

## Ever More Transparent? A History of International Arbitration

*Neumann and Peters 2019*

Thore Neumann and Anne Peters, “Transparency“, in: Hélène Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (Oxford: Oxford University Press 2019), paras 4, 15, 26, 32, 45, 77-78.

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4 Recent developments, however, suggest an overarching trend towards a broader and more consolidated espousal of judicial transparency also at the international plane (see on the general ‘transparency turn’ in international law and its implications in detail Peters, 2013, 534 *et seq.*, and Peters, 2015, 4–9): During the last decades, States and/or courts themselves, or their parent organizations, have created new transparency-promoting legal instruments such as the → *United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules* (→ *Rules on Transparency in Treaty-based Investor-State Arbitration: United Nations Commission on International Trade Law (UNCITRAL)*), which narrow down party control of and tribunal discretion on transparency (Shirlow, 2016, 642–47), and the landmark Mauritius Convention (→ *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*). The actors have remodelled procedural regimes in favour of transparency (cf for example the International Center for Settlement of Investment Disputes’ [‘ICSID’] 2006 transparency reform, see for an analysis and criticism Wong and Yackee, 2010, 253–61, 268). They have fleshed out transparency-related norms (cf. eg, the Rules of Procedure of the European Court of Justice (‘ECJ’) [2012], which introduce a new Article 79 (1) with more detailed rules on the reasons for exceptional confidentiality during the oral phase of proceedings). The relevant actors have applied and interpreted existing procedural regimes in favour of transparency (cf, eg, the progressive interpretation of the WTO Dispute Settlement Understanding (‘DSU’) and its Annex 3 in favour of an option for open hearings during Appellate Body proceedings; Ehring, 2008, 1028–30 and Alvarez-Jiménez, 2010, 1083–84). Moreover, courts have created new practices and programmes such as outreach strategies (cf, eg, International Criminal Court [‘ICC’], Summary of the Integrated Strategy for External Relations, Public Information and Outreach). The parent organisations or courts have adopted soft law (cf, eg, Council of Europe Recommendation Rec (2002) 13 of the Committee of Ministers to Member States on the publication and dissemination in the member states of the text of the European Convention on Human Rights and the case-law of the European Court of Human Rights [2002]) and other measures fostering procedural transparency. And they have introduced or revamped web-based case-law databases and other practical measures to boost transparency (see, eg, International Court of Justice (‘ICJ’), Report of the International Court of Justice for the Period 1 August 2016 to 31 July 2017 [2017], para 17: ‘The Court [...] endeavours to ensure that its decisions are well understood and publicized as widely as possible throughout the world, through its publications, the development of multimedia platforms and its own internet site, which was recently completely redesigned and updated to make it more user-friendly.’). In traditional-style courts and in arbitral regimes and in diverse areas of international adjudication, the proliferation of publicity and thus of transparency in international judicial and quasi-judicial proceedings has become a distinct trend and era in the historic development of international adjudication.

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**15** Throughout the 19th and early 20th century, the notion of publicity and public opinion as a safeguard for compliance with international arbitral or judicial decisions and/or international law in general became a popular, albeit not universally accepted, argument. It was taken up by parts of the peace movement, which in the 19th century became one of the most important non-governmental driving forces in the advancement of international arbitration and adjudication (O’Connell and Vanderzee, 2014, 44–45). For example, the founder of the American Peace Society, William Ladd, in his influential Essay on a Congress of Nations enthusiastically propagated the idea of public opinion as a tool to ‘enforce’ sentences of an international court: ‘I believe that, even now, public opinion is amply sufficient to enforce all the decisions of a Court of Nations, [...] and public opinion is daily obtaining more power. If an Alexander, a Caesar, a Napoleon, have bowed down to public opinion, what may we not expect of better men, when public opinion becomes more enlightened? The *pen* is soon to take the place of the *sword*, and reason is soon to be substituted for brute force in settling all international controversies. Already, there is no civilized nation that can withstand the frown of public opinion’ [emphasis in original] (Ladd, 1840/1906, 77). Ladd generally referred to ‘public opinion’ as the ‘queen of the world’ (Ladd, 1840/1906, 1). Unlike Bentham and Mill, Ladd and other authors often did not directly refer to the publicity of international proceedings and of awards/judgments as such but invoked the ‘sanctioning’ power of a (however defined) ‘public opinion’. But such ‘public opinion’ could not form without a minimum degree of publicity of the proceedings. These authors, too, therefore presupposed the availability of judicial information on concrete proceedings to the public.

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### **3. Interim Conclusions**

**26** This glimpse into the origins of ‘international judicial transparency’ before and at the beginning of the institutionalization of the international judiciary shows that both in theory and in practice, the concepts of international adjudication and transparency have been deeply intertwined. The 18th/19th century enthusiasm for governmental publicity at least partly promoted the idea that international adjudication should and could be effective. That idea was initially confronted with a dilemma: On the one hand, institutionalized hard enforcement mechanisms by tribunals were feared to unacceptably contravene national → *sovereignty* and/or the ideal of peace among nations. On the other hand, it was clear that international adjudication would be futile without at least some form of implementation scheme. For some, the concepts of publicity and of the ‘soft’ sanction of public opinion provided the intellectual *fundamentum* for a way out of this conundrum (see, in particular, Ladd, 1840/1906, 76–78). This may have made international adjudication a more realistic prospect and motivated calls for its further development.

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**32** In the following, the functionality of transparency for (1) fairness and a rule-of-law-based procedure, (2) compliance, (3) systemic operability, and (4) democratic legitimacy and accountability is discussed. These rationales generally play an important role across all types of international courts and tribunals, while their exact scope and weight may differ between the various institutions and contexts. They can be distinguished from other, more court type-specific transparency rationales which are not treated in this entry. Such type-specific rationales often result from the particular mandates and functions an international court fulfills. For example, procedural transparency in international criminal courts may also serve purposes of deterrence – a rationale which arguably does not play an equally pronounced role in other contexts of adjudication.

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## **E. Core Manifestations of International Judicial Transparency**

**45** International courts and tribunals – much like domestic ones – employ various procedural and practical means to make their work known to the general public. These may include opening procedures to the public, providing general access to procedure-related information, issuing of reports, public notifications, press releases and other forms of public relations work, and the like (Grossman, 2009, 153; see for a comprehensive catalogue of suggested transparency elements in international criminal proceedings Kavran, 2017b, 143). In the following, we focus on access to documents and oral hearings as the two single most important legal instruments by which members of the public may gain insights into the proceedings before international courts and tribunals. Legal issues revolve around five basic parameters: the object of publication ('what'), the basic decision on publication and the exceptions ('if' and 'under what circumstances'), the timing ('when'), the publicizing entity ('who'), and the modalities and procedures of publication ('how').

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## **F. Conclusions**

**77** Transparency is – both in theory and in practice – linked to the historic development of international adjudication. It specifically supports the functioning of international courts in various ways. Its main components are increasingly backed by procedural rules and regulations, partly even in international arbitral systems which have been traditionally closed. These findings point to the development of transparency as an overarching, general principle of international procedural law (Neumann and Simma, 2013, 476). Such a general principle does not mean that all international courts and tribunals must open their proceedings to the public through equal or similar means. Also, a considerable number of international proceedings – especially arbitral proceedings – still remain to a large degree shielded from public scrutiny and will probably remain so in the future.

**78** However, the historical foundation, the functionality, the normative consolidation across different courts and tribunals, and the concomitant practice suggest that a duty to take transparency into account exists as a matter of international legal principle. This generates procedural obligations both for law-makers and law-apppliers. First, all creators of international procedural law (States and courts), are obliged to take into consideration and weigh the public's potential interest in access to the proceedings. They must have reasons should they formulate a rule against transparency (cf *Commission v Breyer*, 2016, para 117: '... seeing the robust trend pointing in a clear direction [towards openness], buttressed by strong normative arguments as to why reasonable openness of courts is a good thing, a very convincing explanation would be needed for suggesting that the Court of Justice is and ought to be different in this regard.'). Second, a similar duty of consideration is incumbent on the law-apppliers: Where the applicable procedural law in question grants discretion on an aspect of transparency or can be construed in favour of transparency, the law-applying actor must carefully ponder the public interest in following the proceedings and reduce confidentiality to the necessary minimum. The mentioned procedural obligations have the practical effect of augmenting the level of reflection of the involved actors when deciding on transparency and may lead to a regular and institutionalized critical questioning of the reasons for confidentiality. This could – in a positive feedback loop – increase the overall amount of actual transparency and would do justice to the general trend in international law and institutions to be more transparent towards stakeholders.