

Transparency in investment treaty arbitration: past, present, and future

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ABSTRACT

This contribution to the special collection analyses transparency in international investment treaty arbitration. It charts the development of transparency in investment treaty arbitration, highlighting how developments in approaches to the transparency of arbitral proceedings track broader evolutions within investment treaty arbitration itself. The article first outlines how ‘transparency’ has been achieved over time through key procedural rules and treaties. It next explores the different objectives associated with transparency reform efforts and measures, examining the possible links between the transparency of arbitral proceedings and improved outcomes in treaty and arbitration practice, the accountability of decision-makers, and public trust and legitimacy in the arbitration system more broadly. Against this backdrop, the article focuses on the different understandings of ‘transparency’ that underpin key measures and reform efforts. It examines, in particular, transparency as ‘availability’, ‘accessibility’, and ‘participation’. The article concludes by examining the close link between transparency and the development and future of investment treaty arbitration. It highlights, in particular, the pivotal role that transparency measures have played in creating a burgeoning system of ‘precedent’, engaging public attention, and prompting the creation of innovative amendment structures that could be applied to implement other reforms in the future.

KEYWORDS: investment arbitration; investor–State dispute settlement (ISDS); transparency; investment treaty; reform; UNCITRAL; ICSID

INTRODUCTION

Transparency in investment treaty arbitration has been a perennial topic for debate and reform. Few questions of procedural law have received a comparable level of engagement from parties, tribunals, arbitration institutions, scholars, and other stakeholders. While most would agree that (at least some) transparency is desirable in investment treaty arbitration proceedings, disagreements remain about what purpose(s) transparency measures serve, what form (s) transparency measures should take to achieve those purpose(s), and their implications of transparency reforms for the development, evolution, and future of investment treaty

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arbitration. Without consensus on such key issues, there is a risk that transparency measures will miss their intended target(s) and that proponents of further reform will speak at cross-purposes.

To clarify the contours of debates about transparency in investment treaty arbitration, and to focus on their implications for the development of this form of dispute settlement more broadly, this article highlights different facets of transparency and its implications for how investment treaty arbitration operates and is perceived by diverse stakeholders.¹ The second section briefly outlines the development of transparency measures in investment treaty arbitration, examining how ‘transparency’ has been achieved through key procedural rules and treaties over time. The ‘The objectives underpinning transparency measures and reform efforts’ section introduces several objectives associated with transparency measures and reform efforts. The section highlights the possible links between transparency and improved outcomes in treaty and arbitration practice; enhanced accountability of tribunals, arbitration institutions, and/or other key actors; and increased public trust and legitimacy in the arbitration system more broadly. The section highlights the close connection between the objectives underpinning transparency measures and decisions about *what* should be made transparent, *to whom* it should be made transparent, and *when*. Against this backdrop, the ‘Defining transparency: adapting transparency measures to achieve their objectives’ section examines the different understandings of ‘transparency’ underpinning key transparency measures and reform efforts. It focuses, in particular, on transparency as ‘availability’, ‘accessibility’, and ‘participation’. The final section ‘Transparency and the evolution, nature, and future of investment treaty arbitration’ concludes by highlighting the close link between transparency and the development and future of investment treaty arbitration. It outlines the pivotal role that transparency measures have played in creating a burgeoning system of ‘precedent’, engaging public attention, and prompting the creation of innovative amendment structures that could be applied to implement other reforms in the future.

THE DEVELOPMENT OF TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION

Investment treaty arbitration has long been criticized as a non-transparent dispute resolution process. Early investment treaties and institutional rules either opted for confidentiality of proceedings or were silent on matters of transparency.² The *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (‘ICSID Convention’), for example, provides in Article 48(5) that: ‘The Centre shall not publish the award without the consent of the parties.’³ Similarly, the 1976 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules provided: ‘[t]he award may be made public only with the consent of both parties’, and further that ‘[h]earings shall be held in camera unless the parties agree otherwise’.⁴ The existence of such rules meant that matters of

¹ This article focusses on procedural transparency in investment treaty arbitration and therefore does not discuss associated issues of transparency including transparency in treaty negotiation and substantive protection standards. On the latter see, further Esmé Shirlow, ‘Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures’ (2017) 8 *Goettingen Journal of International Law* 73.

² See, eg, Arbitration Rules of the United Nations Commission on International Trade Law (1976) UNGA Res 31/98, arts 25(4) and 32(5); ICSID Convention, art 48(5); Cristoffer Nyegaard Mollestad, ‘See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement’ (finding that 88 percent of bilateral investment treaties concluded between 2010 and 2013 did not address procedural transparency).

³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 14 October 1965, 575 UNTS 159, art 48(5).

⁴ Arbitration Rules of the United Nations Commission on International Trade Law (1976) UNGA Res 31/98 (n 2), arts 32(5) and 25(4).

transparency were commonly left to party and/or arbitral discretion, with a resulting risk of divergent decisions and a lack of clarity for key stakeholders.

Against a context of increased public interest in investment treaty arbitration, States and arbitration institutions have increasingly sought to regulate approaches to transparency in investment treaty arbitration through adjustments to applicable treaty provisions and procedural rules. Various States, for instance, have adopted interpretive statements,⁵ model investment treaties,⁶ and/or bi- or multilateral treaties⁷ reflecting expanded procedural transparency requirements for investment treaty arbitrations. Adjustments have also been achieved through amendments to the International Centre for Settlement of Investment Disputes (ICSID) and UNCITRAL Arbitration Rules, which are commonly applied in investment treaty arbitrations.

The ICSID Secretariat has engaged in several processes to enhance transparency in ICSID arbitration proceedings. In 2006, the ICSID Arbitration Rules were revised to permit the publication of documents generated during investment treaty arbitration proceedings, the holding of open hearings with party consent, and the express regulation of third-party (*amicus curiae*) submissions.⁸ Subsequently, in 2022, the ICSID Arbitration Rules were further amended to provide for the publication of arbitral awards and decisions on annulment within 60 days, if either party objects to such publication within that period.⁹ Such provision was designed to be consistent with Article 48(5) of the Convention by deeming parties to consent to the publication of the award absent an express objection. The amended Rules also take advantage of the fact that Article 48(5) of the Convention does not cover a range of documents produced in ICSID proceedings. The revised rules provide, for instance, for the publication subject to redactions agreed by the parties of arbitral orders and decisions¹⁰ and, upon request of a party, 'any written submissions, observations or other documents which that party filed in the proceeding'.¹¹ The amended rules further regulate the observation of hearings by third parties,¹² the publication of hearing recordings and transcripts,¹³ and non-disputing treaty party submissions.¹⁴ The adjusted ICSID Arbitration Rules also

⁵ Notes of Interpretation of Certain NAFTA Chapter 11 Provisions 2001; Statement of the Free Trade Commission on Non-disputing Party Participation, 7 October 2003 (2004 16 WTAM 167). On the NAFTA FTC Statements, see, further, Amokura Kawharu, 'Public Participation and Transparency in International Investment Arbitration: Suez v Argentina' (2007) 4 New Zealand Year Book of International Law 159, 167; Alessandra Asteriti and Christian J Tams, 'Transparency and Representation of the Public Interest in Investment Treaty Arbitration' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 5.

⁶ See, eg, Canada Model Investment Treaty (2004) 2004; United States Model Investment Treaty (2004).

⁷ See, eg, Dominican Republic–Central America FTA (CAFTA-DR), arts 10.20 and 10.21; China–Australia Free Trade Agreement (2015), arts 9.16 and 9.17; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art 9.24; Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment (2005/2006), arts 28(3) and 29(2).

⁸ Rules of Arbitration of the International Centre for Settlement of Investment Disputes (2006), arts 32, 37, and 48(4); This followed two working papers, in 2004 and 2005: ICSID Secretariat, 'Possible Improvements to the Framework for ICSID Arbitration' <<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>> accessed 1 December 2025; ICSID Secretariat, 'Suggested Changes to the ICSID Rules and Regulations' <<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf>> accessed November 2024.

⁹ ICSID Arbitration Rules (2022), Rule 44(1) and (2). In the absence of consent, the Centre shall continue to 'publish excerpts of the legal reasoning in such documents': Rule 44(3). For Additional Facility proceedings, not subject to art 48(5) of the Convention, the Rules stipulate that '[t]he Centre shall publish Awards, orders and decisions within 60 days after their issuance, with any redactions agreed to by the parties': ICSID Additional Facility Arbitration Rules (2022), Rule 54.

¹⁰ ICSID Arbitration Rules (2022), Rule 45.

¹¹ *ibid*, Rule 46; ICSID Additional Facility Arbitration Rules (2022), Rule 55.

¹² *ibid*, Rule 47(1); *ibid*, Rule 56(1).

¹³ *ibid*, Rule 47(3); *ibid*, Rule 56(3).

¹⁴ *ibid*, Rule 49; *ibid*, Rule 58.

address other matters connected to transparency, including disclosure of third-party funding arrangements.¹⁵

Adjustments to procedural transparency for investment treaty arbitration have also been the focus of discussions within UNCITRAL's Working Groups II (2008–2014) and III (2017–present). UNCITRAL's Working Group II, for example, developed *Rules on Transparency in Treaty-Based Investor-State Arbitration* ('Transparency Rules'), which address, among other things, the publication of documents generated in arbitral proceedings, submissions by third and non-disputing treaty parties, and open hearings.¹⁶ The Working Group also developed a *Convention on Transparency in Investor-State Treaty-Based Arbitration* to facilitate the application of the *Transparency Rules* to arbitrations commenced under treaties already in force when the *Transparency Rules* were adopted.¹⁷ In 2017, questions related to investor–State dispute settlement reform were moved to Working Group III for consideration.¹⁸ Working Group III has acknowledged that the transparency standards developed through earlier initiatives could be better implemented¹⁹ and has further examined matters unaddressed in the *Transparency Rules*, including transparency in arbitrator appointment processes and related to third-party funding.²⁰

THE OBJECTIVES UNDERPINNING TRANSPARENCY MEASURES AND REFORM EFFORTS

A 2018 survey of practitioners indicated that a slim majority viewed current approaches to transparency in investment treaty arbitration as largely 'sufficient'.²¹ However, investment treaty arbitration is still often criticized as a secretive dispute resolution process, and the ongoing UNCITRAL Working Group III process, in particular, has indicated that states and other stakeholders remain interested in potentially adopting additional transparency initiatives in the future.²² This suggests that at least some stakeholders perceive that existing transparency measures have not (at least yet) achieved the objectives that prompted their initial design. Recognizing that transparency must be viewed as 'a conduit to regulation, not as regulation itself',²³ this section outlines several key objectives associated with transparency measures and reform efforts. Increased transparency has, in particular, been linked to improved quality of arbitral awards, accountability for arbitral tribunals and institutions, and

¹⁵ *ibid*, Rule 21; *ibid*, Rule 32.

¹⁶ United Nations General Assembly, 'United Nations Commission on International Trade Law Rules on Transparency in Treaty-Based Investor-State Arbitration and Arbitration Rules (as Revised in 2010, with New Article 1, Paragraph 4, as Adopted in 2013)' Resolution adopted by the General Assembly on 16 December 2013, 68/09.

¹⁷ See UNCITRAL, *Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (2014) <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html> accessed 1 December 2025.

¹⁸ United Nations General Assembly, *Report of the United Nations Commission on International Trade Law Fiftieth Session (3–21 July 2017)*, UN Doc A/72/17, para 264.

¹⁹ UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session* (Vienna, 27 November to 1 December 2017), Part 1, para 87.

²⁰ *ibid* 88; UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the Work of Its Fifty-Fifth Session* (Vienna, 3–7 October 2011) (A/CN.9/736), paras 76–77, 90–92; UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Sixth Session* (New York, 6–10 February 2012) (UN Doc A/CN.9/741), paras 102–103.

²¹ IBA Arbitration Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration* (2018) 54.

²² See, eg, United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), *Possible Reform of investor-State Dispute Settlement (ISDS): Submission from the European Union*, A/CN.9/WG.III/WP.145, 12 December 2017, para 35; 'Submission from the Governments of Chile, Israel and Japan', A/CN.9/WG.III/WP.163, 15 March 2019, p 3; 'Submission from the Government of Thailand', A/CN.9/WG.III/WP.162, 8 March 2019, para 18; 'Submission from the Government of Morocco', A/CN.9/WG.III/WP.161, 4 March 2019, para 27 and Annex II, para 9(d), (e).

²³ Thomas N Hale and Anne-Marie Slaughter, 'Transparency: Possibilities and Limitations' (2006) 30 *Fletcher Forum of World Affairs* 153, 162–163.

enhanced legitimacy and public trust in investment treaty arbitration.²⁴ These objectives are considered in the following subsections, which aim to highlight the connection between the design of transparency initiatives and the objectives they purport to achieve.

Transparency to improve decision-making

Transparency initiatives have often been linked to improved decision-making, including on the part of parties to investment treaty disputes, arbitral tribunals, and states as treaty-drafters. The public availability of arbitral awards and decisions, party pleadings, and other documents generated through arbitral proceedings may assist parties to investment treaty disputes to decide whether to file cases, how to develop their case, and when to settle.²⁵ The ICSID Secretariat recently noted, for instance, that:

Increased transparency allows disputing parties to better comprehend the ISDS [investor-State dispute settlement] process and more effectively prepare litigation: parties can assess the procedural and substantive arguments available to them by referring to past cases. Parties can also make more informed decisions about arbitrator selection if they have access to prior orders, decisions and Awards.²⁶

Transparency has also been linked to improved decision-making by arbitral tribunals. Some commentators suggest that the mere fact that arbitral decisions are publicly disclosed will encourage arbitrators to ‘thoroughly research and investigate before reaching a conclusion’.²⁷ For others, the improvement in arbitral decision-making follows the release of particular documents or the engagement of specific stakeholders, including through third-party participation procedures. Third-party (*amicus curiae*) submissions could, for instance, improve arbitral decision-making by ensuring that decisions are ‘informed by, and responsive to, a wide range of interests’.²⁸ So, too, transparency might help states draft better treaties²⁹ or better comply with their obligations under existing treaties by highlighting how key obligations are interpreted and applied.³⁰ Emerging scholarship raises important questions as to whether such improvements can be, and have, in fact, been, secured through enhanced transparency in investment treaty arbitration. This scholarship highlights various important lines of

²⁴ Transparency has also been justified by reference to other objectives. See, generally, discussion in Shirlow, ‘Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures’ (n 1).

²⁵ Jack J Coe Jr, ‘Transparency in the Resolution of Investor-State Disputes—Adoption, Adaptation, and NAFTA Leadership’ (2005) 54 University of Kansas Law Review 1339, 1356; Nyegaard Mollestad (n 2) 13; Daniel Barstow Magraw Jr and Niranjali Manel Amerasinghe, ‘Transparency and Public Participation in Investor-State Arbitration’ (2008) 15 ILSA Journal of International & Comparative Law 337, 345; N Jansen Calamita, ‘Dispute Settlement Transparency in Europe’s Evolving Investment Treaty Policy: Adopting the UNCITRAL Transparency Rules Approach’ (2014) 15 Journal of World Investment & Trade 645, 652; Amy Schmitz, ‘Untangling the Privacy Paradox in Arbitration’ (2005) 54 University of Kansas Law Review 1211, 1232; Christina Knahr and August Reinisch, ‘Transparency versus Confidentiality in International Investment Arbitration—The Biwater Gauff Compromise’ (2007) 6 Law & Practice of International Courts and Tribunals 97, 115.

²⁶ ICSID Secretariat, *Proposals for Amendment of the ICSID Rules—Working Paper, Volume 3*, 857.

²⁷ Avinash Poorooye and Ronan Feehily, ‘Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance’ (2017) 22 Harvard Negotiation Law Review 275, 286.

²⁸ Tomoko Ishikawa, ‘Third Party Participation in Investment Treaty Arbitration’ (2010) 59 International & Comparative Law Quarterly 373, 402, 409; J Anthony VanDuzer, ‘Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation’ (2007) 52 McGill Law Journal 681, 685; Barstow Magraw Jr and Amerasinghe (n 25) 346–348; Olivia Bennaim-Selvi, ‘Third Parties in International Investment Arbitrations: A Trend in Motion’ (2005) 6 Journal of World Investment & Trade 773, 803; Thomas Risse, ‘Transnational Governance and Legitimacy’ in Arthur Benz and Ioannis Papadopoulos (Eds), *Governance and Democracy* (Routledge, 2006) 8; Eugenia Levine, ‘Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation’ 29 Berkeley Journal of International Law 200, 217; Dinah Shelton, ‘The Participation of Nongovernmental Organizations in International Judicial Proceedings’ (1994) 88 American Journal of International Law 611, 618; Astrid Wiik, *Amicus Curiae before International Courts and Tribunals* (1st edn, Hart Publishing 2018) 43.

²⁹ See, eg, ICSID Secretariat (n 26), Schedule 8; Calamita (n 25) 653.

³⁰ ICSID Secretariat (n 26) para 3, Schedule 8.

analysis for future study, including questions about the extent to which arbitral decisions and the publication of existing investment treaties influence state treaty-making and/or the internal evaluations by states of actions that could breach investment treaties.³¹ Additional questions that could be examined through further empirical research include the extent to which enhanced transparency has prompted convergence in the approaches of tribunals to common procedural or even substantive questions (and the extent to which such convergence is desirable),³² the extent to which the publication of arbitral documents has levelled the playing field between repeat or powerful players and other stakeholders, and the cognitive impacts (if any) of transparent versus confidential proceedings for arbitrators and party representatives.

Transparency to achieve accountability

Transparency is commonly presented as a means of securing greater accountability of arbitral tribunals and/or arbitral institutions.³³ Transparency measures may enhance accountability by supporting stakeholders in monitoring the behaviour of these key actors.³⁴ The knowledge that they are being watched might discourage practitioners, arbitrators, and/or arbitral institutions, for example, from engaging in ‘improper behavior’.³⁵ It might also influence states and investors’ positions when presenting pleadings or settling cases.³⁶ However, for many commentators, true accountability depends on implementing transparency measures that accord stakeholders some capacity to demand changes in behaviour where transgressions are detected.³⁷ As Hale and Slaughter explain, for example, to achieve accountability, ‘it is necessary not only to know what [a tribunal is] doing, but also to have some way to make [it] do something else’.³⁸ Further research could usefully engage with these questions, including exploring the degrees to which existing transparency initiatives support the monitoring and/or sanctioning facets of accountability, the target(s) that have been empowered to exercise such aspects of accountability through these measures, and the extent to which the behaviours of practitioners, arbitrators, and officials change when subject to the prospect of either monitoring or sanctioning as a result of enhanced transparency in proceedings.

³¹ See, eg, N Jansen Calamita and Ayelet Berman (eds), *Investment Treaties and the Rule of Law Promise: An Examination of the Internalisation of International Commitments in Asia* (1st edn, Cambridge University Press 2022); Jonathan Bonnitcha and Zoe Phillips Williams, ‘The Impact of Investment Treaties on Domestic Governance in Developing Countries’ [2024] 46 *Law & Policy* 140; Chen Yu, ‘The uneasy delegation: conditional judicialization of international investment dispute settlement’ (2025) 16(2) *Journal of International Dispute Settlement*. <https://academic.oup.com/jids/article/16/2/idafo16/8090238>

³² Such work could build, for instance, on Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007). See, also Esmé Shirlow and Michael Waibel, ‘Article 32 of the VCLT and Precedent in Investor-State Arbitration: A Sliding Scale Approach to Interpretation’ in Esmé Shirlow and Kiran Nasir Gore (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution, and Future* (Kluwer 2022).

³³ See, eg, Poorooye and Feehily (n 27) 282; Cindy Buys, ‘The Tensions between Confidentiality and Transparency in International Arbitration’ (2003) 14 *American Review of International Arbitration* 121, 134; UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session* (New York, 23–27 April 2018) (A/CN.9/935), para 66.

³⁴ Elizabeth Figueroa, ‘Transparency in Administrative Courts: From the Outside Looking In’ (2015) 35 *Journal of the National Association of Administrative Law Judiciary* 1, 8.

³⁵ Barstow Magraw Jr and Amerasinghe (n 25) 345.

³⁶ See, further Esmé Shirlow, ‘The Promises and Pitfalls of Investor-State Mediation’ (2019) *Yearbook on International Investment Law & Policy*.

³⁷ See, eg, Marilyn Strathern, ‘The Tyranny of Transparency’ (2000) 26 *British Educational Research Journal* 309, 313; Hale and Slaughter (n 23) 154; Jenifer Shkabatur, ‘Transparency With(out) Accountability: Open Government in the United States’ (2012) 31 *Yale Law & Policy Review* 79, 82; Jonathan Fox, ‘The Uncertain Relationship between Transparency and Accountability’ (2007) 17 *Development in Practice* 663, 665; Daniel R McCarthy and Matthew Fluck, ‘The Concept of Transparency in International Relations: Towards a Critical Approach’ (2017) 23 *European Journal of International Relations* 416, 421; Wim Voermans, ‘Judicial Transparency Furthering Public Accountability for New Judiciaries’ (2007) 3 *Utrecht Law Review* 148, 150.

³⁸ Hale and Slaughter (n 23) 154.

Transparency for publicity

Transparency reforms have also been cited as integral to achieving greater legitimacy and public acceptance of investment treaty arbitration. Underlying this objective is a belief that the more the public understands investment treaty arbitration, the more it will accept and trust this dispute resolution process.³⁹ This view has been criticized as ‘hopelessly romantic’⁴⁰ and a ‘fallacy’.⁴¹ It nevertheless persists. Working Group II, for instance, repeatedly noted when developing the *Transparency Rules* that transparency could improve ‘public understanding’ and overcome ‘suspicion’ of investment treaty arbitration.⁴² The recent ICSID Rules amendment process similarly embraced a view that ‘[i]ncreased transparency enhances the public legitimacy of ISDS’, including because ‘access to documents, hearings, decisions and Awards enhances public understanding and confidence in ISDS’.⁴³ Working Group III has also ‘highlighted that enhancing public understanding of ISDS was key in addressing the perceived lack of legitimacy of the system’.⁴⁴ States and other stakeholders have similarly cited such goals when proposing enhanced transparency in investment treaty disputes.⁴⁵ Future research could tackle these questions, including by building upon empirical studies from other fields of law that have measured whether increased public information about legal proceedings has discernible effects on how individuals perceive the legitimacy or fairness of particular outcomes or institutions more broadly.

DEFINING TRANSPARENCY: ADAPTING TRANSPARENCY MEASURES TO ACHIEVE THEIR OBJECTIVES

Different types of transparency measures will differ in their capacity to achieve the various objectives associated with enhanced transparency in investment treaty arbitration proceedings. This section examines three different approaches to defining transparency and illustrates how they are relevant to understanding, designing, and appraising transparency initiatives in investment treaty arbitration.⁴⁶ The first, ‘transparency as availability’, refers to the availability of information about arbitral proceedings. The second, ‘transparency as accessibility’, refers to the capacity for the target(s) of a relevant transparency measure to *understand* the information made available through that measure. The third, ‘transparency as participation’, refers to the capacity for the target(s) of transparency measures to participate in arbitral proceedings. In outlining these three different understandings of transparency, the section highlights the intersection between different types of transparency and the goals underpinning transparency measures and reform efforts. It also highlights the importance of

³⁹ See, eg, Claudia Reith, ‘Enhancing Greater Transparency in the UNCITRAL Arbitration Rules—A Futile Attempt’ (2012) 2 Yearbook on International Arbitration 297, 300; Stephan W Schill, ‘Editorial: The Mauritius Convention on Transparency’ (2015) 16 Journal of World Investment & Trade 201; Poorooye and Feehily (n 27) 286.

⁴⁰ Jarrod Wong and Jason Yackee, ‘Transparency, Accountability and Influence in the International Investment Law System’ (2025) 46 Michigan Journal of International Law 121.

⁴¹ Elizabeth Smythe and Peter J Smith, ‘Legitimacy, Transparency, and Information Technology: The World Trade Organization in an Era of Contentious Trade Politics’ (2006) 12 Global Governance 47.

⁴² See, especially UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-Eighth Session* (New York, 4–8 February 2008) (UN Doc A/CN.9/646), para 57; UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Third Session* (Vienna, 4–8 October 2010) (UN Doc A/CN.9/712), paras 17, 53, 63; UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Fourth Session* (New York, 7–11 February 2011) (UN Doc A/CN.9/717), para 112.

⁴³ ICSID Secretariat (n 26) 857.

⁴⁴ UNCITRAL (n 19) para 87.

⁴⁵ See, eg *United Parcel Service of America Inc v Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (17 October 2001) para 51.

⁴⁶ This section is based on the definitions of transparency developed in: Shirlow (n 1) and Esmé Shirlow and David D Caron, ‘The Multiple Forms of Transparency in International Arbitration, Their Implications, and Their Limits’ in Federico Ortino and Thomas Schultz (eds), *Oxford Handbook on International Arbitration* (Oxford University Press).

considering whether transparency is an absolute goal in itself or a regulatory tool that can be balanced alongside other measures and objectives.⁴⁷

Transparency as availability

Transparency is frequently used to refer to the disclosure—or ‘availability’—of information about investment treaty arbitration proceedings.⁴⁸ This could encompass the disclosure of information about the existence of an arbitration, the disclosure of documents generated through the arbitration proceedings, or the opening of arbitration hearings to public view. On this understanding, ‘transparency’ is an information-centric concept: it designates a ‘one-way’⁴⁹ transfer of information about arbitral proceedings (or the institutions that administer them and the individuals who take part) to the relevant target(s) of transparency measures (eg, the public or specific individuals such as local communities impacted by the investment at issue).

A view of transparency as ‘availability’ has informed many of the initiatives adopted by states and arbitration institutions to enhance transparency in investment treaty arbitration proceedings. In discussing transparency measures for documents generated in arbitral proceedings, for instance, members of UNCITRAL’s Working Group II noted that ‘the public might have an interest in any or all of them’,⁵⁰ further observing that ‘the most interesting information for the public [...] might be contained in an attachment or annex to a document’.⁵¹ The availability of information about arbitration proceedings may assist in achieving the various objectives outlined in the previous section to differing degrees. For instance, the public release of arbitral awards might improve future arbitral decision-making by positioning other tribunals to ‘build on the experience and wisdom of past decisions’.⁵² Such releases of information may also position interested stakeholders to hold tribunals and/or arbitration institutions accountable because the availability of such information is critical to the ability of stakeholders to monitor arbitral decision-making, arbitrator appointment trends, and other elements of arbitral practice.

Transparency as accessibility

Transparency might alternatively be defined to require that released information be understandable, or ‘accessible’, to the target(s) of the transparency measure. This is a ‘user-centric’ approach to transparency.⁵³ On this understanding, disclosures of information will achieve ‘transparency’ if they enable a target(s) to understand and/or use the disclosed information meaningfully.⁵⁴ In this sense, transparency will be in the eye of the beholder.⁵⁵ Many early transparency initiatives focused on releasing information (transparency as availability) and largely neglected questions related to whether that information would be accessible to its intended target(s).

⁴⁷ See, eg, David D Caron, ‘Regulating Opacity: Shaping How Tribunals Think’ in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 379–397.

⁴⁸ See, eg Asteriti and Tams (n 5) 1.

⁴⁹ McCarthy and Fluck (n 37) 421.

⁵⁰ UNCITRAL (n 42) para 65.

⁵¹ UNCITRAL (n 42) para 84.

⁵² Federico Ortino, ‘External Transparency of Investment Awards’ [2008] *Society of International Economic Law, Online Proceedings Working Papers*, Working Paper No 49/08 14.

⁵³ Shkabatur (n 37) 127.

⁵⁴ Smythe and Smith (n 41) 37; McCarthy and Fluck (n 37) 419–421; William Mock, ‘On the Centrality of Information Law: A Rational Choice Discussion Law and Transparency’ (1999) 17 *John Marshall Journal of Computer and Information Law* 1069, 1081–1082; Shkabatur (n 37) 127; Anoeska Buijze, ‘The Six Faces of Transparency’ (2013) 9 *Utrecht Law Review* 3, 9; Frederick Schauer, ‘Transparency in Three Dimensions’ (2011) 2011 *University of Illinois Law Review* 1339, 1343; Archon Fung, *Full Disclosure*, p 59.

⁵⁵ See, generally Esmé Shirlow, ‘Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration’ (2016) 31 *ICSID Review—Foreign Investment Law Journal* 622.

To achieve transparency as accessibility, transparency measures may require additional features to ensure that the released information is understandable to the intended target(s).⁵⁶ To achieve transparency as accessibility (as compared to availability) for the public, for instance, the entity that releases such information may need to consider how information is presented, the language(s) it is presented in, and the length of the document(s) in which it is contained.⁵⁷ They may also benefit from engaging with intermediaries, like the media or other third parties, to ensure that technical information is rendered understandable to a broader audience.⁵⁸ As UNCITRAL's Working Group II acknowledged, when engaging with the public as an intended target of enhanced transparency, 'information might need to be made available in other forms' to ensure that the public is capable of engaging with it.⁵⁹

The mere release of information, without consideration of how accessible that information is to the intended target(s), may, in fact, risk undermining the capacity for transparency measures to achieve certain objectives. As Figueroa has noted, 'large amounts of raw information in the public domain may breed opacity rather than transparency'.⁶⁰ This, in turn, may undermine public trust by simply further empowering the groups with the necessary resources to understand the released information. The mass release of information in a 'transparency as availability' paradigm may, for example, undermine the capacity of states with limited resources to improve their investment treaties or pleadings in individual disputes due to the sheer volume of information that must be processed under such measures to achieve 'transparency as accessibility'. Similarly, whereas releasing party pleadings may improve transparency for lawyers and arbitrators, such a measure may—without more—be ill-adapted to achieve transparency as accessibility for the general public.⁶¹ As Chile recently commented as part of the Working Group III process: '[e]ven though we are transparent and we disclose everything, the public is not understanding it because these are very large and extensive legal documents.'⁶²

Transparency as participation

Transparency as 'participation' emphasizes a 'dialogue', or two-way exchange of information between tribunals and/or arbitration institutions and the target(s) of transparency measures.⁶³ Transparency as participation could be open insofar as it is offered to 'anyone interested', or closed insofar as it is only provided to specified groups.⁶⁴ It may also be accorded to differing degrees. Transparency as participation may involve, among other things, a capacity for non-disputing third parties to make submissions to the tribunal, a requirement that the tribunal consider those submissions, and/or capacity for third parties to intervene in

⁵⁶ Anthony Downs, *An Economic Theory of Democracy* (Pearson 1976) 222, 224; Adam Candeub, 'Transparency in the Administrative State' (2013) 51 *Houston Law Review* 385, 385; Fung (n 54) 55.

⁵⁷ Mock (n 54) 1081; CCSI, *Transparency for Whom? Grounding Land Investment Transparency in the Needs of Local Actors* (2021) 14; Mark Fenster, 'The Opacity of Transparency' (2006) 91 *Iowa Law Review* 885, 942; Shkabatour (n 37) 127; Figueroa (n 34) 10–11, 26; Caroline Bradley, 'Transparency Is the New Opacity: Constructing Financial Regulation after the Crisis' (2011) 1 *American University Business Law Review* 7, 16.

⁵⁸ The *Glamis Gold* tribunal, eg, prepared an 'executive summary' of its award to bolster 'governmental and public faith in the integrity of the process of arbitration', aiming to 'communicate its conclusions succinctly to the various branches of government or public involved': *Glamis, Award, 8 June 2009* (UNCITRAL) 4–5.

⁵⁹ UNCITRAL (n 42) para 38.

⁶⁰ Figueroa (n 34) 7. See, similarly, Fenster (n 57) 914–915.

⁶¹ Priska Gislser and others (eds), 'Every Picture Speaks a Thousand Words: Visualizing Judicial Authority in the Press', *Intersections of Law and Culture* (Palgrave Macmillan 2012) 31.

⁶² Transcription of a session recording reported in: Anthea Roberts and Zeineb Bouraoui, 'UNCITRAL and ISDS Reforms- Concerns about Costs, Transparency, Third Party Funding and Counterclaims'.

⁶³ McCarthy and Fluck (n 37) 422; Lindsay Stirton and Martin Lodge, 'Transparency Mechanisms: Building Publicness into Public Services' (2001) 28 *Journal of Law & Society* 471, 475.

⁶⁴ Michal Saliternik, 'Perpetuating Democratic Peace: Procedural Justice in Peace Negotiations' (2016) 27 *European Journal of International Law* 623.

some other way (even as parties) in the proceedings. Empirical analysis suggests that even where transparency measures have been adapted to secure transparency as participation, most transparency measures have so far only targeted the former end of this spectrum. While third-party submissions are nowadays regularly admitted in arbitral proceedings, empirical analysis suggests that they continue to have a limited impact on resulting arbitral decisions.⁶⁵ This indicates that even if some degree of ‘transparency as participation’ has been achieved through reforms, the two-way nature of that participation is (so far, at least) limited in meaningful ways. This reinforces that different form(s) of transparency will be better adapted to achieving different objectives. Transparency reforms will be particularly ill-suited to achieving accountability, for example, where disclosed information is not accessible or relevant (transparency as accessibility) or used and impactful (transparency as participation) to the intended target(s).

TRANSPARENCY AND THE EVOLUTION, NATURE, AND FUTURE OF INVESTMENT TREATY ARBITRATION

Transparency initiatives have helped to give concrete shape to investment treaty arbitration, which is a largely *ad hoc* and under-institutionalized form of dispute settlement. The public availability of arbitral decisions has prompted—and enabled—tribunals deciding different disputes between different parties under different treaties to seek guidance from one another’s approaches.⁶⁶ This link between enhanced transparency and convergence amongst arbitral decisions has been expressly recognized as a potential benefit of transparency in reform discussions.⁶⁷ In this sense, transparency measures have a tangible impact on the shape of this area of law and have prompted particular types of interactions between the actors that constitute it. So too, the webcasting of proceedings may prompt tribunals and/or arbitration institutions to adopt specific formalities or rituals that may inform the practice of investment arbitration and how observers come to perceive the nature of this form of dispute settlement in the future.⁶⁸

Transparency initiatives have also tracked changes in the audience(s) that investment treaty arbitration seeks to engage. Early investment treaty arbitration was primarily directed towards meeting the needs of disputing parties (States and investors). This meant that party autonomy and equality and the integrity of arbitral proceedings from the parties’ perspective were elevated over concerns about, for example, public interest or confidence in arbitration procedures and outcomes. As this form of dispute settlement has matured, many have come

⁶⁵ See, generally Federico Ortino, ‘The Impact of Amicus Curiae Briefs in the Settlement of Trade and Investment Disputes’ in Karl M Meessen (ed), *Economic Law as an Economic Good* (Sellier Publishing 2009) 314, 316; James Harrison, ‘Social Justice in International Investment Treaty Arbitration: The Value of Human Rights Interventions’ in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 17; Levine (n 28) 217; Harrison 15; Maciej Zachariasiewicz, ‘Amicus Curiae in International Investment Arbitration: Can It Enhance the Transparency of Investment Dispute Resolution?’ (2012) 29 *Journal of International Arbitration* 205, 220. Cf Ishikawa (n 28) 406–407.

⁶⁶ See, generally, Nyegaard Mollestad (n 2) 13; Barstow Magraw Jr and Amerasinghe (n 25) 345, 350; Valérie König, *Präcedenzwirkung internationaler Schiedssprüche: dogmatisch-empirische Analysen zur Handels- und Investitionsschiedsgerichtsbarkeit* (De Gruyter 2013) 250; Ortino (n 52) 14; Andrea Bjorklund, ‘Investment Treaty Arbitral Decisions as Jurisprudence Constante’ [2008] UC Davis Legal Studies Research Paper Series, Research Paper No 158 274–275; João Ribeiro and Michael Douglas, ‘Transparency in Investor-State Arbitration: The Way Forward’ (2015) 11 *Asian International Arbitration Journal* 49; JP Commission, ‘Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence’ (2007) 24 *Journal of International Arbitration*; Esmé Shirlow and Michael Waibel, ‘Article 32 of the VCLT and Precedent in Investor-State Arbitration: A Sliding Scale Approach to Interpretation’ in Esmé Shirlow and Kiran Nasir Gore (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution, and Future* (Kluwer 2022).

⁶⁷ UNCITRAL (n 42) paras 17, 62.

⁶⁸ Coe Jr (n 25) 1361.

to recognize that ‘the general public is a significant stakeholder’.⁶⁹ A range of transparency initiatives have been prompted by changing views as to who the key stakeholders (and potential targets of transparency measures) in investment treaty law and arbitration should be. When it developed the *Transparency Rules*, for example, Working Group II noted that the envisaged transparency initiatives were ‘not meant to benefit only the investor and the host State but also civil society’.⁷⁰ Such transparency initiatives have, in turn, supported individuals, communities, and organizations to better engage with the development and practice of investment treaty arbitration.

Transparency initiatives also bring into focus potential futures for investment treaty arbitration. Some of the successes of early transparency reform come not just from the substance of the measures adopted but also from the processes through which they have been developed and implemented. In particular, the *Convention on Transparency in Investor–State Treaty-Based Arbitration* developed by Working Group II to achieve broader application of the *Transparency Rules* provides a potential model by which other reforms could be implemented without requiring individual amendments to be made to the thousands of investment treaties that would pre-date future reform.⁷¹ Transparency also connects, sometimes in surprising ways, with various reform initiatives slated for the future. The balance between transparency and other reform objectives will play a significant influence, for instance, in the design of alternative forms of investor–State dispute settlement and their likely future uptake and efficacy.⁷²

The longstanding engagement by states, arbitral institutions, and other stakeholders with transparency measures and reform provides important insights into the development, nature, and future of investment treaty arbitration. In sum, this article has aimed to illustrate how the analysis of transparency—its past, present, and future—is a useful proxy for tracking the past, present, and future of investment treaty arbitration and dispute settlement more broadly. It highlighted possible pathways for future research concerning transparency in investment treaty arbitration, bringing into focus a range of questions that remain to be investigated about the past, present, and future of this area of international law.

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⁶⁹ Robert Argon, ‘Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration’ (2015) 40 *Brooklyn Journal of International Law* 209. See, eg, Brigitte Stern, ‘Civil Society’s Voice in the Settlement of International Economic Disputes’ [2009] 22(2) *ICSID Review—Foreign Investment Law Journal* 280, 347; Lance Bartholomew, ‘The Amicus Curiae before International Courts and Tribunals’ (2005) 5 *Non-State Actors and International Law* 209, 283; Ribeiro and Douglas (n 67) 23; Eric de Brabandere, ‘NGOs and the “Public Interest”: The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes’ (2011) 12 *Chicago Journal of International Law* 85.

⁷⁰ UNCITRAL (n 42) paras 50, 55, 104; UNCITRAL (n 20) para 33; UNCITRAL (n 20) para 61.

⁷¹ See especially Schill (n 39) 202; Gabrielle Kaufmann-Kohler and Michele Potesta, *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? Analysis and Roadmap* (UNCITRAL 2016) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf> accessed 1 December 2025.

⁷² See, further, Esmé Shirlow, ‘Back into the Shadows? Public Participation in the Peaceful Settlement of Investment Disputes through Non-Arbitral Means’ in Avidan Kent, Eric de Brabandere and Tarcisio Gazzini (eds), *Public Participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes* (Brill); Shirlow (n 36).

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