts from the legal rules applied by the courts. This decision was made to create a more neutral disclosure of the proceedings. By the end of 1984, the parties had unilaterally disclosed information about past proceedings without any control, so the Centre considered it necessary to make provision for such publications. The disclosure of information was carried out unilaterally by one party, which, of course, violated the confidentiality of the arbitrations, but also harmed the other party. The Revised Terms entered into force in September 1984.[63]

In 2002, the Secretariat proposed three major changes to ICSID Rules and the Supplementary Fund Rules. The newly amended provisions have entered into force since 2003. In this second amendment, the provisions on transparency remain almost the same as in the 1984 amendment, for example, Art. 48 (5) of the Convention states that the agreement of the parties is fundamental when it comes to the publication of information on proceedings, specifically the publication of awards by the Centre. Article 27 of Reconciliation Rule contains a general rule that hearings will be held privately and remain secret, except for the parties otherwise agreeing. Besides, it was stated that the

[61] International Centre for Settlement of Investment Disputes. ICSID Review: Foreign Investment Law Journal. ICSID Review: Foreign Investment Law Journal.
[62] PARRA, ANTONIO R. *The History of ICSID. Second ed.* Oxford, United Kingdom: Oxford University Press, 2017, Chapter 7.
[63] Revised Regulations and Rules News from ICSID, 1985. [reviewed on 16 October 2019]. Available at: https://icsid.worldbank.org/en/Documents/resources/vol%202%20winter%201985.pdf

commission decides with the consent of the parties when third parties may participate in the hearings. The following changes took place in 2004.[64] The ICSID Secretariat released a document with possible improvements to ICSID arbitration. The proposals outlined in this discussion paper suggested the idea of creating a more open and transparent arbitration process and stated that the ICSID Arbitration Rules or the authority to accept and consider submissions made by amicus curiae, further in paragraph 15 it was suggested that the consent of the parties was not a requirement for the admission of third parties to hearings, which in turn was an innovation.

It is interesting to note that the Third Amendment offered more proposals regarding transparency in a broad sense, not only involving third parties in the proceedings, but also the publication of decisions. Later, the ICSID Secretariat published a working document with proposed changes to the ICISD Rules 7 concerning the participation of amicus curiae, Rule 37 (2) stipulates that ICSID tribunals may receive and consider written submissions from a third party or the State, having previously advised both parties. In order to consider submissions from third parties, they must satisfy three criteria. In order to consider submissions from third parties, they must satisfy three criteria. Firstly, any such submissions should assist the tribunal in determining the factual or legal issue of the dispute. Secondly, the party must have a significant interest in the dispute. Also, consideration of such appeals should not disturb the dispute process itself, or burden of any other parties, which is the third component. Pursuant to Rule 32, the tribunal may allow without the consent of the parties, third parties to attend all or part of the hearings.

Discussions indicated that in some cases it would be useful to open hearings to persons other than those directly involved in the proceedings.[65] The proposed changes will make it clear that third-party involvement may be considered by the court after consultation with the Secretary-General and both parties, as far as possible, by giving the tribunal the final say in order to resolve such participation. It should be noted that the general idea behind these amendments was to give arbitrators broader authority to address important issues related to public hearings and amicus curiae side-lined the parties to the backstage. It can be said to be a rather controversial decision, given the fact that any arbitration is based on the mutual consent of the parties. The 2006 amendment was very important for transparency as it involved amicus curiae participation, the publication of decisions and open arbitration hearings. In August 2018, ICSID published its proposals

[64] Suggested Changes to the ICSID Rules and Regulations. Working Paper of the ICSID Secretariat, May 12, 2005, p. 4.
[65] PARRA, ANTONIO R. *The History of ICSID. Second ed.* Oxford, United Kingdom: Oxford University Press, 2017. Chapter 10. p.225.

for amendments to the ICSID Rules, which aim to provide greater transparency by including provisions regarding access to documents including arbitration awards, access to hearings and participation by non-parties, as well as consent to the publication of awards. Voting for these proposed changes is expected in 2020.[66]

The Mauritius Convention

The Mauritius Convention entered into force on 18 October 2017. The Convention aims to provide States and regional economic integration organizations with an effective mechanism that extends the scope of the UNCITRAL Transparency Rules to arbitration based on treaties concluded before the Transparency Rules came into force. Like the Transparency Rules, the Mauritius Convention seeks to take into account both the public interest in such arbitrations and the parties' interest in resolving disputes fairly and effectively, although the temporal and procedural scope of the Rules and the Mauritius Convention are different. Transparency rules apply automatically to all investor-states arbitrations governed by UNCITRAL Arbitration Rules under treaties concluded after April 2014.[67] On the other hand, the Mauritius Convention applies to investor-state arbitrations following the investment agreements of States parties, whether initiated or not in accordance with UNCITRAL Arbitration Rules. More specifically, the Convention may apply to contract-based arbitrations where the defendant is a party to the Convention and the applicant investor is a State party to the Convention. When these conditions are met, the Convention provides for the mandatory application of the Rules on Transparency, unless either the respondent or the claimant has made a reservation. Substantially, by making such a reservation, a party may exclude the application of the Convention to arbitration under a specific contract or which concluded using a specific set of arbitration rules, except for UNCITRAL Arbitration Rules.

The drafters of the Mauritius Convention argue that it is a powerful tool for increasing transparency in the settlement of investor-state disputes. Although the Convention reflects current practices regarding third parties, it requires higher disclosure requirements for access to documents and public hearings. The rules and the Convention push for a high level of transparency, requiring the mandatory and automatic disclosure of certain documents, including the tribunal's awards. This is a stricter standard than those found today in institutional arbitration rules. For example, Rule 48 (4) of the ICSID Arbitration Rules only requires ICSID to publish certain excerpts from the legal

[66] A Brief History of Amendment to the ICSID Rules and Regulations. [reviewed on 16 October 2019]. Available at: https://icsid.worldbank.org/en/amendments/Pages/Background%20Material/History-Amendment-ICSID-Rules.aspx

[67] SCHILL. S. *The Maritius Convention on Transparency: A Model for Investment Law Reform*. Amsterdam Center for International Law (ACIL), 2015.

considerations of each ruling, leaving any other documentary disclosure subject to the agreement of the parties. [68]

Despite this ground-breaking step towards transparency, the Rules and Convention have had only limited success. The Mauritius Convention entered into force on 18 October 2017 after Canada, Mauritius and Switzerland ratified the treaty. 19 States have signed the Convention, but only 3 have ratified it.[69] During the discussions of the Working Group, the states objected to the far-reaching consequences of this retrospective application. After all, there are over 3,000 investment treaties concluded before 2014, and states were not ready to subordinate these treaties to transparency. With a large number of States and regional economic integration organizations, such as the EU or ASEAN, signed and ratified, the Mauritius Convention will change the paradigm of investor-state dispute settlement.[70] While the scope for reservation is quite broad in Articles 3 and 4 of the Mauritius Convention, and although ongoing arbitrations are outside the scope of the Mauritius Convention Article 5, the Convention establishes transparency as a general principle of international investment law. [71]This is another step in the gradual adaptation of international investment law to the requirements of a more democratic and responsible international public-law system. The widespread use of transparency under the Convention will not only enhance the accountability of the core investor-state relationship but also allow for better public scrutiny of the arbitration process. This transforms the Mauritius Convention into a tool with a constitutional consequence for the international investment regime.[72]

NAFTA

In 2001, the NAFTA FTC clarified that nothing in NAFTA prevents parties from granting the public access to documents submitted or issued by an arbitration court. In 2003, the NAFTA Commission announced new transparency measures to make Chapter 11 arbitration more accessible to the public. The commission statement acknowledged the

[68] Rule 48 (4) of the ICSID Arbitration Rules.

[69] The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration will enter into force in six months after ratification by Switzerland. [reviewed on 17 October 2019]. Available at: http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl244.html

[70] The Mauritius Convention. Boosting transparency in Treaty-based Investor-State Arbitration, 2017. [reviewed on 17 October 2019]. Available at: https://www.bothends.org/uploaded_files/document/LR_Mauritius_Convention.pdf

[71] Mauritius Convention, Art 4.5.

[72] KAUFMANN-KOHLER, G., POTESTÀ, M. *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?* Geneva Center For International Dispute Settlement, 2016. [reviewed on 25 October 2019]. Available at: https://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf

tribunal's authority to accept amicus curiae and endorsed the use of standard forms for the Arbitration Notice of Intent.[73]

Subsequently, Canada and the United States issued statements supporting open hearings in NAFTA Chapter 11 arbitrations. Mexico announced support for open hearings in disputes between an investor-state following the 2004 NAFTA Commission meeting. With certain exceptions, the statements confirmed that each country would agree that under Chapter 11 disputes should be open to the public with a request to consent open hearings in investor disputes. The statements clarify that countries may withdraw consent for public hearings to protect confidential information where necessary. Countries encouraged tribunals to engage with conflicting parties, listen to live broadcasts, use closed-circuit television or use other forms of access to make the hearings public.[74]

Although not binding on the tribunals, the statements of the contracting parties give Canada and the US incentives to actively seek open hearings against them. While Canada and the US have steadily adhered to their obligations to make arbitration more transparent.[75] For example, in the United Parcel Service against Canada, the parties agreed to hold a public hearing in Washington, DC, except for those parts of the hearing that concerned confidential information.[76] Cameras and recorders were not allowed at the Methanex v. the United States case supported public access to arbitration documents and proceedings. However, the tribunal decided that it did not have the authority to open hearings to non-opposing parties without the consent of both parties. While the Tribunal did not wish to open hearings to non-litigating parties without the consent of Methanex, it asserted its authority to accept amicus submissions.[77]

In 2013, the US company Eli Lilly and Co initiated arbitration to settle their patents in Canada. The plaintiff alleged that the interpretation of the Canadian Patent Law violates Canada's obligations under NAFTA. All arbitration courts and procedural orders were promulgated shortly after they were filed or issued in Eli Lilly and Co v Canada.[78]

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[73] The North American Free Trade Agreement (NAFTA). [reviewed on 25 October 2019]. Available at: https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta.aspx?lang=eng

[74] JACK J., COE JR. *Transparency in the Resolution of Investor-State Disputes: Adoption, Adaptation and NAFTA Leadership*. University of Kansas Law Review, 2006, p. 1339, 1361.

[75] HEINDL, J.A. *Toward a History of NAFTA's Chapter Eleven.* Berkeley Journal of International Law, Vol. 24:2, 2006.

[76]Arbitration Rules Proceeding. December 2005. Award on Jurisdiction *United Parcel Service of America, Inc v Government of Canada*. [reviewed on 25 October 2019]. Available at: https://www.cambridge.org/core/journals/international-legal-materials/article/united-parcel-service-of-america-inc-v-government-of-canada/05BA5C1EE2C35F163E775260FB17E048

[77] Decision of the tribunal *Methanex Corp v United States* on Petitions from Third Persons to Intervene as 'Amici Curiae'(NAFTA Ch 11 Arb Trib 15 January 2001), para 42, 53.

[78] Global Affairs Canada, 'Cases Filed Against the Government of Canada: *Eli Lilly and Company v Government of Canada.* [reviewed on 25 October 2019]. Available at:

The tribunal received six of the nine non-conflicting briefings submitted by the amicus curiae. In addition, the opposing parties agreed to make the hearing public and the remaining Member States, Mexico and the USA, have been attended as representatives during the hearings.

By comparison, before the FTC 2001 Interpretation Note and NAFTA Transparency Statements, tribunals regularly denied the parties' requests to initiate proceedings and to file applications. In Case Metalclad v. Mexico, the tribunal obliged the parties to maintain the confidentiality of the trial by refusing the applicant's request to publish the case.[79] Similarly, the Loewen Group tribunal against the United States[80] denied the request of the United States.

ICC

ICC Secretariat Clause 3-807 clarifies that the Rules do not provide that the arbitration process is confidential. Since the revision of 2012 of the rules pursuant to Article 22 the tribunal has the power to adopt confidentiality orders. Before the 2012 revision the rules allowed the tribunal to take general measures to protect business secrets and other confidential information.[81]

Article 26 provides for the rights of the parties to hearings, adding that persons who do not participate in the proceedings cannot be admitted unless the court and the parties approve the participation of a third party. Article 3, Annex II, Article 1 (3) provides that in exceptional circumstances, the President of the Court may invite other persons to the court.[82]

ICC Annex II, Article 1, emphasizes the importance of ensuring that any person outside the court who is granted access to arbitration documents must maintain the confidentiality of the materials. According to ICC rules, there is no requirement to publish documents filed with the tribunal. Rather, Article 1(4) of Annex II states that documents submitted to the Court or prepared by it or the Registry in the course of proceedings shall be communicated only to members of the Court, the Registry and persons authorized by the President to attend the sessions of the Court.[83]

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https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/eli.aspx?lang=eng

[79] British Columbia Supreme Court: 2 May 2001. Award *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1. [reviewed on 25 October 2019]. Available at: https://www.iisd.org/itn/2018/10/18/metalclad-v-mexico/

[80] Trade Pacts' "Investor-State" Systems: Private Corporate Tribunals Used To Attack Countries' Courts. [reviewed on 25 October 2019]. Available at: https://www.citizen.org/wp-content/uploads/loewen-case-brief-final.pdf

[81] ICC, Arbitration Rules, Art 22.

[82] Ibid; ann II, Art.1,3

[83] Ibid; ann II, Art.4.1

In rare cases where a third party is granted access to documents submitted to the ICC Tribunal or any decision coming from the ICC Tribunal, Annexes II, Articles 1 (5) and 1 (6) provide for restrictions on the use of the documents. Article 1 (5)[84] provides that the President or the Secretary-General of the ICC may authorize researchers to access certain decisions and other documents of common interest. The President or the Secretary General of the Court may authorize researchers undertaking work of an academic nature to acquaint themselves with awards and other documents of general interest, with the exception of memoranda, notes, statements and documents remitted by the parties within the framework of arbitration proceedings. Such authorization shall not be given unless the beneficiary has undertaken to respect the confidential character of the documents made available and to refrain from publishing anything based upon information contained therein without having previously submitted the text for approval to the Secretary General of the Court. Any scientific work that the third party desires to publish with the help of ICC Arbitration documents shall be sent to the ICC Secretary-General for approval.

In an effort to make the ICC more transparent, the ICC began publishing details of the arbitrators in 2016. Information of the ICC and the arbitrators appointed by the parties is published monthly on the ICC website. In addition to the name and nationality of the arbitrators, the ICC also sets out the arbitrator's appointment, arbitrator role, arbitration status, and arbitrator status in the particular case. The ICC also began publishing excerpts of decisions and procedural orders, as well as challenging of arbitrators.[85]

[84] Ibid; ann II, Art.1 (5),(6)

[85] ALTENKIRCH, M., BOUSSIHMAD, M. *ICC Publishes Arbitrator's Details – A New Level of Transparency.* [reviewed on 31 October 2019]. Available at: https://globalarbitrationnews.com/icc-publishes-arbitrators-details-new-level-transparency/

2.3 Non-disputing party access

Third parties are often involved in dispute resolution as amicus curiae. The term is widely translated as a friend of the court. Amicus involvement is usually justified on the basis that this friend of the court may provide the court or tribunal with its particular perspective or expertise on the dispute. Amicus involvement in dispute resolution usually takes the form of written submissions to the decision-maker, however, the involvement of third-party organizations is by definition not limited to written communications.[86] The concept of amicus curiae is not restricted to any form of participation and may, where appropriate, include participation in oral hearings, access to the documents of the opposing parties and even cross-examination of witnesses.[87]

Investment arbitration courts initially refused to allow outsiders to participate because of a significant difference between arbitration proceedings and arbitration awards before national or international courts. In Aguas del Tunari SA v Bolivia, known as the Bechtel case[88], which was held upon the bilateral investment agreement between the Netherlands and the UK, the tribunal denied the participation of citizens and environmental organizations because the parties were unwilling to consent to their participation. The ICSID tribunal found that the interaction between the ICSID Convention and the agreement as well as the consensual nature of the arbitration had left the amicus decision in the hands of the parties to the arbitration. As the parties did not agree, the tribunal lacked the authority to allow any form of third party interference. The Bechtel decision has received considerable criticism and suggestions that the Tribunal's approach will deprive the public of reasonable expectations. In recent years, there has been a clear shift in investor-state arbitration to a greater tolerance for the limited involvement of third-parties, perhaps in response to continued public pressure and criticism.[89] The practice of intervention by NGOs is also widespread to ensure that tribunal decisions take into account human rights, law obligations or take into account the views of those affected by the decision. International investment arbitration, by its nature, affects the public interest, and the tribunals are often tasked with assessing the state's

[86]LEVINE, E. *Amicus Curiae in International Investment Arbitration*. Berkley Journal of International Law, Voi.29:1, 2011.
[87] BUTLER, N. *Non-Disputing Party Participation in ICSID Disputes: Amicus Curia*, 24 April 2019
[88] International Centre for Settlement of Investment Disputes. 21 October 2005. Award *Aguas dal Tunari SA v. The Republic of Bolivia*, ICSID Case No. ARB/03/02
[89]. VIFLUALES, J.E. *Amicus Intervention in Investor-State Arbitration*, 61 DISP. RESOL. J. 72 (2007)

performance of public responsibilities.[90] Taking into account the social impact of disputes, tensions arise when arbitration is conducted behind closed doors. For example, even with its most basic, arbitration results and monetary decisions unfavorable to a State party, it is likely to be paid by taxpayers. Given the impact that investment arbitration has on stakeholders beyond the two direct parties to a dispute, there is an extremely important place for NGOs to address the implications of public interest in disputes that may affect international human rights such as health, indigenous rights and the right to a healthy environment[91]

Participation in ICISD cases as amicus curiae involves two steps: firstly, the party seeking to participate as amicus must petition the Tribunal for permission to intervene as a non-opposing party; secondly, if the Tribunal grants leave, amicus may submit written submissions. Rule 37 (2)[92] of the ICSID Rules governs both stages of the process. The first ICSID decision to apply Rule 37 (2) of the Rule was the 2006 decision in Biwater Gauff.[93] Biwater has filed a lawsuit against Tanzania to terminate its contract for the supply of water and sanitation services to the capital, Dar es Salaam. Five non-governmental organizations have led a joint written application to participate as non-contradictory parties. These NGOs raised issues of human rights, the environment and sustainable development. Their initial petition required three orders: to become amici in the dispute, gain access to key arbitration materials, and leave to participate and ask questions during the oral hearing that may have resulted from the written submission.

Under Rule 37 (2) of the Rules, the Tribunal requested the parties to the dispute to comment on the written submission. Both parties to the dispute commented on the NGO's request for participation, Biwatter opposed the petition, and Tanzania supported it. On the basis of the justification for the factors provided for in rule 37, paragraph 2, the Tribunal decided that NGOs could participate in the dispute because it was a broad political issue on which petitioners were of public concern but could not participate in oral proceedings.[94] In their initial petition, potential amicus may require the authorization of oral proceedings under Rule 32 (2). However, the Tribunal requires the consent of both disputing parties to grant this request. No ICSID tribunal has yet granted amicus curiae

[90] Miller, B., Liu, J., Wright, R., Yoo, J. *Guide for potential amici in international investment arbitration.* University of Toronto, January 2014.
[91] KNAHR, C. *The new rules on participation of non-disputing parties in ICSID arbitration: Blessing or curse?* Cambridge University Press, 2011, pp. 319-338.
[92]) ICSID Arbitration Rules, Art. 37(2).
[93] International Centre for Settlement of Investment Disputes (ICSID). 2 February 2007. Procedural Order *Biwater Gauff v. United Republic of Tanzania Case* No. ARB/05/22, No. 5
[94] G´OMEZ, K, F. *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest.* Fordham International Law Journal Volume 35, Issue 2 Article 3, 2012.

permission to attend oral hearings, since Rule 32 (2) gives each party veto right to allow an amicus to participate in the proceedings and, as a rule, one party, contradictory, almost always object to this. Some investment treaties, such as the Dominican Republic-Central America - US FTA require open hearings[95]. For example, Pac Rim Cayman LLC v. The Republic of El Salvador requires a contract for the proceedings to be open[96]. By the way, this requirements were found to be best met by web broadcasting. However, this degree of openness is exceptional in ICSID arbitration.

2.4 Future of developing transparency in investment arbitration as a global value

In recent years, observers have questioned whether investor-state arbitration will or should be a feature of the next generation of free trade and bilateral investment treaties. Commentators have suggested a backlash against the system of investor-state arbitration that has developed over the past half-century. Critics allege that investor-state arbitration disproportionately favours investors that private lawyers sitting as arbitrators are too close to claimants and that investment awards encroach upon state sovereignty and upon states right to regulate. Others more broadly object to investor-state arbitration on the ground that it uses mechanisms derived from private law to resolve public disputes without sufficient transparency. Some states, such as Brazil, have refused the arbitration of the investor-state directly. For example, Tanzania has adopted several provisions prohibiting international investment arbitration in natural resource disputes. However, other states and groups of states are trying to review the legal framework to resolve disputes over investment contracts. In particular, the US, Mexico and Canada have agreed to replace the North American Free Trade Agreement and the US-Mexico Agreement, which systematically narrows the availability of dispute resolution between investors.[97] We can say that these are the changes that relate to the interpretation and role of arbitration in bilateral agreements that await us in the future. However, we now live in a world that is embraced by modern technologies and Blockchain and there is one unique feature of Blockchain that can be useful for investment arbitration. Transparency is a procedural concept that corresponds to openness, clarity and reliability. At the same time,

[95] The Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR). [reviewed on 04 November 2019]. Available at: https://wits.worldbank.org/GPTAD/PDF/archive/UnitedStates-DominicanRepublic(CAFTA).pdf

[96] International Centre for Settlement of Investment Disputes (ICSID). 14 October 2016. Award *Pac Rim Cayman LLC v. Republic of El Salvador case* No. ARB/09/12

[97] RAMOS-MROSOVSKY, C. *Investor–State Arbitration And The 'Next Generation' Of Investment Treaties.* The Investment Treaty Arbitration Review, Edition 4, June 2019.

transparency, accessibility, openness and democratization are the concepts that underpin the value of Blockchain[98].

Despite the advantages, transparency of investment arbitration has some disadvantages. Among them is the notion that transparency can cause delays and increase costs. Allowing the flow of information and engaging third parties requires more time and therefore more cost.

According to Article 2 of the UNCITRAL Transparency Rules, information is made public through the UNCITRAL Transparency Register, which is the central source for publishing information and documents in investor-state arbitrations based on treaties managed by the UN Secretary-General through the UNCITRAL Secretariat[99].

According to the Rules, the Transparency Register is freely available to the public thus information and documents in the arbitration process are published subject to certain safeguards, including the protection of confidential information or the integrity of the arbitration process.

The Registry, as the central repository for the publication of information and documents in investor-state arbitrations, requires that the arbitral tribunal appoint a person from the court from which the Registry will receive information and to which the Registry may return for questions. In all cases where the Transparency Rules apply, the arbitral tribunal must file the documents by e-mail or courier on a USB stick, CD or DVD. Moreover, documents submitted to the Registry must be in PDF format and should not exceed 5 MB. If the document exceeds this size, it should be divided into smaller documents. Finally, any costs for submission is covered by the submitting party or the court. [100]

In principle, the service of the Registry is at no cost to the parties, tribunals, and the public. However, it would be remiss, to neglect the issue of the transaction costs associated with transparency. People demand more transparency everywhere. Curious people want distributed access to information. Now everyone wants to increase trust and transparency in sharing information of all shapes and sizes, and Blockchain technology is the answer.[101]

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[98] Firmin, J. *Blockchain and International Arbitration: Opportunities and Challenges.* December 2018

[99] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014) [reviewed on 08 November 2019]. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf

[100] DUARTE, M. *Could Blockchain Become The New Standard For Transparency in Investment Arbitration?* October 15, 2018. [reviewed on 08 November 2019]. Available at: http://arbitrationblog.kluwerarbitration.com/2018/10/15/could-blockchain-become-the-new-standard/

[101] JEVREMOVIĆ, N. *2018 In Review: Blockchain Technology and Arbitration.* January 27, 2019. [reviewed on 08 November 2019]. Available at:

Blockchain eliminates the need for a central authority that is, a transparency Register to manage information, making it highly secure and impervious to hackers. Blockchain systems include a fully validated book of information. General record entries can only be made if they are verified by the system and to change it, every other Blockchain on the system must also be changed. In the nearest future, arbitrators should have the power to exchange information that UNCITRAL Transparency Rules are binding directly on the Blockchain system. With this advanced form of technology, a protocol can be implemented to protect highly sophisticated information within the framework of the Transparency Rules. Therefore, the system would be automated to minimize the arbitration tribunal's discretion and to increase the efficiency of the process. With greater transparency, there is a need for faster information transfer. Nowadays, transparency is achieved through a long chain of information and parties involved, from counterparties to the arbitral tribunal and subsequently to the Transparency Register[102].

However, greater transparency requires that information is exchanged quickly with the involvement of all parties at the same time. Using a Blockchain system to exchange information directly with arbitrators may mean that third parties can get information about the dispute more quickly. It may enhance participation in the arbitration process as observers during oral hearings or as amici curiae. Due to Blockchain, a person who is not fully involved in the dispute, a third party who is involved in the case, and a party who does not dispute the relevant investment agreement are entitled to the same level of access, therefore Blockchain and the transparency rules are compatible. Such improved UNCITRAL transparency rules enable States to improve investor arbitration, and such a project is already under discussion.

http://arbitrationblog.kluwerarbitration.com/2019/01/27/2018-in-review-blockchain-technology-and-arbitration/

[102] SHEHATA, I. *Three Potential Imminent Benefits of Blockchain for International Arbitration: Cybersecurity, Confidentiality & Efficiency*. Young Arbitration Review, November 24, 2018.

III. TRANSPARENCY IN INTERNATIONAL COMMERCIAL ARBITRATION

3.1 Public Access, disclosure and need for Transparency in Commercial arbitration

In recent years, there has been a growing request for transparency in the international commercial arbitration system. While some favour the presumption of publication of arbitral awards, unless the parties object, others propose to establish an international supervisory body to oversee the publication of decisions. Although mandatory publication of arbitration awards is often put forward as a solution to the transparency gap, this approach may raise more questions than it answers.[103]

In order to understand why the request for transparency has emerged, it is important to understand how arbitration has worked in the past. The parties submitted their disputes to arbitration, trying to avoid going to ordinary court and keeping their disputes out of the public's attention. The current principle of confidentiality prevailing in international commercial arbitration and the importance attached to confidentiality is probably partly the result of such practices. Any attempt to define transparency in the context of arbitration brings together two different concepts: public access and disclosure. Transparency can lead to a higher degree of confidence and acceptance of the arbitration process.[104] Transparency increases accountability to the arbitration when the lawyer and the parties to the arbitration remember that their behaviour may be publicly verified. Transparency also makes the decision-making process in arbitration more accurate as arbitrators who know that their decisions would be published are conducting research and investigation properly before reaching a conclusion. In investor-state arbitration, transparency allows the public to scrutinize public activity. As the results of investor-state arbitration can affect government decision-making process and finances, these arbitrations must be under the critical eye of the public and remain open to scrutiny.[105]

Although the promotion of transparency has been less significant in international commercial arbitration, there have been positive developments over the last decade aimed at increasing the transparency of international commercial arbitration.

These positive developments have taken several forms. Arbitral Tribunals have moved away from hiding arbitral awards and have begun to publish edited versions of

[103] ROGERS, C.A. *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1302 (2006).
[104] FEICIANO, F.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 PHIL. L.J. 1, 2 (2012)
[105] HSIE-LIEN TUNG, S., LIN, B. *More Transparency In International Commercial Arbitration: To Have Or Not To Have?*

arbitral awards or even full versions where the parties have consented. Legal news websites are increasingly beginning to comment on international disputes. The most important difference between international commercial arbitration and investor-state arbitration is the identity of the parties. In international commercial arbitration, private parties from different countries, sometimes states, submit their disputes for consideration by an impartial arbitrator and receive a final and binding arbitration award that can be enforced by a court. For comparison, investor arbitration involves state or public authorities and private investors. International commercial arbitration and investor-state arbitration involve a variety of stakeholders. [106]

The vast majority of scholars, listing the major benefits of arbitration for parties, include confidentiality. There is no doubt that in some very specific situations privacy can play a decisive role in the choice of parties. For example, in intellectual property agreements or when commercial information is involved.[107] In other circumstances, the parties may be reluctant to publicly state that they are dishonest, incompetent or lacking adequate financial resources. First of all, corporations are often required to report to shareholders and disclose their annual reports, which may contain confidential information. Indeed, the duty of confidentiality disappears when the obligation to disclose information arises. In addition, many commercial arbitration issues do not provide confidential commercial information, making confidentiality not such a serious issue[108]. It is rarely the case that a company image can be damaged by its involvement in a dispute. In the vast majority of situations, such participation would not result in a serious loss of business for the parties.

There are several reasons for transparency or lack of privacy. Obviously, posting awards would allow people to learn about other people's mistakes and bad behaviour while avoiding future controversy. In addition, the confidentiality of arbitral awards may lead to inconsistent settlement of disputes arising from a single business transaction, but resolved by different arbitral tribunals

It carries the risk of conflicting decisions. Access to arbitration awards can also help educate future and less experienced arbitrators. Moreover, transparency can help users monitor and evaluate the quality of services provided by individual arbitrators and arbitration institutions. By reading the arbitral awards, the future arbitrators will be able

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[106] ARGEN, R.D. *Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration*. 40 BROOK. J. INT'L L., 2014, p.207, 207.
[107] DESSEMONTET F. *Arbitration and Confidentiality*. The American Review of International Arbitration, 2001, 7:1, p. 299.
[108] BALDWIN, C.S. Pr*otecting Confidentiality and Proprietary Commercial Information in International Arbitration*, 31 TEX. INT'L L.J. 451, 453 (1996).

to assess how a particular arbitrator considered such proceedings, whether it would be appropriate to appoint that person in a similar future arbitration, his level of specific technical skills, how the arbitration institution fulfilled its responsibilities, and so on. Transparency does not mean that all information relating to a particular proceeding should be disclosed to everyone.[109]

3.2 Transparency as a Means to Develop Commercial Arbitration

Transparency in international arbitration applies to both institutional and ad hoc arbitrations and refers to the transparency of arbitration in relation to the public domain. Traditionally, confidentiality was the basis of international commercial arbitration. Transnational companies preferred the option of arbitration to resolve their disputes, to ensure the confidentiality of certain trade secrets, as well as the dispute itself in order to prevent adverse effects on its customers and the market. [110]

Article 39 [111]of the Arbitration Rules of the new Chinese Arbitration Association, International 2017 (hereinafter "CAAI Rules"), in force as of 1 July 2017, provides for confidentiality and states that unless otherwise agreed by the parties or required by applicable law, parties, arbitrators and administrators of the CAAI shall keep all matters confidential. This is also extended to emergency arbitrators and expert witnesses. It also mandates that the arbitral proceedings be kept confidential unless the parties agree otherwise. The CAAI Rules also allow for scrutinized versions of awards to be published if a request is made to the CAAI and neither party objects within the required time limit.

The ICC Arbitration Rules 2017 (hereinafter "ICC Rules") do not specifically indicate that all ICC arbitrations are confidential. Instead, in the absence of party agreement, the ICC empowers the tribunal, upon a party's request, to make orders concerning the confidentiality of the arbitral proceedings or of any other matter in connection with the arbitration at the request of any party. Furthermore, it empowers the tribunal to take measures to protect trade secrets and confidential information. Notwithstanding the above, Appendixes I and II[112] of the ICC Rules provide that all work by the Court and the Secretariat remain confidential and decisions of the Secretariat and

[109] PISLEVIK, S. *Precedent and development of law: Is it time for greater transparency in International Commercial Arbitratio*n. Arbitration International, Volume 34, Issue 2, June 2018, pp. 241–260.
[110]BUYS, C.G. *The Tensions between Confidentiality and Transparency in International Arbitration*, 14 Am. REV. INT'L ARB. 121, 138 (2003).
[111] CAAI Arbitration Rules, Article 39.
[112] ICC Arbitration Rules. [reviewed on 12 November 2019]. Available at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/

Court remain confidential, including scrutiny of the award, and shall not be disclosed to anyone outside of the ICC, including the parties, unless the Rules provide otherwise.

The confidentiality obligations of the Court and Secretariat are confirmed by the Secretariat's Guide. The Secretariat's Guide further provides that the ICC will only publish awards with the parties' consent or, if there is no consent, it will publish awards in redacted format.

Article 30 of the London Court of International Arbitration (hereinafter "LCIA") Rules of Arbitration 2014[113] provides for confidentiality of the arbitration proceedings and prohibits parties from publishing any documentation and information unless otherwise required by law, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. It also provides for confidentiality of the deliberations of the arbitral tribunal and publication of the arbitral awards only with the prior written consent of the parties.

Rule 39 of the Singapore International Arbitration Centre (hereinafter "SIAC") Rules 2016[114] imposes obligations of confidentiality on all matters relating to the proceedings of arbitration, including the award and deliberations of the tribunal. It then sets out a list of exceptions to the obligation of confidentiality and grants power to tribunals to take appropriate measures including issuing an order or Award for costs if a party breaches the confidentiality obligations set out under its rules. Furthermore, Rule 32.12 of the SIAC Rules 2016 grants the SIAC the power to publish awards with the consent of the parties.

Article 3 of Stockholm Chamber of Commerce Rules of Arbitration (2017)[115] (hereinafter SCC Rules) provides that unless the parties have agreed otherwise, the parties, SCC and the arbitral tribunal shall maintain the confidentiality of the arbitration and of the award. Article 9 of Appendix I of the SCC Rules further states that the institution shall keep the arbitration confidential.

Given the increase in the use of international commercial arbitration to resolve disputes, there has been a rise in demand for transparency in arbitration proceedings for the public domain.

Proponents of the increased transparency of the arbitration in the public domain rely on the need for accountability of the arbitrator, the rule of law, and the need for the

[113] LCIA Arbitration Rules. [reviewed on 12 November 2019]. Available at: https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx

[114] SIAC Rules. [reviewed on 12 November 2019]. Available at: http://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule32

[115] SCC Arbitration Rules. [reviewed on 12 November 2019]. Available at: https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf

predictability and certainty of the law to govern commercial conduct. One of the main interests of creating the public domain is to better understand how arbitrators make their decisions, what arguments are compelling and what type of evidence is considered decisive.

It is also in the interest of the public domain to trace the case law produced by a particular arbitrator in determining whether an arbitrator should be challenged or not. It is also in the public interest to have the necessary resources to evaluate how arbitral tribunals may interpret certain commercial reservations or arrangements or decide on the consequences of particular commercial events in past arbitration decisions.

As of 2015, there were more than 1,200 arbitration institutions and organizations providing arbitration services in the world. The increase in the use of arbitration has led to an increase in arbitration administered by arbitration institutions. Arbitration institutions, changing the degree of their involvement in the arbitration process, no doubt make a number of decisions that affect the arbitration process itself. These decisions include, but are not limited to, procedural decisions on consolidation of arbitrations, prima facie jurisdiction, appointment, confirmation and appeal of arbitrators, costs of arbitration and review of decisions.[116] Previously, arbitration institutions did not provide reasons for issuing such decisions. Such opacity has raised complaints from users of institutional arbitration, as well as the legal community, as it has led to frivolous claims and increased costs since the parties did not realize whether their application would be successful. The lack of transparency also raised the parties' confidence in the institutional arbitration. In response to the growing number of complaints, arbitration institutions have recently taken steps to increase transparency. In particular, the ICC has recently announced a series of steps to increase transparency in institutional decision-making. These steps include notifying the decisions of the institution on the challenge against an arbitrator, initiating the replacement procedure and subsequently replacing the arbitrator at will, consolidating the arbitration proceedings, and deciding jurisdiction.

It is important to note that such reasons are communicated to the ICC only when the parties mutually agree and request such reasons and if the ICC has the full discretion to accept or reject such a request. The ICC also began to publish on its website the names of

[116] SEOW, A. *More Transparency in International Commercial Arbitration Is a Good Thing*. International Arbitration Law, 2017. [reviewed on 12 November 2019]. Available at: http://internationalarbitrationlaw.com/wp-content/uploads/2017/07/YSIAC-Essay-entry-pdf.pdf

arbitrators currently pending cases ICC, their nationality, the intended destination, and whether the arbitration is the sole arbiter, co-arbitrator or president[117].

In addition, since 2014, LCIA has provided reasons for the parties to their decisions regarding challenges to arbitrators. The HKIAC also published a Practice note on the call to arbitrators, which stipulates that the HKIAC's determination of the challenge shall be communicated to the parties, the Challenged Arbitrator and, where applicable, the other members of the arbitral tribunal in writing.[118] The practice note also states that HKIAC is not obliged to state such reasons.

There is no obligation to provide reasons in decisions regarding challenges to arbitrators under the SCC Rules. However, the SCC periodically publishes a summary of its decisions on arbitration challenges.

LCIA also published data on average costs and length of work of LCIA arbitrators, as well as SCC. The SCC report also provides detailed information on the magnitude of the disputes and the manner in which the costs of arbitration and legal representation are shared by the arbitration courts. The stated purpose of this report was to increase confidence and transparency in the SCC practice. Between privacy and transparency, the scales are just shifting in favour of the latter.[119]

Although confidentiality remains one of the pillars of the international commercial arbitration, it must be reconciled with the fact that in our time and age the unwillingness to become more transparent is increasingly met with malicious misconduct and equates to the reluctance of individuals and institutions to take responsibility for their decisions. According to the Queen Mary International Arbitration Survey, which expressed dissatisfaction with the lack of understanding of arbitration institutions, it is clear that the parties welcome and increasingly expect greater transparency from arbitration institutions[120].

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[117] ICC Begins Publishing Arbitrator Information in Drive for Improved Transparency, ICC 2016. [reviewed on 12 November 2019]. Available at: https://iccwbo.org/media-wall/news-speeches/icc-begins-publishing-arbitrator-information-in-drive-for-improved-transparency/

[118] Practice Note on the Challenge of an Arbitrator, 2014. [reviewed on 14 November 2019]. Available at: https://www.hkiac.org/news/practice-note-challenge-arbitrator-2014

[119] BASSI, R., NEWMAN, J. *Increased Transparency in International Commercial Arbitration*, FINANCIER WORLDWIDE (Aug. 2016), https://www.financierworldwide.com/increased-transparency-in-international-commercial-arbitration#.XeQHCFczbIU

[120]International Arbitration Survey: Improvements and Innovations in International Arbitration, 2015. [reviewed on 14 November 2019]. Available atmhttp://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf

3.3 The Effects of Transparency in International Commercial Arbitration

The inconsistency of the transparency requirements between investor-state arbitration and international commercial arbitration is explained by the fact that the public is an important stakeholder in state affairs. Such a discrepancy is justified on the basis of the public interest, which provides for greater transparency of investor-state arbitration than international commercial arbitration. Many scholars believe that increased transparency is unacceptable in international commercial arbitration, while others believe that international commercial arbitration between private entities can also affect the public interest, and thus the disagreement is not justified.[121] Similarly, commercial arbitration can also influence state policy-making process on issues such as electricity, water or infrastructure, since private companies often play a major role in such areas. Environmental protection, public health and safety, and competition in the marketplace may also be added to the list of issues that may be of concern to society. Pharmaceutical disputes that lead to a sharp rise in prices for vital drugs also affect the public interest. The global financial crisis of 2007 and 2008 illustrates the impact that private multinational corporations can have on policy-making process and public finances, as well as on individuals and communities. Enforcement of decisions in international commercial arbitration awards in national courts is also of concern to the public interest. However, even transparency advocates acknowledged that transparency should not be required on a blanket basis since not all disputes are matters of public interest.[122]

Although parties to commercial arbitration may voluntarily disclose that their disputes are related to issues of public interest, however, such voluntarism is rare in practice, as parties prefer to keep disputes private. It is justified to make private disputes a private forum to resolve their disputes. However, it is undesirable to allow multinational corporations to embrace their corporate practices, some of which may be affecting millions of people, subject to privacy concerns. [123]

Numerous commentators support the publication of reasoned arbitration awards. Higher consistency and better predictability of arbitration jurisdictions can be achieved by creating a preliminary pool similar but not identical to the earlier precedents. In addition, although arbitral awards are only binding on the parties involved, the totality of the

[121] POOROOYE, A., FEEHILY, R. *Confidentiality and transparency in international commercial arbitration: Finding the right balance*. Harvard Negotiation Law Review, 2017, vol. 22(2), pp. 275-324.
[122] GRUNER, D.M. *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L., 2003, p. 923, 959.
[123] DRLIČKOVÁ, K. *Arbitrability and Public Interest in International Commercial Arbitration.* International and Comparative Law Review, 2017, ISSN 1213-8770, pp. 55-71.

powers of the authorities at their disposal may have compelling value in such cases. As stated earlier, the publication of arbitration awards would undoubtedly provide some degree of predictability and facilitate arbitration law, scholars and practitioners would be able to understand, analyse, criticize and refine dispute resolution system and arbitration databases and integrity in the arbitration process, thus satisfying a considerable democratic purpose. Although transparency advocates praise its merits, critics say that consistency and predictability are a mirage and that they are not essential to the development of international commercial arbitration.[124]

Another positive effect of increasing transparency in international commercial arbitration is that arbitrators will have more incentives to make defensive, persuasive and carefully crafted decisions. The effect of increased transparency on arbitration awards is twofold. Firstly, the arbitrators would be aware that their decisions would be researched by academics and professionals. Secondly, as the public, the parties and other interested parties will be able to see the arguments of the arbitration panel, the arbitration process will benefit from greater public trust and the parties will face greater pressure to adhere to their decisions.

Although the transparency of international arbitration is complained, as noted above, the courts have called for the cancellation of enforcement proceedings for arbitral awards that do not meet the transparency obligations. Such decision should be opposed as it is too radical and damaging to arbitration ideas as the preferred dispute settlement mechanism. Therefore, the decision should be based on a set of rules already established. However, the extension of the UNCITRAL Rules on Transparency to International Commercial Arbitration should not be considered as a universal means of misapplying the principles of confidentiality in the system. Like its application in the investor State's arbitration, the rules are expected to apply unless the parties explicitly refuse to apply them[125].

Indeed, in a system where privacy is seen as a key safeguard, the disclaimer of its use is mandatory. Such disclaimers may take the form of partial withdrawal when only specific issues remain, or full withdrawal when confidentiality is absolute. While such an approach would promote the transparency and privacy obligations of international commercial arbitration, an unqualified waiver could undermine the effectiveness of such a system if all parties to the conflict decide to opt-out. Therefore, adopting the

[124] ZHAO, M. *Transparency in international commercial arbitration: Adopting balanced approach*. Virginia Journal of International Law, 2019, vol. 59(2), p.218.
[125] CARMODY, M. *Overturning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency Be Applied to International Commercial Arbitration*. International Trade and Business Law Review, 2016, 19, 96-179.

UNCITRAL Rules on Transparency in International Commercial Arbitration will require a well-defined set of rules that address any concerns about the protection of one's goodwill and the protection of confidential information, such as intellectual property, patents and trade secrets. Given the likelihood of counteracting compulsory transparency reform and additional spending on party budgets, it will be important to develop a system that ensures compliance.

IV EUROPEAN POINT OF VIEW REGARDING TRANSPARENCY ISSUE IN INVESTMENT AND COMMERCIAL ARBITRATION

4.1 EU regulations and transparency policy in arbitration

Investment arbitration is currently attracting considerable public attention, and the debate about the future of this dispute resolution mechanism is now taking place not only among investment lawyers, but also among a wide range of different organizations, both public and private. Initially, the main purpose of bilateral investment treaties was to protect investment in emerging market economies as a means of stimulating international trade and foreign direct investment in these countries and thereby supporting their economies.[126] However, the first BITs did not include arbitration clauses, and it would take several years to standardize the use of such clauses, often with reference to the ICSID Convention .

However, investment arbitration is now at a crossroads. After two decades, during which the appeal to this type of dispute resolution mechanism has increased dramatically, investment arbitration is facing increasing criticism and challenges.

Part of this criticism was directed at the way investment arbitration currently operates, pointing to the cost and duration of arbitration, as well as the lack of consistency and accuracy in the decisions made by the arbitration courts[127].

These criticisms also pose a challenge to the European Union, as the debate around investment arbitration has been somewhat "Europeanized" since the Lisbon Treaty came into force. This is largely due to the fact that the power to negotiate treaties relating to the protection of direct investment has been transferred to the EU level. this has had important implications for member States, which are now expected to phase out their BITs as the European Commission negotiates new BITs. At the same time, the EU is allowed to act as a defendant in investment arbitration cases.[128]

This new competence for the EU also had implications for the jurisprudence of the Court of justice of the European Union, which was asked to determine the division of competence between the EU and its member States when negotiating and signing a new generation of free trade agreements that include provisions on investment protection.

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[126] The Economist Journal, issue 8-14, June 2019.

[127]Fact Sheet on Investor-State Dispute Settlement Cases in 2018 Available at: https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf

[128] MERSCH Y., ACHTOUK-SPIVAK L., AFFAKI G., CONTARTESE C., VIDAL PUIG R. *The new challenges raised by investment arbitration for the EU legal order*, Legal Working Paper Series No 19 / October 2019

The European Commission's approach to combating ISDS is further reflected in the new EU international treaties that are currently under negotiation. In October 2018, the EU and Singapore signed three agreements that took their political, trade and investment relations to a new level. The investment protection agreement contains all aspects of the EU's new approach to investment protection, which provides for a reformed system of investment courts for dispute resolution, similar to that of CETA. The investment protection agreement will enter into force after it has been ratified at the level of member States. Similarly, the EU has completed negotiations on all parts of the EU-Japan economic partnership Agreement, with the exception of investment protection. The same changes to the ISDS, which provide for the creation of a two-tier investment court to deal with disputes between investors and States, are provided for in the modernized free trade agreement between the EU and Mexico, which, however, is not expected to enter into full force until 2022. In July 2018, the EU and Vietnam also agreed on the final texts of the EU-Vietnam free trade agreement and the EU-Vietnam investment protection agreement. The latter provides for the creation of a bilateral investment court with Vietnam, an authoritarian state with a one-party system, which will have the right to appoint one-third of the members of this court. In violation of the established arbitration rules, States parties may appoint their own nationals. It is obvious that dogmatism was more important for the EU than the impartiality and independence of judges.

Over the past decade, the concept of protecting foreign investment has changed significantly. A new generation of bilateral and multilateral Free Trade Agreements is being created, some of which cover more than half of global gross domestic product. Some of these announced agreements involving the European Union, such as the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA)[129], the EU-Vietnam Free Trade Agreement (EVFTA)[130] and the EU-Singapore Investment Agreement (ESIPA)[131], have already been negotiated.[132] They all contain provisions to protect foreign investment and a dispute settlement mechanism to settle disputes between host countries and foreign investors. CETA contains provisions on the transparency of investment arbitrations as a means of enhancing its legitimacy. The UNCITRAL transparency rules are incorporated by reference following Article 8.36. Further, the

[129] Comprehensive Economic and Trade Agreement (CETA). [reviewed on 19 November 2019]. Available at ec.europa.eu/trade/policy/in-focus/ceta/.
[130] EU – Vietnam Free Trade Agreement (EVFTA). [reviewed on 19 November 2019]. Available at trade.ec.europa.eu/doclib/press/index.cfm?id=1437
[131] EU – Singapore Trade and Investment Agreements. [reviewed on 19 November 2019]. Available at trade.ec.europa.eu/doclib/press/index.cfm?id=961.
[132] LAM, J., ÜNÜVAR, G. *Transparency and participatory aspects of investor-state dispute settlement in the EU 'new wave' trade agreements.* Leiden Journal of International Law (2019), 32, pp. 781–800

article provides that request for consultation, a notice requesting the appointment of a respondent, a notice of appointment of a defendant, consent to mediation, a notice of intent to appeal to a member of the tribunal, appeals against a member of the tribunal and a request for consolidation must be available to the public.

Article 8.36.5[133] stipulates that CETA hearings will also be open to the public. The tribunal, together with the disputing parties, will decide how to make the hearing public. This may result in the physical access of the public to hearings or video broadcasts. Under Article 8.36.5, confidential information is intended to be kept in public. Article 8.37 CETA[134] allows the respondent State to disclose to the officials of the EU, the Member States and the national governments the documents it deems necessary in the course of the proceedings but requires the protection of confidential information. Article 8.38[135] further provides that the responding States must exchange information with a non-negotiable condition, even if such information is not required.

Finally, the provisions on transparency and third-party participation contained in the EU TTIP proposal should be examined. Although it is not a negotiating text, it is indicative in the sense that it demonstrates a text prepared exclusively by the EU. Article 18 of section 3 of the TTIP proposal is titled Transparency, and that it largely contains language parallel to that of CETA and EVFTA. First, the TTIP proposal also adopts the UNCITRAL Transparency Rules and similarly qualifies and changes its provisions accordingly.

Although article 18 (2) is almost identical to Article 8.36 (2) of CETA, it includes all documents submitted and issued by the court of Appeal in the list. Article 18 (3), clearly considers exhibits to be included in documents to be made public. As the latest addition to publicly available Treaty texts, the EU-Singapore investment protection Agreement ESIPA contains provisions more detailed than previous agreements. Articles 3.16 and 3.17 of the ESIPA [136]text entitled "Transparency of proceedings" and "Party that is not contrary to the Agreement" are the relevant provisions.107 Article 3.16 directs the reader to Annex 8 entitled Rules for public access to documents, Hearings and the ability of third parties to make submissions. Probably one structural difference between ESIPA and the other deals discussed here is that neither articles 3.16 and 3.17 nor Annex 8 contain references to UNICTRAL's transparency Rules. Instead, ESIPA sponsors its own set of rules, which is strongly inspired by the UNICTRAL framework, and this is

[133] Ibid.,, Art. 8.36.5.
[134] Ibid., Art. 8.37.
[135] Ibid., 8.38
[136] Ibid., 3.16; ESIPA, Art. 3.17.

considered to be the main reason for its lengthy provisions. Article 1 (1) of Annex 8 details the documents to be made available to third parties that do not conflict and its content closely resembles other FTA's. In particular, two features stand out. Firstly, unlike CETA, ESIPA does not distinguish between documents that should be automatically available and documents that are provided on demand. The text simply states that all documents must be accessible. Secondly, article 1 (1) adheres to the merger of the provisions on public access to documents and information and access by the parties do not conflict. Article 1 States that documents and information to be made available to a party, which is not inconsistent, must also be made available to the General public, whether they have a substantial interest in the dispute or not. Identical to the UNCITRAL Transparency Rules, Annex 8, article 5, notes that the Secretary-General of the United Nations, through the UNCITRAL Secretariat, shall act as a repository and provide access to public information in accordance with this Annex.

Like other new-generation agreements, article 2 of Annex 8 States that hearings must be open. previous new generation agreements are article 3 (5) of Annex 8. Under this provision, the Tribunal shall ensure that such submissions do not infringe or unduly burden the proceedings, or unfairly prejudice any party that challenges.

This provision is identical to Article 4 (5) of the UNICTRAL transparency Rules, but ESIPA is the only new generation Treaty that has incorporated this provision up to the text of the Treaty itself. Although article 3.17 of the ESIPA is almost identical to article 5 of the UNICTRAL Transparency Rules, the former removes one paragraph from the article which stated that the Arbitral Tribunal, after consultation with the parties that dispute the right, may authorize the filing of applications for further matters within the scope of the dispute from the contract, which does not negate the dispute. Given the lack of a clear reference to the UNICTRAL Transparency Rules, The ESIPA framework does not allow submissions to be submitted in this context, unlike other new EU instruments. Finally, although article 4 of Annex 8 shares certain positions 114 with article 7 of the UNCITRAL Transparency Rules. Article 4 of Annex 8 on confidential information provides for several additional procedures for the submission of information and the communication of confidential or protected information, objections to the reduction of information from submitted documents and objections to the publication of allegedly protected information.

Trust in the new UNCITRAL Transparency Rules, supplemented by special changes regarding the parties to specific agreements, is an important step towards establishing a single set of standards governing transparency and the participation of

outsiders in investment disputes. It is important that the EU takes this decision consistently in future trade agreement related disputes, following a clearly established and appropriate procedure. UNICTRAL Transparency Rules further set out the criteria by which the Tribunal should exercise its discretion. In addition, the Tribunal is mandated to apply a two-tier test to verify whether a third party has a significant interest in the arbitration proceedings and representation in the arbitral Tribunal in determining the actual or legal issue related to the arbitration proceedings. [137]This test provides sufficient guidance and a legal basis for the court to base its assessment in international law, allowing it to simultaneously assess the importance of a case to a third-party and the usefulness of a particular submission in that particular case. One reservation regarding the scope of the new UNCITRAL Transparency agreements and Rules by extension is the rule provided for in article 7 (5) of the UNCITRAL Transparency Rules. The Regulation provides that States are not obliged to provide information on the disclosure of which it considers to be contrary to its essential security interests. While it is important to keep information confidential for investors and for Respondent States, this provision may allow States that accept to waive information that is critical to resolving a dispute under the guise of security interests. Thus, this provision removes the judicious consideration of the courts in determining whether certain information should be disclosed publicly.

In 2018, the EU General data protection regulation (GDPR) came into force. The GDPR is an important development as it introduces potential criminal liability and fines, and will have a significant impact on international arbitration. It applies to all arbitrations where everyone involved is based in the EU, including the parties as well as their lawyer, arbitration institution, members of the arbitration court, experts and suppliers, each of whom may have to enforce the GDPR.[138] The transfer of personal data outside the EU is prohibited, including during arbitration, except for certain limited conditions. Therefore, personal data processed and transmitted during arbitration should be kept to a minimum, and appropriate data protection measures should be taken at the beginning of the review process. From a practical point of view, GDPR compliance usually requires the adoption of a data protection Protocol or other measures to enforce GDPR compliance in the arbitration process, including its potential impact on the transmission and disclosure of data. In order to ensure GDPR compliance, the international arbitration community should consider trying to develop a coherent framework for GDPR compliance with

[137] MERSCH, Y. *Legal Working Paper Series The new challenges raised by investment arbitration for the EU legal order*. European Central Bank, No 19 / October 2019.
[138] ZAHARIEV, M. (Dimitrov, Petrov & Co.). *GDPR Issues in Commercial Arbitration and How to Mitigate Them*, September 7, 2019.

respect to international arbitrations. This must be a nightmare for any hard-nosed cross-examiner who prefers to interrogate witnesses using their personal data obtained from all sorts of secret sources.

4.2 European courts` and scholars` opinion regarding transparency

The crisis of legitimacy of investment arbitration reached its peak in 2018, when the CJEU issued a landmark decision in the case of Achmea BV. vs. The Slovak Republic on 6 March 2018[139]. Achmea and Opinion 1/17[140] are the most recent rulings of the Court of Justice of the European Union on the strained relations between the EU and investor-state dispute settlement mechanisms. As is well known, the CJEU issued the Achmea decision on 6 March 2018 after requesting a preliminary decision from a German court in the context of a dispute between Achmea and Slovakia. The court was asked to determine whether the dispute settlement provision under the EU bilateral investment Treaty, the agreement on the promotion and mutual protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic is compatible with EU treaties. It concluded, in particular, that articles 267 and 344 of the TFEU exclude the dispute settlement provision, since the investment Tribunal may be called upon to interpret and apply EU law in order to settle the dispute before it, and there are no other mechanisms that can guarantee a uniform and consistent interpretation and application of EU law in this context. In Opinion 1/17, which was issued on 30 April 2019 in response to a request from Belgium under article 218 (11) of the TFEU, the court concluded that the ISDS mechanism under the comprehensive economic and trade agreement (CETA) Between Canada and the EU and its member States is compatible with EU treaties.

According to the CJEU, ISDS cannot guarantee that disputes relating to the application or interpretation of EU law will be resolved by a court within the EU judicial system. In contrast to the position of the advocate General in this case, the CJEU concluded that an arbitration court established on the basis of BITs could not be considered as a "court or Tribunal of a member state" and therefore did not have the right to request preliminary decisions of the CJEU on EU legal matters.[141] The ruling stated that the investor-state arbitration clause called into question the principle of mutual trust

[139] The European Court of Justise. 6 March 2018. Judgement *Slovak Republic v. Achmea B.V. Case* C-284/16, EU:C:2018:158.
[140] Opinion 1/17 of the Court of 30 April 2019, CETA, ECLI:EU:C:2019:341.
[141] IULIANA IANCU. The Future of Investment Arbitration in Europe: AIA Conference, June 2018. (Hanotiau & van den Berg Brussels). [revieved on 20 November 2019]. Avaliable at:http://arbitrationblog.kluwerarbitration.com/2018/07/14/future-investment-arbitration-europe-report-aia-conference-held-june-2018/

between member States and was therefore incompatible with the principle of sincere cooperation and undermined the authority of national courts. The decision, which affects almost 200 bilateral investment treaties between EU member States, was met with harsh criticism from the majority of the arbitration community. Taking into consideration that investors from EU countries were the most frequent users of ISDS, this decision is particularly unfortunate. It is quite predictable that some EU member States, in the meantime, either challenge the jurisdiction of arbitration courts dealing with cases against them by EU investors, or enforce decisions already made against them on the basis of the Achmea decision, regardless of whether the jurisdiction of the Arbitration court was based on a BIT or a multilateral agreement[142].

As it seems that the national courts of the EU may become the main place for consideration of investment claims in the future, some concerns were expressed by the professional community. One of the main concerns regarding the sensitive issue of mutual trust. Can investors expect the same level of quality of the judicial system, independence and rule of law in all EU member States? There are real reasons to doubt that the European Commission's seemingly limitless trust in the national courts of EU member States is justified.

Over the years, EU law and international commercial arbitration have been singled out as separate areas of law operating in different areas, and each area has pursued its own political goals. This concept is based to some extent on the fact that international commercial arbitration is neither negotiated nor regulated within the EU. In fact, the practice of arbitration has developed within the EU on the basis of the new York Convention of 1958 on the recognition and enforcement of foreign arbitral awards and the National arbitration legislation of member States. However, a number of recent events and the case law of the European court of Arbitration have clearly shown that EU law has an impact on the practice of international commercial arbitration and that this influence can be felt at various stages of the arbitration process, from the stage of the award to the recognition and enforcement of the award. Indeed, EU law and arbitration interact differently, and the effectiveness of arbitration within the EU can help achieve the EU's goals of ensuring an effective justice system and dispute resolution and mutual decision-making within the EU. But the interaction between EU law and international commercial arbitration is not always clear. Transparency in arbitration has long been associated with parallel discussions about the confidentiality of arbitration. Some authors have raised

[142] *Statement: EU Member States agree on a plurilateral treaty to terminate bilateral investment treaties*. 24 October 2019. [revieved on 20 November 2019]. Avaliable at:https://ec.europa.eu/info/publications/191024-bilateral-investment-treaties_en

such questions about the interplay of transparency and privacy. According to Stefano Azzali, General Secretary of one of the most famous and reformed arbitration institutions in Italy-the Milan Arbitration court, confidentiality was naturally seen as one of the main features of commercial arbitration[143]. Azzali also believes that the publication of anonymous arbitration decisions in a recent practice of CAM-can be an important step towards increasing the transparency of the process, in which arbitration bodies should be particularly active. It can also help to increase the allowance in the arbitration. A similar argument was made by bays, who stated that all arbitral awards in various arbitration proceedings, from those involving public or semi-public cases such as ICSID to truly private commercial arbitration, should be publicly available if the parties do not object to publication.

Referring to the potential benefits of publishing decisions, Buys points to aspects similar to those presented by Azzali, i.e. improving the quality of long-term arbitration decisions, developing arbitration scholarships, and providing additional arguments. These arguments relate to the following possible avoidance by the parties of such errors in future business relationships, hence avoiding future disputes, increasing the democratic accountability of the arbitration process, and ensuring greater public confidence in the process. Similarly, other authors have made more detailed proposals to ensure a balance between confidentiality and transparency in the context of awards. Argen argues that the adoption of these rules should affect not only investor-state arbitration, but also international commercial arbitration. While some authors note that some EU treaties already lead to greater transparency in the resolution of disputes during negotiations note that the success of the final text of the UNCITRAL transparency Rules will largely depend on the implementation of these rules within existing and future international treaties[144]. Furthermore, according to Malintoppi and Limbasan[145], the development of a coherent transparency policy will depend on the willingness of States to immediately accede to the Mauritius Convention on transparency. As in the Rogers report, the success of the transparency reforms in international commercial arbitration will depend on the willingness of private parties to continue to build their dispute system on the basis of increased openness, transparency and the rule of law. This, according to Bourne and

[143] AZZALI, S. *Balancing Confidentiality and Transparency*. NYU Law, 2012

[144] 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. [revieved on 20 November 2019]. Avaliable at https://www.transnational-dispute-management.com/article.asp?key=2032

[145] MALINTOPPI, L., LIMBASAN, N. *Living in Glass Houses? The Debate on Transparency in International Investment Arbitration*. Issue 1, pp. 31–57

Schenkman[146], can only increase the effectiveness and legitimacy of international commercial arbitration.

In addition to theoretical approaches to the transparency of arbitration, it is crucial to mention one important ongoing project that aims to provide practitioners and scholars with more data on international arbitration, and therefore to increase its transparency, fairness and accountability. The author of this project, Professor Rogers, has created a portal called "Arbitration Intelligence", where basically anyone interested in arbitration and relevant knowledge of the arbitration award that was recently issued can upload a summary of that decision to the website. This project is extremely innovative and promising[147].

Shortly after the CJEU Achmea decision concerning BITs between EU member States, the Council of the European Union adopted negotiating directives that authorize the European Commission to negotiate a Convention establishing a multinational court for the settlement of investment disputes. The overall goal is to create a permanent international institution for the settlement of investment disputes, moving away from the traditional ISDS system. The timing of the introduction of the new institution, as well as the exact characteristics of the court, remain uncertain[148].

One of the main problems and criticisms of investment arbitration is related to its alleged lack of transparency. It is sometimes reported that the existing investment arbitration system has not historically considered transparency as a necessary component of dispute resolution. In this context, it is paradoxical that, contrary to its explicit desire to increase transparency, the CJEU in ClientEarth V. The European Commission[149] case rejected a request for access to certain documents relating to the compatibility of the ISDS with EU law, namely documents containing legal advice provided by the legal services of the European Commission on this issue.

[146] BORN, G.B., SHENKMAN, E.G. *Confidentiality and Transparency in Commercial and Investor–State International Arbitration*

[147] ROGERS, C.A., ALFORD, R.P. *The Future of investment arbitration.* Oxford University Press, 2009

[148] WEGEN, G., WILSKE, S., *Gleiss Lutz Getting the Deal Through – Arbitration* Wednesday 27 February 2019. Available at: https://gettingthedealthrough.com/area/3/article/29352/arbitration-2019-introduction/

[149] The European Court of Justise. 4 September 2018. Judgement *ClientEarth v European Commission Case C-57/16 P* Available at: http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en

CONCLUSIONS

Summing up this work it can be concluded that the work has highlighted the development of the concept of transparency in the history of arbitration, the concept of transparency in investment arbitration, as it is shown in the UNCITRAL Rules of Transparency, ICSID and the Mauritius Convention; analysed public participation in the arbitration and how this fits with the concept of transparency; the concept of transparency through the system of international commercial arbitration; and the role of the EU and the European approach on the development of the concept of transparency.

1) For almost 20 years, the concept of transparency has evolved and every year this issue is raised more and more. Confidentiality is increasingly placed above transparency, even in commercial arbitration, and is increasingly distrusted by the public and the parties, but confidentiality is not the prevailing principle of international commercial arbitration, since most arbitration statutes and arbitration rules do not provide for a general principle of confidentiality, and therefore the parties themselves must take care of it. The implementation of the Transparency Rules has led to more improvements and positive changes than any other negative aspects. However, one of the main drawbacks is that these rules were developed explicitly for investor-state arbitration, which causes some difficulties when trying to use these rules in commercial arbitration. However, it created open arbitration between the state and the investor, which was not previously available to the ICSID Convention or to the NAFTA.

2) In the current system, largely based on or derived from commercial arbitration, transparency has not historically been considered a necessary component of dispute resolution.

The current investment regime is largely characterized by recurring disputes, relative uncertainty, and vertical relations in the context of situations in the field of public international law and public law.

Despite the modern approach to transparency and the development of the rules of UNCITRAL and the Mauritius Convention, this Convention has had limited success.

There is also a very large body of work focused on third-party participation (amicus curiae) as the main aspect of transparency. It was noted that the concept of amicus curiae was not limited to any form of participation and included participation in oral hearings, access to documents of opposing parties and even cross-examination of witnesses. It is also common for the NGO`s to intervene to ensure that the Tribunal's decision takes into account human rights, legal obligations or the views of those who may be harmed by the

decision. One of the most important problems of any society is that communities affected by investment or development projects are often unaware of the dispute between the state and the investor. They are rarely given the opportunity to participate in dispute resolution by asserting their rights and holding the government accountable. Greater transparency would ease this problem, since at least the existence of the dispute would be open to the public. In addition, access to the details of the dispute would increase the importance of public participation, thereby helping the Tribunal to determine the real issues of the case, and public participation in amicus briefings can reveal new arguments put forward by the parties themselves, which is particularly relevant for the protection of the public interest.

Critics argue that investor-state arbitration disproportionately favours the interests of investors, private lawyers who are arbitrators are very close to plaintiffs, and that investment decisions violate state sovereignty and the right of States to regulate. Others more widely object to investor-state arbitration on the grounds that it uses mechanisms derived from private law to resolve public disputes without sufficient transparency. This is why some States, such as Brazil, have refused to go directly to arbitration before the investor state. Tanzania has adopted a number of provisions prohibiting international investment arbitration in disputes over natural resources, and other States and groups of States are trying to revise the legal framework for the settlement of disputes under investment treaties.

3) The promotion of transparency in international commercial arbitration was less significant. These positive developments took several forms. Arbitration courts have moved away from concealing arbitral awards and have begun to publish edited versions of arbitral awards or even full versions by mutual agreement of the parties. Legal news sites are increasingly beginning to comment on international disputes. There are several reasons for transparency or lack of confidentiality. Obviously, posting solutions will allow people to learn about the mistakes or problems of other parties that are raised in disputes, avoiding future disputes. In addition, the confidentiality of arbitration decisions leads to inconsistent settlement of disputes arising from a single commercial transaction, but are resolved by different arbitration courts. Access to arbitration decisions can also help in training future and less experienced arbitrators. In addition, transparency helps users to monitor and evaluate the quality of services provided by individual arbitrators and arbitration institutions.

4) The arbitration of investment contracts is at a crossroads, and the European Union is undergoing a profound restructuring and reform of this system. Thanks to the Achmea decision, the EU abandoned arbitration on internal bilateral investment

agreements between member States, changed the approach in bilateral investment agreements between the EU and third countries, and creating a new investment system within the European Union. The overall goal is to create a permanent international institution for the settlement of investment disputes, moving away from the traditional ISDS system. The timing of the introduction of the new institution, as well as the exact characteristics of the court, remain uncertain.

The power to negotiate treaties relating to the protection of direct investment has been transferred to the EU level. this has had important implications for member States, which are now expected to phase out their BITs as the European Commission negotiates with the new BITs. At the same time, the EU is allowed to act as a defendant in investment arbitration cases.

It is also very remarkable that the work does not specify the definition of transparency as such, and it is not clear whether it is a principle, concept, or trend. However, based on general knowledge of the theory of law, the main features of the principle of law is that they are explicit statement of essential features and values inherent in a certain system of law; have the most general character; determine the content of the system of law and its system units, as well as the direction of their further development; have priority over the rules of law; compared to legal norms, are more stable. In other words, they remain unchanged for a long time, are usually indicated in external sources of law and an important form of their identification is judicial practice. Therefore, at this stage, it can be argued that transparency cannot be seen as a principle, but rather as a concept and a general trend.

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SUMMARY

This work is devoted to the development of the concept of transparency in the history of arbitration especially in investment arbitration, international commercial arbitration and considering the role of the EU and the European approach to the development of the concept of transparency.

The first Chapter of my work is dedicated to an overview of the concept of transparency. It examines the history of the concept of transparency, the role and significance of the UNCITRAL Rules of Transparency, and provides a comparative analysis of the concepts of transparency and confidentiality. It was concluded that the implementation of transparency rules resulted in more improvements and positive changes than any other negative aspects.

The entire content of the second Chapter is devoted to the analysis of the concept of transparency in investment arbitration, how it is regulated, its advantages and disadvantages. In addition, a very large amount of work is focused on attracting third parties (amicus curiae), which is an important aspect of transparency.

The third section raises the issue of transparency in an international commercial arbitration system, and it is very similar to the second section, given the need to introduce the concept of transparency into such a system. The confidentiality of arbitration decisions leads to inconsistent resolution of disputes arising from the same commercial transaction, but resolved by different arbitration courts. In addition, transparency helps users monitor and evaluate the quality of services provided by individual arbitrators and arbitration institutions.

The last fourth section focuses on the European Union's legislative and scientific approach to transparency and the crisis of investment arbitration within the EU. Investment contract arbitration is at a crossroads, and the European Union is undergoing a deep restructuring and reform of this system. Thanks to the Achmea decision, the EU abandoned arbitration on internal bilateral investment agreements between member States, changed the approach in bilateral investment agreements between the EU and third countries, and created a new investment system within the European Union. The overall goal is to create a permanent international institution for the settlement of investment disputes, moving away from the traditional ISDS system.