

Fixing the Transparency Problem in State-Investor Arbitration: A Multi-Layered Affair

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Abstract

State-Investor arbitration is not - or should not be – the same as commercial arbitration for the simple reason that the State is not a normal party but a sovereign instead, who is to be held accountable by the public. Investments, and thus disputes about them, involve the State acting as a sovereign in relation to public interests in key areas such as health, safety, environmental protection, land use and planning, access to water and natural resources management.

Furthermore, investment arbitration usually has important financial implications for the government; just think about the 2.2 billion USD the State of Kuwait had to pay to Dow Chemical in 2012. These kinds of monetary penalties are essentially penalties paid by the people, whether that is taxpayer's money or oil money. Despite these significant public interests at stake, until recently neither the public nor the press had the right to access to the information produced in investment arbitration. Things are finally changing though. The question however is whether this change is fast and wholeheartedly enough.

This paper deals with that question. It explores the rights at stake here: the right of access to information and the right to a public hearing. Insofar these transparency rights apply to investment arbitration, the question is whether investment arbitration is up to speed when it comes to transparency.

This can only be properly answered through a multi-layered approach, because it involves more than one instrument: individual investment contracts, bilateral investment treaties and the arbitration rules to which these contracts and treaties refer. This paper deals with all of these instruments. It also deals with situations in which more than one instrument applies at the same time, inviting parties to treaty shopping.

Finally, this paper concludes with a finding on the current - not very reassuring status - on transparency in investment arbitration and recommendations for improvement.

Key words: investment arbitration, transparency, human rights, bilateral investment treaties, arbitration rules.

1. Introduction

“Dow Chemical of the US has been awarded \$2.16bn in damages from the Petrochemicals Industries Co of Kuwait by an arbitration court over the breakdown of a planned joint venture between the two companies in 2008.” [...] Dow and PIC, a subsidiary of state-owned Kuwait Petroleum Corp, had agreed to resolve contract disputes through the arbitration court of the International Chamber of Commerce, a panel of leading commercial lawyers. It was this body that awarded Dow \$2.16, plus interests and costs⁽¹⁾. End of report.

This leaves the reader behind with more questions than answers. What happened between the parties? Why was Dow awarded this staggering amount? What did the contract stipulate about cancellation? The article does not tell us. And this is not because of sloppy journalism, but because of the confidential character of arbitration. What happened inside that arbitration room, stayed inside that arbitration room.

It was only until a few months later that some – but not all⁽²⁾ – background information became publicly known. PIC challenged the arbitral award and filed for an appeal in the English courts, which is – as opposed to arbitration - a public institution, hence our access to some information⁽³⁾. From the judgement we learned that under the envisioned joint venture between PIC and Dow, the first was to pay the latter 7.5 billion USD in return for a 50% interest in certain petrochemical assets of Dow. Dow needed the ‘Dow-proceeds’ to complete the acquisition of Rohm & Haas, a petrochemical competitor at the time. PIC wrongly cancelling the joint venture agreement, Dow had to refinance that acquisition against higher costs, for which the arbitration tribunal held PIC (partly) responsible⁽⁴⁾.

The judgement dealt with this specific legal issue: did arbitrators make the right decision regarding quantum by attributing the refinancing costs to PIC? It is beyond the scope of this article to deal with details regarding first and second limbs of remoteness in assessing how damages can be attributed to a

(1) Financial Times, 24 May 2012.

(2) The exact reasons for cancelling the joint venture agreement, for example, has never been made officially public. Local and international media reported ‘opposition in the parliament’ and ‘low oil prices’ in general terms, but were never informed about the decision making process behind the last minute cancellation of a multi-billion dollar deal.

(3) Section 68 of the (UK) Arbitration Act 1996 enables parties to challenge an arbitral award on the basis of “a serious irregularity affecting the tribunal, the proceedings or the award”.

(4) [2010] EWHC 2739 (Comm) 11 October 2012, online accessible through <http://www.bailii.org/ew/cases/EWHC/Comm/2012/2739.html>

contract party. Suffice it to say that justice Mr Andrew Smith rejected PIC's claim, which eventually meant that the initial amount of 2.16 billion USD was upheld, one of the highest amounts ever awarded⁽⁵⁾.

This paper is not about the Dow case, it is about what the Dow-case shows us: the secrecy of investment arbitration and the high public (financial) interests at stake. It shows us what equally applies in many other cases: neither the public nor the press has the right to access to the information produced in investment arbitration, even though investment arbitration often concerns a variety of topics of public interest, such as the environment, public health or access to water and land.

In fact, this may very well be the reason why parties choose arbitration in the first place. One of the main advantages of arbitration in both commercial and investment disputes is its confidentiality⁽⁶⁾, valued by both investor and host-state:

“An investor will always have a strong and legitimate interest in protecting business-related and other sensitive information from being disclosed. Moreover, an investor would be likely to insist on confidentiality when there is fear of damage to the public image of the investor or the investment. Both parties to a dispute would likely be interested in avoiding negative publicity in general, and if public light on the details of the case and the proceedings is expected to lead to critical attention, the parties will probably choose to keep the details of the proceedings as confidential as possible. The parties may also fear that public discussion will lead to an escalation of the dispute, deteriorate the relationship between the parties or generally complicate the resolution of the case before the tribunal”⁽⁷⁾.

Investment arbitration is a relatively new practice. It was only in the 1990s that it was widely ‘discovered’, leading to a sharp increase in the number of international investments agreements containing consent to arbitration⁽⁸⁾.

(5) On a side-note: according to some, this award made Kuwait arbitration-shy. Compared to the other Gulf states, it is slow in adopting modern arbitration laws. Cf. D. Al Houti, *Arbitration in the Gulf*, Kluwer Arbitration Blog, 20 February 2015 (http://arbitrationblog.kluwerarbitration.com/2015/02/20/arbitration-in-kuwait-time-for-reform/?doing_wp_cron=1591079111.4248969554901123046875)

(6) C. Tevendale/S. Bakstad, *International Arbitration in the Energy Sector*, ed. Maxi Scherer, Oxford University Press 2018, p. 22.

(7) N.C. Mollestad, *See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement*, PluriCourts Research Paper No. 14-20, accessible via: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516242

(8) M.A. Correllana, *The Right of Access to Information and Investment Arbitration*, ICSID Review: Foreign Investment Law Journal, Vol 26 (2), January 2011, p. 59.

Parties simply adopted existing rules of regular commercial arbitration. And as just mentioned, in commercial arbitration, the starting point – and indeed selling point – is confidentiality, unless parties agree otherwise. Thus, the principle of party autonomy is paramount. For years, States got away with copy pasting this practice of confidential commercial arbitration. No questions were asked, and most cases went largely unnoticed by lawyers and activists alike.

However, State-Investor arbitration is not – or better: should not be - the same as commercial arbitration, for the simple reason that the State is not a normal party but a sovereign instead, who is to be held accountable by the public. Investments involve the State acting as a sovereign in relation to public interests in key areas such as health, safety, environmental protection, land use and planning, access to water and other essential services and natural resources management⁽⁹⁾.

Furthermore, investment arbitration usually has important financial implications for the government; just think about the billions of the Dow case. Apart from the subject matter of the case, that means arbitration often entails an extra public interest: penalties. Monetary penalties to be paid by a State are essentially penalties paid by the people, whether that is taxpayer's money or oil money, there is no fundamental difference.

Accountability to these issues may mostly sound as a negative thing to governments and companies involved. However, increase in transparency and public participation can benefit them as well. It contributes to more popular acceptance and effective implementation of policies. If information is available and secrecy is reduced, public awareness, interest, support and trust in government policies or company activities is on the rise⁽¹⁰⁾.

The fact that transparency – and thus accountability - is largely absent in State-investor arbitration has itself been a well-kept secret for years. Only recently the public is becoming aware of the parallel universe of investment disputes, notably because it started to catch the eye of influential media such as The New York Times. Take this report on (NAFTA) investment arbitration⁽¹¹⁾:

“Their meetings are secret. Their members are generally unknown. The decisions they reach need not to be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being

(9) Orrellana, *ibid.* p. 77.

(10) Cf. Mollestad, p. 13/14.

(11) A. DePalma, *NAFTA's Powerful Little Secrets*, The New York Times (11 March 2001).

revoked, justice systems questioned, and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors...”

Now, it is one thing that we may want to know what is going on in these arbitrations, another is: do we actually have the right? Is the confidential character of investment arbitration legally compatible with the accountability of a State? If so, the public has no right to information produced in investment arbitration. If not, it does. In other words: does the State have an actual *obligation* to disclose such information? And if so, are there any limits to that obligation, justifying the confidentiality of investment arbitration? And if indeed it can be established that transparency (rather than confidentiality) should be the rule, does current practice reflect that and if not, where should changes be made?

As will become clear, the latter question is a tricky one as investment arbitration is a multi-layered practice thus changes are needed in more than one place. This paper deals with these different layers. Recent transparency initiatives of various well-known arbitration institutions are discussed. It also deals with the question whether parties can still contract around these initiatives, for example by choosing other – less transparent - rules. It discusses the role of BITs, focusing on Dutch BIT-practice in particular and, eventually, conclusions are drawn, and recommendations are made as to the current state of transparency in investment arbitration⁽¹²⁾. But first we should establish if there is an actual *right* to transparency in arbitration.

2. The right to transparency

As to the term transparency, it covers a wide range of topics, such as the background of the arbitrator(s) or details of third-party financing, or whether hearings should be behind closed doors or in public, or whether awards should be published and if interested third parties should be allowed to make submissions in the proceedings. This paper focuses on the ‘types’ of transparency that are the most relevant to the subject of investment arbitration and the public: the right of access to information and the right to a public hearing.

a. The right to access to information

For media and individuals to collect and pass on information truthfully and

(12) The focus on Dutch BITs partly has to do with the author’s nationality, but mostly with the fact that the Dutch BIT model is one of the most used in the world, which has to do with the – not necessarily laudable - ease of setting up a Dutch company.

accurately, they need to have access to that information. In human rights law, the right to access to information is often considered instrumental to the right to freedom of expression. Some consider it not just an instrumental right, but an intrinsic right, embodying a right in itself, a fundamental element of morality. In that view, the right follows directly from the fact that humans are endowed with reason, rather than from the interests that people may have in speaking or knowing about specific issues⁽¹³⁾.

Regardless how we conceptualize the basis of the right to access to information, it is widely accepted that such a right exists. It is firmly anchored in the body of human rights law and has been laid down in numerous international and regional human rights instruments⁽¹⁴⁾. It cannot be overlooked, one would say. But somehow, for many years, it has been. The right may have been laid down in conventions and constitutions, but implementation on the practical level was largely lacking⁽¹⁵⁾.

This changed in the beginning of the 1990s, when for the first time, human rights tribunals were addressed by interested parties, which felt their right to access of information was blocked⁽¹⁶⁾. These cases often involved environmental issues related to foreign investment projects⁽¹⁷⁾. Hence, transparency came in the slipstream of increasing environmental concerns and awareness, eventually leading to the evolution of environmental rights.

In the *Claude Reyes* case for example, the Inter-American Court of Human Rights for the first time had to rule on the right of access to information⁽¹⁸⁾. The facts were as follows: in 1991 Chile's Foreign Investment Committee signed a 180 million dollar investment contract for the design, construction and operation of a forestry complex that consisted of timber and wood related

(13) For a more in-depth discussion about the conceptual basis for the right to information cf. M. McDonough, *The Right to Information in International Human Rights Law*, Human Rights Law Review 13:1 (2013), p. 25-55.

(14) Universal Declaration of Human Rights, art. 19; International Convention on Civil and Political Rights, art. 19; American Convention on Human Rights, art. 13, European Convention on Human Rights, art. 10; Arab Charter on Human Rights, art. 32.

(15) There are a few exceptions, such as Sweden, which already had an access to information framework in place in 1776.

(16) For a list of states that have currently some sort of right to information legislation in place, see

(17) Of course, it must be taken into account, that aforementioned case law is – precisely because of the lack of transparency characterizing the system - rarely and inconsistently available to the public. Awards and decisions are still largely hidden from the public. And not only the public; it also means that tribunals themselves have no access to a full body of existing case law upon which a common and consistent practice could be built. Hence, we are still dealing with fragmented and inconsistent jurisprudence.

(18) *Claude Reyes et al. v. Chile*, Inter-Am. Ct. H.R.(set. C) No 151, para. 57(7) (Sept. 19, 2006).

industrial activities. This logging project had a significant environmental impact in what used to be pristine and delicate forest ecosystems and the sustainable use of natural resources.

Several NGO's requested the Committee to provide them with certain information of public interest concerning the project. In particular, they required information about the contracts, the investment and the investors. In response, the NGO's received some but not all information, without being given reasons as to why most information was withheld. After exhausting domestic remedies without the desired result, a petition was brought before the Inter-American Human Rights System, of which its Commission ruled that Chile had breached the right to access to information, and recommended Chile to disclose the information, which it did not.

The case ended up at the Inter-American Court, which – following the Commissions ruling earlier on - also found that Chile had a positive obligation to provide the information:

“The State’s actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately.”

In sum: every person has the right to information held by the State and the State has an active duty to disclose that information. A similar development came – albeit slow and late - from the European Court of Human Rights, which had for long resisted to acknowledge a duty of the State to provide information under Article 10 of the European Convention for Human Rights⁽¹⁹⁾.

Again, the change in position came with environmental matters, more specifically the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters⁽²⁰⁾. Following that convention, in the context of environmental risk, the ECHR recognized access to information as a human right. Gradually, the court extended the right to other areas than environmental risks⁽²¹⁾.

(19) Art. 10 par. 1 ECHR: Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(20) <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

(21) Cf. *Társaság Szabadságkögökért v. Hungary*, App. No. 37374/05, ECHR 14 April 2009.

In addition (and/or in reaction) to human rights tribunals ruling in favour of access to information, a vast number of States began to adopt domestic freedom of information laws. Today, more than one hundred countries have some sort of access to information law in place⁽²²⁾. All in all, human rights law progressively developed towards what we now safely and firmly can call a general (human) right to access of information⁽²³⁾.

b. The right to public hearings

All human rights instruments acknowledge a fair and public hearing by a competent impartial tribunal established by law⁽²⁴⁾. But how does this relate to arbitration agreements? One might argue that an agreement to arbitrate can be considered as a waiver of the right to public state-administered justice. In the *Deweer* case for example, the European Court of Human Rights noted that:

“In the Contracting States’ domestic legal systems, a waiver of this kind is frequently encountered both in civil matters, in the shape of arbitration clauses in contracts, [...]. The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention; [...]”⁽²⁵⁾.

However, we need to have a closer look at the words “in principle” here. This caveat refers to the fact that the European Court and Commission have consistently held that an arbitration agreement can only be considered a valid waiver if certain requirements are met. One is that the agreement must have been concluded without constraint, the other is that “agreements involving issues of public interest may make arbitration inappropriate and waivers of the right of access to court in such cases invalid”⁽²⁶⁾.

However, the latter is by no means established case law and follows from just an *obiter* in one particular decision of the Commission⁽²⁷⁾. Rather, there is consensus that arbitration as such is not inadmissible but must meet the requirements – fair and public – of Art. 6⁽²⁸⁾.

(22) For an overview of states with access to information laws, see www.worldbank.org/publicsector/gpa/transparency.

(23) Cf. J. Spiegel, *The Right to Know: Insights in the Right to Information*, Kuwait International Law School Journal, Vol. 7, Issue 2, June 2019, p. 75-97.

(24) Cf. Art. 14 ICCPR.

(25) *Deweer v. Belgium*, ECHR 27 February 1980, Series A, No. 35.

(26) F. Rinquist, *Do Procedural Human Rights Requirements Apply to Arbitration – a Study of Article 6 (1) of the European Convention on Human Rights and its Bearing upon Arbitration*, Master thesis University of Lund, 2005.

(27) *Axelsson and others v. Sweden*, App. No. 11960/86, decision of 13 July 1990.

(28) Rinquist, *ibid.* p. 54-55.

So, international human rights law requires access to information *and* fair and public hearings, whether they are held in State-administered courts or arbitration. There can be no doubt about it: investment arbitration must be subject to disclosure under human rights law. In other words: there should be no more secretive arbitration proceedings between States and investors, away from the public eye, whether parties like it or not.

Transparency and accountability outweigh privacy and confidentiality⁽²⁹⁾. Most countries now having embraced transparency laws in one way or another, one would expect them to move fast forward as well towards full-fledged transparent investment arbitration. However, the reality is different. This may have to do with the fact that it is not simply a matter of fixing one set of rules.

3. What needs fixing?

Investment arbitration is based on the consent between the State and the foreign investor. In the simplest scenario it is laid down in an individual agreement, a situation not very different from regular commercial contracts between companies. This agreement would include the choice for specified arbitral rules, which govern the arbitration, unless modified by specific stipulations in the agreement. And unless parties deviate by contract, they are bound to that certain set of rules, including its transparency requirements. In that scenario: it's a two-level arrangement.

Matters can become more complicated when there is a bilateral investment treaty (BIT) in place. First of all, the BIT – of which there are thousands worldwide - is in itself a rather special agreement. Countries signing them commit themselves to following specific standards on the treatment of foreign investments within their jurisdiction. In case of breach of those commitments, BIT's provide detailed procedures for the resolution of disputes.

The problem is that, and many would argue that this is where BIT's have off-railed⁽³⁰⁾, gradually the BIT's (which are often drafted according to a standard local model) started not only providing for a mechanism of dispute

(29) (Cf. M. Kinnear, “*Transparency and Third Party Participation in Investor-State Dispute Settlement*, 3 n. 10 (December 2005): <https://www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf>; D.W. Rivkin/C. Amirfar, *Climate Disputes and Sustainable Development in the Energy Sector*, in: *International Arbitration in the Energy Sector*, p. 402 (Oxford University Press 2018); M.A. Orellana, *The Right of Access to Information and Investment Arbitration*, ICSID Review 2011, Vol. 26, no 2, p. 85; C.N. Mollestad, *See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement*, Pluri Courts Research Paper 2014, No 14-20.

(30) Cf. *Rethinking Bilateral Investment Treaties, Critical Issues and Policy Choices*, ed. K. Singh/B. Ilge, Centre for Research on Multinational Corporations, 2016.

resolution between the two signatory states, but for disputes between investor and host-state as well. Hence, besides the individual contract between host-State and investor, there may be a BIT between host-State and home-State of the investor, allocating certain rights directly to the investor.

Now, in order to guarantee transparency in investment arbitration, all these different instruments – individual contracts, arbitration rules, BITs – must be transparency proof⁽³¹⁾. Are they? Not even close. It is probably safe to say that the rules are at best – including the recent transparency initiatives – halfway there, but when it comes to the investment agreements, very few State seems to have has their house in order yet. Let's have a closer look, starting with the most commonly used arbitration rules⁽³²⁾.

4. Transparency initiatives in arbitration rules

Organizations such as UNCITRAL and ICSID are not only providing the most commonly used arbitration rules for investment disputes, but they are also 'creatures of international law'⁽³³⁾. It is thus not surprising that they were the first 'get their act together' and came up with amended rules, incorporating more transparency. The word 'first' must still be taken with some scepticism here, as one may legitimately wonder why these 'creatures of international' law did not offer full transparency from the very beginning. That aside, let's have a closer look at the recent initiatives and see if they made up for lost time and opportunity.

a. ICSID

The International Centre for the Settlement of Investment Disputes was established in 1966 as part of the World Bank group. This international arbitration institute was established specifically to facilitate conciliation and if need be, the settlement of disputes between States and investors. It was only in 2006 that the ICSID Rules and Regulations were amended to increase transparency, most notably Rules 48 and 32⁽³⁴⁾. These amendments were inspired by two cases, *Aguas del Tunari*⁽³⁵⁾ and *Suez/Vivendi*⁽³⁶⁾.

(31) States (obviously) cannot contract out of their human rights obligations, cf. *Bosphorus Havat Yollary Turizm ve Ticaret Anonim Sirketi v. Ireland*, ECHR (June 30, 2005).

(32) Cf. *Report on the Subcommittee's Investment Treaty Arbitration survey*, International Bar Association, May 2016.

(33) Orellana, p. 95.

(34) The ICSID Rules can be found at: www.icsid.worldbank.org

(35) *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3.

(36) *Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19.

The first case involved widespread community opposition against the privatization of a water utility in the city of Cochabamba (Bolivia). The case, brought by Bechtel, a private company, against the state of Bolivia, caught the attention of hundreds of NGO's from around the world. Concerned about access to and privatization of water, a coalition of them requested the ICSID tribunal to have access to the hearings and documents. These requests were rejected on the basis that the parties did not consent to such transparency and the tribunal did not have the authority to grant such requests by itself.

In the Suez/Vivendi case, which concerned water distribution and sewage systems in Argentina, a similar situation arose. Human rights and environmental organizations requested disclosure of documents, access to the hearings and the opportunity to present a written submission. This time, the tribunal allowed some of the requests, albeit under conditions and restrictions.

Clearly, in both cases the tribunal felt bound by the existing rules. And equally clearly, it was felt that these rules no longer sufficed. Hence, in 2006, shortly after Suez/Vivendi, the amendments of rules 48 and 32 saw the light. Rule 48 now requires the centre to publish excerpts of the tribunal's legal reasoning in cases where parties do not consent to integral publication of the award. Thus, every ICSD decision is now published, either in full or as a summary. Rule 32 provides that all hearings are open, provided that neither party objects. Since the amendments, some proceedings have indeed been made public. For example, in *The Renco Group Inc. v. Republic of Peru*, an investment dispute in the mining sector, the parties agreed to publish all documents and hold open hearings⁽³⁷⁾.

However, despite bringing more transparency, the ICSID rules still largely depend on the consent of parties to that transparency. If they do not consent to full publication or open hearings, it will not happen. What these amendments essentially did, was adding the option of transparency. This is hardly revolutionary and by no means an insurance that the public has access to information produced in ICSID arbitration, as required by international human rights law. It should not be a matter of parties *wanting* transparency or not, it is a matter of an obligation under international human rights law. ICSID's amendments are therefore rather disappointing, especially for an UN-agency.

b. UNCITRAL

The most far-reaching attempt comes from another UN-family member: the

(37) *The Renco Group Inc v Republic of Peru*, Procedural Order No 1 (ICSID Case No UNCT/13/1): http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3004/DC3712_En.pdf

United Nations Commission on International Trade Law, UNCITRAL. In July 2013 it adopted a package of rules aimed to ensure transparency in investment arbitration. The new rules, which can also be used in combination with other arbitral rules such as ICSID, guarantee transparency from start to finish. They contain articles mandating openness and disclosure, governing participation by non-disputing parties (such as NGO's), setting limits to the disclosure requirements and regarding management of disclosure through a repository.

These rules are now an integral part of the UNCITRAL arbitration rules, but only when the underlying dispute is based on an investment treaty concluded after the new rules came into effect on 1 April 2014⁽³⁸⁾. For treaties prior to that, parties can opt-in the transparency rules.

Furthermore, UNCITRAL came up with an instrument by which parties to investment treaties prior to 1 April 2014 were able to express their consent to the new Transparency Rules. However, this tool - known as the "Mauritius Convention on Transparency" - has not been a success: five years after its adoption by the General Assembly it only has five parties: Canada, Mauritius, Gambia, Switzerland and Cameroon. UNCITRAL's biggest flaw is indeed its applicability to post April 2014 agreements only, which leaves thousands of existing agreements untouched⁽³⁹⁾.

c. ICC

Transparency initiatives are also found outside the rules of 'creatures of international law' such as ICSID and UNCITRAL. The ICC for example, a private sector-funded profit based business organization, obviously has a keen interest in attracting investment disputes because of their high financial stakes. Understanding that State-clients now need to be accommodated with a certain level of transparency, the ICC recently came up with a transparency initiative in the form of a Note to Parties and Arbitral Tribunals⁽⁴⁰⁾.

For awards issued after 1 January 2019, the presumption is that the ICC Court may publish the award in its entirety no less than two years after its notification. However, parties have an opportunity to object to the full or partial publication of their award and various other measures, including redaction of awards. And most importantly, and disappointingly, the hearings remain as closed as ever.

(38) Art 1 (4)

(39) Cf. O. Svoboda, *Current State of Transparency in Investment Arbitration: Progress Made But Not Enough*, SSRN Electronic Journal (1 January 2017); L. Johnson/N. Bernasconi-Osterwalder, *New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps*, Investment Treaty News Quarterly, Issue 4, Vol. 4, September 2013, p. 5.

(40) <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/>

5. The role of BITs in investment arbitration

Now, if the rules (as interpreted and implemented by the tribunals) to which the underlying agreements refer, still do not guarantee a minimum level of transparency, how about those underlying agreements themselves? Can, or do, or should, they play a role to achieve more openness? First of all, we need to distinguish here between the individual contract between host-State and investor, and bilateral investment treaties (hereafter: BITs) between host-State and home-State of the investor. Furthermore, we need to take into account the legally complicated matter of juxtaposition of the two.

a. BITs and their background

The United Nations Conference on Trade and Development (UNCTAD) defines BITs as “agreements between two countries for reciprocal encouragement, promotion and protection of investments in each other’s territories by companies based in either country”⁽⁴¹⁾. The underlying idea of BIT’s is the desire of capital-exporting countries to seek protection for investors and their investments in capital-importing countries. The first BIT was concluded in 1959, between Germany and Pakistan. Today, there are more than 3000 BITs in place globally. However, criticism against BITs is growing. One of the key concerns is the existence and functioning of State-investor dispute settlement clauses in most BITs.

In case of breach of the treaty commitments, the BIT provides for a detailed dispute resolution mechanism for the signatory State-parties. There is nothing unusual about that. However, those are not the only disputes BITs are covering. Towards the end of the 1960s, most BITs began to include investor-State dispute settlement mechanisms, which allow investors to directly sue host-States for violations of treaty provisions. These investor-State dispute settlement provisions – often seen as a generous gift to the investors – are subject to increasing criticism. Their legitimacy, consistency of decisions, absence of appeal, arbitrator’s independence and impartiality, financial stakes and last but not least level of transparency are questioned⁽⁴²⁾.

Critics therefore suggest leaving the method and place of dispute resolution between State and investor to their individual contract, because incorporating them into BITs allows “foreign investors to challenge, in a secretive tribunal of highly paid lawyers, any government action that interferes with investors’

(41) Cf. <https://investmentpolicy.unctad.org/international-investment-agreements>

(42) J. Khan, *International Investment Rule-making: Trends, Challenges and Way Forward*, in: *Rethinking Bilateral Investment Treaties* (ed. K. Singh/b. Ilge), Somo 2016, p. 23.

legitimate' expectations of profit⁽⁴³⁾. Other issues of concern are matters of interpretation, such as: which categories of investments are protected by a BIT?, which investors are eligible for protection under a BIT?, how to deal with the 'nationality' of an investor? Etc⁽⁴⁴⁾.

b. The example of the Dutch BIT practice

Let us have a look at the BIT between Kuwait and the Netherlands of 2001⁽⁴⁵⁾. Art. 10 provides for the settlement of disputes between the contracting parties, i.e. the State of Kuwait and the State of the Netherlands. It stipulates that parties must first try negotiations through diplomatic channels. Should that not lead to a settlement, parties agree to ad hoc arbitration, for which detailed rules are given as to the appointment of arbitrators, costs etc. Art. 9 sees to disputes between the investor and one of the contracting States. It states that if parties cannot settle amicably, they shall submit the dispute, at the election of the investor, through either a competent domestic court or arbitration⁽⁴⁶⁾. If the investor opts for arbitration, then it should be either ICSID or UNCITRAL arbitration.

There is no express transparency regulation in this BIT and the reference to either ICSID or UNCITRAL⁽⁴⁷⁾ does not guarantee transparent arbitration either, as the treaty dates from before 1 April 2014 (and neither the Netherlands nor Kuwait ratified the Mauritius Convention). ICSID would even be less of a guarantee of transparency, as it gives ample opportunity to opt for confidentiality. So, under the current Dutch-Kuwaiti BIT, there is no guaranteed minimum level of transparency whatsoever. And this BIT is by no means unique. Very few of the existing BITs meet transparency requirements⁽⁴⁸⁾.

This situation essentially comes down to a violation of – as we have seen - a firmly established human right. And not just by States with dubious human rights records, but by those who like to see themselves as the guardian of

(43) B.K. Baker/K. Geddes, ISDS, *Intellectual Property Rights and Public Health*, in: *Rethinking Bilateral Investment Treaties* (ed. K. Singh/B. Ilge), Somo 2016, p. 189.

(44) N. Blackaby and C. Partasides with A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration*, p. 470

(45) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1851/download>

(46) It's beyond the scope of this article to go into the question whether these type of split or hybrid clauses – referring both to litigation and arbitration – are considered valid in the relevant jurisdiction or tribunal.

(47) Again, it's beyond the scope of this article to go into the question whether an arbitration clause with two options as to the rules, would constitute a valid clause.

(48) With the exception of some, such as the US-Chile Free Trade Agreement, cf. G. Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford University Press (2007), p. 164.

human rights and fundamental freedoms such as the Netherlands. As a matter of fact, this may be less surprising than it sounds, as the Netherlands has a distinctive pro-business bias when it comes to investment protection. Twelve percent of all publicly known investment cases worldwide are filed by investors who claim that they are Dutch, even though the Netherlands is party to only three per cent of all investment treaties.

Only thirteen per cent of these investors are in fact Dutch, the rest of the claims come from non-Dutch companies: mailbox companies with no substantial commercial or operational presence in the Netherlands. There is an estimated 12,000 of those letterbox companies. All legal and all of them are regarded as Dutch investors in over one hundred BITs the country concluded. And all of them are thus allowed to file suits against host-States under those BITs. This makes the Netherlands the second most popular home state - after the United States - in investor-state dispute settlement claims⁽⁴⁹⁾.

In recent years, various countries have expressed their discontent with the Dutch approach after being hit by claims brought under Dutch treaties. In addition to that, local environmental and human rights lawyers, concerned citizens and journalists expressed their discontent as well. In response to this public criticism and to implement its new ‘sustainable trade and investment policy’, the Dutch government recently introduced a new model-BIT, which is to serve as a template for negotiating new BITs and replace existing ones⁽⁵⁰⁾.

The new model offers less protection to investors, as for example it reduces the type of companies that actually rely on the treaty. As to transparency, there are changes as well, albeit not drastic. Investor-state dispute settlement provisions are still present in the new model BIT, and they still contain the ICSID or UNCITRAL option. However, art. 20 par. 13 now prescribes that “The UNCITRAL Transparency Rules shall apply to disputes under this section”. That is an improvement, although it remains to be seen how many BITs will be concluded based on this model⁽⁵¹⁾. It also remains to be seen how this would relate to the individual investment agreements concluded between investor and state.

(49) E.g. R. van Os, *Dutch Investment Treaties, Socialising Losses, Privatising Gains*, in: *Rethinking Bilateral Investment Treaties* (ed. K. Singh/b. Ilge), Somo 2016, p. 187.

(50) <https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden>

(51) So far, no new treaties based on the model are concluded: cf. <https://investmentpolicy.unctad.org/international-investment-agreements/countries/148/netherlands>

C. The relation between BITs and individual investment agreements

BITs over the years have generated some sort of legal framework that governs agreements between States and foreign investors, but it remains largely unclear how these ‘background’ treaties relate to the individual investment contracts between the host-State and the investor. The investment treaties themselves do not say anything about how they relate to individual contracts. On the transparency level, this may complicate things even more.

The problem can be illustrated by using the Kuwaiti-Dutch BIT as an example again. Let us assume that a Dutch petroleum company signs an LNG import deal with the State of Kuwait. In the contract it is stipulated that disputes will be settled by arbitration under ICC rules. Furthermore, it contains a confidentiality clause stating that all negotiations, mediation, arbitration, and expert determinations relating to a dispute are confidential and may not be disclosed by the parties. Now, there is also the BIT of 2001 that allows the investor to either go to court or to ICSID or UNCITRAL arbitration.

Needless to say, that if a dispute arises things may become muddy. If the State initiates ICC-arbitration, can the company argue that ICC lacks competence as the dispute should be brought before UNCITRAL, or ICSID. Or vice versa: if the company goes to court or initiates ICSID arbitration, can the State rebut by saying they should go to the ICC? It all comes down to the question: which one prevails, the BIT or the contract?

Investment tribunals have not (yet) dealt with conflicting arbitration clauses (ICC v. ICSID for example), but they were confronted with questions regarding collisions between arbitration and forum selection clauses. Faced with treaty silence, their answers have been few, irregular and inconsistent, giving sometimes priority to treaty and sometimes to contract.

In *SGS v. Philippines* for example, the dispute on the merits concerned the failure of the Philippines to pay substantial contractual fees for import supervision services provided by SGS, headquartered in Switzerland⁽⁵²⁾. The company ignored the contract’s forum selection clause and sought relief through arbitration, as provided for in Switzerland’s BIT with the Philippines. The tribunal ruled in favour of the contract as the forum clause was considered part of the deal, which could have been negotiated non-exclusively, but wasn’t.

Party autonomy thus prevailed and the tribunal issued a stay⁽⁵³⁾. Six years later,

(52) *SGS v. Philippines*, ICSID Case no. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004).

(53) Y. Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims*, *The American Journal of International Law*, Vol. 99, Issue 4 (2005), p.835-851.

SGS was involved in a similar case, this time against Paraguay⁽⁵⁴⁾. The BIT, contract and facts were similar to the Philippine case, but this time the tribunal gave priority of the treaty provision over the contractual one. It considered the dispute at stake as covered by treaty obligations, generated by the umbrella clause in the BIT⁽⁵⁵⁾.

Thus, as Arato puts it: “international investment law is frustratingly fragmented – comprised of thousands of treaties, which are interpreted with semi-precedential effect on an ad hoc basis, by one-off arbitral panels”⁽⁵⁶⁾. To those seeking maximum confidentiality, this existing practice of uncertainty is prone to treaty shopping.

6. Practicalities: when, how, what

Now that we have established that there is a duty to disclose information, the next question is: when should this be done: during or at the end of the proceedings? The Human Rights Committee highlighted in its recommendation that States should ensure prompt access to information. Equally so in the Claude Reyes case, where the court stated that the public can “question, investigate, and consider whether public functions are being performed adequately”⁽⁵⁷⁾, which can be interpreted as ‘timely’⁽⁵⁸⁾.

The UNCITRAL Transparency Rules reflect this stance. Art. 2 prescribes that the repository shall promptly inform the public about the start of an arbitration proceedings, including the names of the disputing parties, the economic sector involved and the treaty under which the claim is made. Art. 3 lists the documents that will be made available, such as the statement of claim, statement of defence and witness statements⁽⁵⁹⁾.

Then there are the hearings. The UNCITRAL rules are very clear about this. Art. 6 par 1 reads: “[...] hearings for the presentation of evidence or for oral argument [...] shall be public.” The article furthermore provides that

(54) *SGS v. Paraguay*, ICSID Case no. ARB/07/29, Decision on Jurisdiction (12 February 2010).

(55) It is outside the scope of this article to go into the controversial provision of an umbrella clause in a BIT. Suffice it to say that they essentially provide that violation of the contract is considered violation of the treaty, thereby elevating the contract to treaty level, which gives investors certain advantages such as avoiding a forum clause in the contract. Cf. J. Arato, *The Logic of Contract in the World of Investment Treaties*, 58 Wm. & Mary L. Rev. 351 (2016), p. 373.

(56) Arato, *ibid.* p. 416.

(57) Claude Reyes etc.

(58) Orellana, *ibid.* p. 79.

(59) The full list: notice of arbitration, response to the notice, statement of claim, statement of defence and any further written statements or submissions, a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, any written submissions by non-disputing parties or third persons, transcripts of hearings, orders, decisions and awards of the tribunal etc.

the tribunal shall make logistical arrangements to facilitate public access, for example by “organizing attendance through video links or such other means as it deems appropriate”⁽⁶⁰⁾. Here, examples can be taken from international tribunals that already have ample experience with ‘virtual attendance’, such as the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia and the European Court of Human Rights.

All in all, practicalities, especially in this online day and age, cannot be used as a pretext to prevent or delay access to information. This leaves us with one final question: are there any limits to the right to transparency? Yes, there are.

7. Restrictions to transparency

All human rights instruments acknowledge limitations to the right of access to information. Generally speaking, limits apply when serious harm or the public interest is at stake. Most international and national instruments contain specific lists of exceptions regarding the *content* of information sought, usually consisting of the following restrictions in one form or another: national security; defence and international relations; public safety; the prevention, investigation and prosecution of criminal activities; privacy and other legitimate private interests; commercial and other economic interests; inspection, control and supervision by public authorities; the economic, monetary and exchange rate policies of the state and the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

As to the right of a fair and public hearing by a competent impartial tribunal established by law, there are limits to that as well.⁽⁶¹⁾ The ICCPR for example, provides for the possibility of excluding public or press from hearings for reasons of morals, public order or national security, or when the interest of private lives of the parties so requires. These are considered and to be treated as exceptional circumstances and are mostly designed for criminal proceedings (although the article applies to civil suits as well).

Media presence and public discussion around investments disputes, where public interests and the performance of the government are at stake, are not to be seen as exceptional circumstances. On the contrary, as the Human Rights Committee observed: “The publicity of hearings is an important safeguard in the interest of the individual and of society at large”⁽⁶²⁾.

(60) Art. 6 par 3 UNCITRAL Transparency Rules.

(61) Cf. Art. 14 ICCPR.

(62) Office of the UN High Commissioner for Human Rights, Human Rights Committee, General Comment No 13: Equality before courts and the right to a fair and public hearing by an independent

Both the Inter-American Court and the European Court addressed the issue of permissible restrictions. In the *Claude Reyes* case, the court stated that any limitations of the right to information are subject to strict requirements, such as: 1) they must have been previously established by law for the general interest so as not to be left to the discretion of public authorities; 2) the restriction should suit a purpose allowed by the American Convention of Human Rights and 3) the restriction should be necessary and proportional.

Similarly, in the *Tarsasag* case, the European Court concluded that the *de facto* information monopoly of a government when it erects barriers to the free exercise of the press regarding issues of public interest, was not called for in a democratic society.

Thus, international human rights instruments and tribunals, as well as national access to information instruments, require a restrictive interpretation of limitations to the enjoyment of the right to access to information and the publicity of court hearings. Maximum disclosure is the rule, confidentiality the exception. Restrictions are only justified under strict conditions, none of which are met in the average investment case⁽⁶³⁾.

What is most certainly not accepted, is a general and unqualified denial of access to hearings, pleadings, submissions and awards. In other words: the up until recently common practice of full confidentiality in investment arbitration not just restricts but fully suppresses the right to access to information and publicity of court hearings, without this blanket-suppression being justified by legal restrictions.

The next issue is whether arbitral tribunals are the right instances to decide over these questions. If one of the parties raises a concern regarding (the lack of) confidentiality - or transparency – it is up to the arbitral tribunal to tackle the issue. This is problematic, as these are essentially issues of human rights law. It is questionable whether such issues are at home in arbitral tribunals, with arbitrators who rarely specialize in human rights but rather are ‘borrowed’ from the world of commercial arbitration. Furthermore, due the very same lack of transparency, arbitrators do not have access to an extensive set of case law to rely upon. However, the few cases that we *do* know are not showing very promising outcomes.

In the *Metalclad* case for example, about the construction of a hazardous

court established by law (Art. 14), 21st Sess, par. 6. Accessible through: <https://www.refworld.org/docid/453883f90.html>.

(63) Orellana, p. 85.

waste site, Mexico applied to the ICSID tribunal for a confidentiality order. The tribunal remarked that:

“It would be of advantage to the orderly unfolding of the arbitral process and conducive in the maintenance of working relationships between the parties if during the proceedings they were both to limit public discussions of the case to a minimum, subject only to any externally imposed obligations by which either of them may be legally bound”⁽⁶⁴⁾.

The tribunal should have denied any request for confidentiality, especially as the request was done by a State, being the very entity that should guarantee the right of access to information, instead of asking the tribunal to undermine it.

In the Biwater case, concerning the privatization of a water concession in Tanzania, the tribunal was faced with a request for confidentiality by the investor. Biwater deemed publicity around the case harmful. Tanzania on the other hand, took into account its obligations towards its citizens to provide them with information. One would expect the tribunal to reason in favour of Tanzania, not to have a choice even, from a human rights perspective. However, the opposite occurred:

“Given the media campaign that has already been fought on both sides of this case (by many entities beyond the parties to this arbitration), and the general media interest that already exists, the Tribunal is satisfied that there exists a sufficient risk of harm or prejudice, as well as aggravation, in this case to warrant some form of control”⁽⁶⁵⁾.

In the eyes of the tribunal, transparency and arbitration are competing interests. It thus failed to acknowledge that transparency is an essential element in procedural integrity, which is at odds with human rights law⁽⁶⁶⁾. Even more worrisome was the argument of the tribunal that “parties are free, of course, to conclude any agreements they choose concerning confidentiality”. The problem is: they are not. The binding character of human rights – and it is here that the words ‘of course’ would have been appropriate - prevents parties from contracting them out.

(64) *Metalclad Co. v. United Mexican States*, ICSID Case No. ARB/(AF)97/1, Confidentiality Order (Oct. 27, 1997).

(65) *Biwater Gauff (Tanzania) v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order (July 24, 2008).

(66) Similar decisions were taken in *BG Group Plc. V. Argentine Republic*, UNCITRAL, Procedural Order No. 3 (Dec. 3, 2004) and *Giovanna a Beccara and Others v. The Argentine Republic*, ICSID Case No. ARB 07/05, Procedural Order (Jan. 27, 2005).

8. Summary and conclusion

There is no doubt as to the existence of a right to transparency, as laid down in numerous human rights instruments and confirmed by human rights tribunals. With that right comes the obligation for states to provide the public with access to information. However, by opting for investment arbitration, states have for decades successfully dodged that obligation.

The confidential character of investment arbitration - with rules borrowed from regular commercial arbitration where confidentiality is standard - helped to keep cases away from publicity. One could speak of large-scale human rights violations. As dramatic as that may sound, it is true. And countries violating the right of access to information must be held accountable. It is indeed rather cynical that countries like the Netherlands, claiming to be frontrunners of international law and human rights, turn out to be one of the major advocates of secret investment arbitration.

Since the beginning of the 2000s things started to change. Driven by increasing awareness and activism in environmental matters, NGOs, journalists and concerned citizens started pressing for more transparency and insisted on having their voice heard in investment disputes where the environment was at stake, which turned out to be rather often the case.

Tribunals were asked to decide on confidentiality (or transparency) requests and the arbitration institutes were forced to reconsider their rules. It led to transparency initiatives such as those of ICSID and UNCITRAL. This is hardly surprising as both are UN-related bodies of international law, so if anything, it was about time they aligned their rules with human rights.

It is however debatable whether they fully succeeded in doing so. Only UNCITRAL delivers far-reaching transparency safeguards, albeit only for post-1 April 2014 treaties, of which there are few. ICSID is half-heartedly in its transparency ambitions, in that it gives parties ample opt-out possibilities. The ICC is even less impressive in that it offers a scrap of transparency, which can be easily refused by parties if they so wish.

Perhaps it is not enough to look at the arbitration rules for change. Perhaps states should take responsibility and start with their own laws. Perhaps what *should* be considered are provisions in domestic legislation, which either prohibit the state from entering into arbitration at all, or if arbitration is allowed, it must meet full standards of transparency, including open hearings and full disclosure of submitted documents to the public. Such domestic laws

would force host-states to enter into agreements which *must* refer to arbitration rules that meet these requirements, whether these are individual agreements or BITs.

Even better would be to leave out state-investor dispute settlement out of the BITs altogether, as it creates opportunities for parties to go treaty shopping for the most confidential option. Remember: even if the arbitration clause in a BIT refers to ICSID or UNCITRAL (as they often do), this may not work. If there is an investment contract with a conflicting clause, it is unclear which one will 'win'. All these uncertainties, differences and inconsistencies give parties plenty of opportunity to seek a way that works best for them, which is very likely a maximum level of confidentiality.

The role of the BIT should therefore be that of a transparency watchdog, supporting domestic legislation, containing general provisions of transparency and participation. The dispute settlement method is left to parties in their individual contract, but whichever they choose, it must meet the transparency threshold of the BIT. The United States-Chile Free Trade Agreement can serve as an example. The agreement works solely between the two signatory States and does not create any rights for the individual investors. Furthermore, it contains explicit provisions on transparency and participation governing dispute settlement⁽⁶⁷⁾.

Does that mean that from now on everything must be out in the open? No, there are well-established limits to the right of access to information and the right to a public hearing. However, these restrictions must be scarcely used and under strict conditions. Arbitral tribunals should realize they are not only called to settle what are essentially commercial disputes but may sometimes have to function as guardians of human rights. This may not be a role all arbitrators are familiar or comfortable with. It may even feel wrong to them, when both parties would prefer confidentiality. However, when it comes to transparency, arbitration – and thus arbitrators - should no longer be the instrument used by both investors and states to keep investment disputes away from the public eye.

(67) United States-Chile Free Trade Agreement of 1 January 2004, Art. 22.10: https://ustr.gov/sites/default/files/uploads/agreements/fta/_asset_upload_file683_4016.pdf

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Table of Contents:

Subject	Page
Abstract	59
1. Introduction	60
2. The right to transparency	63
a. The right to access to information	63
b. The right to public hearings	66
3. What needs fixing?	67
4. Transparency initiatives in arbitration rules	68
a. ICSID	68
b. UNCITRAL	69
c. ICC	70
5. The role of BIT	71
s in investment arbitration	71
a. BITs and their background	71
b. The example of the Dutch BIT practice	72
C. The relation between BITs and individual investment agreements	74
6. Practicalities: when, how, what	75
7. Restrictions to transparency	76
8. Summary and conclusion	79
References	81

