

COMMENTS

TRANSPARENCY AND CONFIDENTIALITY REQUIREMENTS IN INVESTMENT TREATY ARBITRATION

AZHAHAM PERUMAL SARAVANAN,

Indian Institute of Technology Kharagpur
(Kharagpur, India)

SUBRAMANIAN RAMAMURTHY SUBRAMANIAN,

Indian Institute of Technology Kharagpur
(Kharagpur, India)

DOI: 10.21684/2412-2343-2018-5-4-114-138

The values of confidentiality and transparency are often invoked in the theory and practice of investment treaty arbitration. Transparency is considered to be one of the key aspects of good governance and corporate social responsibility. It includes the obligation of the host state to publish all the legal rules, regulations and other statutory requirements affecting investors. Confidentiality is considered the hallmark and unique feature of arbitration as a dispute resolution mechanism. However, it is difficult to balance these two values, in principle due to the difference in the various investment arbitration cases, as well as the high degree of public interest involved in such proceedings. The competing interests between transparency and confidentiality have significantly increased in the recent past, and the difficulty lies in drawing a medial line between them. There is also debate as to what extent non-disputing parties are allowed to participate in investment arbitration, and what the essential requirements are to admit them.

It is in this connection that this article makes an in-depth analysis of how investment arbitration frameworks have approached the questions of transparency, confidentiality and amicus curiae participation over the years. The article assesses and explores similar issues within the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (ICSID), the North American Free Trade Agreement, 1994 (NAFTA) and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 1978. The study also makes a critical analysis

of celebrated cases falling within each category. The article further elaborates the transparency requirements in the U.S. Model Bilateral Investment Treaty (BIT), 2012, and the recently adopted Indian Model BIT, 2015. The study is very significant because the United Nations has recently adopted the Convention on Transparency in Treaty-based Investor-State Arbitration, 2014 (Mauritius Convention), which ensures transparency and public accessibility to investor-state arbitration.

Keywords: bilateral investment treaty; confidentiality; ICSID Convention; investment treaty arbitration; NAFTA; transparency; UNCITRAL Arbitration Rules.

Recommended citation: Azhaham Perumal Saravanan & Subramanian Ramamurthy Subramanian, *Transparency and Confidentiality Requirements in Investment Treaty Arbitration*, 5(4) BRICS Law Journal 114–138 (2018).

Introduction

Transparency is considered to be one of the key aspects of good governance and corporate social responsibility. It requires the government to publish all documents and avoid secrecy in its administration. In a general sense, the term “transparency” is not immediately associated with international law. However, it has lately become a foundation of international law due to the active participation of public and non-governmental organisations (NGOs) in global governance.¹ Since the 2000s, increasing recognition has been given to transparency in international dispute settlement processes. This has been the case with *amicus curiae* briefs. Transparency is an evolving concept and has become increasingly evident in the practice of investor-state dispute settlement (ISDS). The term “transparency” in international investment law connotes that host states have an obligation to publish all of the legal rules, regulations and other statutory requirements affecting investors.² It is pertinent to note that in relation to *amicus curiae* briefs, World Trade Organization (WTO) decisions have undeniably influenced investment treaty arbitral awards.³

¹ Andrea Bianchi, *On Power and Illusion: The Concept of Transparency in International Law* in *Transparency in International Law* 1 (A. Bianchi & A. Peters (eds.), Cambridge: Cambridge University Press, 2013).

² Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* 133 (Oxford: Oxford University Press, 2008); see the discussion in Joachim Delaney & Daniel B. Magraw, *Procedural Transparency* in *The Oxford Handbook of International Investment Law* 756 (P. Muchlinski et al. (eds.), Oxford: Oxford University Press, 2008); also see Christina Knahr & August Reinisch, *Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise*, 6(1) *Law and Practice of International Courts and Tribunals* 97, 110 (2007); see The Energy Charter Treaty, 2080 U.N.T.S. 95, Art. 20 (entered into force 16 April 1998); also see Maupin’s adaptations of “transparency” definition in Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky* in *Transparency in International Law*, *supra* note 1, at 149.

³ Laurence Boisson de Chazournes & Rukia Baruti, *Transparency in Investor-State Arbitration: An Incremental Approach*, 2(1) *Bahrain Chamber for Dispute Resolution International Arbitration Review* 59, 69 (2015).

On the other hand, confidentiality is considered the hallmark and unique feature of arbitration as a dispute resolution mechanism. However, it has different dimensions in the context of investor-state disputes. Confidentiality in international investment law means the evidence, claims, documents, counterclaims, any other information prepared for and exchanged during the course of arbitration, awards, and any other decisions cannot be disclosed to any third parties. It also restricts the participation of *amicus curiae* in the arbitral process.⁴

It is significant to note that in the recent past the investment treaty arbitral tribunals have witnessed the increased participation of NGOs as non-disputing parties in order to gain access to these forums as *amicus curiae*. The acceptance of *amicus* briefs clearly shows the public interest and principles of transparency. However, it is noted that confidentiality still remains a general rule in investment arbitration, because *amicus curiae* are not allowed to take part in the arbitration proceedings and also refused access to documents. But the competing values between confidentiality and transparency have significantly increased in the recent past, and the difficulty lies in drawing a medial line between them.⁵ There is also debate as to what extent non-disputing parties are allowed to participate in investment arbitration, and what the essential requirements are to admit them.

It is in this connection that this paper reiterates how investment arbitration frameworks have approached questions of transparency, confidentiality and *amicus curiae* participation over the years. In line with the central theme of this paper, Section 1 sets the legal framework governing transparency in investment arbitration. Section 2 examines the practice of transparency, confidentiality and public interest representation in the North American Free Trade Agreement (NAFTA) Rules. Section 3 assesses and explores similar issues within the International Convention on the settlement of investment disputes between States and nationals of other States (ICSID) framework. The study also makes an in-depth analysis of celebrated cases falling within each category. Section 4 elaborates the transparency requirements in the United Nations Commission on International Trade Law (UNCITRAL) framework including recently adopted UNCITRAL Rules on Transparency, 2013 and the Mauritius Convention on Transparency, 2014. The final section, Section 5, of the paper suggests a number of possible ways to resolve the competing interests between transparency and confidentiality.

⁴ Loukas Mistelis, *Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corp v. United States in International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 173 (T. Weiler (ed.), London: Cameron May, 2005).

⁵ Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14(1–2) *American Review of International Arbitration* 121, 136 (2003); also see the discussion in Federico Ortino, *External Transparency of Investment Awards*, Online Proceedings, SIEL – Working Paper No. 49/08 (2008); for a discussion on concerns about the legitimacy of ISDS, Florentino P. Feliciano, *The Ordre Public Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration*, 87 *Philippine Law Journal* 1, 11 (2013); see the critique on the system in Kirsten Mikadze, *Uninvited Guests: NGOs, Amicus Curiae Briefs, and the Environment in Investor-State Dispute Settlement*, 12(1) *Journal of International Law and International Relations* 35, 66 (2016).

1. Legal Framework Governing Transparency in International Investment Arbitration

Transparency plays a vital role in many of the on-going debates in international investment law such as those concerned with fair and equitable treatment, expropriation, compensation, full protection and security, and publication of awards.⁶ Transparency also touches on the feasibility of *amicus curiae* participation in investor-state dispute settlement proceedings, access to information and documents, and publication of investment arbitral awards.

Notable international legal instruments such as the ICSID Convention, 1965, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), NAFTA, 1994 as well as the UNCITRAL Arbitration Rules, 1976 all play a significant role in ensuring transparency in the investment arbitration system. The comprehensive examination of relevant provisions of transparency, confidentiality and *amicus* requirements are laid down in Table 1 below.

It is pertinent to note that while these legal instruments are accessible to everyone, the state of affairs under stand-alone “bilateral investment treaties” (BITs) are worked out in closed processes and controlled by government bureaucrats. The earlier scenario of reduced public participation in investment arbitration changed after 1995 with civil societies strongly registering their participation in investment arbitration through *amicus curiae* submissions.⁷ This situation has led to the conducting of mandatory public review while drafting a new model BIT.

2. Chapter Eleven of NAFTA

NAFTA aimed at creating a trilateral trade group between the USA, Canada and Mexico. In particular, Chapter Eleven of the Agreement sought to protect foreign investors from discrimination by host states and to facilitate settlement of investor-state disputes. It may be noted that this is one of the first such agreements to allow foreign investors to directly challenge the host state through an arbitral mechanism.⁸ Therefore, investors can initiate arbitration pursuant to any one of the methods stipulated in Article 1120, either through the ICSID Convention, 1965 or the Additional Facility Rules of ICSID, 1978 or the UNCITRAL Arbitration Rules, 1976.

⁶ Delaney & Magraw 2008, at 756–758; also see Noah Rubins, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?* in *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock After 40 Years* 124, 125 (R. Hofmann & C.J. Tams (eds.), Baden-Baden: Nomos, 2007).

⁷ Maupin 2013, at 151–152.

⁸ North American Free Trade Agreement, 32 I.L.M. 289 and 605, Arts. 1119–1120 (entered into force 1 January 1994).

NAFTA is notable for some of its transparency provisions. For instance, Article 1126(13) requires that “public register of arbitration claims... be maintained by the NAFTA Secretariat.”⁹ However, it also provides that publication of arbitral awards is possible only with the consent of the parties.¹⁰ Nonetheless, in practice this provision is restricted only to the arbitration claims initiated against Mexico, as the other NAFTA members often resort to the publication of awards even without the consent of the parties.¹¹ In the case of public hearings, all NAFTA members are committed to open hearings with the mandatory consent of the disputing parties.¹²

Table 1: Comparison of the Relevant Provisions on Transparency, Confidentiality and *Amicus Curiae* Participation in NAFTA, ICSID and the UNCITRAL Arbitral Framework (including recent amendments and revisions)

Sl. No.	Requirements	NAFTA	ICSID	UNCITRAL
1	Access to Documents, and Publication of Awards, Orders and Decisions of the Tribunal	<p><i>Article 1137(4) and Annex 2(b):</i> – The award can be made publicly available, subject to the redaction of confidential and other protected information.</p> <p>Requirements for publication of other documents provided in <i>Article 1137(4):</i> – Without consent, if the respondent is either the USA or Canada. – With consent, if Mexico is a respondent</p>	<p><i>Article 48(5) of the Convention and Rule 48(4) of the Additional Facility (Arbitration) Rules:</i> – Prohibits the publication of awards without the consent of the parties.</p> <p>– However, ICSID can publish excerpts of the legal reasoning, even without the consent of the parties</p>	<p><i>Article 3 of 2013 Rules:</i> – Wide range of documents mandatory and automatically disclosed to the public, but subject to certain exceptions mentioned in Article 7.</p> <p>– The award can be made publicly available even without the consent of the parties.</p> <p><i>Article 34(5) of 2010 Rules and Article 32(5) of 1976 Rules:</i> – The award can be made publicly available with the consent of the parties</p>

⁹ J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52(4) McGill Law Journal 681, 683 (2007).

¹⁰ The ICSID Rules of Procedure for Arbitration Proceedings, Doc. ICSID/15 (April 2006), R 48(4) (“ICSID Arbitration Rules”); The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, U.N. Doc. A/31/17, Art. 32(5) (entered into force 28 April 1976) (hereinafter UNCITRAL Arbitration Rules).

¹¹ Andrea J. Menaker, *Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration in Arbitration Under International Investment Agreements: A Guide to the Key Issues* 129, 129–131 (K. Yannaca-Small (ed.), Oxford: Oxford University Press, 2010).

¹² Worthy of note here is the joint statement issued in 2003 by Canada and the United States declaring their intent to consent to open hearings in every case. Mexico issued a similar statement in 2004.

2	Open Hearings	<i>Article 1126(13):</i> – NAFTA Parties (respondent) have already consented to making the hearings open to the public; the only requirement is that claimants have to approve this	<i>Rule 32(2):</i> – Disputing parties have a right to deny public access to open hearings	<i>Article 25(4) of 1976 Rules and Article 28(3) of 2010 Rules:</i> – Require mandatory consent from both of the disputing parties. <i>Article 6 of 2013 Rules:</i> – The default position in all substantive hearings is public, subject to certain exceptions mentioned in Article 7
3	Confidentiality (also Exceptions)	<i>Articles 2102 and 2105:</i> – The information or documents affect the national security and are contrary to essential security, thus to be kept confidential	<i>Rule 6(2):</i> – The declaration obligates the arbitrator to keep all the information confidential. – It also includes the contents of the award coming to the knowledge of the arbitrator. <i>Rule 15(1):</i> – No third persons except members of the tribunal are allowed to take part in the deliberations of the tribunal	<i>Article 7(2) of 2013 Rules:</i> – Provides an exhaustive list of confidential or protected information which will give rise to the exception for transparency. <i>Article 25(4) of 1976 Rules:</i> – The hearings shall be held in camera, and the parties have to maintain the confidentiality of all documents submitted for the purpose of court proceedings. <i>Article 28(3) of 2010 Rules:</i> – All hearings are to be kept confidential
4	Third-Party Submissions	<i>Article 1128:</i> – Upon written notice to the disputing parties, third parties may make submissions to the tribunal. – They can be filed for the purpose of interpretation of the NAFTA Agreement	<i>Rule 37(2):</i> – After consulting the disputing parties, the tribunal may allow amicus submissions. – They can be filed by a person or entity that is not a party to the dispute. – The subject matter should be within the scope of the dispute	<i>Article 4 of 2013 Rules:</i> – Provides the standard for a third party who is not a disputing party and not a party to the treaty. <i>Article 5 of 2013 Rules:</i> – Sets a standard for non-disputing parties, who are not a disputing party, but a party to the Treaty. <i>Articles 4(5) and 5(4) of 2013 Rules:</i> – Submissions shall neither disrupt the proceedings nor unduly burden either party. <i>Articles 4(6) and 5(5) of 2013 Rules:</i> – Ensures the equal opportunity of the disputing parties to convey their observations in the amicus submissions

2.1. Amendments and Clarifications

As noted above, the NAFTA Agreement did not incorporate very detailed provisions providing for transparency in the investor-state dispute settlement process. However, the relevant provisions were later incorporated through amendment of NAFTA in 2003 and supported by clarifications by the Free Trade Commission (FTC) in October 2001,¹³ 2003¹⁴ and 2005¹⁵ providing for the participation of *amicus curiae* in investment arbitration.¹⁶ The FTC clarification of 2005 (i.e. FTC Statement, 2005) contained various procedural aspects regarding submissions from “a person or entity that is not a disputing party” (para. 1 of the FTC Statement, 2005). The scope of the FTC Statement, 2005 is much broader than Article 1128 of NAFTA, and the content of the Statement is similar to the additional procedures adopted by the WTO’s Appellate Body in the *EC-Asbestos* dispute.¹⁷

2.2. Practice Under NAFTA

Before the emergence of NAFTA, confidentiality was the norm and transparency the exception. However, the present situation is quite uncertain, as neither NAFTA nor other arbitral rules presuppose the status of confidentiality in matters of arbitration.¹⁸ In practice, arbitral tribunals have generously allowed transparency, provided that openness should maintain a balance between the confidentiality concern and the transparency burden of investors.¹⁹ The subject matter of disclosure may vary from case to case: for instance, in *Ethyl v. Canada*²⁰ the NAFTA tribunal restricted disclosure only to the investor’s statement of claim, statement of defence and the orders of the tribunal.²¹ But the transcripts of hearings, evidence and other submissions remained confidential. Later, in the case of *Pope & Talbot v. Canada* the permissible list of

¹³ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001 (Nov. 1, 2018), available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

¹⁴ Statement of the Free Trade Commission on Non-Disputing Party Participation, 7 October 2003 (Nov. 1, 2018), available at <https://goo.gl/ZVcQ1D>.

¹⁵ Statement of the Free Trade Commission on Non-Disputing Party Participation, 44 I.L.M. 796 (2005).

¹⁶ Alexis Mourre, *Are Amici Curiae the Proper Response to the Public’s Concerns on Transparency in Investment Arbitration?*, 5 Law and Practice of International Courts and Tribunals 257, 259 (2006).

¹⁷ Christina Knahr, *Transparency, Third Party Participation and Access to Documents in International Investment Arbitration*, 23(2) Arbitration International 327, 340 (2007).

¹⁸ Maupin 2013, at 155; also see the comparison of the ICSID Framework and the NAFTA/UNCITRAL Framework examined in Table 1 of this paper.

¹⁹ *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, 26 June 2003, paras. 231–233; VanDuzer 2007, at 699.

²⁰ *Ethyl Corporation v. The Government of Canada*, UNCITRAL (NAFTA), Award on Jurisdiction, 24 June 1998, 38 I.L.M. 708; it is important to note that this is the first Chapter Eleven arbitration instituted before the NAFTA Tribunal and administered under the UNCITRAL Arbitration Rules, 1976 (hereinafter Ethyl Award).

²¹ *Id.*

disclosures was extended to the written submissions, transcripts of oral submissions, *amicus curiae* briefs and correspondence from the tribunal.²² In order to understand the current practice, it is important to discuss the celebrated cases in detail.

2.3. *Amicus Curiae Briefs Under NAFTA*

It is important to note that the earlier claims in cases such as *Ethyl*²³ and *Metalclad*²⁴ were instituted by the parties against each other, and no third parties sought to submit an *amicus curiae* brief to the arbitral proceedings. The tribunal in the *Ethyl* case held that no transcripts or accounts of oral submission should be published without permission of the parties.²⁵ However, in *Metalclad* the tribunal entirely rejected Mexico's contention on confidentiality and held that

neither NAFTA nor ICSID Additional Facility Rules contain an express restriction on freedom of [the] parties. Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity unless the agreement between the parties incorporates such a limitation, each of them is free to speak publicly of the arbitration.²⁶

Following the success of the *Metalclad* award, non-disputing parties also sought to take part in NAFTA Chapter Eleven arbitration.²⁷ The first recognition for the participation of *amicus curiae* in investment arbitration came before the NAFTA tribunal in the celebrated case of *Methanex Corporation v. USA*.²⁸

To validate these arguments, the following subsections will discuss *Methanex* and other seminal cases.

2.3.1. *Methanex v. United States of America*

The case relates to the regulation of "methyl tertiary butyl ether" (MTBE) for the production of gasoline. MTBE is used as a fuel additive and also as a source of octane

²² VanDuzer 2007, at 700.

²³ The Ethyl Award.

²⁴ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, 30 August 2000; it is noted that this is the first Chapter Eleven arbitration administered under the ICSID Additional Facility Rules, 2000.

²⁵ Para. 21 of the Ethyl Award; Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership*, 54 University of Kansas Law Review 1339, 1367 (2006).

²⁶ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1 (ICSID Procedural Order 1), 27 October 1997, para. 13; Menaker 2010, at 132; Monique Pongracic-Speier, *Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration*, 3(2) Journal of World Investment 231, 245 (2002).

²⁷ Coe 2006, at 1371.

²⁸ *Methanex Corporation v. United States of America*, UNCITRAL, decision of the Tribunal on Petitions from Third Persons to Intervene as *amici curiae*, 15 January 2001 (hereinafter *Methanex amicus order*).

and oxygenate.²⁹ In due course, a scientific study was conducted on MTBE, and the result of the study showed that the use of the chemical-based oxygenates causes a serious threat to the environment and public health. Following this study, in 1999 the State of California imposed a ban on the sale of gasoline manufactured with MTBE.³⁰

The claimant, Methanex, was a Canadian company that was considered one of the primary producers of methanol and it used MTBE as one of their components. Subsequent to the ban imposed by California, the Methanex Corporation initiated arbitration proceedings against the United States under Chapter Eleven of NAFTA complaining of expropriation, and asked for US\$970 million in compensation for its losses.³¹ The claimant alleged that the executive action violated various provisions of NAFTA, such as Article 1102 (national treatment), Article 1105 (minimum standard of treatment) and Article 1110 (expropriation and compensation).

During the proceedings, the tribunal received first-ever amicus briefs from the Canadian International Institute for Sustainable Development (IISD), and a joint brief from three US-based NGOs, Bluewater Network of Earth Island Institute, Communities for a Better Environment and the Centre for International Environmental Law (collectively known as Earth Justice). Their request included permission to make oral and written submissions, to participate in the proceedings, to take part in the judicial proceedings, to review memorials and other submissions, and to be given the status of observer.³² The legal basis for these requests relied on Article 15 of the UNCITRAL Arbitration Rules, 1976.³³

The tribunal heard the petitions together in view of the similarities in the submissions.³⁴ The tribunal relied on the discretion and “procedural flexibility” of the UNCITRAL Arbitration Rules to determine the authority of the tribunal to accept *amicus curiae* submissions.³⁵ The tribunal ultimately accepted the written submissions from the petitioners and stated that it had jurisdiction to address the amicus standing

²⁹ Federico Ortino, *The Impact of Amicus Curiae Briefs in the Settlement of Trade and Investment Disputes in Economic Law as an Economic Good: Its Rule Function and Its Function Tool in the Competition of Systems* 310 (K.M. Meessen et al. (eds.), Munich: Sellier, 2009).

³⁰ Andrew Newcombe & Axelle Lemaire, *Should Amici Curiae Participate in Investment Treaty Arbitrations?*, 5 *Vindobona Journal of International Commercial Law and Arbitration* 22, 24 (2001).

³¹ Mistelis 2005, at 192.

³² Jorge E. Vinuales, *Amicus Intervention in Investor-State Arbitration*, 61(4) *Dispute Resolution Journal* 72, 74 (2006); also see Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59(2) *International & Comparative Law Quarterly* 373, 398–399 (2010).

³³ Art. 15(1) of the UNCITRAL Arbitration Rules states that, “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”

³⁴ Knahr 2007, at 330.

³⁵ Paras. 26 and 27 of the Methanex amicus order.

under Article 15(1) of the UNCITRAL Arbitration Rules.³⁶ The tribunal strongly relied on the *Carbon Steel* dispute,³⁷ wherein the Appellate Body held that it had the power to accept amicus briefs under Article 17.9 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The tribunal furthermore examined the legal provisions of NAFTA on the issue of amicus submissions and observed that no provision in Chapter Eleven either explicitly supports or rejects the amicus submissions.³⁸ Accordingly, the tribunal was convinced that “the legal nature of arbitration remains wholly unchanged” even after the admission of third-party submissions.³⁹

However, the determination of other requests such as to participate in proceedings, to review memorials and to declare observer status raised serious debate over issues of confidentiality and privacy. The tribunal realised the importance of public concerns in respect of the arbitration taking place and observed that

there is an undoubtedly public interest in this arbitration, therefore the arbitral process could benefit from being perceived as more open or transparent or conversely be harmed if seen as unduly secretive.⁴⁰

In this regard, the tribunal’s willingness to accept amicus submissions not only supports this arbitration matter in particular, but also the arbitral process in general.⁴¹ The tribunal decided that it had the power to accept only *amicus curiae* submissions, and rejected all other requests made by the petitioners.⁴²

2.3.2. *United Parcel Service of America Inc. v. Canada*⁴³

The United Parcel Service (UPS) is a US-based courier company incorporated under the laws of the State of Delaware. UPS initiated arbitration proceedings against Canada for unfair competitive practices. The claimants alleged that Canada Post had acquired a monopoly in the parcel and courier services sector throughout Canada, and that the government had failed to ensure free and fair competitive markets, thereby breaching its obligations set down in NAFTA, such as the principle of national treatment stipulated

³⁶ Paras. 31 and 53 of the Methanex amicus order; also see the discussion in Ortino 2009, at 311.

³⁷ United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R, adopted on 7 June 2000.

³⁸ Para. 39 of the Methanex amicus order.

³⁹ *Id.* para. 30.

⁴⁰ *Id.* para. 39.

⁴¹ Ishikawa 2010, at 379; also see Knahr 2007, at 331.

⁴² Para. 48 of the Methanex amicus order.

⁴³ *United Parcel Service of America Inc. v. Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002 (hereinafter UPS Award on Jurisdiction).

in Articles 1102 and 1202, fair and equitable treatment, full protection and security requirements referred to in Article 1105, and the monopolies and state enterprises provisions mentioned under Article 1502(3)(a) and (d), and Article 1503.⁴⁴

Subsequently, the tribunal received amicus briefs from the Canadian Union of Postal Workers, a Canada-based trade union, and the Council of Canada. The petitioners requested the tribunal add them as a standing party, and if that option was not available, to grant them permission to participate in the arbitral proceedings as *amicus curiae*.⁴⁵ The petitioners raised two important issues before the tribunal: *firstly*, whether the petitioners can be added to the proceedings as parties; *secondly*, whether the tribunal can accept amicus briefs under the UNCITRAL Rules. To justify their *locus standi*, the petitioners argued that they had a direct public interest in the subject matter, and also that they had pursued their legal arguments under Article 15(1) of the UNCITRAL Arbitration Rules.⁴⁶ The disputing parties contended that the tribunal should not agree with the request of the petitioners to allow them to stand as a third party.⁴⁷ The parties, however, later agreed that the tribunal has the discretion to accept amicus briefs, subject to the limitations of the tribunal.⁴⁸

The tribunal *firstly* emphasised its power to add parties to the arbitration taking place, and it clearly stated that “the arbitration might be different from the private, contract-based, narrowly focused norm, neither NAFTA nor other relevant provisions provided the basis to accept the petitioners as standing parties.”⁴⁹ Therefore, it rejected the petitioner’s request to stand as a third party to the dispute.⁵⁰ The tribunal *secondly* analysed the discretionary power of the tribunal to accept *amicus curiae* submissions. While doing so, the tribunal found that it had indeed the discretion to accept *amicus curiae* briefs which came within the ambit of Article 15(1) of the UNCITRAL Arbitration Rules.⁵¹ Access to the public hearing and documents can be granted only with the consent of the parties, and there was no such agreement that arose in this case. Therefore, the tribunal refused to grant all other requests made by the petitioners.⁵²

⁴⁴ Mistelis 2005, at 191–192.

⁴⁵ Pongracic-Speier 2002, at 255.

⁴⁶ Knahr 2007, at 332.

⁴⁷ Paras. 6–10 of the UPS Award on Jurisdiction.

⁴⁸ *Id.* It is worth mentioning here that the USA also argued the same view as the disputants that the tribunal should not authorise granting the petitioners the status of parties under Chapter Eleven of NAFTA, but they could accept *amicus curiae* submissions under the UNCITRAL Arbitration Rules. In contrast, Mexico had the different opinion that the petitioners should neither be granted the status of parties nor could amicus briefs be accepted from them.

⁴⁹ Paras. 36–42 of the UPS Award on Jurisdiction; also see the critique in Mistelis 2005, at 193–194.

⁵⁰ Para. 43 of the UPS Award on Jurisdiction.

⁵¹ *Id.* para. 6; Jorge E. Vinuales & Folrian Grise, *Amicus Intervention in Investor-State Arbitration: A Contemporary Reappraisal* in *Handbook on International Arbitration and ADR* 445 (American Arbitration Association, Huntington, N.Y.: JurisNet, 2010).

⁵² Paras. 67 and 73 of the UPS Award on Jurisdiction; Pongracic-Speier 2002, at 256.

2.4. Analysis

Both the *Methanex* tribunal and the *UPS* tribunal held that they had no power to add third parties to the arbitration proceedings. However, they acknowledged the importance of public concern and supported the participation of third parties as *amicus curiae*. The *Methanex* tribunal firmly upheld the need for transparency in Chapter Eleven arbitration proceedings. It is, however, important to note that both of the tribunals failed to address how their powers were to be exercised while dealing with *amicus curiae* submissions. Following the *Methanex* and *UPS* awards, the FTC issued a clarification statement in 2003 which facilitated the participation of non-disputing parties in NAFTA arbitrations.⁵³

3. Transparency Provisions in the ICSID Framework

The main objective of the ICSID Convention is to promote international cooperation for economic development and to establish a better arbitral forum to settle disputes arising in connection with foreign investment. The Convention also laid down detailed procedures, rules and institutional support to conduct arbitral proceedings.⁵⁴ The ICSID Arbitration Rules are regularly used as a procedural tool in most of the investor-state arbitral proceedings. However, the practice of the ICSID tribunals on *amicus* submissions has developed in a direction similar to that of the NAFTA tribunals. Therefore, it is important to discuss the evolution and development of arbitral jurisprudence on transparency and public participation in arbitration proceedings administered under the ICSID Convention and ICSID Additional Facility Rules. In this regard, the following subsections discuss the relevant ICSID provisions governing transparency, and examine the ICSID tribunal's approach on transparency, with the help of celebrated cases.

3.1. Rules on Access to Documents

The ICSID Centre publishes the award only with the consent of the parties, as required under Article 48(5) of the Convention.⁵⁵ The text of the award is available on the ICSID website and it can also be published in the *ICSID Review – Foreign Investment Law Journal* provided that the parties to the dispute have consented.⁵⁶ In any case, the Centre makes available the excerpts of the legal reasoning of the tribunal in its publications. It is also suggested that if one party refuses the publication of the award, the other

⁵³ Also see VanDuzer 2007, at 710–712.

⁵⁴ Christoph H. Schreuer, *The ICSID Convention: A Commentary* 823 (Cambridge: Cambridge University Press, 2009).

⁵⁵ Also see Table 1 of this paper for a comparison of the ICSID framework and the UNCITRAL Arbitration Rules.

⁵⁶ Art. 53 of the ICSID Additional Facility Rules; also see the discussion in Peter Malanczuk, *Confidentiality and Third-Party Participation in Arbitration Proceedings under Bilateral Investment Treaties*, 1(2) *Contemporary Asia Arbitration Journal* 183, 192 (2008); see generally Giuseppe Bianco, *Article 2. Publication of Information at the Commencement of Arbitral Proceedings in Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* 80 (D. Euler et al. (eds.), Cambridge: Cambridge University Press, 2015).

party may submit the award for publication in other international legal sources, such as International Legal Materials, ICSID Reports or *Journal du Droit International*.⁵⁷ The Centre has to treat all other decisions of the tribunal, including preliminary decisions, procedural orders, or recommendations of provisional measures, in the same manner as if they were final awards.⁵⁸

3.2. Amendment to the ICSID Arbitration Rules, 2006

The ICSID Secretariat published a discussion paper in 2004 that called for greater transparency in the ICSID arbitral system.⁵⁹ The discussion paper suggested that member states amend the ICSID Arbitration Rules, which would ameliorate the active participation of non-disputing parties in the ICSID arbitral system. Based on the recommendations of the ICSID Secretariat, Rules 32(2), 37(2) and 48(4) of the ICSID Arbitration Rules were amended in 2006.⁶⁰

Firstly, paragraph 2 of Rule 32 was amended with respect to *amicus curiae* submissions; the mandatory requirement of consent was removed, and the amended Rule provides that

unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.⁶¹

Secondly, paragraph 2 of Rule 37 was amended by adding the title Submissions of Non-Disputing Parties.⁶² The revised Rule states that

⁵⁷ The ICSID Secretariat incorporated this provision in Art. 48(4) through an amendment in 2006; see generally Malanczuk 2008, at 193.

⁵⁸ Federico Ortino, *Transparency of Investment Awards – External and Internal Dimensions in Transparency in International Trade and Investment Dispute Settlement* 119, 121 (J. Nakagawa (ed.), London: Routledge, 2013); also see Schreuer 2009, at 82.

⁵⁹ See the discussion in the World Bank, Working Paper of the ICSID Secretariat, Suggested Changes to the ICSID Rules and Regulations, 12 May 2005 (Nov. 1, 2018), available at <http://www.worldbank.org/icsid/052405-sgmanual.pdf>; Amanda L. Norris & Katina E. Metzidakis, *Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water War*, 15 Harvard Negotiation Law Review 31, 72 (2010).

⁶⁰ The ICSID Additional Facility Rules, 10 April 2006 (Nov. 1, 2018), available at https://icsid.worldbank.org/en/Documents/icsiddocs/AFR_English-final.pdf.

⁶¹ Richard Happ, *ICSID Rules in Institutional Arbitration: Article-by-Article Commentary* 963 (R.A. Schütze (ed.), München: C.H. Beck, 2013).

⁶² *Id.* at 969.

after consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute to file a written submission with the Tribunal regarding a matter within the scope of the dispute.⁶³

The tribunal shall consider three requirements to determine whether to accept or reject the submissions from non-disputing parties, which was adopted in the *Aguas Argentinas* case:⁶⁴ (a) the submissions would assist the tribunal in the determination of a factual or legal issue, and it would also bring a new perspective or insight which should be different from that of the disputing parties; (b) the subject matter of submissions should fall within the scope of the dispute; (c) the non-disputing parties should have a significant interest in the proceeding.

Thirdly, Rule 48(4) was amended to require the prompt publication of excerpts of the legal reasoning of the tribunal. Together, these changes heralded the transparency in the ICSID process.

3.3. The ICSID's Approach on Transparency

It is interesting to note that the ICSID was quite reserved in its approach on transparency, even after the amendment. Also, there have been several instances after the amendment where non-disputing parties have submitted their briefs, and only a few of them have resulted in awards. Thus it is necessary to discuss the most seminal cases in this regard.

*3.3.1. Aguas Del Tunari v. Republic of Bolivia*⁶⁵

At the request of the World Bank, Bolivia had decided to privatise the water services in Cochabamba, its third largest city. Owing to severe corruption and several other issues, the Bolivian government could no longer afford to make the necessary improvements to supply quality water to the general public.⁶⁶ As a result, a concession agreement was finalised between the Bolivian government and Aguas del Tunari ("AdT"), a Bolivian company, on 2 September 1999 for a period of forty years. According to the agreement, AdT had to supply a certain volume of good quality water to Cochabamba city and in exchange would receive a 16 per cent return on its investment. The returns would

⁶³ Eric De Brabandere, *Investment Treaty Arbitration as Public International Law* 169 (Cambridge: Cambridge University Press, 2014); see generally Christian Schliemann, *Requirements for Amicus Curiae Participation in International Investment Arbitration: A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15*, 12(3) *The Law & Practice of International Courts and Tribunals* 365, 370 (2013).

⁶⁴ Schreuer 2009, at 704; Happ 2013, at 969; A. Saravanan & S.R. Subramanian, *The Participation of Amicus Curiae in Investment Treaty Arbitration*, 5(4) *Journal of Civil and Legal Sciences* 1, 6 (2016).

⁶⁵ *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005 (hereinafter AdT decision on objection).

⁶⁶ Norris & Metzidakis 2010, at 35.

subsequently be increased each year depending on the U.S. Consumer Price Index. It was later discovered that the majority of the shareholders in AdT were associated with Bechtel, a U.S.-based construction company. The terms of the contract had not been disclosed to the public.⁶⁷

The lack of transparency in the agreement led to widespread protests in all parts of Cochabamba city. After five months of continuous agitation, Bechtel left Bolivia and the government rescinded the contract.⁶⁸ The aggrieved party, Aguas del Tunari requested the ICSID Centre to proceed with arbitration with Bolivia for breach of contract. The claimant sought \$50 million to recover losses and damages for the loss of profits.⁶⁹ The tribunal was constituted in July 2002, and it finally accepted jurisdiction in pursuance of Bolivia and Netherlands BIT.⁷⁰ In August 2002, the tribunal received requests from four NGOs⁷¹ to participate in the arbitral proceedings as *amicus curiae*. On behalf of these NGOs, Earth Justice filed a petition before the tribunal to grant them standing as parties to the dispute, and if this were denied, to allow them to participate in the arbitral proceedings as *amicus curiae*.⁷² The petitioners also sought to attend the hearings, make an oral presentation during the hearings, and have access to all documents, which included written submissions, claims and the defences of the parties.⁷³ The petitioners argued that each of them had a direct interest in the subject matter of the dispute.⁷⁴ The petitioners also contended that their involvement in the proceedings would enhance the level of transparency.⁷⁵

The tribunal rejected the petitioners' requests in their entirety, for three reasons. *Firstly*, the claims were made "beyond the power or the authority of the tribunal to grant,"⁷⁶ because

⁶⁷ Krista Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials* 135 (Cheltenham: Edward Elgar, 2013); Stephan Wilske & Willa Obel, *The "Corruption Objection" to Jurisdiction in Investment Arbitration: Does It Really Protect the Poor? in Poverty and the International Economic Legal System: Duties to the World's Poor* 177 (K. Nadakavukaren Schefer (ed.), Cambridge: Cambridge University Press, 2013).

⁶⁸ Rene Uruena, *No Citizens Here: Global Subjects and Participation in International Law* 189 (Leiden: Martinus Nijhoff, 2012).

⁶⁹ Pierre Thielborger, *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* 159 (Berlin: Springer, 2014); Schefer 2013, at 137.

⁷⁰ Also see the AdT decision on objection 2005.

⁷¹ The Coalition for the Defense of Water and Life (*Coordinadora*), the Cochabamba Federation of Irrigators' Organizations, Friends of the Earth-Netherlands and SEMAPA Sur.

⁷² Uruena 2012, at 190.

⁷³ *Id.*

⁷⁴ Knahr 2007, at 338.

⁷⁵ Para. 16 of the AdT decision on objection 2005.

⁷⁶ The AdT decision on objection 2005, at the Order-Appendix III; Moshe Hirsch, *Investment Tribunals and Human Rights Treaties: A Sociological Perspective in Investment Law Within International Law: Integrationist Perspectives* 85, 98 (F. Baetens (ed.), Cambridge: Cambridge University Press, 2013).

the interplay between the two treaties involved (ICSID and BIT) and the consensual nature of arbitration places the control of the issues [sought to be raised] with the parties, not the Tribunal.⁷⁷

Secondly, there was no consent from the parties to grant *amicus curiae* status to the petitioners. Therefore, the tribunal decided that petitioners' requests cannot be granted⁷⁸ and stated that at this stage there was no need to seek any assistance from the petitioners.⁷⁹ The tribunal relied on the provisions of the treaties, observing that

there is no less our duty to follow the structure and requirements of the instruments that control this case.⁸⁰

This case gained significant importance on transparency requirements in investment arbitration, which was reflected in the *Suez-Vivendi* and *Suez-InterAguas* cases.

3.3.2. *Aguas Argentinas et al. v. Argentine Republic* ("*Suez-Vivendi*")⁸¹

Subsequent to the privatisation of public water service to the claimant, certain restrictive measures were brought about due to the severe economic and financial crisis faced by Argentina.⁸² Confrontations between the parties led to an arbitration claim instituted under BITs signed by Argentina with France, Spain and the UK. The arbitration claims were based on the concessions given to Spanish, French and British shareholders to operate water and sewage facilities in Buenos Aires. In this regard, five NGOs⁸³ submitted *amicus curiae* petitions before the tribunal in order to protect the interests of consumers and the human rights of citizens. Their requests included permission to submit amicus briefs, access the court hearings, present their legal arguments and access case materials.⁸⁴

⁷⁷ Communication Between the President of the Tribunal, David D. Caron, and the Director of Earth Justice, J. Martin, dated 29 January 2003; Schreuer 2009, at 705; Uruena 2012, at 191.

⁷⁸ AdT decision on objection 2005.

⁷⁹ Knahr 2007, at 338.

⁸⁰ AdT decision on objection 2005; see, e.g., the views expressed in Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?* in *The Backlash Against Investment Arbitration: Perceptions and Reality* 262 (M. Waibel (ed.), London: Kluwer Law International, 2010).

⁸¹ *Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus curiae*, 19 May 2005 (hereinafter *Suez/Vivendi amicus order*).

⁸² Blackaby & Richard 2010, at 262.

⁸³ *Asociación Civil por la Igualdad y la Justicia (ACIJ)*, *Centro de Estudios Legales y Sociales (CELS)*, *Center for International Environmental Law (CIEL)*, *Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria*, and *Unión de Usuarios y Consumidores*.

⁸⁴ Ishikawa 2010, at 383.

Initially, the tribunal had to address whether amicus requests were in pursuance of Rule 32(2) of the ICSID Arbitration Rules.⁸⁵ It is interesting to note that while the respondent approved the petition, the claimant rejected it in its entirety.⁸⁶ The tribunal found it difficult to assess its power under Article 44 of the ICSID Convention, as there were no explicit provisions either in the ICSID Convention or in the ICSID Arbitration Rules at that time on *amicus curiae* briefs. The tribunal further observed that the decision on acceptance of *amicus curiae* submissions depends on the justification of a three-criteria approach:

- i) The appropriateness of the subject matter of the case;
- ii) The suitability of a non-party to act as *amicus curiae* in the case, and
- iii) The procedure in which the submission has been made (to protect the substantive and procedural rights of the disputing parties).⁸⁷

With respect to the *first* criteria, the public interest in the case would justify the acceptance of amicus submissions from the petitioners.⁸⁸ The tribunal further observed that amicus submissions would increase the transparency and legitimacy of the international arbitral process when they involve states and matters of public interest.⁸⁹ The tribunal was also satisfied with the *second* criteria and found that the petitioners do possess “the expertise, experience and independence to be of assistance in the case.”⁹⁰ Similarly, the tribunal noted in respect of the *third* criteria that the acceptance of amicus submissions, in this case, is part of the “procedural question [and] does not affect the substantive rights of the parties.”⁹¹ Thus, the tribunal finally accepted the *amicus curiae* submissions and confirmed that the dispute raised public interest concern.⁹² However, the tribunal allowed the petitioners to attend the court hearings, make oral arguments and have access to documents only if the parties reached the required consensus under Rule 32(2) of the ICSID Arbitration Rules. Since no such agreement was made, the tribunal rejected all other requests of the petitioners.⁹³

⁸⁵ Knahr 2007, at 334.

⁸⁶ Para. 3 of the Suez/Vivendi amicus order.

⁸⁷ Para. 17 of the Suez/Vivendi amicus order; Schreuer 2009, at 705.

⁸⁸ Paras. 19 and 20 of the Suez/Vivendi amicus order.

⁸⁹ Paras. 19–22 of the Suez/Vivendi amicus order; also see Yusuf Caliskan, *Dispute Settlement in International Investment Law in Implementing International Economic Law: Through Dispute Settlement Mechanisms* 148 (Y. Aksar (ed.), Leiden; Boston: Martinus Nijhoff, 2011); VanDuzer 2007, at 718.

⁹⁰ Para. 24 of the Suez/Vivendi amicus order; also see Vinuales & Grise 2010, at 455–456.

⁹¹ Para. 14 of the Suez/Vivendi amicus order.

⁹² VanDuzer 2007, at 718.

⁹³ Paras. 6–7 of the Suez/Vivendi amicus order; Saravanan & Subramanian 2016, at 5.

3.3.3. *Aguas Provinciales et al. v. Argentine Republic* (“Suez-InterAguas”)⁹⁴

The background of the case is similar to that of the *Suez-Vivendi* case. It is interesting to note that the tribunal was comprised of the same arbitrators appointed for the *Suez-Vivendi* case.⁹⁵ During the proceedings, three individuals along with a Mexico-based NGO⁹⁶ requested the tribunal to accept and grant them *amicus curiae* status. The tribunal invoked the three-criteria approach adopted in the *Suez-Vivendi* case. In this case, the dispute was related to the distribution of water and sewerage systems in a metropolitan city and generally considered more appropriate for admitting amicus briefs.⁹⁷ In order to assess the suitability of the petitioners, the tribunal critically examined their expertise, their interests and their independence in this case.⁹⁸ After careful examination, the tribunal concluded that the petitioners had failed to provide sufficient information on how they met the qualities required of *amicus curiae*. Accordingly, the tribunal refused to grant permission to the petitioners to make amicus submissions.⁹⁹

The ICSID Arbitration Rules did not expressly address the question on the acceptance of *amicus curiae* submissions in arbitral proceedings until 2006. *Aguas Argentinas* was the first ICSID arbitration to accept *amicus curiae* briefs, which eventually led to an amendment of the ICSID Arbitration Rules in 2006. The revised Rules expressly authorise the tribunal to grant access to amicus briefs.

4. Transparency Provisions of the UNCITRAL Arbitration Rules

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 1976 provide a detailed and comprehensive framework within which to conduct arbitration proceedings that is widely used in *ad hoc* arbitrations, including in NAFTA Chapter Eleven arbitrations. The 1976 Rules were revised in 2010¹⁰⁰ in order to reflect modern arbitration practices and to “enhance the efficiency of

⁹⁴ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as *Amicus curiae*, 17 March 2006 (hereinafter *Suez/InterAguas amicus order*).

⁹⁵ Knahr 2007, at 339.

⁹⁶ Fundacion para el Desarrollo Sustentable (AC Sustainable development Foundation) & Professor Ricardo Ignacio Beltramo, Dr Ana Maria Herren, and Dr Omar Dario Heffes.

⁹⁷ Paras. 18–19 of the *Suez/InterAguas amicus order*.

⁹⁸ *Id.* paras. 30–32.

⁹⁹ Para. 34 of the *Suez/InterAguas amicus order*; see the critique in Tomoko Ishikawa, *NGO Participation in Investment Treaty Arbitration, Connected Accountabilities in Environmental Justice & Global Citizenship* 101, 107 (S. Vemuri (ed.), Oxford: Inter-Disciplinary Press, 2009); see generally Chiara Ragni, *Role of Amicus Curiae in Investment Disputes: Striking a Balance Between Confidentiality and Broader Policy Considerations in Foreign Investment, International Law and Common Concerns* 86, 90 (T. Treves et al. (eds.), New York: Routledge, 2014).

¹⁰⁰ The UNCITRAL Arbitration Rules (2010), 49 I.L.M. 1640.

arbitration.” It is important to note that the Commission has initiated several measures to promote transparency in investor-state dispute settlement, such as the adoption of the UNCITRAL Rules on Transparency, 2013¹⁰¹ and the Mauritius Convention in 2014,¹⁰² the latter being to ensure the effective application of the 2013 Rules. This section elaborates the transparency provisions enshrined in these rules.

4.1. The UNCITRAL Arbitration Rules, 1976 and Amended Rules, 2010

The 1976 Rules, in their original form, employ the most restrictive approach on aspects of transparency, and under the Rules transparency is said to be an exception rather than a rule.¹⁰³ For instance, Article 25(4) provides that “hearings [are] to be held in camera unless the parties agree otherwise.” Similarly, Article 32(5) states that “the award can be made public only with the consent of the parties.” It is interesting to note that the 1976 Rules previously did not contain any express provisions to grant access to documents and court hearings. It was a matter of discretion of the disputing parties, and the tribunals have rarely discussed this issue during proceedings.¹⁰⁴

The United Nations General Assembly made a number of amendments to the UNCITRAL Arbitration Rules in 2010 in order to update their content in respect of transparency. The revised Rules discussed only a few aspects of transparency. For instance, the tribunal had the power to restrict the opportunity to participate in open hearings unless both the disputing parties consented to it.¹⁰⁵ Similarly, it was stipulated that no award could be published without the agreement of the parties.¹⁰⁶ In matters of transparency and public participation, the UNCITRAL Arbitration Rules lagged behind other legal instruments such as NAFTA and ICSID Arbitration Rules until the adoption of the UNCITRAL Rules on Transparency, 2013.

4.2. The UNCITRAL Rules on Transparency, 2013

The U.N. General Assembly formally adopted the Rules on Transparency on 10 December 2013,¹⁰⁷ and they came into force on 1 April 2014.¹⁰⁸ These Rules serve as a tool

¹⁰¹ The UNCITRAL Rules on Transparency (2013), G.A. Res. 69/116, U.N. Doc. A/RES/69/116.

¹⁰² United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, G.A. Res. 69/116 (entered into force 18 October 2017).

¹⁰³ Samuel Levander, *Resolving “Dynamic Interpretation”: An Empirical Analysis of the UNCITRAL Rules on Transparency*, 52(2) *Columbia Journal of Transnational Law* 506, 516 (2014); also see Table 1 of this paper for a detailed comparison of the ICSID framework and the UNCITRAL Arbitration Rules.

¹⁰⁴ Also see Neale Bergman, *Transparency of the Proceedings and Third Party Participation in Litigating International Investment Disputes: A Practitioner’s Guide* 402 (C. Giorgetti (ed.), Leiden; Boston: Martinus Nijhoff, 2014); Knahr & Reinisch 2007, at 99.

¹⁰⁵ Art. 28(3) of the UNCITRAL Arbitration Rules (2010).

¹⁰⁶ *Id.* Art. 34(5); also see Levander 2014, at 517.

¹⁰⁷ The UNCITRAL Rules on Transparency (2013), *supra* note 101.

¹⁰⁸ Levander 2014, at 523–524.

to enhance transparency by allowing the submission of amicus briefs and providing access to the information submitted to the tribunal.¹⁰⁹ The 2013 Rules automatically apply to all the BITs concluded between the member states on or after 1 April 2014, unless the parties have expressly “opted out” of the treaty.¹¹⁰

Article 3 of the 2013 Rules empowers the tribunal to publish three categories of documents, subject to certain exceptions mentioned in Article 7.¹¹¹ Article 3 provides that the documents described in the *first category* should be mandatorily and automatically disclosed, which includes notice of arbitration, response to the notice of arbitration, statement of claim, statement of defence, written submissions by the disputing parties, transcripts of hearings, orders, decisions and arbitral awards.¹¹² The documents mentioned in the *second category* may not be automatically disclosed, but upon the request of any person to the arbitral tribunal, they may be disclosed. This category includes witness statements and expert reports.¹¹³ On the other hand, any other documents that do not fall under the first or second categories are classified as the *third category*, which may be ordered to be disclosed at the discretion of the tribunal after consultation with the parties.¹¹⁴

Article 6 of the 2013 Rules adopted a default rule that all hearings shall be made public, and the arbitrators have the discretion to conduct hearings in camera only in certain exceptional cases provided in Article 7, such as to protect confidential information or to maintain the integrity of the arbitral process.¹¹⁵ The arbitral tribunal shall make necessary logistical arrangements to facilitate public access to hearings.¹¹⁶ Article 7(2) provides an exhaustive list of confidential or protected information which will give rise to the exception for transparency. This list includes confidential business information, protected information under the treaty, protected information under

¹⁰⁹ Markus Gehring & Dimitrij Euler, *Public Interest in Investment Arbitration in Transparency in International Investment Arbitration*, *supra* note 56, at 27; *see, e.g.*, the views expressed in Gabriele Ruscilla, *Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?*, 3(1) Groningen Journal of International Law 1, 19 (2015).

¹¹⁰ Art. 1(4) of the UNCITRAL Rules on Transparency dealt with the scope of application.

¹¹¹ Bianco 2015, at 91.

¹¹² Art. 3(1) of the UNCITRAL Rules on Transparency; Chazournes & Baruti 2015, at 69.

¹¹³ Art. 3(2) of the UNCITRAL Rules on Transparency; also *see* N. Jansen Calamita & Ewa Zelazna, *The Changing Landscape of Transparency in Investor-State Arbitration: The UNCITRAL Transparency Rules and Mauritius Convention in Austrian Yearbook on International Arbitration* 271, 288 (C. Klausegger et al. (eds.), Wien: Manz, 2016).

¹¹⁴ Art. 3(3) of the UNCITRAL Rules on Transparency; also *see* Bergman 2014, at 391.

¹¹⁵ Art. 6(2) of the UNCITRAL Rules on Transparency; Levander 2014, at 523–527; Klint Alexander, *Article 6: Hearings in Transparency in International Investment Arbitration*, *supra* note 56, at 227.

¹¹⁶ Art. 6(3) of the UNCITRAL Rules on Transparency (2013); Chazournes & Baruti 2015, at 71; also *see* Fernando Dias Simoes, *A Guardian and A Friend? The European Commission's Participation in Investment Arbitration*, 25(2) Michigan State International Law Review 233, 244 (2017).

the law of the respondent state, and any other protected information determined by the tribunal under any law which would impede law enforcement.¹¹⁷

4.3. The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 2014 (the Mauritius Convention on Transparency)

The Convention was adopted by the U.N. General Assembly on 10 December 2014, and it entered into force on 18 October 2017. The Convention together with the 2013 Rules on Transparency contributes to a fair and efficient settlement of investment disputes, to increased transparency and to promoting good governance. The Convention also supplements the existing international investment law instruments with respect to transparency-related obligations. Article 2 is a key provision of the Convention. It determines when and how the Rules on Transparency, 2013 shall apply to investor-state arbitration for the purposes of the Convention.¹¹⁸ Paragraph 1 of Article 2 stipulates the general rule of bilateral or multilateral application. It states that the 2013 Rules shall apply to any investor-state arbitration proceedings, whether or not administered under the UNCITRAL Arbitration Rules, in which the disputing parties have not made any reservations under Article 3(1) of the Convention. Paragraph 2 of Article 2 refers to the unilateral offer of application of the Rules on Transparency only when the respondent state is a party to the Convention.¹¹⁹

4.4. Adoption of Transparency Principles in the U.S. and Indian Model BITs

The changes brought about in the NAFTA Agreement influenced not only the ICSID framework and the UNCITRAL Arbitration Rules, but also several other bilateral investment treaties (BITs) as well. This paper attempts to explain this by reference to the BITs of two countries, namely, the USA and India. The USA revised its Model BIT in 2012, incorporating key reforms including an obligation for arbitral transparency enshrined in Articles 11 and 29 and the provision for acceptance of amicus submissions in Article 28. The new provisions incorporated general standards of transparency practices as adopted in the NAFTA and ICSID frameworks.¹²⁰ In particular, Article 29 requires the publication of all pleadings, memorials and briefs submitted by the disputing parties. It also requires public hearings, and the publication of the minutes or transcripts of the hearings of the tribunal, as well as all orders, awards and decisions of the tribunal. Similarly, Article 28(2) authorises

¹¹⁷ Art. 7(2) of the UNCITRAL Rules on Transparency (2013); Thierry P. Augsburger, *Article 7: Exceptions to Transparency in Transparency in International Investment Arbitration*, *supra* note 56, at 265.

¹¹⁸ Also see Esme Shirlow, *Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration*, 31(3) ICSID Review – Foreign Investment Law Journal 622, 623 (2016).

¹¹⁹ See generally Jansen Calamita & Zelazna 2016, at 274–278.

¹²⁰ Katia Fach Gomez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35(2) Fordham International Law Journal 510, 529 (2012).

the tribunal to accept oral or written submissions from non-disputing parties for the purpose of treaty interpretation, while Article 28(3) empowers the tribunal to accept *amicus curiae* submissions from any person or entity.¹²¹

India has recently adopted a revised Model BIT, as a reaction to the “White Industries” award and a series of investment disputes initiated against India. The revised Model BIT has a number of key proposals to improve the conduct of arbitral tribunals, including the obligations of transparency.¹²² Article 22 authorises the defending party to make “certain documents” publicly available, subject to “redaction of confidential information.” These documents include notice of the dispute, notice of arbitration, pleadings, written submissions on jurisdiction, and transcripts of hearings, decisions, orders and awards of the tribunal.¹²³ The 2015 Model BIT also expressly recognises oral and written submissions from a non-disputing party on matters of interpretation of the treaty.¹²⁴

Conclusion and A Way Forward

After analysing the relevant provisions and celebrated cases, we found that NAFTA Chapter Eleven arbitrations have taken a leading role in the matters of transparency and the acceptance of amicus briefs. The reason for this could be its limited membership which may result in greater consensus among its member states. We also found that under the U.S. and Indian Model BITs transparency is a requirement, not an option. It is also significant to note that these legal instruments equally respect the confidentiality principle, which is considered the hallmark of arbitration. Two seminal cases, *Biwater Gauff*¹²⁵ and *Piero Foresti*,¹²⁶ have made a valuable contribution to the on-going debate on transparency versus confidentiality.

¹²¹ Greg Hicks, *U.S. Model BIT Sets the Global Standard for ISDS Transparency*, Center for Strategic and International Studies, 11 March 2015 (Nov. 1, 2018), available at <https://www.csis.org/analysis/us-model-bit-sets-global-standard-isds-transparency>.

¹²² Prabhash Ranjan, *As India's New Bilateral Investment Strategy Sputters out, the Secrecy and Opaqueness Must Go*, *The Wire*, 1 May 2017 (Nov. 1, 2018), available at <https://thewire.in/130524/bits-investment-strategy-failure/>.

¹²³ The Model Text for the Indian Bilateral Investment Treaty (2015), Art. 22(1) (notified on 28 December 2015) (hereinafter Model BIT (2015)), also this provision is similar to Art. 6 of the UNCITRAL Rules on Transparency (2013).

¹²⁴ Art. 22.4 of the Model BIT (2015); also see Kavaljit Singh, *An Analysis of India's New Model Bilateral Investment Treaty in Rethinking Bilateral Investment Treaties: Critical Issues And Policy Choices* 81, 96 (K. Singh & B. Ilge (eds.), Amsterdam; New Delhi: Both Ends, Madhyam & SOMO, 2016); also see A. Saravanan & S.R. Subramanian, *Paradigmatic Shifts in Indian Bilateral Investment Treaties*, *The Indian Economist*, 6 September 2016 (Nov. 1, 2018), available at <https://qrius.com/indian-bilateral-investment-treaties/>.

¹²⁵ *Biwater Gauff v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, 24 July 2008.

¹²⁶ *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, 4 August 2010 (hereinafter Piero Foresti Award).

The central question of the *Biwater Gauff* dispute arose on second Procedural Order and the minutes of the first session meeting because the respondent published both the documents on the internet without the consent of the claimant.¹²⁷ The claimant had asked the tribunal for provisional confidentiality measures. After careful examination of all the documents produced during the proceedings, the tribunal firmly held that the “concerns on procedural integrity no longer apply” after rendering the award,¹²⁸ but that it has to be handled restrictively when the proceedings are pending.¹²⁹ It is pertinent to note that, on the one hand, the tribunal did not impose any restrictions on publication of documents such as decisions, orders and directions, because “the presumption should be in favour of allowing the publication.”¹³⁰ On the other hand, the tribunal reached a restrictive conclusion on the publication of another set of documents, such as transcripts, minutes of the hearings, pleadings, written memorials and communication between the parties.¹³¹

It is significant to note that the ICSID tribunal for the first time in *Piero Foresti* granted an amicus request to access key documents and observed that

*this would assist them to focus their submissions upon the issues arising in the case and to see what positions the parties have taken on those issues.*¹³²

However, the tribunal refused to permit the petitioners to participate in oral hearings.¹³³ Instead, the tribunal limited the role of non-disputing parties to engage in arbitral proceedings.¹³⁴

¹²⁷ Nathalie Bernasconi-Osterwalder, *Transparency and Amicus Curiae in ICSID Arbitration in Sustainable Development in World Investment Law* 194, 201 (M.-C. Cordonier Segger et al. (eds.), Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2011); Knahr & Reinisch 2007, at 103; also see *Yearbook on International Investment Law & Policy 2010–2011* 120 (K.P. Sauvant (ed.), New York: Oxford University Press, 2012).

¹²⁸ Para. 142 of the *Biwater Gauff* Procedural Order No. 3; Knahr & Reinisch 2007, at 107.

¹²⁹ Schreuer 2009, at 703.

¹³⁰ Paras. 153–56 of the *Biwater Gauff* Procedural Order No. 3; Bernasconi-Osterwalder 2011, at 204–205.

¹³¹ Para. 163(a) of the *Biwater Gauff* Procedural Order No. 3; see Cristoffer Nyegaard Mollestad, *No Evil? Procedural Transparency in International Investment Law and Dispute Settlement*, PluriCourts Research Paper No. 14-20 (2014).

¹³² *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Letter Regarding Non-Disputing Parties, 5 October 2009, para. 2.

¹³³ Lucas Bastin, *The Amicus Curiae in Investor-State Arbitration*, 1(3) Cambridge Journal of International and Comparative Law 208, 2018 (2012).

¹³⁴ It is worthy to note here that the tribunal adopted a “novel procedure” in order to address these issues, i.e., “after all submissions, written and oral had been made, the Tribunal would invite the parties and the NDPs to offer brief comments on the fairness and effectiveness of the procedures adopted for NDP participation in this case. The Tribunal would then include a section in the award, recording views (both concordant and divergent) on the fairness and efficacy of NDP participation in this case and on any lessons learned from it”; also *reference* *Piero Foresti Award* (2010).

It is noted that the *Biwater Gauff* tribunal for the first time addressed the issue on the publication of documents in a “detailed fashion.”¹³⁵ The tribunal separately examined various kinds of documents, weighing the competing interests of transparency on one side and procedural integrity that protects confidentiality on the other. The balanced approach adopted by the *Biwater Gauff* tribunal has influenced subsequent cases as well.¹³⁶ Interestingly, the *Piero Foresti* tribunal went even further and adopted an “innovative step” to allow *amicus curiae* to access documents.¹³⁷

Our discussion has confirmed the ubiquitous presence of the competing interests between confidentiality and transparency in investment arbitration, which originated in the WTO’s Dispute Settlement Body, was further elaborated by NAFTA, followed by the ICSID Arbitration Rules, and finally refined by the UNCITRAL Rules on Transparency. Current arbitration practice has departed from its earlier position: it has reversed the obligations of confidentiality and shifted towards transparency and openness. However, the current arbitral system still remains unsatisfactory for the admission of *amicus curiae*; therefore, it is necessary to bring uniform or minimum standard requirements in all the legal instruments we discussed in these pages. Arbitral tribunals should engage in the careful weighing of the quest for transparency and the need for confidentiality. Such balancing will greatly benefit the international community as a whole.

References

Bastin L. *The Amicus Curiae in Investor-State Arbitration*, 1(3) Cambridge Journal of International and Comparative Law 208 (2012).

Bianchi A. *On Power and Illusion: The Concept of Transparency in International Law in Transparency in International Law* 1 (A. Bianchi & A. Peters (eds.), Cambridge: Cambridge University Press, 2013).

Buys C.G. *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14(1–2) American Review of International Arbitration 121 (2003).

Delaney J. & Magraw D.B. *Procedural Transparency in The Oxford Handbook of International Investment Law* 756 (P. Muchlinski et al. (eds.), Oxford: Oxford University Press, 2008).

¹³⁵ Knahr 2007, at 323 and 327.

¹³⁶ *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 3, 27 January 2010; also see Jan Peter Sasse, *An Economic Analysis of Bilateral Investment Treaties* 181 (Berlin: Springer, 2011).

¹³⁷ See also the discussion in Caliskan 2011, at 151; generally see Comel Marian, *Balancing Transparency: The Value of Administrative Law and Mathews-Balancing to Investment Treaty Arbitrations*, 10(2) Pepperdine Dispute Resolution Law Journal 275, 284 (2010); generally Rinaldo Sali, *Transparency and Confidentiality: How and Why to Publish Arbitration Decisions in The Rise of Transparency in International Arbitration* 84–85 (A. Malatesta & R. Sali (eds.), Huntington, N.Y.: Juris, 2013).

Dolzer R. & Schreuer C. *Principles of International Investment Law* (Oxford: Oxford University Press, 2008).

Ishikawa T. *Third Party Participation in Investment Treaty Arbitration*, 59(2) *International & Comparative Law Quarterly* 373 (2010).

Jansen Calamita N. & Zelazna E. *The Changing Landscape of Transparency in Investor-State Arbitration: The UNCITRAL Transparency Rules and Mauritius Convention in Austrian Yearbook on International Arbitration* 271 (C. Klausegger et al. (eds.), Wien: Manz, 2016).

Knahr C. & Reinisch A. *Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise*, 6(1) *Law and Practice of International Courts and Tribunals* 97 (2007).

Knahr C. *Transparency, Third Party Participation and Access to Documents in International Investment Arbitration*, 23(2) *Arbitration International* 327 (2007).

Malanczuk P. *Confidentiality and Third-Party Participation in Arbitration Proceedings under Bilateral Investment Treaties*, 1(2) *Contemporary Asia Arbitration Journal* 183 (2008).

Mourre A. *Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?*, 5 *Law and Practice of International Courts and Tribunals* 257 (2006).

Ortino F. *Transparency of Investment Awards – External and Internal Dimensions in Transparency in International Trade and Investment Dispute Settlement* 119 (J. Nakagawa (ed.), London: Routledge, 2013).

Pongracic-Speier M. *Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration*, 3(2) *Journal of World Investment* 231 (2002).

Ragni C. *Role of Amicus Curiae in Investment Disputes: Striking a Balance Between Confidentiality and Broader Policy Considerations in Foreign Investment, International Law and Common Concerns* 86 (T. Treves et al. (eds.), New York: Routledge, 2014).

Saravanan A. & Subramanian S.R. *The Participation of Amicus Curiae in Investment Treaty Arbitration*, 5(4) *Journal of Civil and Legal Sciences* 1 (2016).

Information about the authors

Azhaham Perumal Saravanan (Kharagpur, India) – PhD Candidate, Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology Kharagpur (Kharagpur, Paschim Medinipur, West Bengal, 721302, India; e-mail: saravananlaw1989@gmail.com).

Subramanian Ramamurthy Subramanian (Kharagpur, India) – Assistant Professor, Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology Kharagpur (Kharagpur, Paschim Medinipur, West Bengal, 721302, India; e-mail: essaesr@gmail.com).