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Introduction

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1.1 Transparency and the hybrid nature of investment arbitration

1. The topic of transparency in international investment arbitration has gained, and continues to gain, increased attention.[1] The heightened public awareness is justified: investment disputes between foreign investors and host States before international tribunals typically involve high-stakes – usually financial, but often also political. Host State governments have much at stake in the political equations arising out of these often sensitive disputes. Sometimes, it may be a population within the host State that most directly bears the effects of a foreign investment project, rather than the host State's government.[2]

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1 See e.g. Nathalie Bernasconi-Osterwalder, 'Transparency and Amicus Curiae in ICSID Arbitrations', in Marie-Claire Cordonier Segger, Markus W. Gehring and Andrew Newcombe (eds.), *Sustainable Development in World Investment Law* (Kluwer Law International, 2011); Julie Maupin, 'Transparency in International Investment Law: The Good, the Bad, and the Murky', in Andrea Bianchi and Anne Peters (eds.), *Transparency in International Law* (Oxford University Press, 2013); Stefan W. Schill, 'Editorial: Five Times Transparency' (2014) 15 *International Investment Law Journal of World Investment & Trade* 363–74. On public interest generally, see Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press, 2012).

2 See Jose Daniel Amado, 'From Investors' Arbitration to Investment Arbitration: A Mechanism for Allowing the Participation of Host State Populations in the Settlement of Investment Conflicts', http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2385776.

2. It is in these circumstances that the concept of transparency in investor-State arbitration has gained increased visibility as a topic of concern. Because of the involvement of a State, investment arbitration has the potential to affect 'public interest' issues, i.e. issues that concern a broader public than just the parties to the dispute. Commentators and civil society groups have thus called for increased public involvement in investment arbitration proceedings, in order to incorporate broader policy considerations into the dispute resolution process. The perception of 'secrecy' in investor-State proceedings has been a contributing factor in the growing dissatisfaction with this type of dispute resolution mechanism as a whole, which has, in some cases, culminated in States' denunciation of bilateral investment treaties.[3]

3. This 'legitimacy crisis' of investment arbitration, of which the transparency debate forms an important part, can be explained, in part, by the hybrid nature of investment arbitration at the crossing of the public and private spheres.[4] On the one hand, investment arbitration is a creature of public international law. The dispute involves a State, and the parties' substantive rights, as well as the agreement to arbitrate (in treaty-based investment arbitration), arise out of an instrument of public international law, i.e. the treaty. On the other hand, arbitration is a private form of dispute resolution, away from State courts, and proceeds under procedural rules shaped and chosen by the parties.

4. This hybrid nature of investment arbitration affects the debate as to whether and, if so, how much transparency is needed. From one point of view, investment disputes or, more precisely, their outcomes, may have fairly immediate effects for large numbers of individuals and for the host State's economy. These disputes involve matters of legitimate public concern, including, for example, the environment or public health, or even human rights or corruption. Therefore, under this view, it is difficult to see why such proceedings ought to enjoy the protections of confidentiality in the manner that commercial arbitrations typically do. Moreover, being based on a treaty, confidentiality protections that exist under purely contractual disputes do not enjoy the same level of justification.

[3] For example, Indonesia in 2014 announced its intention to review or terminate numerous bilateral investment treaties. Further, Venezuela in 2012 submitted a notice to ICSID denouncing the ICSID Convention. Bolivia and Ecuador had done likewise in 2007 and 2009, respectively.

[4] See e.g. Zachary Douglas, 'The Hybrid Foundations of Investment Arbitration' (2003) 74 *British Yearbook of International Law* 151.

5. From a different perspective, investment arbitration remains a private dispute resolution mechanism. As such, irrespective of the parties' identities or the source of the arbitration agreement, these proceedings should remain confidential, precisely because they do not occur before State courts. Where the parties have decided to refer a dispute to arbitration, rather than to litigate it in court, their right to confidentiality should be respected.

6. The various chapters of this book will show that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the Rules) attempt to strike a balance between the different interests at stake. Also, as discussed in more detail in the conclusion of this book, they arguably successfully level the playing field between investors and host States, and contribute to increasing the legitimacy of investment arbitration as a system.[5]

1.2 The development of the transparency rules

7. The drafters of the Rules were not the first to consider the thorny issue of transparency. Even before the adoption of the Rules, certain tribunals constituted under the UNCITRAL Arbitration Rules had shown themselves amenable to transparency-based arguments, at least as far as third-party written submissions were concerned. Notable among these instances was the decision of the tribunal in *Methanex* v. *United States of America* that certain third parties or *amici* – the International Institute for Sustainable Development, Communities for a Better Environment and the Earth Island Institute specifically – were permitted to make written submissions to the tribunal.[6] It was the first investment tribunal to hold that Article 15(1) of the UNCITRAL Arbitration Rules gave it the power to accept *amicus* briefs, even against the wishes of one of the disputing parties, thereby signalling a recognition of public concerns associated with the transparency of proceedings. The *Methanex* tribunal offered a powerful statement in this order on third party submissions and transparency: [7]

[5] See Dimitrij Euler and Maxi Scherer, 'Conclusion', [7]–[11].
[6] *Methanex Corporation* v. *United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001. Third party refers to both third person and non-disputing party.
[7] *Ibid.* at [49].

> There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public importance than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.

8. By way of comparison, similar developments occurred in arbitrations under the ICSID Rules. Notably, the tribunal in *Aguas Argentinas* v. *Argentina* decided to allow a third-party written submissions despite the opposition of the investor.[8] More recently, the tribunal in *Biwater Gauff* v. *Tanzania* allowed an *amicus* submission under the revised ICSID Rules.[9] These cases, and others, are discussed in more detail in the relevant chapters of this book.[10]

9. It is against this background of developing case law and awareness of transparency issues that the UNCITRAL's Working Group II (Arbitration and Conciliation) (WG) began to develop the Rules. The transparency debate commenced in earnest during the WG's forty-eighth session in 2008. Certain non-governmental organisations (NGOs) and States pushed the topic of transparency onto the agenda at that session, and the Commission created a mandate for the WG with respect to the topic of transparency.[11] The Rules were finally adopted during its forty-sixth session in 2013.[12] The Rules are thus the product of over four years of work by the WG and the Commission itself. However, the WG's efforts did not stop here, since the UN General Assembly adopted the

[8] *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.* v. *Argentina* (Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*), 19 May 2005 and 12 February 2007.

[9] *Biwater Gauff* v. *Tanzania* (Procedural Order No. 5), 29 September 2006, [46]–[61].

[10] See e.g. Christopher Kee, 'Article 3' [18]–[23]; Mariel Dimsey, 'Article 4', [37]–[87]; Martins Paparinskis and Jessica Howley, 'Article 5', [3]–[5]; Klint Alexander, 'Article 6', [7]–[12]; Thierry P. Augsburger, 'Article 7', [37]; Johannes Koepp and Cameron Sim, 'Application of Transparency', [50].

[11] See Markus Gehring and Dimitrij Euler, 'Public interest in investment arbitration', [14]–[44].

[12] *Ibid.* [44].

WG's elaborated Convention on Transparency in Treaty-Based Investor-State Arbitration on 10 December 2014 open for signature since 17 March 2015, which aims at broadening the scope of application of the Rules, as discussed in Chapter 11 and the conclusion of this book.[13]

1.3 What is transparency?

10. The first difficulty when looking at the Rules stems from the very word 'transparency'. It is not a straightforward term or concept in the present context. First, the term could be defined negatively and refer to a (full or partial) absence of confidentiality. For instance, this would allow the arbitrators and the parties to report about the disputes in public, as they deem fit. Second, transparency could also be understood as referring to certain mechanisms which aim to safeguard public interest and involve the public as a whole. These might include, for instance, opening the hearing to the public or inviting third party submissions.

11. In the context of the Rules (and thus in this book), the term 'transparency' operates broadly. It can be described as an umbrella term that includes a number of components, notably but not exclusively the publication of information about the arbitral proceedings, access to various documents from the arbitration file and to the hearings, as well as involvement of third parties in the conduct of proceedings. Collectively, all of these elements fall under the heading of 'transparency' as that term is typically used in connection with international investment arbitration.

12. Based on this broad use of the term 'transparency', the Rules thus have a symbolic significance in that they facilitate public access to investment arbitration proceedings, and provide certain tools for doing so. Whether they will, in application, render these objectives concrete remains to be seen and will be considered in this book.

13. The chapters of this book discuss the notion of 'public interest' in investment arbitration more broadly (Chapter 2); the scope of application of the Rules (Chapter 3); the publication of information at the commencement of the arbitral proceedings (Chapter 4); the publication of, and access to, documents filed in the arbitration (Chapter 5); the possibilities for third parties to make submissions, i.e. submissions by a third person (Chapter 6) or by a non-disputing party to the underlying

[13] See Johannes Koepp and Cameron Sim, 'The Application of Transparency', [8]; Dimitrij Euler and Maxi Scherer, 'Conclusion', [10]–[15].

treaty (Chapter 7); the use of public hearings (Chapter 8); the exceptions to transparency allowed under the Rules (Chapter 9); the organisation and use of a repository to collect published information (Chapter 10); and, finally, how the Rules will apply in practice in combination with other instruments (Chapter 11).

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Public interest in investment arbitration

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2.1 Absence of public interest in investment disputes

1. Investment agreements, either in the form of contracts or treaties, are problematic because the State agrees to exclude a dispute from its jurisdiction and instead offers investment arbitration. States accept this limitation because they believe arbitration to be one significant factor for foreign investors to assess where they intend to invest. Thus, the arbitration clause, in addition to other protections, shall attract investments and promote growth in the long run. In contracts, the dispute is defined under the arbitration clause. Treaties, however, are more problematic than contracts because States need to determine the term 'investment' related to unknown disputes in their investment treaty. The term is not defined under customary international law. Assuming that protection of all kinds of investment creates growth, States prefer to include a very broad definition of investment in their respective investment treaties.

2. Investment treaties are highly problematic for a host State if they omit a clear definition of investment whilst still containing an offer to arbitrate with the investor. Host States risk violating investors' rights with any measure domestically enacted, irrespective of whether it is in the national or international public interest. The lack of definition, in combination with the offer to arbitrate, allows the investor to file for arbitration against the State more easily. Once arbitration is undertaken and an award is made, it is generally enforceable under the New York

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Convention on Recognition and Enforcement of Foreign Arbitral Awards (NY Convention) or directly under the International Centre for Settlement of Investment Disputes (ICSID) Convention if it was an ICSID tribunal. States have no right to appeal.

3. An additional problem arises with regard to the legitimacy of these treaties. The investment treaties discussed here sometimes fail to have the requisite degree of democratic legitimacy, especially when compared to national laws. States at times negotiate these treaties in the absence of any political debate and the public misses the opportunity to comment on or contribute to their content. The departments of foreign affairs usually negotiate such treaties in a sphere beyond the reach of the public.[1]

4. Once States conclude investment treaties, the arbitration clause in the treaties excludes disputes concerning State interference with a foreign investor's right protected under these treaties from the scope of their courts. These courts are generally expected to act in the public interest with independence and impartiality. However, the arbitral tribunal also acts in the interest of the disputing parties in a fair and efficient manner, and endeavours to resolve the dispute under its jurisdiction concerning a question based on the disputing parties' submissions. Outside the disputing parties' submission and the arbitral tribunal's jurisdiction, an arbitral tribunal cannot address any third person submission. Thus, investment disputes concern the public interest but are beyond the reach of the public.

2.2 Transparency as an answer to the public interest

5. The system of investor-State arbitration borrows its main elements from the system of commercial arbitration. One of the most cited advantages of commercial arbitration as opposed to court proceedings is the level of confidentiality without public disclosure that the parties enjoy.[2] The existence of the dispute remains private; hearings are treated confidentially and the publication of awards often depends on the decision of the parties. In commercial disputes, confidentiality aims to expedite

[1] Philip Allot, *The Health of Nations, Society and Law beyond the State* (Cambridge University Press, 2002) (Kindle), Loc 3240.

[2] See Julian D. M. Lew, Loukas A. Mistelis and Stefan Michael Kröll, 'Arbitration as a Dispute Settlement Mechanism' in *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 1, 3.

arbitrations, whilst also serving to protect the confidentiality of information and reputation. However, investor-State disputes often raise public interest issues that are usually absent from international commercial arbitration. The involvement of a State in the investment context can lead to arbitral decisions that affect a significantly broader range of actors than the two parties to the dispute. Commentators and civil society groups have thus called for increased public involvement in investment arbitration proceedings in order to incorporate broader policy considerations into the dispute resolution process and add a measure of transparency.

6. There are sometimes fundamental questions raised with regard to investor-State arbitrations as such, largely because those disputes typically involve public interests. As one NGO publication suggests, the allegation is that these disputes create public problems while enhancing private rights.[3] Certainly it is a legitimate question to ask whether confidentiality should be granted to investors when their dispute concerns important public interest values such as human rights or sustainable development more broadly. More concretely, it is questionable whether environmental priorities and socio-economic development imperatives should be solely represented by the State party in dispute. When the public is concerned, and arguably in sustainable development disputes that is often the case, the State might not be able to represent all public interests at issue.

7. The promise of sustainable development, as an objective, is to achieve transparency in an integrated manner. 'Sustainable development' has been recognised by countries of the world in a progressive series of international policy debates and declarations over the past three decades.[4] The concept draws attention to the long-term sustainability of development progress, especially whether this progress can respect

[3] IISD-WWF, *Private Rights, Public Problems* (IISD, 2001) www.iisd.org/pdf/trade_citizensguide.pdf.

[4] See *inter alia* 'The Rio Declaration on Environment and Development' (1992) UN Doc. A/CONF.151/26 www.un.org/documents/ga/conf151/aconf15126-1annex1.htm (*Rio Declaration on Environment and Development*); 'Johannesburg Declaration on Sustainable Development' (2002) UN Doc. A/CONF/199/20; 'Doha Ministerial Declaration (Ministerial Conference, Fourth Session, 14 November 2001)' (2001) WTO Doc. WT/MIN(01)/DEC/W/1. For a more detailed review, see Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* (Oxford University Press, 2004) 3–4.

social, economic and environmental priorities in a balanced and coherent manner.[5] The prospect of a 'global green economy' in the context of poverty eradication and sustainable development addresses precisely these issues, supporting the trade, investment and development efforts that spur more ecologically and socially beneficial outcomes.[6] It is usually assumed that investment law includes several features that protect an investment, such as protection for the transfer of funds, long-term activity, as well as protection of the investor's participation in the management of the project.[7] The promotion of foreign direct investment (FDI) is regulated mainly by international investment agreements (IIAs). These treaties are designed to provide security and certainty for foreign investors, in order to promote FDI, with the object of achieving the ultimate goal of development.

8. The relationship between FDI and sustainable development can be described as 'dual-natured'.[8] On the one hand, the activity of transnational corporations (TNCs) and other foreign investors can, and often does, promote certain aspects of sustainable development. This is evident from experiences such as foreign investment in renewable energy technologies and infrastructure that can help to mitigate climate change, investment in watershed restoration that improves water supplies for people, investment in new agricultural techniques that support organic farming, or investment in information and communications technologies that improves quality of life and opens new educational opportunities in developing countries. On the other hand, the activities of investors may also frustrate sustainable development, promoting economic development projects that externalise social and environmental costs as significant negative impacts on the environment and on communities. Similarly, some FDI also adversely affects the global environment, such as investments that seek to establish new coal-based

[5] Cordonier Segger and Khalfan (n. 4) 3–4.
[6] See e.g. Céline Kauffmann and Cristina Tébar Less, *Transition to a Low-Carbon Economy: Public Goals and Corporate Practices* (OECD, 2010), paras 105–9 www.oecd.org/dataoecd/40/52/45513642.pdf.
[7] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) 60.
[8] This term was recently used to describe the more specific relationship between FDI and climate change, see United Nations Conference on Trade and Development, *World Investment Report 2010, Investing in a Low Carbon Economy* (United Nations Publications, 2010) 136.