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THE QUEST FOR TRANSPARENCY IN INVESTOR-STATE ARBITRATION: ARE THE TRANSPARENCY RULES AND THE MAURITIUS CONVENTION EFFECTIVE INSTRUMENTS OF REFORM?

Enuma U. Moneke*

Abstract

In recent years, critics have questioned the legitimacy of international investment law, particularly investor-State arbitration on the grounds, amongst others, that confidentiality and lack of transparency in arbitral proceedings pose a threat to the basic principles of public law and democracy. In response, minimal transparency measures have been introduced by States, regional international economic organizations and ICSID over the last two decades. More recently, the Transparency Rules and the Mauritius Convention were introduced by the UNCITRAL for a more far-reaching impact. These instruments have been widely applauded as the much awaited solution for entrenching transparency and enhancing the legitimacy of treaty-based investor-State arbitration. But will they really establish transparency in ISA considering the opt-out provisions in article 1(1) of the Transparency Rules and article 3(1) of the Mauritius Convention? In attempting this question, the article examined the concept of treaty based ISA, its public character and the possible effect the opt-out provisions could have on the quest for transparency. It posited that a mechanism that allows parties – States and foreign investors - a choice whether or not to apply these instruments in a given arbitration will impede the attainment of the objective of entrenching transparency in investor-State arbitration.

1.0.Introduction

Privacy and confidentiality are hallmarks of arbitration. The need to protect business plans, financial results and essential security interests is a key reason why businesses, foreign investors, governments may choose to arbitrate investment disputes. The issue of confidentiality and lack of transparency in investor-State arbitration has been the subject of intense scrutiny and criticisms by key actors in the field – mostly, scholars of international investment law and non-governmental organisations, who often perceive the mechanism as shrouded in secrecy and lacking legitimacy. This perception stems from the fact that despite the public character of investor-State arbitration, the public has had limited access to investment arbitral proceedings; to information regarding the existence of a specific dispute; or even access to details of investment arbitral awards. Also, there have been limited

opportunities for *amicus curiae* submissions or non-disputing party participation in investor-State arbitral proceedings.

In recent times, there has been a move towards entrenching transparency in investor-State arbitration. As part of efforts made in this regard, some States and regional international economic organisations have included transparency provisions in international investment agreements (IIAs) concluded by them.[1] The International Centre for the Settlement of Investment Disputes (ICSID) has also amended its Rules of Procedure for Arbitration Proceedings (ICSID Rules) in 2006 to include some minimal transparency measures.[2] But more remarkable and on a global scale, are the recent efforts by the United Nations Commission on International Trade Law (UNCITRAL) which include the introduction of the Rules on Transparency in Treaty-based Investor-State Arbitration (Transparency Rules) 2013,[3] the establishment of the Transparency Registry and the development of the Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention),[4] which was adopted by the General Assembly of the United Nations (UN) in 2014 to give the Transparency Rules a widespread application. The revision in 2013, of the UNCITRAL Arbitration Rules 2010 to incorporate the Transparency Rules is also part of the efforts.[5]

The Transparency Rules and the Mauritius Convention each apply to different categories of treaties and effectively require public disclosure of a broad range of information submitted to and issued by investment arbitral tribunals. They provide for open hearings and also facilitate participation by *amicus curiae* and non-disputing State parties. These instruments have been widely applauded as possessing the capacity to establish transparency as a general principle of international investment law.[6] However, article 1(1) of the Transparency Rules and article 3(1)

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[1] See ASEAN - Australia-New Zealand Free Trade Agreement (signed 27 February 2009, in force 1 January 2010), Ch 11, art 26(1); See North American Free Trade Agreement (Canada –Mexico- United States) (signed 17 December 1992, in force 1 January 1994), Ch 11, article 1126(13); see also the United Nations Conference on Trade and Development (UNCTAD) Handbook 2012, the International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development-Negotiators' Handbook 2006 and the Southern African Development Community (SADC) Model Bilateral Investment Treaty Template 2012, all of which contain negotiating tips and /or standard clauses on transparency.

[2] Hereinafter referred to as the "ICSID Rules", r 32 and 37(2). The ICSID Arbitration Additional Facility Rules were also amended to enhance transparency in arbitral proceedings, see arts 39(2) and 41(3).

[3] Hereinafter referred to as the, "Transparency Rules" or the "Rules".

[4] Hereinafter referred to as the "Mauritius Convention".

[5] Hereinafter referred to as the "UNCITRAL Arbitration Rules", art 1(4).

[6] See for instance, Stephan Schill, 'The Mauritius Convention on Transparency: A Model for Investment Law Reform?' (April 8, 2015)<https://www.ejiltalk.org/the-mauritius-convention-on-transparency-a-model-for-investment-law-reform/> accessed 11 March 2019; see also United Nations, 'Draft Transparency Convention 'a

of the Mauritius Convention allows States to opt-out of transparency, thereby raising questions as to whether the high expectations for transparency and legitimacy in investor-State arbitration are real or illusory.

The article commences with a discussion on investment treaty arbitration. Next, it examines the issue of confidentiality and lack of transparency in arbitration *vis-a-vis* the public character of investor-State arbitration. It then elaborates on the application of the Transparency Rules and the Mauritius Convention and their key provisions. Finally, the article discusses the import of the opt-out provisions in these instruments and the negative impact they could have on the quest for transparency in investor-State arbitration.

2.0.Treaty Based Investor-State Arbitration: A Background

The international regime for international investments currently consists of 3,317 IIAs, 2932 of which are bilateral investment treaties (BITs).[7] IIAs promote trade in the sense that countries that conclude them reap economic benefits. While the host States use capital invested by investors to build local industries, create employment opportunities and enhance infrastructure delivery, the investors make profit from those investments.[8] IIAs are predicated upon a bifurcated regime for the protection of investments. First, they confer certain substantive rights on investors in the form of international obligations placed upon contracting States. With these obligations, States are mandated to uphold certain standards of investment protection in relation to foreign investors and their investments. Such protections include fair and equitable treatment; full protection and security of investment; protection from expropriation; prompt and adequate compensation in the event of expropriation; national treatment; most favoured

Powerful Instrument' in Treaty-based Arbitration United Nations International Trade Law body tells Sixth Committee' (13 October 2014)<https://www.un.org/press/en/2014/gal3479.doc.htm> accessed 11 March 2019.

[7]Of the 3317 IIAs concluded, 2658 are in force. Examples of BITs include the Agreement for the Reciprocal Promotion and Protection of Investments (Serbia-United Kingdom) (signed 6 November 2002, in force 3 April 2007); Agreement for the Promotion and Protection of Investments (Austria-Egypt) (signed 12 December 2001, in force 29 April 2002); Reciprocal Investment Promotion and Protection Agreement (Morocco-Nigeria) (signed 3 December 2016, not yet in force) and more recently, the Agreement for Cooperation and Facilitation of Investments (Brazil-Ethiopia) (signed 11 April 2018, not yet in force).Multilateral investment treaties such as the Energy Charter Treaty (ECT) (signed 17 December 1994, in force 16 April 1998) and the North American Free Trade Agreement (NAFTA) (signed 17 December 1992, in force 1 January 1994, revised to form the United States-Mexico-Canada Agreement (USMCA) which was signed 30 November 2018) are also categorized as IIAs; see United Nations Conference on Trade and Development, 'World Investment Report 2019: Special Economic Zones' (United Nations, 2019) 99; United Nations Conference on Trade and Development, 'International Investment Agreement Navigator' <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 12 November 2019.

[8] Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521; David W. Rizkin, 'Investor-State Arbitration (ISDS) and the New York Convention' (2016) 82 (1) The International Journal of Arbitration, Mediation and Dispute Management 34.

nation treatment and free capital transfer, amongst others.[9] Second, IIAs permit investors to enforce those substantive protections provided in the treaties through the instrumentality of arbitration, hence the name treaty based investor-State arbitration. Investor-State arbitration is based on the commercial arbitration model. It often commences where the foreign investor alleges that the host government of the investment has taken an action or decision, or introduced new laws, regulations or policies which have adversely affected their investment. Where negotiations and consultations prove futile, the investor would usually initiate arbitration under the applicable investment treaty by sending a Notice of Arbitration to the host State.[10] The parties select the arbitral tribunal, usually made up of three arbitrators, one selected by each of the parties and one chair chosen by either of the two selected arbitrators or the arbitral institution.[11] An IIA would usually contain a list of arbitral institutions that the parties may choose from.[12] The role of the arbitral institution would be to administer and supervise the arbitration. The parties may select from private institutional fora, such as the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) or international fora such as ICSID and the Permanent Court of Arbitration (PCA). They will also choose the procedural rules that will govern the conduct of the arbitral proceedings. The ICSID Rules of Procedure for Arbitration and the UNCITRAL Arbitration Rules are the most widely used sets of rules in investor-State arbitration. As at 12 November 2019, the ICSID Rules of Procedure for Arbitration had been used in 528 arbitrations, while the UNCITRAL Arbitration Rules had been applied in 308 cases.[13] Also, the ICSID and PCA are the two most used arbitral institutions for investor-State arbitration.[14] As soon as the arbitral tribunal is constituted, the parties begin the exchange of pleadings; meetings are convened and hearings are held to present evidence. At the close of proceedings, the tribunal issues a binding award.

[9] See for instance, articles 3 -7 of the United States Model BIT 2004; articles 3 – 7 of the United States Model BIT 2012; Chapter 2 of the Investment Promotion and Protection Agreement (Nigeria-Singapore) (signed 4 November 2016, not yet in force).

[10] In the case of arbitrations conducted pursuant to the International Chamber of Commerce (ICC) Arbitration Rules 2012, a Request for Arbitration is served on the host State. This also applies to arbitrations conducted under the ICSID Rules of Arbitration Procedure and the ICSID Convention. For arbitrations governed by the UNCITRAL Arbitration Rules and other *ad hoc* rules a Notice of Arbitration is served instead.

[11] Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 Vanderbilt Journal of Transnational Law 775.

[12] Aside arbitration, IIAs also allow parties a choice to resolve disputes through the national courts of the host-State. See for instance article 8(2) (a) of the Agreement for the Reciprocal Promotion and Protection of Investments (Nigeria- Italy) (signed 27 September 2000, in force 22 August 2005).

[13]See United Nations Conference on Trade and Development (UNCTAD), 'Investment Dispute Settlement Navigator'<https://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution > accessed 11 November 2019.

[14] United Nations Conference on Trade and Development, 'Arbitral Rules and Administering Institution' <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 16 November 2019.

The investor-State arbitration system is a sharp contrast to the traditional mechanism for the settlement of investment disputes. Prior to the advent of investor-State arbitration an individual or corporation who sought to assert a claim against a foreign State for breach of customary international law could not do so directly. Rather they had to depend on their government to assert the claim on their behalf.[15] The more powerful and influential individuals would often persuade their government to dispatch a delegation of warships to anchor off the coast of the host State of the investment until recompense was received.[16] Where a State refused to embrace the claims of its nationals, usually for political reasons, no remedy was generally available to that national other than action in the courts of the offending State, which were often seen as biased. [17] Thus, the previous regime for resolution of investor-State disputes was basically predicated upon the institution of diplomatic protection and "gun boat diplomacy".[18] Gunboat diplomacy finally came to an end with the signing, in 1907 of the Convention on the Peaceful Resolution of International Disputes which laid down the framework for the execution of bilateral arbitration treaties.[19] Under this treaty, a State espoused the claim of its national by virtue of their (national's) right to diplomatic protection and resolved disputes through State-State arbitration.[20] However, the procedure was still considered unsatisfactory as aggrieved nationals did not have a direct cause of action and had to rely on their government to pursue their claims against offending States.[21] A direct form of recourse was introduced with the creation of the ICSID mechanism. The ICSID is established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) 1965 which aims to facilitate the settlement of investment disputes between a contracting State and an investor who is a national of another contracting State with a view to

[15]N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press, 2015) 441 para 8.01.
[16] ibid 8.01.
[17]Christoph H. Schreuer, 'Investment Arbitration' (2014) in Cesare P. R. Romano, Karen J. Alter and Yuval Shany (eds.), *Oxford Handbook of International Adjudication* (Oxford University Press 2014) (as cited in 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' (2016) 5 <www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf >accessed 11 November 2019).
[18]Kaufmann-Kohler and Potesta (n 17).
[19] Blackaby and Partasides (n 15) 8.03.
[20] Blackaby and Partasides (n 15) 8.04.
[21] In describing the plight of the aggrieved investor, Brierley opined as follows, 'he has no remedy of his own, and the state to which he belongs may be unwilling to take up his case for reasons which have nothing to do with its merits; and even if it is willing to do so, there may be interminable delays before, if ever, the defendant state can be induced to let the matter go to arbitration…it has been suggested that a solution might be found by allowing individuals access in their own right to some form of international tribunal for the purpose…' See J.L. Brierley, *The Law of Nations* (6th edn, Oxford University Press, 1963) 277. In: Blackaby and Partasides (n 15) para 8.06.

promoting foreign investment.[22] The mechanism created by the Convention provided for a new arbitral forum for the direct resolution of disputes between investors and States through the incorporation of arbitration clauses in State contracts.[23] The ICSID style of dispute resolution eventually found its way into national investment laws and IIAs.

Today, arbitration is widely used in the resolution of treaty based investor-State disputes.[24] From 15 known cases in 1998 to 942 at the end of 2018, the mechanism has witnessed significant expansion.[25] For proponents of the foreign investment regime, IIAs have contributed, '…to the strengthening of the rule of law at the international level'.[26] More importantly, investor-State arbitration has significantly reduced the risk of investment disputes deteriorating into inter-State conflicts.[27] These encomiums notwithstanding, investor-State arbitration has been the subject of intense scrutiny and criticism by States, investors, public authorities, non-governmental organisations, domestic and international law scholars.[28] Some of these criticisms have related to the excessiveness of the discretion granted to tribunals engaged to interpret and apply substantive treaty standards which are often drafted in ambiguous and very broad terms;[29] inconsistencies and contradictions in awards rendered by tribunals which impede the development of consistent jurisprudence;[30] excessive costs incurred by parties in investment arbitral proceedings and;[31] lack of a proper appellate mechanism.[32]

[22]As of 14 October 2019, 163 countries have signed the ICSID Convention; see the International Centre for the Settlement of Investment Disputes, 'Database of ICSID Member States' (2017) <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> accessed 14 October 2019.
[23]Blackaby and Partasides (n 15) 8.08.
[24] See the 2nd Preamble to the Transparency Rules; 1st Preamble to the Mauritius Convention.
[25]United Nations Conference on Trade and Development, 'World Investment Report 2019: Special Economic Zones' (n 7).
[26] Thomas W. Walde, 'Investment Arbitration and Sustainable Development: Good Intentions - or Effective Results? Transnational Dispute Management' (2006) Vol. 3(5) (as cited in Kaufmann-Kohler and Potesta (n 17)).
[27] Ibrahim F.I. Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA', (1986) 1(1) ICSID Review – Foreign Investment Law Journal 1.
[28] Stephan W Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52(1) Virginia Journal of International Law 57.
[29]In recent times, however, States have taken steps to address this issue by concluding treaties that have more precise standards. For instance, the fair and equitable treatment (FET) clause which has been described as a "catch all" is now more precisely defined in some newer IIAs. An example is the FET provision of the Morocco-Nigeria BIT (2016) which unequivocally states that the extent of the treatment to be afforded to foreign investors is the minimum standard of treatment allowed under customary international law; see Morocco-Nigeria BIT (2016), art 7; International Institute for Sustainable Development, 'Investment Treaties and why they matter to Sustainable Development: Questions and Answers' (2012)< https://www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf> accessed 13 November 2019.
[30] See for instance, *CME Czech Republic BV v Czech Republic,* Ad Hoc UNCITRAL Arbitration Rules, partial award (13 September, 2001); IIC 62 (2003), final award (14 March 2003), initiated under the Czech-Netherlands BIT and *Lauder v Czech Republic,* Ad Hoc UNCITRAL Arbitration Rules, Final Award, (3 September, 2001).
[31]United Nations Conference on Trade and Development IIA Issues Note, 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap' (June 2013) Issue 2, 4.
[32] Under the ICSID, an internal mechanism is used for the review of decisions made further to the ICSID Rules of Arbitration. Thus, local courts do not have jurisdiction to review ICSID awards. However, commercial

There has also been a backlash against excessive confidentiality and lack of transparency in investment arbitral proceedings. This is the first and major criticism of investor-State arbitration.[33] The issue of confidentiality and lack of transparency in investor-State arbitration is discussed in the succeeding section.

3.0.Confidentiality and Lack of Transparency in Investor-State Arbitration: The Public Interest Angle

Transparency in the context of this article refers to the extent to which the public may be notified of, obtain information about and possibly, take part in arbitral proceedings established to decide a claim made by a foreign investor. The freedom of contract is one of the hallmarks of arbitration, thus parties may decide that proceedings be conducted confidentially.[34] In fact, 'confidentiality may be the very reason the parties agreed to dispute resolution by arbitration in the first place'.[35] Parties may choose to keep proceedings confidential for a variety of reasons. For States, confidentiality enables them maintain secrecy of information concerning essential State security interests. Also, it helps them avoid political implications that may arise from public disclosure.[36] For investors, confidentiality allows them to shield sensitive information such as company secrets and business information from the media and competitors.[37] Also, confidentiality in arbitration ensures that long-standing business relationships are not completely damaged;[38] it prevents the establishment of adverse judicial precedents;[39] it allows parties ample freedom to thoroughly argue their cases, even where issues

arbitration awards or investment awards rendered pursuant to the UNCITRAL Arbitration Rules may be reviewed by domestic courts.

[33] Kaufmann-Kohler and Potesta (n 17).

[34] Joao Ribeiro and Michael Douglas, 'Transparency in Investor-State Arbitration: The Way Forward' [2015] 11 Asian International Arbitration Journal 49.

[35] Ribeiro and Douglas (n 34); However, research conducted by Naimark and Keer implies that privacy or confidentiality is not the most desired of the advantages that international commercial arbitration offers; see Richard W Naimark and Stephanie E Keer, 'What do Parties really want from International Commercial Arbitration?' AAA Dispute Resolution Journal 78 (as cited in Cindy Galway Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration' (2003) 14 (121) American Review of International Arbitration 121, 122)

[36] Valerie Li, 'Protecting Confidentiality in Investor-State Arbitration' *International Arbitration Law: Network and Resources* (1 March 2017) <http://internationalarbitrationlaw.com/blog/protecting-confidentiality-in-investor-state-arbitration/ > accessed 13 November 2019.

[37]Ileana M Smeureanu, *Confidentiality in International Commercial Arbitration* (Wolters Kluwer, 2011) xv (as cited in Ribeiro and Douglas (n 34); Avinash Poorooye and Ron´an Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' [2017] 22 Harvard Negotiation Law Review 275.

[38] Charles S. Baldwin, 'Protecting Confidentiality and Proprietary Commercial Information in International Arbitration', (1996) 31 Texas International Law Journal 451, 453 (as cited in Pooroye and Feehily (n 37) 278).

[39] Poorooye and Feehily (n 37) 278; See also Christoph Henkel, 'The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration' (2012) 37 The North Carolina Journal of International Law 1059, 1060.

of a sensitive nature are involved.[40] Consequently, arbitral proceedings are not transparent. As with commercial arbitration, investment arbitral proceedings, are not open to the public. The possibilities for third-parties who may be affected by the outcome of the proceedings, to participate or submit *amicus curiae* briefs are very limited. Unlike court judgments, investment arbitral awards are not published and, even where they are published, the contents are heavily redacted. Investor-State arbitration is thus antithetical to the common law principle of open justice which is a hallmark of litigation. [41] The essence of this principle is that proceedings are conducted publicly; submissions are made openly; evidence is tendered in full glare of the public; the decisions and reasons for same, are published.[42] For commercial and other forms of arbitration, the lack of transparency does not present much problems because such proceedings usually implicates only the interest of the parties to the proceedings. However, the absence of transparency in arbitral proceedings does not sit well with the critics of investor-State arbitration because it undoubtedly has, a very public character.[43]

According to Macgraw and Amerasinghe, there are several perspectives to public interest in investor-State arbitration.[44] First, the State is often involved in investor-State arbitrations in its capacity as a sovereign government democratically elected by the people of the host State of the investment to govern in their interest.[45] The public definitely has an interest in any actions that involve their government in such capacity. Second, investor-State arbitration usually involves accusations of wrongdoing by the State.[46] Clearly, this catches the attention of the public. Third, investor-State arbitration implicates the interests of the nationals and residents of the respondent (host) State.[47] It may involve challenges to government laws, regulations,

[40] Florentino P. Feiciano, 'The "Ordre Public" Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration' (2012) 87 Philippine Law Journal 1, 2 (as cited in Poorooye and Feehily (n 37) 278).
[41]Ribeiro and Douglas (n 34).
[42]Ribeiro and Douglas (n 34).
[43] Markus Gehring and Dimitrij Euler, 'Public Interest in Investment Arbitration' in Dimitrij Euler, *Markus Gehring and Maxi Scherer (eds.)Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015 Cambridge University Press) 7-27; United Nations Commission on International Trade Law, 'Settlement of Commercial Disputes: Revision of UNCITRAL Arbitration Rules (Observations by Canada)',(12 June 2008) paras 8-9, 41st Session of the United Nations General Assembly, A/CN.9/662<https://undocs.org/en/A/CN.9/662> accessed 13 November 2019.
[44]Daniel Barstow Magraw and Niranjali Manel Amerasinghe, 'Transparency and Public Participation in Investor-State Arbitration' (2009) 15(2) ILSA Journal of International & Comparative Law 337.
[45] ibid.
[46] ibid.
[47]United Nations Commission on International Trade Law (n 44); Corinne Montineri, 'UNCITRAL Standards onTransparencyinTreaty-BasedInvestor-State Arbitration'<https://www.victoria.ac.nz/law/research/publications/about-nzacl/publications/special-issues/hors-serie-volume-xvi,-2013/Montineri.pdf> accessed 13 November 2019.

actions and policies that protect natural resources, environment, human rights, public health and cultural heritage which are traditionally the exclusive preserve of the government.[48] The public would clearly want to know that the integrity and efficacy of such policies and actions are preserved.[49] Examples of cases illustrating the public character of investor-State arbitrations include, *Aguas del Tunari SA v Republic of Bolivia* and *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* which pertained to the drinking water supply system in Bolivia[50] and Tanzania respectively;[51]*Methanex Corporation v United States of America*, which related to the prohibition of the use of an additive in gasoline in California;[52]*Piero Foresti v Republic of South Africa* which had to do with racially based affirmative action steps taken by the South African government;[53]*Sociedad Anonima Eduardo Vieira v Republica de Chile* which involved the alleged imposition of fishing quota on hake catches off the coast of southern Chile as a result of environmental concerns[54] and *Philip Morris Asia Limited v Australia*, which bordered on the use of standardised packaging for cigarette to reduce smoking.[55]

Fourth, the costs incurred by the government in defending such claims and the sums awarded the investor, if any, will ultimately be borne by the public. And as the sums at stake in this class of arbitration could be quite substantial, the impact that satisfying such awards may have on the welfare of the citizenry attracts public interest.[56] The public needs to know whether these costs are proportionate to the benefits that flow from investment treaties. Recently, an impact assessment of Ecuador's BITs resulted in the termination of all her BITs including those concluded with the US, Canada and China.[57] The assessment came on the heels of an order by an investment arbitration tribunal in 2012 that Ecuador should pay over 1.7 billion USD plus

[48] Macgraw and Amerasinghe (n 44).
[49] Macgraw and Amerasinghe (n 44).
[50] (ICSID, Case No ARB/02/3, 21 October 2005).
[51] (ICSID Case No ARB/05/22, 24 July 2008).
[52] (In the Matter of an Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Final Award of the Tribunal, 3 August 2005).
[53](ICSID Case No ARB(AF)/07/1, 4 August 2010).
[54](ICSID Case No ARB/04/7, 21 August 2007); See Ribeiro and Douglas (n 39).
[55] (PCA Case No.2012-12).
[56] Macgraw and Amerasinghe (n 44).
[57] Cecilia Olivet, 'Why did Ecuador terminate all its Bilateral Investment Treaties?' *TNI* (25 May 2017), <https://www.tni.org/en/article/why-did-ecuador-terminate-all-its-bilateral-investment-treaties>accessed 20 September 2019. According to the President of the CAITISA Commission, 'Ecuador has taken a sound decision by terminating its investment protection agreements. The auditing process revealed that these treaties not only failed to attract additional investment or advance the country's development plan, they also diverted millions of dollars of government money to fighting costly lawsuits. We hope other governments will learn from Ecuador's example and review their own investment agreements to find out if they are truly beneficial to their citizens.'

interest to Occidental, a United States oil company.[58] The sum was at that time, one of the highest amounts a State had ever been ordered to pay in the history of international arbitration.[59] For Ecuador, the figure accounted for fifty-nine percent of her annual budget for education and one-hundred and thirty-five percent of her yearly budget for healthcare.[60] This order prompted the Ecuadorian President to establish the Investment Treaties Audit (CAITISA) Commission to carry out *inter alia* the impact assessment. Again, in July 2014, a Permanent Court of Arbitration tribunal ordered Russia, to pay Yukos Universal Limited, an oil company registered in the Isle of Man, a staggering 50 billion USD being damages for claims resulting from a series of actions taken by the Russian government against the company.[61]According to the New York Times, '…the potential of a $50 billion pay-out, even if it took years to collect, could cloud Russia's already weak economic picture in the near term…'[62] Generally, the award of substantial sums such as the above, has raised questions as to how governments are addressing the conflict between public and private law in the context of investor-Sate arbitration. [63] They have also provoked inquiries into the impact of investor-State arbitration on the regulatory authority of States, democracy and good governance.[64] Fifth, the decisions of investment arbitral tribunals appear to be developing into a body of international investment law that is becoming an effective source of international law. In so far as this trend is continuing, the public has an interest in investor-State arbitration. [65]

Confidentiality and lack of transparency means that the public may not know that there is ongoing arbitration against the government which could hold serious implications for their well-being. Macgraw and Amerasinghe state that the public may not be aware: that an arbitration has been initiated; what the allegations of wrongdoing are; of who the arbitrators are likely to be, or are; of what legal issues are involved; of what legal arguments and factual

[58]*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* ICSID Case No. ARB/06/11 (Award).
[59]Daniela Paez-Salgado, 'Occidental v Ecuador: Partial Annulment Decision Upholds the State's Liability' (2015) <arbitrationblog.kluwerarbitration.com>accessed 7 March 2019.
[60]*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* ICSID Case No. ARB/06/11ICSID Case No. ARB/06/11 (Decision on the Stay of Enforcement).
[61] See *Yukos Universal Limited v Russia* (PCA Case No. AA 227); the actions of the Russian government that gave rise to this claim includes arrests, large tax assessments and liens, the auction of the main Yukos facilities, among others. These actions led to the bankruptcy of the company. The Permanent Court of Arbitration tribunal found that Russia's actions amounted to a breach of her obligations to Yukos under article 14 of the Energy Charter Treaty.
[62] Stanley Reed, '$50 Billion Awarded in Breakup of Yukos', *New York Times* (New York, 28 July 2014) <https://www.nytimes.com/2014/07/29/business/international/yukos-shareholders-awarded-about-50-billion-in-court-ruling.html> accessed 13 November 2019.
[63]Li (n 36).
[64] ibid.
[65] Macgraw and Amerasinghe (n 44).

assertions are being made; of what oral presentations are being made; of what procedural or interim orders are issued; of what the final award is and;[66] of what sums have been awarded against the government, if any. Confidentiality and lack of transparency as well as other shortcomings of investor-State arbitration have resulted in what has been described as a "backlash" against investor-State arbitration.[67] In the past two decades, the mainstream media has featured interesting headlines speaking of "obscure tribunals" and "secret trade courts".[68] In 2001, there was a powerful indictment of the investment chapter of NAFTA in the New York Times which attained notoriety. Referring to international arbitral tribunals established to decide claims resulting from alleged breach of NAFTA Rules by host governments, De Palma stated that:

> Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small number of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged.[69]

According to yet another Editorial in the New York Times:

> Some arbitration is necessary in international trade, not least because courts in many poor countries are corrupt, inept or unfair. Partly for this reason, the United States trade representative has pushed countries to include clause in trade agreements allowing companies to take trade disputes to arbitration, bypassing courts. But the arbitration process itself is often one-sided, favouring well-heeled corporations over poor countries, and must be made fairer than it is today. Unlike trials, arbitrations take place in secret. There is no room in the process to hear people who might be hurt, in this case Ecuador's rainforest dwellers. There is no appeal… The trade agreements that set the rules should direct arbitration panels to take a much broader view to consider not just corporate interests but the needs of government and citizens. The panels should also be

[66] Magraw and Amerasinghe (n 44).
[67] T Schultz and C Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study' (2014) 25 European Journal of International Law 1147, 1147.
[68] Kaufmann-Kohler and Potesta (n 17).
[69] Anthony De Palma, 'NAFTA's Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say', *New York Times*, (11 March 2001) <https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html>accessed 13 November 2019.

required to invite a wider range of views. Because their decisions have great public impact arbitration panels owe the public a hearing.[70]

The criticisms continued into the mid-2000s to early 2010s during which time there was already a widespread lack of trust by the public in the fairness and impartiality of investor-State arbitration. Non-governmental organisations decried their inability to participate and make *amicus curiae* submissions in investor State arbitrations. In some quarters, it was argued that investment arbitrators should not be able to make decisions affecting public interest regulations enacted by democratically elected governments in response to public concerns or, to address democratic ideals without public input.[71] In others, the argument was that international tribunals, when compared to tenured judges holding a public office, did not have sufficient relationship to the States whose actions and decisions they were called to scrutinize.[72]

It is instructive that confidentiality in investor-State arbitration has not always been absolute. Some States and regional international economic organisations have with foresight included minimal transparency provisions in treaties concluded by them, as far back as the 1990s. The North American Free Trade Agreement (NAFTA), for instance, mandates the NAFTA Secretariat in article 1126(13) to maintain a public register of the request for arbitration or notice of arbitration and receipts for that request or notice. Regardless of the criticisms that trailed the conduct of the arbitrations arising under NAFTA in the early 2000s, the article holds the view that the inclusion of article 1126(13) at a time in history when agitations for transparency were still at the budding stage, is quite commendable. Even though the article was the only provision on transparency in the NAFTA, it ensured at the very least that the public was made aware of any investment arbitration instituted pursuant to the treaty,[73] which is more than can be said for most of the IIAs concluded in that era. Also, the signatories to NAFTA issued a Note of Interpretation in 2001 making transparency the standard in all arbitrations brought under the treaty.[74] This ensured that information relating to the composition of the

[70] Editorial 'The Secret Trade Courts,' *New York Times* (27 September 2004) <https://www.nytimes.com/2004/09/27/opinion/the-secret-trade-courts.html > accessed 13 November 2019.
[71] Choudhury (n 11).
[72] ibid.
[73] Ribeiro and Douglas (n 34).
[74] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain NAFTA Chapter 11 Provisions'(31 July 2001) part A <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp> accessed 14 November 2019; article 10.21 of the US-Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) (signed 5 August 2004, in force 1 January 2009) also contained transparency provisions.

arbitral tribunal, pleadings, orders and awards amongst others were in the public domain.[75] In response to current international best practices, however, more and more recently concluded IIAs are now including transparency measures. For example, article 10(5) of the Morocco-Nigeria BIT which was concluded in 2016,[76] provides for public hearings and publication of documents in relation to an arbitration conducted pursuant to it. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) 2018 also incorporates transparency provisions.[77] While efforts made at State and regional levels should be encouraged, it must be noted that the membership of these treaties are often made up of a few countries such that any transparency provisions contained therein would hardly make the sort of sweeping impact required to fully entrench transparency as an inextricable part of international investment law.

In 2006, the ICSID made attempts to give transparency in investment arbitral proceedings a wider coverage by amending its Rules of Procedure for Arbitration of 2003. The 2006 Rules allow third parties to attend hearings and make *amicus curiae* submissions.[78] Rule 32 provides that tribunals after consultation with the Secretary-General of ICSID, can permit attendance, unless either party objects.[79]Also, rule 37(2) permits written submissions of *amicus curiae* by non-disputing parties provided certain conditions are met.[80]As at June 2018, non-disputing parties had made submissions in only seven ICSID cases, three of which include *Biwater Gauff (Tanzania) Ltd; Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*[81] and *Infinito Gold Ltd. v. Republic of Costa Rica.*[82]The non-

[75] However confidential, privileged or otherwise confidential information could be redacted; ibid; Julie A. Maupin, 'Transparency in International Investment Law: The Good, the Bad, and the Murky' in Andrea Bianchi and Anne Peters (eds.) *Transparency in International Law* (Cambridge University Press, 2013)9.
[76]Morocco-Nigeria BIT (2016) (n 7).
[77] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) 2018, art 9.24.
[78]The ICSID Additional Facility Rules 2003 were also amended in 2006, along these lines.
[79] Under the former ICSID Rules of Arbitration Procedure 2003 rule 32(2) specified that the tribunal would decide, with the consent of the parties, which other persons may attend the hearings. Accordingly, in *Aguas del Tunari v. Bolivia* (n 50), when asked by certain petitioners to attend the hearing, the Tribunal considered that, absent the agreement of the parties, it had no power to provide access to the hearings to non-parties.
[80]In determining whether to allow such a filing, article 37(2) provides that the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. See also Paul .O. Idornigie, 'Transparency in Investor-State Dispute Settlement' *This Day* (Nigeria, 28 June 2016)<https://www.pressreader.com/nigeria/thisday/20160628/281694024087101> accessed 13 November 2019.
[81] ICSID Case No. ARB/03/19.
[82] ICSID Case No. ARB/14/5.

disputing parties in these cases were non-governmental organisations.[83]The series of rules preceding the 2006 Rules were silent on *amicus curiae* submissions.[84] Prior to the 2006 amendments, ICSID published basic procedural information on all disputes registered by the Secretariat on their website. Such information included the existence of a dispute, the composition of the tribunal, and the stage of proceedings. But even with the amendments, the ICSID can still not publish awards fully unless the parties give their consent. Where parties do not give consent to the full publication of the award, rule 48 (4) mandates ICSID to publish extracts of the arbitral tribunal's legal reasoning.[85] In practice, however, parties usually consent hence most ICSID awards are fully published.[86] But the parties' submissions, expert reports and witness statements remain confidential.[87]

In spite of these amendments, the agitation for transparency and inclusiveness in investor-State arbitration continued. Thus, it appears the amendments did not make the expected impact. This is surprising because at the time of the amendments, ICSID had 143 State parties[88] and the ICSID Rules were the most frequently used rules for the settlement of investment disputes at the time. For this reason, it is thought that as ICSID had a ready market, made up a considerable number of countries to which the amendments could potentially apply, the transparency fever would catch on. Also, regardless of the wide acceptance that the ICSID Convention enjoyed, some arbitrations were still being conducted pursuant to other Rules such as the LCIA Rules and PCA Rules which did not make provisions for transparency. Further, the UNCITRAL Arbitration Rules which were the second most used Rules in investor-State arbitration were silent on the issue of transparency until the advent of the Rules on Transparency in Treaty-based Investor-State Arbitration (Transparency Rules) 2013 and subsequently, the Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) 2014.

4.0.The UNCITRAL Transparency Reforms in Investor-State Arbitration: The Transparency Rules and the Mauritius Convention

[83] The other cases include *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) where the World Health Organisation and Pan American Health Organisation made submissions; *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12); *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (n 53) and; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17).
[84] See the ICSID Rules of Procedure for Arbitration 1968, 1984 and 2003.
[85] See also, ICSID Arbitration (Additional Facility) Rules, r 53.
[86] Maupin (n 75) 10.
[87] Maupin (n 75) 10.
[88]See also Aurélia Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' [2006] 21(2) *ICSID Review-Foreign Investment Law Journal* 427.

The Transparency Rules, the Mauritius Convention and the Transparency Registry are said to be, '…the most recent successful results of a multilateral endeavor to reform investment arbitration…'[89] The Transparency Rules and the Mauritius Convention attracted much press coverage at the time of their inception, particularly as they came at a time the negotiations of the Transatlantic Trade and Investment Partnership (TIIP) and the Trans-Pacific Partnership (TPP) were underway.[90] The work on transparency in investor-State arbitration started after the revision of the UNCITRAL Arbitration Rules in 2010. During the revision process, the Canadian government advised States to work towards achieving transparency in investment arbitration, stressing that failure to do so may be tantamount to encouraging secrecy in investor-State arbitration which would contradict good governance and the sanctity of human rights which are fundamental values upon which the United Nations is predicated.[91] The policy considerations informing the appeal for transparency were summed up as follows:

> The interests involved in investor-state arbitration are substantially different from those involved in commercial arbitration, particularly when the arbitration is brought pursuant to a treaty. Investment arbitration often implicates the public interest and government policy in ways simply not salient in commercial arbitration. In particular, an investment treaty is a document of public international law, made between sovereign states, and, thus, when a dispute arises under it, the whole international community has a stake in how that dispute is resolved. Such adjudication can serve an important legal education function in so far as it furthers the understanding both of investors and States as to how certain provisions are construed and provides guidance for future dealings.
>
> Investor-State arbitration implicates the interests of the citizens and residents of the disputing State. Disputes brought pursuant to investment treaties often involve regulations with public policy implications, such as tax laws, environmental laws, health regulations and natural resources laws. Further, the defense of any claim and the payment of any award will ultimately come from public funds. As Professor John Ruggie, the Special Representative of the United Nations' Secretary-General on the

[89] Montineri (n 47).
[90] Countries such as Germany, Austria and the United States were hostile to the idea of including investor-State arbitration in an investment chapter of the TIIA. Investor-State arbitration was portrayed as a special right of large transnational corporations to circumvent domestic courts; see August Reinisch, 'The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court, in Investor-State Arbitration' (Series Paper No. 2 – March 2016, Centre for International Governance Innovation (2016)) 8; Montineri (n 47).
[91] United Nations Commission on International Trade Law (n 44).

> issue of human rights and transnational corporations and other business enterprises, explains when discussing investor-state arbitration in his report to the Human Rights Council, 'where human rights and other public interests are concerned, transparency should be a governing principle, without prejudice to legitimate commercial confidentiality'.[92]

The Transparency Rules were adopted in 2013 by the UNCITRAL following nearly three years of intense negotiations by fifty-five member States, observer States and international organizations, non-governmental and inter-governmental alike at the sessions of the UNCITRAL Working Group on Arbitration and Conciliation. The Transparency Rules require public disclosure of a broad range of information submitted to and issued by investment arbitral tribunals such as pleadings, witness statements, orders and awards. They provide for open hearings and also facilitate participation by *amicus curiae* and non-disputing State parties. In the same year, the UNCITRAL further revised its Arbitration Rules (as revised in 2010) to include a new provision, article 1(4). By virtue of this inclusion, the Transparency Rules are applicable in investor-State arbitrations arising under treaties incorporating the UNCITRAL Arbitration Rules.[93] Article 8, establishes the Transparency Registry which would serve as a central Repository for information concerning investment arbitral proceedings. [94] It must be noted that the former versions of the UNCITRAL Arbitration Rules did not allow for the publicizing of investor-State disputes. As the application of the Transparency Rules is not retrospective, it meant that it was limited in scope and would only apply to IIAs coming into force after the inception of the Rules. To require the application of the Rules to the bulk of the 3247 IIAs in force at the time of its inception, the UNCITRAL developed the Mauritius Convention which was adopted by the General Assembly of the United Nations in 2014.[95] The Transparency Registry was also established to enable the Transparency Rules fully realise their potentials. These are examined in more details below.

4.1. The Rules on Transparency in Treaty-based Investor-State Arbitration (Transparency Rules) 2013

[92] ibid.
[93]Treaties that incorporate rules other than the UNCITRAL Arbitration Rules (for instance the ICSID Rules of Procedure for Arbitration or the International Chamber of Commerce Rules of Arbitration 2012), can expressly apply the Transparency Rules to a particular case.
[94] The Registry is available at http://www.uncitral.org/transparency-registry/en/introduction.html.
[95] Mauritius Convention, arts 1 and 2(1).

The 5th Preamble to the Transparency Rules states that they were developed in recognition of the need, '… to take account of the public interest involved…' in investor-State arbitrations. Essentially, the Rules comprise of a reform-oriented collection of procedural rules that open up investment arbitral proceedings to the public. The scope of the Transparency Rules is provided for in article 1(1) which states as follows:

> The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall apply to investor-state arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors concluded on or after 1 April 2014, *unless the Parties to the treaty have agreed otherwise.*[96]

Accordingly, the Transparency Rules apply by default to investor-State arbitrations conducted pursuant to IIAs concluded after 1 April 2014 which have incorporated the UNCITRAL Arbitration Rules. The parties to an IIA may however decide that the Transparency Rules would not apply. Thus, where the State parties do not take active steps to exclude the application of Transparency Rules, they will apply as part of the UNCITRAL Arbitration Rules. The Transparency Rules are silent on the modalities for exclusion. However, it appears that the exclusion may have to be made at the time of negotiation and conclusion of the relevant IIA. It has been stated that the rationale for this libertarian paternalist approach adopted by the UNCITRAL Working Group is that '… the Rules will attract more adherents than if States had to undertake a positive step to accept them'.[97] Besides, an opt-out approach would ensure that States do not breach any obligations by applying transparency to investor-State arbitrations. [98] IIAs concluded before 1 April 2014 are not automatically covered by the Rules unless the disputing parties (State and investor) expressly consent to their application under article 1(2)(a). A case in point is *Iberdrola SA and Iberdrola Energia SAU v Bolivia.*[99] In this case, the Transparency Rules were applied through the agreement of the parties because the arbitration was initiated under the Bolivia-Spain BIT (2001).[100] The Transparency Rules may

[96] Emphasis added; for the purposes of the Transparency Rules the phrase "parties to the treaty" includes regional economic integration organizations; see the Transparency Rules, pg 5.
[97] Krista Nadakavukaren Schefer 'Scope of application' in Dimitrij Euler, *Markus Gehring and Maxi Scherer (eds.)Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015 Cambridge University Press) 51.
[98] ibid.
[99] PCA Case No. 2015-05.
[100](signed 29 October 2001, in force 9 July 2002); International Bar Association, 'Consistency, Efficiency and Transparency in Investment Treaty Arbitration' (November 2018) (Report by the IBA Arbitration Subcommittee on Investment Treaty Arbitration)< https://www.ibanet.org/Document/Default.aspx?DocumentUid=a8d68c6c-120b-4a6a-afd0-4397bc22b569> accessed 12 November 2019.

also apply to existing IIAs where State parties agree to their application under article 1(2)(b). Again, the Rules do not specify how State parties' consent to their application is to be expressed. However, it is thought that such consent may be expressed through a joint statement issued by the parties. The article 1(2) provisions are commendable. A strictly prospective application of the Transparency Rules would have downgraded the 3247 IIAs that were in force as at the inception of the Transparency Rules.[101] The opt-in approach was considered an appropriate way of ensuring that the Rules could be applied to the bulk of the international investment treaty regime without necessarily compelling States to apply rules that were never envisaged at the time the existing IIAs were concluded.[102] Article 1(9) makes the Rules available for use in investor-State arbitrations initiated pursuant to other arbitration rules or in *ad hoc* proceedings. An example is *BSG Resources Limited v Republic of Guinea* which applied the Transparency Rules in an arbitration initiated pursuant to ICSID Rules of Arbitration.[103] Usually, parties confer ample discretion on arbitral tribunals to conduct proceedings in a manner that is necessary to meet the ends of justice. In exercising such discretion, the Rules require tribunals to strike a balance between public interest and the interest of the disputants in a fair and efficient settlement of the matter.[104]

Under article 2 of the Transparency Rules, the commencement of an arbitration must be made public. To make this information public, each of the disputants are required to communicate a copy of the Notice of Arbitration to the repository, that is, the Transparency Registry.[105] On receipt of the notice, the repository is mandated to promptly provide the public with the name of the disputants, the economic sector involved and the IIA pursuant to which the claim is made.[106] This requirement is a crucial step for making sure transparency is achieved as it provides a foundation upon which the other provisions in the Rules achieve their purpose.[107] Article 3(1) mandates the automatic publication of documents pertaining to the hearing. This includes the Notice of Arbitration, the response to the Notice of Arbitration, pleadings, table of exhibits, written statements, and written submissions by third parties or non-disputing parties, transcripts of hearings, orders, decisions and awards of arbitral tribunals. Expert reports

[101] Schefer (n 97) 52
[102]UNCITRAL (n. 46) UN Doc. A/CN.9/741 [43]–[45] and 54. The opt-in approach was also thought necessary to prevent arbitral tribunals from having to carry out "dynamic interpretation" to apply the Transparency Rules in a given case.
[103] ICSID Case No. ARB/14/22
[104] Transparency Rules, art 1(4).
[105] Transparency Rules, art 8.
[106] Transparency Rules, art 2.
[107] Montineri (n 47).

and witness statements must also be disclosed, but only where a request for such is made.[108] Under article 3(3), the arbitral tribunal has a discretion whether or not to disclose exhibits and any other documents provided to or issued by it. By virtue of article 4, third parties who have an interest in contributing to the resolution of the dispute may make *amicus curiae* submissions to arbitral tribunals. The Rules provide a list of factors that must be taken into account before allowing such submissions. This includes the interests the third party might have in the arbitration as well as the usefulness of the information that they can provide.[109] The tribunal will also be mindful of public interest and the interest of the parties in deciding whether to permit such submissions.[110] The Rules allow submissions by non-disputing parties to an IIA on issues of treaty interpretation.[111] A non-disputing party may be a State or a regional economic integration organization - that is not a party to the dispute. Such submissions are often directed at avoiding lopsided interpretation of treaty provisions. Under article 5(4), tribunals are required to accept such submissions provided they do not 'disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party'.

Article 6 requires hearings to be open. The disputants, even where they decide to, cannot close hearings.[112] However, open hearings will not be allowed in three circumstances. First, if it is necessary to protect confidential or protected information as provided in article 7(2) the hearing will be closed. Thus, where a party (State or an investor) considers a particular information to be confidential or protected, they may be able exclude the disclosure of such information by virtue of article 7(1).[113]The Transparency Rules defines confidential or protected information to include:(a) confidential business information; (b) information that is protected against being made available to the public under the treaty; (c) information that is protected against being made available to the public, in the case of the information of the respondent, under the law of the respondent, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or (d) information the disclosure of which would impede law enforcement.[114] These categories of confidential or

[108] Transparency Rules, art 3(2).
[109] Transparency Rules, art 3(a) and (b).
[110] Transparency Rules, art 1(4); Lise Johnson and Nathalie Bernasconi-Osterwalder, 'New UNCITRAL ArbitrationRulesonTransparency:Application,ContentandNextSteps'(August2013)< http://ccsi.columbia.edu/files/2014/04/UNCITRAL_Rules_on_Transparency_commentary_FINAL.pdf> accessed 12 November 2019
[111] Transparency Rules, art 5(1).
[112] Johnson and Bernasconi-Osterwalder (n 110)
[113] Article 7(3) allows the tribunal discretion to determine how parties and non-parties should proceed when designating information as confidential or protected
[114] Transparency Rules, art 7(2).

protected information are somewhat overlapping. [115] For instance, a piece of information that is protected under the laws of the respondent (the State) could also fall within the category of information, the disclosure of which would impede law enforcement. In any event, whether and what piece of information will come within the exceptions will be a matter to be determined on an individual basis taking into account, the nature of the information and applicable law.[116] The Rules appear to confer on the tribunal powers to determine, on its own motion or that of a party, the substantive law when deciding whether a particular information is confidential or protected. [117] However, it appears that these powers are restricted where the information for which protection is sought is that of the respondent (State) and such information is protected under the laws of the respondent (State).[118]The tribunal's powers to determine the applicable law in these cases is also circumscribed by article 7(5) which excuses a State from disclosing information if they consider that such disclosure would be contrary to their essential security interests. It is instructive, however, that the abuse of these special State protections is somewhat prevented by article 1(6) which provides that, 'in the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail'. In essence, whether a piece of information will be protected or excluded is ultimately decided by the arbitral tribunal.

Second, the hearing will not be open where it is necessary to protect the integrity of the arbitral process.[119] A piece of information impugns the integrity of the arbitral process under the Rules if publishing it could, '…hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties, or members of the arbitral tribunal, or in comparably exceptional circumstances'.[120] Third, the hearing will be closed where an open hearing is not possible for logistical reasons. To make sure that tribunals do not abuse the authority to close hearings, article 6(3) provides that logistic issues should be addressed before the hearing to prevent problems and promote ease of access by the public. Hearings may only be closed because of unforeseen or unexpected events that subsequently arise after all necessary precautions have been taken.[121] Thus, hearings can only be closed

[115]Johnson and Bernasconi-Osterwalder (n 110).
[116]Johnson and Bernasconi-Osterwalder (n 110).
[117]Johnson and Bernasconi-Osterwalder (n 110).
[118] Transparency Rules, art 7(2)(c).
[119] Transparency Rules, 7(6).
[120] Transparency Rules art, 7(7).
[121] Transparency Rules, art 6(3).

where there are cogent and compelling reasons for doing so. Where hearings are closed in any of the three circumstances discussed above, they are only to be closed to the extent necessary.[122]

4.1.1. The Transparency Registry

In line with the objective of improving transparency in treaty-based investor-State arbitration, article 8 of the Transparency Rules provides that, 'the repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations or an institution named by UNCITRAL.' To this effect, the Transparency Registry was established under the Rules to function as a central repository for the publication of important information relating to investor-State arbitration conducted pursuant to the Rules.[123] The Registry would also serve as a repository where it is appointed to do so by parties to an IIA or to a dispute regardless of whether the Rules are applicable. [124] It became effective as of 1 April 2014. The Registry is innovative as it seeks to provide the public with free access to a service with reliable and exhaustive information concerning investor-State arbitrations as against fragmented and unreliable materials that may be available via private subscription services.[125] Before the advent of the Registry there was no central location for cataloguing arbitral information. Rather what was available were pockets of storages established by arbitral institutions and private subscription services.[126] The ICSD, for instance, publishes at least basic information about its cases on its website and streams live hearings. Also, international organizations such as UNCTAD compiles a database of past and ongoing investor-State arbitrations.[127] Further, there are search engines created by private organizations to facilitate access to arbitral material.[128] Also, the PCA started publishing information about its cases.[129] Though laudable, the result is a fragmented system for the storage and collection of arbitral information.[130] Thus, the Registry is revolutionary because it seeks to defragment the system for accessing information on investor-State arbitration by creating a central pool for the storage of such information Claussen argues that an effective repository has the capacity to transmogrify international arbitration

[122] See Transparency Rules, arts 6(2) and (3).
[123]UNCITRAL, 'Transparency Registry' <https://www.uncitral.org/transparency-registry/en/introduction.html> accessed 12 November 2019.
[124]Ibid.
[125]Kathleen Claussen, 'Repository of Published Information' in Dimitrij Euler, *Markus Gehring and Maxi Scherer (eds.) Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015 Cambridge University Press) 307.
[126] Ibid 308-311.
[127] Claussen (n 125).
[128] Some examples include Westlaw and Lexis Nexis; Claussen (n 125)311.
[129] The PCA began publishing cases in July 2014. It would only publish where parties have given their consent; see Permanent Court of Arbitration, 'Cases' < http://pcacases.com/web/> accessed 12 November 2019.
[130] See Claussen 311 (n 125).

practice as it will permit average citizens easy access to cases of interest and enable lawyers to found arguments on past decisions.[131] This, according to Claussen, may, 'either contribute to, or challenge, the increasing consistency in decision-making that has become a systemic value and has been heralded as enhancing the system's legitimacy both within the profession and towards the public at large'.[132] The efficacy of the Transparency Rules is dependent on the Registry because a central storage for information is necessary to achieve the objectives of the Rules.[133] The role of the Registry is carried out by the Secretary-General of the United Nations, via the UNCITRAL secretariat.

The Transparency Rules are no doubt, the most comprehensive set of procedural rules made in the efforts to bring legitimacy to and restore confidence in investor-State arbitration. They are reflective of the UNCITRAL's position on transparency and represents a painstakingly negotiated and widely accepted model that can function as template for the conduct of investor-State arbitration.[134] Indeed, the Rules are in line with global practices which recognize that transparency is imperative for the attainment of, 'effective democratic participation, good governance, accountability, predictability and the rule of law'.[135]

4.2. The Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) 2014

As at 1 April 2014 there were 3247 IIAs in existence to which the Transparency Rules would not automatically apply because of the limitation in its article 1(1). Of this figure 2907 are BITs. The Mauritius Convention is directed at modifying and modernizing those IIAs by potentially bringing them within the remit of the Transparency Rules.[136] Accordingly, article 1(1) of the Convention extends the application of the Transparency Rules to investor-State arbitrations conducted pursuant to IIAs concluded before 1 April 2014.[137] The Mauritius Convention may apply on a unilateral or bilateral basis. This means that it would apply where the respondent-State and the investor-claimant's State are contracting parties or; where only the respondent-State is a contracting party and the investor-claimant accepts a unilateral offer from the respondent-State to apply the Rules.[138] The Convention applies the Transparency

[131] ibid 308.
[132] Ibid 308.
[133] Ibid 308.
[134] Johnson and Bernasconi-Osterwalder (n 110)
[135] Ibid.
[136] Schill (n 6).
[137] Mauritius Convention, 4th Preamble.
[138]See Mauritius Convention, art 2(1)(2).

Rules to all treaty-based investor-State arbitrations conducted pursuant to existing treaties, the applicable arbitration rules notwithstanding.[139] Therefore, it is immaterial that the particular arbitration is not governed by the UNCITRAL Arbitration Rules. Whether the applicable rules are the ICSID Convention, the LCIA Rules or the ICC Arbitration Rules, the Mauritius Convention would apply the Transparency Rules.[140]

The Convention permits contracting parties to make three reservations in relation to their acceptance of the Mauritius Convention. Article 3(1) provides that a party may declare that it:

a) shall not apply this Convention to investor-State arbitration under a specific investment treaty, identified by title and name of the contracting parties to that investment treaty;
b) …shall not apply to investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules, and in which it is a respondent;
c) …shall not apply in investor-State arbitration in which it is a respondent.

Accordingly, first, a contracting State may specify particular investment treaties to which the Convention will not apply.[141] Second, it may limit the application of the Transparency Rules to arbitrations conducted under the UNCITRAL Arbitration Rules.[142] Third, a State may exclude the application of the Rules of Transparency in investor-State arbitrations in which it is a respondent.[143] Reservations are deposited with Secretary-General of the United Nations.[144] Reservations that are made at the time of ratification, acceptance or approval of or accession to the Convention take effect together with the entry into force of the Convention in the country making such reservation.[145] Article 4(4) of the Convention provides that reservations deposited after the Convention enters into force in the reserving country shall take effect twelve months after the date of its deposit.[146] A reservation may be withdrawn at any time.[147] Parties are permitted to make multiple reservations in a single instrument. For such an instrument, each

[139] Mauritius Convention, art 2(1).
[140] Schill(n 6).
[141] Mauritius Convention, art 3(1)(a).
[142] Mauritius Convention, art 3(1)(b).
[143] Mauritius Convention, art 3(1)(c).
[144] Mauritius Convention, art 6.
[145] Mauritius Convention, art 4(3).
[146] However, a reservation made to the effect of excluding the application of a revised version of the Transparency Rules under article 3(2) takes effect immediately upon deposit.
[147] Mauritius Convention, art 4(6)

declaration of reservation made constitutes a separate reservation which may be withdrawn separately.[148] As at the time of writing, the Convention has been signed by 23 States, however, only Mauritius, Canada, Switzerland, Cameroon and Gambia have ratified it.[149] By ratifying the Mauritius Convention, States accept that the Transparency Rules will apply to investor-State arbitrations arising under their existing investment treaties. Article 1(1) of the Convention is somewhat similar to article 1(2)(b) of the Transparency Rules as discussed above. In both cases, States are expected to take positive steps to apply the Rules to existing treaties. However, the steps taken with respect to the Convention would have a more far-reaching effect on the pursuit for transparency in investor-State arbitration depending, however, on the number of reservations made by contracting States.

5.0. Will the Transparency Rules and the Mauritius Convention Effectively Establish Transparency in Investor-State Arbitration in view of the Opt-Out Mechanisms Contained therein?

The Transparency Rules and the Mauritius Convention are a significant move towards addressing the perceived illegitimacy of investor-State arbitration. They have been widely applauded by States, scholars, non-governmental organisations and the international investment community as a whole. For instance, it has been said that the Mauritius Convention will, '…establish transparency as a general principle of international investment law'.[150] Also, the UNCITRAL has described the Convention as, 'a powerful instrument to enhance transparency in investor-State dispute settlement'.[151] Further, the Transparency Rules are said to, 'have the potential to overcome the (real or perceived) lack of legitimacy in international investment law and inspire renewed confidence in a system that was created to avoid unfair or even belligerent means of 'resolving' disputes'.[152] But would these instruments live up to expectation? Would they really establish transparency at the anticipated level and restore confidence in ISDS? The article is sceptical that these instruments will achieve the set objectives because in its carefully considered opinion, they effectively provide loopholes

[148] Mauritius Convention, art 3(3).
[149] The Mauritius Convention was adopted on 10 December 2014. It entered into force on 18 October 2017.
[150] See Schill (n 6).
[151] United Nations (n 6).
[152] Dimitrij Euler and Maxi Scherer, 'Conclusion: The Rules as a Swing of the Pendulum?' in Dimitrij Euler, *Markus Gehring and Maxi Scherer (eds.) Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015 Cambridge University Press) 356.

through which transparency in treaty based investor-State arbitration may be avoided. The article holds this view for the following reasons:

1. Since 1 April 2014, 216 IIAs have been concluded by countries around the world. Of this figure 74, are in force.[153] Most of these treaties have incorporated the UNCITRAL Arbitration Rules meaning that the Transparency Rules should automatically apply to investor-State arbitrations arising under them where the UNCITRAL Arbitral Rules are the applicable rules.[154] However, with the use of the proviso, '*…unless the parties to the treaty have agreed otherwise…'* in article 1(1), contracting States may opt-out of transparency by agreeing that the Transparency Rules will not apply to potential investor-State arbitrations under a given treaty even where the UNCITRAL Arbitral Rules are to apply. Again, by virtue of articles1(2)(a) disputing parties (States and foreign investors) may opt into transparency by agreeing to apply the Rules to a given investor-State arbitration. Similarly, article 1(2)(b) permits State parties to an IIA to opt-in by incorporating the Transparency Rules into an existing IIA. While the article appreciates the rationale for the opt-in and opt-out mechanisms in article 1 of the Rules,[155] it is thought that these approaches will impede the quest for transparency in investor-State arbitration. This is because they allow investors and States in particular, a choice whether or not to apply transparency meaning that transparency will not be applied in every case. The import is that investment arbitral proceedings could still be kept fully confidential where the States and investors so desire – even in cases involving matters of public interest. Transparency in arbitral proceedings may be a source of concern for prospective disputants as confidentiality can often be in the interest of the parties.[156] As earlier noted, a respondent-State may be mindful of the implications of making public disclosure of matters that are essential to its security interests; the claimant-investor on their own part may be worried about their competitors gaining an edge over them as a result of disclosures made during the arbitral process.[157] Although, the Transparency Rules provide a broad list of exceptions to transparency on the basis of which parties may apply to exclude privileged information, they (the Transparency

[153]United Nations Conference on Trade and Development, 'International Investment Agreement Navigator' (n 7).
[154] See for instance, Agreement between Japan and the State of Israel for the Liberalization, Promotion and Protection of Investment (signed 1 February 2017; in force 5 April 2017), article 24; Morocco-Nigeria BIT (n 8), article 27.
[155] See Schefer (n 97) 50 – 52.
[156] Li (n 36).
[157] Li (n 36).

Rules) also allow tribunals discretion to decide how parties should proceed when designating information as confidential or protected. Thus, designations are subject to the tribunal's review on its own motion or the motion of a disputant.[158] So, in spite of the exceptions in article 7(2), whether or not a piece of information will actually be excluded because a party claims it is privileged, is subject to the determination of the tribunal.

Considering that the Rules are relatively new it not yet clear how tribunals will deal with applications under article 7(2). As has been the case in some arbitrations conducted pursuant to the ICSID Rules of Procedure for Arbitration, tribunals have shown a tendency to exercise their discretion narrowly when considering applications to apply similar exceptions. In *Merrill & Ring Forestry L.P. v. The Government of Canada*,[159] the tribunal refused the respondent-State's application for "cabinet confidence" privilege as recognized under Canadian law to apply to the proceedings on the grounds that the Canadian government did not provide a sufficiently clear explanation about the reasons for claiming the privilege. Also in *Biwater Gauff v. Tanzania*,[160] the tribunal opined that the Tanzanian doctrine of "public interest immunity" was not applicable in an international arbitral tribunal. Accordingly, tribunals interpreting the exceptions in the Transparency Rules may take a narrow view,[161] especially in cases where excluding the application of the Rules will heavily undermine its *raison d'etre*. As mentioned earlier, the provision in article 1(6) is intended to checkmate some of the exceptions in article 7(2) which give respondent-States a measure of latitude to invoke their own law as grounds for evading disclosure. Therefore, opportunities for States to circumvent the application of the Rules when they do apply is limited. For the above reasons, when it comes to choosing whether or not the Rules will apply, parties may take the view that it is safer to completely exclude the application of the Transparency Rules to the arbitral proceedings, rather than subscribe to it and discover during proceedings that information considered to be privileged would not be protected. Be that as it may, if parties are able to opt-out and opt-in at will, then there would be inconsistencies in

[158]Transparency Rules, art 7(3).
[159]ICSID Case No. UNCT/07/1.
[160]ICSID Case No. ARB/05/22.
[161]Li (n 36).

transparency. Inconsistent application of the Transparency Rules will impede the attainment of the objective of entrenching transparency in investor-State arbitration.

2. As earlier indicated, article 3(1) of the Mauritius Convention allows States to make three reservations in relation to the Convention. At any time during their membership of the Convention, States can exclude specific investment treaties and particular sets of arbitration rules from the scope of the Convention. A State can also exclude the operation of the Transparency Rules in cases where it is a respondent. By making reservations, States will have a lot of flexibility in complying with the transparency standards. It is thought that States will be influenced by the same considerations discussed in (1) above in making reservations. This would mean that the application of the Convention (and by extension the Transparency Rules again) would not be consistent. Besides, nearly five years after the Convention opened for signature, only five States have ratified the Convention. As a result, the Mauritius Convention is currently applicable to the Cameroon-Canada BIT (2014),[162] Cameroon-Switzerland BIT (1963),[163] Gambia-Switzerland BIT(1993) [164] and the Mauritius-Switzerland BIT (1998),[165] that is, only four out of the over 2907 BITs that were in existence as at 1 April 2014.[166] This is surprising considering the overwhelming support provided by States during the development processes of the two instruments.[167] This state of affairs would hardly make the type of sweeping impact that is required to entrench legitimacy in investor-State arbitration and restore public confidence in the mechanism. To gain the type of universal application that would establish transparency as an integral part of international investment law – the type enjoyed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958[168] - States must ratify

[162] (signed 3 March 2014, in force 16 December 2016).
[163] (signed 28 January 1963, in force 6 April 1964).
[164] (signed 22 November 1993, in force 30 March 1994).
[165] (signed 26 November 1998, in force 21 April 2000); the Mauritius Convention should also apply to the Cameroon- Mauritius BIT of 2001, but it is not inforce.
[166] United Nations Conference on Trade and Development, 'Investing in the SDGs: An Action Plan', (United Nations 2014) 114; see also United Nations Conference on Trade and Development, International Investments Agreement Navigator (n 7).
[167]Johnson and Bernasconi-Osterwalder (n 110); United Nations (n 6); see also Aceris Law LLC, 'Transparency in Investment Arbitration: Entry into force of the Mauritius Convention' (14 July 2017) https://www.acerislaw.com/transparency-investment-arbitration/ accessed 12 November 2019.
[168] There are currently 161 State parties to the New York Convention; see the United Nations Commission on International Trade Law (UNCITRAL) Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) < https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 > accessed on 21 November 2019.

the Mauritius Convention. However, ratifying States must also consider that the more the number of reservations they make, the more the anticipated effects of the Mauritius Convention and the Transparency Rules are whittled down.

3. Information held by the Transparency Registry and UNCTAD indicates that the Transparency Rules may not be applied across board. For instance, the pending cases of *RAKIA v India* and *Strategic Infrasol and Thakur Family Trust v India*[169] were initiated in 2016 under the India-United Arab Emirates BIT (signed 12 December 2013, in force 21 August 2015). Even though, both arbitrations adopted the UNCITRAL Arbitration Rules, there is no information about them at the Transparency Registry.[170] Also, there is no information on the case of *RusHydro v. Kyrgyzstan*[171] instituted in 2018 under the Treaty on Eurasian Economic Union (signed 29 May 2014, in force 1 January 2015).[172] Thus, it appears that the States and the foreign investors involved in these cases opted-out of transparency. On the other hand, the materials relating to the ongoing case of *Christian Doutremepuich and Antoine Doutremepuich v Mauritius,*[173]initiated in 2018 pursuant to the France-Mauritius BIT (signed 22 March 1973, in force 1 March 1974) are available at the Registry.[174] The foregoing suggests that the Rules will be applied in some cases, but not in others. It is however important to note that in *Doutremepuich*, the parties opted into transparency despite the fact that the arbitration arose under an existing BIT. This is also the case with *Iberdrola SA and Iberdrola Energia SAU v Bolivia* as mentioned above;[175] *Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis and Enrique Carrizosa Gelzis v. Colombia*[176]which was instituted under the United States-Colombia Trade Promotion Agreement (signed 22 November 2006, in force 15 May 2012) and; *Michael Ballantine and Lisa Ballantine v. Dominican Republic*[177] which was commenced pursuant to the Dominican Republic-

[169] See United Nations Conference on Trade and Development, 'Investment Dispute Settlement' (n 13).
[170] UNCITRAL Transparency Registry<https://www.uncitral.org/transparency-registry/registry/search.jspx> accessed 12 November 2019; the full details of the proceedings are also not available on the ICSID and PCA case repositories; ICSID, 'Pending Cases with Details'https://icsid.worldbank.org/en/pages/cases/pendingCases.aspx?status=p accessed 16 November 2019; Permanent Court of Arbitration, 'Cases' https://pca-cpa.org/cases/ accessed 16 November 2019.
[171] PCA Case No. 2018-21.
[172] The Eurasian Investment Agreement (signed 12 December 2008, in force 11 January 2016) is also applicable to this arbitration.
[173](PCA 2018-37).
[174] See the Transparency Registry at http://www.uncitral.org/transparency-registry/en/introduction.html.
[175] (n 99).
[176] PCA Case No. 2018-56.
[177] PCA Case No 2016-17.

> Central America-United States Free Trade Agreement (signed 5 August 2004, in force 1 January 2009). These developments are commendable as it shows that some States and part of the international business community are beginning to realise the important role that openness and inclusiveness can play in restoring public confidence in investor-State arbitration. Be that as it may, it must be stated that a significant number of known ongoing arbitrations in this category (arbitrations arising under existing IIAs) as listed on UNCTAD website have not opted into transparency.[178]

In sum, it must be stressed that transparency is a necessary condition for the legitimacy of investor-State arbitration. For legitimacy to be achieved, transparency has to be consistently applied. Failure to do this means that investor-State arbitration will continue to lack legitimacy and the little public confidence that has been gained with the introduction of the Transparency Rules and the Mauritius Convention will be lost and the backlash will continue. It is important to reiterate that the overarching consideration necessitating the introduction of these reforms is public interest. This is evident in the corresponding resolution of the UN General Assembly which provides that the Transparency Rules were introduced in recognition of, '…the need for provisions on transparency in the settlement of….treaty-based investor-State disputes to take account of the public interest...'.[179]The Mauritius Convention was also developed along similar lines.[180] The right of access to information by members of the public is a vital element of the freedom of expression under international human rights law. In fact, transparency and inclusiveness are reflections of fundamental UN values such as human rights, good governance and the rule of law.[181] Therefore, if transparency in the sense that has been discussed in this article, is to be achieved in treaty-based investor-State arbitration, public access must be granted to every arbitral proceeding established to resolve an investment dispute between a foreign investor and a State.

6.0.Conclusion

[178] UNCTAD's database of cases shows pending arbitrations initiated under existing IIAs after 1 April 2014;see United Nations Conference on Trade and Development, 'Investment Dispute Settlement' http://investmentpolicyhub.unctad.org/IIA accessed 9 November 2019; compare with entries made at the Transparency Registry at UNCITRAL, 'Transparency Registry' <https://www.uncitral.org/transparency-registry/en/introduction.html> accessed 12 November 2019.

[179] Resolution adopted by the United Nations General Assembly, 68th Plenary Meeting, 16 December 2013 (68/109).

[180] Resolution adopted by the United Nations General Assembly, 68th Plenary Meeting, 10 December 2014 (69/116); see also the 2nd Preamble to the Mauritius Convention.

[181] Ribeiro and Douglas (n 39).

Foreign investors are confident to invest and do business in other countries because where an infringement is alleged, they are allowed direct recourse against the host State through the instrumentality of investor-State arbitration. The issue of confidentiality and lack of transparency in investor-State arbitration has threatened its very foundation, hence the introduction of the Transparency Rules and the Mauritius Convention. While the instruments are welcome, they allow certain choices which means that States and investors can avoid transparency. The article postulates that a mechanism will allows States and investors to choose whether or not to apply the Transparency Rules will not allow for consistency, neither would a flexible application of the Mauritius Convention. Thus, it is unlikely that these instruments will entrench transparency as an integral part of international investment law. However, as they were only introduced in the last six years,[182] it may be too early to gauge the attitude of States towards transparency and properly evaluate the impact of these reforms on public perception of investor-State arbitration. But it remains to be seen whether there will be an even application of the Transparency Rules.

[182] The Transparency Rules became effective from 1 April 2014 while the Mauritius Convention was opened for signature on 17 March 2015.