

International Trade and Business Law Review

Volume XIX, 2016

The *International Trade and Business Law Review* publishes leading articles, comments and case notes as well as book reviews dealing with international trade and business law, arbitration law, foreign law and comparative law. It provides the legal and business communities with information, knowledge and understanding of recent developments in international trade, business and international commercial arbitration. The Review contributes in a scholarly way to the discussion of these developments while being informative and having practical relevance to business people and lawyers. From time to time, the Review also devotes a section to the Willem C Vis International Commercial Arbitration Moot and publishes the memoranda prepared by a team coached by Professor Gabriël Moens.

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Gabriël A Moens

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Articles

DEVELOPMENTS IN THE LAW RELATING TO MEDICAL NEGLIGENCE IN THE LAST 30 YEARS

THE HON JUSTICE SUSAN KIEFEL AC*

Abstract

Medical Negligence — Professional Negligence — Professional Liability — Duty of Care — Causation — Breach of Duty of Care — Damage — Bolam Rule — Tort Law — Civil Law

The principle of negligence law was definitively stated by a case in the early 20th century — a person whose acts or omissions may cause injury to another has a duty to exercise reasonable care to avoid doing so. This article examines the development of medical negligence law in Australia by cases, the influence of English law and the introduction of civil liability legislation throughout the Australian states. Three elements of medical negligence are identified and analysed: the duty of care owed by medical practitioners to patients and the extent of that duty; causation; and the nature of damage that warrants compensation. A discussion of the evolving nature of the responsibility of a medical practitioner to patients demonstrates the need of the law to respond to scientific advances and resulting changes in the needs of society.

* High Court of Australia. This paper is based on a speech presented at the 15th Greek/Australian International Legal and Medical Conference, 1 June 2015, Thessaloniki, Greece.

I HISTORICAL BACKGROUND

The modern law of negligence is based upon the general rule that those whose acts or omissions might injure another should exercise reasonable care to avoid that occurring. The rule is of relatively recent origin and is attributed to a case decided in the early part of the 20th century.¹ In much earlier times, English law showed no interest in providing compensation for unintended injury; society had other, more pressing, concerns. By the 19th century, there was still no general rule for liability for negligence, but particular callings were identified as subject to potential liability for loss to customers — for example, innkeepers and common carriers, whose liability was strict. Other callings, such as the surgeon or the attorney were subject to a duty of carefulness. A prominent legal historian suggests that the reason why cases involving these two professions do not appear earlier is that it was not until much later ‘that these professions attained social dignity by measures taken to eliminate quacks in the one case and swindlers in the other’.²

The Industrial Revolution of the 19th century had a profound effect on the development of the law of negligence. Whilst philosophers debated new theories of individual and societal rights and responsibilities, the courts were grappling with the extent to which industrialists and others should be held liable to compensate for injuries caused by new processes and emergent technologies. It was not until the 1930s that the modern law of negligence is considered to have emerged. As sometimes happens in our system of precedential law, an unremarkable case was responsible for an important statement of legal principle. In 1928, a Scottish woman became ill after drinking ginger beer which was contaminated by a

¹ *Donoghue v Stevenson* [1932] AC 562.

² Percy H Winfield, ‘The History of Negligence in the Law of Torts’ (1926) 42 *Law Quarterly Review* 184, 187.

dead snail. Up to this point, a manufacturer could only be held liable to the purchaser of the product and the ginger beer had not been purchased by the woman, but by her friend. In this case, the maker of the ginger beer was held liable to the ultimate consumer of the ginger beer by applying the principle that a duty of care is owed to a person who might be affected by one's negligent acts.³ The person might be called one's 'neighbour'. It may be of some interest to note that the English judge who wrote that leading judgment, Lord Atkin, was born, and spent his early life, in Brisbane, Australia.

The elements that needed to be proved in the modern action for negligence could now be stated as follows: the existence of a duty of care; a breach of that duty by a negligent act or omission; and damage suffered as a consequence. Inherent in these, but often considered separately, is the requirement of a causal connection between breach and damage.

II DEVELOPMENTS IN THE LAST 30 YEARS — AN OVERVIEW

In the 80 years or so since that decision, the High Court of Australia ('the High Court') has further developed the law of negligence. In the last 30 years — the period the subject of this paper — the High Court has considered each of the elements of the action for negligence in the context of actions in which medical negligence was alleged. Medical negligence is not a discrete area of the law. However, cases involving allegations of negligence against medical practitioners quite often raise difficult questions as to the concepts which inform the elements of the action for negligence.

The starting point is the landmark decision in *Rogers v Whitaker*,⁴

³ *Donoghue v Stevenson* [1932] AC 562.

⁴ (1992) 175 CLR 479.

which doubtless has been largely responsible for the abundance of information which is now routinely provided to patients about surgery or other treatment. That case involved the extent of information that should be provided to a patient about the risks involved in treatment. The legal question was the content, or extent, of the duty of care owed to the patient when advising about treatment.

The next element to be discussed is the problematic question of causation. Causation is the connection necessary, for there to be liability, between an act of negligence and the damage suffered. It is a conclusion about legal responsibility. In the period in question, the High Court discussed the applicable tests.

The remaining element to be discussed concerns the nature of 'damage'. The law does not recognise every kind of harm or loss as warranting compensation. In this context, three novel claims of damage will be discussed.

In the course of the discussion of these elements, reference will be made to aspects of legislation that was introduced in the latter part of the period, for the purpose of limiting liability. An inquiry was held into the rising costs of indemnity and other insurance, which led to the introduction of the *Civil Liability Act 2002* (NSW) ('*Civil Liability Act*') in New South Wales. The other States and Territories followed suit. This article will comment upon whether this legislation has effected any substantial changes to the law as developed by the High Court. In my conclusion, I will touch upon the interconnectedness of the elements of the action as relevant to the development of the law.

III DUTY AND STANDARD OF CARE: *ROGERS V WHITAKER*

The salient facts in *Rogers v Whitaker*⁵ were as follows: the patient had injured her right eye in a childhood accident and an ophthalmic surgeon advised her that an operation on the eye would not only improve its appearance, but would likely also substantially restore sight to it. The operation was not successful in that regard, but it was performed with the requisite care and skill. However, the patient suffered sympathetic ophthalmia post-operatively and, as a result of inflammation arising from this, lost all sight in the left eye; the patient was rendered almost totally blind.

In Australia, it had been accepted that the standard of care to be observed by a professional person is that of the ordinary skilled person exercising and professing to have that special skill. The question in this case was whether the observance of that standard of care required information regarding the risk associated with the aftermath of surgery to be given to the patient. The ophthalmic surgeon gave evidence that it had not occurred to him to mention sympathetic ophthalmia to the patient. There was a body of evidence from other medical practitioners to like effect. However, there was also evidence from others that they would have given a warning. The state of the evidence may itself have signaled to the Court that the old rule was unsustainable.

In England, the approach to the resolution of similar problems had been determined by a case which lends its name to the *Bolam* rule. The case of *Bolam v Friern Hospital Management Committee*⁶ involved a patient who was injured whilst receiving electroconvulsive therapy ('ECT') without the prior administration of a relaxant drug. Evidence as to the practice to be followed varied as

⁵ Ibid.

⁶ [1957] 1 WLR 582 ('*Bolam*').

between doctors, leading the Court to formulate a rule that has since been stated as:

a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a *responsible body* of medical opinion even though other doctors adopt a different practice. In short, the law imposes the duty of care; but the standard of care is a matter of medical judgment.⁷

It followed from this rule that, so long as a sufficient number of medical practitioners adopted the practice in question, the practitioner being sued would have a complete defence. It may be observed that the *Bolam* rule is directed to accepted practice in the actual provision of treatment, whereas *Rogers v Whitaker*⁸ was concerned with advice about the risks involved in treatment. In cases decided after *Bolam*, some judges expressed the view that the rule should only apply in cases involving negligent treatment or surgery, but not where the issue was the quality of the advice or information given. In *Rogers v Whitaker*⁹ the Court decided that the rule should be restricted in that way.¹⁰

In relation to diagnosis and treatment, the Court accepted that the *Bolam* rule would continue to be influential, for the reason that whether a diagnosis or a method of treatment was negligent would depend largely upon medical standards, which are known best by doctors. The question as to whether a risk is relevant to a patient, and is one about which they should be warned, is different. The High Court said that the courts are able to determine this question themselves.

⁷ *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 871, 881 (Lord Scarman) (emphasis added).

⁸ (1992) 175 CLR 479.

⁹ (1992) 175 CLR 479.

¹⁰ *Ibid* 489–90.

Influential to this ruling was the view that a person is entitled to make informed decisions about his or her life. A patient must, therefore, be informed of 'material risks'. A risk is material, the Court said, if a reasonable person in the patient's position would be likely to attach significance to it or the doctor should be aware that this patient would do so. In the case in question, it would be reasonable for a person with one good eye to be concerned about the possibility of injury to it, especially in the context of a procedure that was elective.

What the Court said about a patient's right to exercise a personal choice in taking the risks of a surgical procedure should not be misunderstood. The Court was not basing its decision on notions of human rights. In a decision in 2013, which is discussed below, it made this clear.¹¹ Damages are not awarded for breach of a human right; they are awarded for a breach of professional duty.

In *Rogers v Whitaker*,¹² the Court did not entirely rule out the exercise of judgment on the part of a doctor as to what information is to be given to particular patients and how it is to be conveyed. The qualification the Court made to the duty owed to patients to give information about risks was where there was a danger that the provision of all information would harm an unusually nervous, disturbed or volatile patient.

The *Civil Liability Act* addresses the application of the *Bolam* rule, providing that a professional person does not incur liability in negligence 'if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent

¹¹ *Wallace v Kam* (2013) 250 CLR 375, 381 [9].

¹² (1992) 175 CLR 479.

professional practice', so long as the practice is not 'irrational'.¹³ The Act does not define what is meant by the term 'widely accepted'. It merely provides that the fact that there are differing opinions does not prevent an opinion qualifying¹⁴ and that peer professional opinion does not have to be universally accepted to be 'widely accepted'.¹⁵

It is not clear whether those drafting the *Civil Liability Act* thought they were effecting a major departure from *Rogers v Whitaker*.¹⁶ If they did, they would appear to have been mistaken, as it is also provided in the Act that the provisions relating to peer professional opinion do not apply to a failure by a professional to give a warning, advice or other information regarding a risk of injury or death to a person,¹⁷ which, of course, was the very issue in *Rogers v Whitaker*. It is worthwhile to note, however, that it was not suggested in *Rogers v Whitaker*¹⁸ that the *Bolam* rule should not apply in cases involving negligent diagnosis or methods of treatment. All the legislation appears to have done is to raise the bar of the *Bolam* rule, when it applies, from a practice that is *accepted* as proper by a responsible body of medical opinion, to one that is *widely accepted*.

IV CAUSATION

To succeed in an action for negligence it is not sufficient to simply establish an act of negligence, constituting a breach of the duty of care; it is necessary to show that the act caused the damage in question. The law's treatment of causation differs from its treatment

¹³ *Civil Liability Act 2002* (NSW) s 50(1)–(2).

¹⁴ *Civil Liability Act 2002* (NSW) s 50(3).

¹⁵ *Civil Liability Act 2002* (NSW) s 50(4).

¹⁶ (1992) 175 CLR 479.

¹⁷ *Civil Liability Act 2002* (NSW) s 5P.

¹⁸ (1992) 175 CLR 479.

in science or philosophy. The law is not concerned to explain, as science does, physical phenomena by reference to conditions and occurrences. The law is concerned with ascribing, *ex post facto*, personal responsibility.

It had been accepted at trial in *Rogers v Whitaker*¹⁹ that the patient would not have undergone surgery had she been warned of the risk of sympathetic ophthalmia. Two conclusions relevant to the approach of the law to proof of causation follow from this. In the first place, she would not in fact have suffered the injury but for the failure to warn. Secondly, she would not have been prepared to take the risk of loss of her sight. In these circumstances, there is no reason why the practitioner should not be held liable for the failure to warn, when a warning would have avoided this consequence. As this indicates, the question of causation is approached by the common law in two steps.

The first enquiry is as to causation in fact. It is a historical enquiry, as to how the injury or harm suffered came about. It looks to the *causae sine qua non* — the factors without which the damage would not have occurred — to provide the necessary connection between a negligent act and injury. If the negligent act is a necessary condition for the event giving rise to injury, it is a cause in fact.

This translates into the ‘but for’ test. Applied negatively, it asks whether the injury would not have occurred ‘but for’ the defendant's negligence. If the damage would have occurred notwithstanding the negligent act or omission, the act or omission is not a cause. It has been said that courts throughout the world agree that the relation of necessity between breach and outcome, expressed as the ‘but for’

¹⁹ *Ibid.*

test, is the one the law should designate as causal.²⁰

The second enquiry is whether, regardless of factual causation, a defendant should be held legally responsible for his or her breach of duty. This is a purely legal question, involving policy concerns and, to an extent, a value judgment. It may involve consideration of the degree of connection between breach and injury. In most cases, it will be obvious that a defendant should be held liable for a breach that has contributed to an injury. The second enquiry assumes significance in more difficult cases. The two enquiries operate in this way: if the breach did, in fact, contribute to the injury, should the defendant be held legally responsible for it?

The *Civil Liability Act* does not ignore the topic of causation, but makes no real change to the common law. It does not depart from the two tests applied by the courts, which the Act calls ‘factual causation’²¹ and ‘scope of liability’.²² The High Court has observed that the first stage of the statutory test involves ‘nothing more or less than the application of a “but for” test of causation’.²³ So far as concerns the second enquiry, the Court said that the statutory provisions do not displace the methodology of the common law.²⁴

The tests of causation may seem straightforward enough. The difficulty arises in their application to the facts of particular cases. In cases where it is alleged that there has been a failure to warn of one or more material risks inherent in a proposed treatment, the

²⁰ Jane Stapleton, ‘Reflections on Common Sense Causation in Australia’ in Simone Degeling, James Edelman and Tom Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters 2011) 331, 338.

²¹ *Civil Liability Act 2002* (NSW) s 5D(1)(a).

²² *Ibid* s 5D(1)(b).

²³ *Wallace v Kam* (2013) 250 CLR 375, 383 [16].

²⁴ *Ibid* 385 [22].

Court has explained that the question of factual causation is largely governed by what the patient would have chosen to do.²⁵

The Court identified three factual scenarios as illustrative of past cases:²⁶

- In the first, the patient would have chosen to undergo the treatment even if warned of all material risks. Here, there can be no finding of factual causation, because the physical injury associated with the risk which materialised would have occurred even if the patient was warned.
- The second is where it is found that the patient would have chosen not to undergo the treatment if warned. *Rogers v Whitaker*²⁷ falls into this category. Where the patient has suffered an injury, a finding of causation can be made without difficulty; but for the failure to warn, the patient would not have been exposed to the risk which materialised.
- The third example is more problematic. It refers to the circumstance where the patient would have chosen not to undergo the treatment at the time the treatment in fact took place. Here, the nature of the risk remains the same. This scenario can only arise in an unusual circumstance where the likelihood of injury can be said to be different at different times, by reason of some variable factor affecting the outcomes.

An example of the third scenario is provided by the decision in *Chappel v Hart*.²⁸ In that case, an ear, nose and throat surgeon performed an operation with all due care and skill, but the patient's

²⁵ Ibid 383 [17].

²⁶ Ibid 384 [18]–[20].

²⁷ (1992) 175 CLR 479.

²⁸ (1998) 195 CLR 232.

oesophagus was perforated in the process. An infection developed and damaged the laryngeal nerve, which led to paralysis of the right vocal chord. The patient had specifically asked about the risk of injury to her voice. The specialist mentioned the risk of perforation, but not the risk of complicating infections. There was some evidence that the chance of perforation bore some relationship to the degree of skill of the surgeon, but the risk of infection was extremely rare. The patient said that, had she been warned, she would not have undergone the surgery when she did and would have waited to engage the most experienced surgeon.

As such, could it be said that ‘but for’ the failure to warn, the patient would not have suffered the infection consequent upon the perforation? It was generally accepted that the patient’s condition was such that surgery would inevitably be required. Therefore, at most, the failure to warn put the patient into surgery at an earlier time. The Court was divided on this question.

A majority of the Court held the surgeon liable on the basis of the patient's evidence that had she been warned of the risk she would have waited and obtained the most experienced surgeon. However, this reasoning exposed an evidentiary difficulty. As McHugh J stated, it is up to the person claiming, the patient, to show that this would have likely made a difference. There was no evidence that other surgeons could have performed the procedure with greater care and skill, and there was no evidence that a surgeon would never perforate the oesophagus. Therefore, to hold the defendant surgeon liable would seem to involve a reversal of the onus of proof.

The second enquiry of causation does not appear to have assumed much importance in the decision. However, it might be seen to identify the difficulty in holding the surgeon liable. It would ask: why should the surgeon be held liable for the materialisation of an extremely rare risk of infection? Should he be liable for failing to

warn of a risk of this kind? The second case to which I will refer, which explained the approach to be taken to both enquiries, is the case of *Wallace v Kam*.²⁹

By the time of this decision, the *Civil Liability Act* had come into operation. Relevantly, the Act does two things: it restates the requirement of the common law that the person claiming always bears the onus of proving any fact relevant to causation.³⁰ This provision may have been a response to *Chappel v Hart*.³¹ The Act also rejects the use of self-serving evidence by plaintiffs in favour of a hypothetical assessment of what the person would or would not have done;³² it leaves the courts to determine this question. The courts have, at any rate, usually discounted self-serving evidence as inherently unreliable and have looked to objective factors, such as whether the treatment was inevitable or not, in order to determine whether a person would have undertaken it and any attendant risks.

In the case of *Wallace v Kam*,³³ the patient was not warned of two risks inherent in the treatment proposed: bilateral femoral neurapraxia, resulting from lying face down on the operating table for an extended period and a one-in-twenty chance of permanent and catastrophic paralysis resulting from damage to the spinal nerves. The patient suffered neurapraxia, but not paralysis.

It was argued for the patient that liability could arise from a failure to warn of all the risks, no matter which materialised; if the patient had been warned of the risk of paralysis, he would not have had the surgery. On this argument, it would be enough for a conclusion of

²⁹ (2013) 250 CLR 375.

³⁰ *Civil Liability Act 2002* (NSW) s 5E.

³¹ (1998) 195 CLR 232.

³² *Civil Liability Act 2002* (NSW) s 5D(3).

³³ (2013) 250 CLR 375.

factual causation that there be a failure to advise of the risk; it does not need to be the risk that eventuates. However, that is to misunderstand both the test of factual causation and the further question of legal policy. The first is concerned with what caused the resulting injury and the second asks whether the defendant should be held liable for the materialisation of the risk of that specific injury.

The limitation of relying only on factual causal inquiry was explained by the High Court by way of an example often referred to in this context.³⁴ A mountaineer is negligently advised by his doctor that his knee is fit to make a difficult climb. He makes the climb, which he would not have made if properly advised about his knee, only to be injured in an avalanche. His injury is a foreseeable consequence of mountaineering, but has nothing to do with his knee. Why should the doctor be held responsible for all the risks inherent in mountain climbing?

With respect to the second, legal, enquiry of causation, the Court identified as relevant the particular damage the patient had suffered, because that is what the law compensates for. The patient suffered neurapraxia. The Court considered that the patient would most likely have regarded the risk of neurapraxia as acceptable. Why should the doctor be held liable for the materialisation of a risk that the patient was prepared to take? The patient's action, therefore, failed.

V NOVEL CASES OF DAMAGES

This brings me to the question of the type of damage that is recognised by the law of negligence. Damage, in the sense of injury

³⁴ *Wallace v Kam* (2013) 250 CLR 375, 386 [24]; see the authorities referred to in n 38.

or harm suffered, is the gist of, and essential to, an action for negligence. 'Damage' in this sense is different from 'damages', which refers to the money that is awarded to compensate for the injury or harm.

To determine whether, and the extent to which, a person has suffered damage, the law looks to the position of the person before and after the occurrence of the injury or harm caused by the negligent act. Generally speaking, in the law of negligence damage may be quantifiable injury or harm to a person, to property or to a person's interests. In cases of medical negligence it will usually be bodily injury or harm.

In the last 10 years or so there have been three cases before the High Court that have challenged accepted notions of damage, which are discussed in turn below. The first question for the Court was whether the damage fell within a category already recognised by the common law. If it did not, could and should the common law be extended to recognise such damage? Once again, we are in the territory of legal policy.

A court such as the High Court is responsible for developments in the Australian common law. Developments in a system that relies on precedent — what is learned or distilled from case to case — tend to be incremental. This is due to the nature of the system and the concern of the law to at least have the appearance of coherence and certainty. New directions have to be explicable by reference to established principles that inhere in actions such as those for negligence. Arguments seeking to alter the elements of the cause of action or their relationship to each other are carefully scrutinised. In two of the three cases discussed, novel claims of damage were advanced, but did not succeed.

One of the cases, *Tabet v Gett*,³⁵ involved a child who had suffered severe, irreversible brain damage. By the time the appeal reached the High Court it was accepted by the parties that the treating doctor at the hospital should have ordered a scan at an earlier time. The scan would have revealed a brain tumour. Lawyers acting for the child recognised that there were problems with causation in her case. The evidence did not establish the necessary connection between the delay in treatment, which resulted from the failure to order a scan, and the subsequent brain damage. It could not be said on the balance of probabilities that ‘but for’ the delay, the child would not have suffered brain damage.

Consequently, the lawyers turned their attention to another kind of damage. They argued that she had suffered a loss of a kind different from the brain injury — that, due to the delay in diagnosing her condition, she had suffered the loss of the possibility of a better medical outcome. However, characterising the damage in this way still could not overcome problems with evidence of causation. At an evidentiary level there is always a degree of speculation necessarily involved in accepting that there would have been a better outcome if a patient had received better advice.

There were other matters of principle at stake as well. A chance is only a possibility. In civil actions such as those for negligence, the standard of proof is the balance of probabilities. It is necessary for a plaintiff to show, on the balance of probabilities, that damage would not have occurred had the doctor not been negligent. To accommodate the loss of a chance of a better medical outcome as compensable damage, the court would have to lower the standard of proof in all actions for negligence, from a probability to a chance. Framing the damage as loss of a ‘chance’ adverts to the fact that what is involved is possibilities rather than probabilities. The

³⁵ (2010) 240 CLR 537.

concept of causation would also have to be redefined, to accommodate a chance. These were large steps that could have far-reaching effects. The Court did not consider that it was established why, as a matter of policy, it should make these fundamental changes to the law. This decision may have been a relief to doctors in Australia, and their insurers, given that the chance of mishap is inherent in most medical procedures.

Difficult questions were also raised about the concept of ‘damage’ in the second case, *Harriton v Stephens*.³⁶ An action was brought on behalf of a child who had been born with congenital abnormalities caused by the rubella virus contracted by her mother during pregnancy, which was not diagnosed by the mother's doctor. It was accepted that, had the mother been informed of the presence of the virus and the risk of abnormalities, she would have terminated the pregnancy.

To say that a person has suffered damage is to invite a comparison between what would have been and what now is. A simple example, such as might arise in a case involving a motor vehicle accident, is the comparison between a pain-free, unimpaired person before a negligent act and a person with a fractured limb having limited movement after. The child's lawyers sought to demonstrate that she had suffered damage by using a comparison of a different kind. It involved the child's condition now, being disabled, and the circumstance which would have followed had her mother been advised of the presence of the virus and terminated the pregnancy. However, this was to compare the state of the child as at the time of the case with a state of not being born. The High Court held that a comparison involving non-existence is impossible to accept. This might be thought to involve an element of moral philosophy. It is probably sufficient to observe that the comparison contended could

³⁶ (2006) 226 CLR 52.

not logically prove damage, as a person cannot complain that they should not exist.

In the third case, *Cattanach v Melchior*,³⁷ the plaintiff was successful. A child had been born after a failed sterilisation procedure. The parents claimed damages for the reasonable cost of raising and maintaining an unplanned child. The question was whether the parents had suffered damage by these costs. It was argued that the parents could not be said to have suffered harm or damage, given the immeasurable benefits that they admittedly derived from the child. On this view there was no real loss or damage. The argument had received some judicial support in England. However, as the High Court considered, it could hardly be said that the birth had no effect upon the parents. The mother suffered pain and suffering in childbirth, for which she could be compensated. The parents also had to pay for the medical and hospital costs of the birth. Logically, there was nothing to prevent compensation for the effect upon their other interests, constituted by the burden of responsibility that had been imposed upon them by the unplanned birth. Consequently, the costs of the child's upbringing were allowed.

VI CONCLUSION

Each of the medical negligence cases I have discussed in this article has contributed in some way to the development of the general law relating to negligence. Development in this sense is not to be equated with an expansion of liability, or a contraction of it for that matter. It refers to the way each case, decided by reference to the facts relevant to it, adds to the body of knowledge, which may later become distilled as a rule, a test or a legal principle. Problems arising in connection with one or more of the elements of the action

³⁷ (2003) 215 CLR 1.

are ultimately resolved. Development by way of further statement, clarification or explanation of the law, tends to be incremental.

In deciding difficult cases of this kind the elements of the action must not be viewed separately, but as interconnected and working together. Thus, the first case stated the duty owed as a duty to warn of material risks. Identifying the duty in that way also facilitates the determination of causation, based on what risks a patient would likely have taken, or not taken. This was picked up and explained in the later cases. In one of them, the resolution of the question of causation brought into focus the connection necessary between the particular injury suffered, and the risk not warned about. The cases concerned with the nature of damage itself show that the Court will consider the changes which would be necessary with respect to the action for negligence should the notion of damage be enlarged. They also show that the Court will be cautious about change where coherence in the law may be lost.

The cases discussed did not come to the attention of the High Court for decision by chance; appeals to the High Court are subjected to the filtering mechanism of special leave, which requires a party to persuade two or three Justices of the Court that the case involves a matter of general importance to the law. This criterion may be satisfied where a question of legal principle is involved and where there will be an opportunity for the Court to clarify, explain or develop the existing case law.

Nobody can predict what the action for negligence will look like in another 100 years. The law responds, to an extent, to the demands of the particular age. The law of medical negligence, in particular, will need to be responsive to developments in technology and scientific understanding. We can, however, look back over the last 30 years and observe not only how change is effected but also how constancy is maintained.

OVERTURNING THE PRESUMPTION OF CONFIDENTIALITY: SHOULD THE UNCITRAL RULES ON TRANSPARENCY BE APPLIED TO INTERNATIONAL COMMERCIAL ARBITRATION?

MATTHEW CARMODY*

Abstract

*Investor-state arbitration — International commercial arbitration
— Transparency — Confidentiality — Privacy — UNCITRAL Rules
on Transparency*

The recent proliferation of bilateral investment treaties has stimulated growth in international trade and promoted foreign direct investment. Transparency has a pivotal role to play in sustained economic revival by providing a more accountable, more democratic and more legitimate system of global governance. Notably, the topic of transparency has gained increased attention in international arbitration. In this context, transparency is usually defined as comprising concepts such as open hearings, disclosure of documents or information, and participation of third parties. The UNCITRAL Rules on Transparency were introduced in July 2013 with the aim of promoting transparency of the arbitral process in investor-state arbitration, and are symbolic of a worldwide trend towards increased transparency in international arbitration. The limited application of this trend to the system of investor-state arbitration has prompted calls for increased transparency in international commercial arbitration. The current system permits disputes that impact profoundly upon matters of public interest to be

resolved outside of the public's view. Consequently, a dynamic debate about the continuing value of privacy and confidentiality in international commercial arbitration has emerged. The secrecy surrounding the recent Trans-Pacific Partnership negotiations has only increased the gravitas of such concerns. This article contends that it would be beneficial for the system as a whole to embrace the shift towards transparency that has been largely recognised as desirable in investor-state arbitration. However, for this transformation to occur on a widespread scale, the traditional presumption that international commercial arbitrations are automatically private and confidential must be overturned. This article proposes the Rules on Transparency as the means by which this change may commence.

I INTRODUCTION

In recent years, there has been a distinct trend towards transparency in international arbitration.¹ In July 2013, the United Nations

* BA, MA UWA, LLB (Hons) UNDA. Special thanks to Professor Gabriël Moens and Zoë Bush for their feedback on earlier drafts of this article. Thank you also to John Ley for providing invaluable guidance and wisdom during my time studying. Finally, thank you to Debbie and Bill Carmody for their everlasting patience and support.

¹ Samuel Levander, 'Resolving "Dynamic Interpretation": An Empirical Analysis of the UNCITRAL Rules on Transparency' (2014) 52 *Columbia Journal of Transnational Law* 506, 517, citing Christopher Dugan et al, *Investor-State Arbitration* (Oxford University Press, 2008) 707. Where this article refers to 'international arbitration', it refers to the broader system encompassing both investor-state arbitration and international commercial arbitration.

Commission on International Trade Law ('UNCITRAL')² adopted the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* ('*Rules on Transparency*').³ The *Rules on Transparency* were introduced with the aim of promoting greater openness and transparency of the arbitral process in investor-state arbitration.⁴

Arbitration is an alternative method of dispute resolution whereby the parties to a dispute agree to authorise an impartial third party to render a legally binding determination of the dispute.⁵ 'International' arbitration refers to the resolution of cross-border transaction disputes.⁶ The legal systems of many countries both sanction and encourage arbitration as an approach to resolving disputes, as is illustrated by the widespread adoption of supportive

² UNCITRAL is the core legal body of the UN system in the field of international trade law. Its mandate is to remove legal obstacles to international trade by progressively modernising and harmonising trade law: Dimitrij Euler et al, *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Cambridge University Press, 2015) 227 n 1.

³ GA Res 68/109, UN GAOR, 68th sess, Agenda Item 79, Supp No 17, UN Doc A/68/17 (16 December 2013) annex I ('*Rules on Transparency*').

⁴ Euler, above n 2, 227–8.

⁵ See Gary B Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012) 3; John R Crook, 'Joint Study Panel on Transparency in International Commercial Arbitration' (2009) 15(2) *ILSA Journal of International and Comparative Law* 361, 362.

⁶ See *UNCITRAL Model Law on International Commercial Arbitration*, GA Res 40/72, UN GAOR, 40th sess, 112th plen mtg, Supp No 17, UN Doc A/40/17 (11 December 1985) annex I, as amended by GA Res 61/33, UN GAOR, 61st sess, 64th plen mtg, Supp No 17, UN Doc A/61/17 (4 December 2006) art 1(3) ('*Model Law*').

laws and policies.⁷ Fundamentally, resolving a dispute by arbitration requires the consent of both parties; that is, an agreement by the parties to submit to arbitration ('arbitration agreement').⁸ By contrast, a party to litigation may unilaterally decide to initiate an action.

International arbitrations may be either 'institutional'⁹ or 'ad hoc'.¹⁰ A central characteristic of international arbitration is the submission of the disputes to a non-governmental neutral third party, selected by or for the parties ('arbitrator').¹¹ The authority of the arbitrator derives from the arbitration agreement.¹² An arbitration agreement may be entered into when the dispute arises, or included as a clause in a commercial contract, which provides that any dispute arising between the parties will be referred to arbitration.¹³ A further

⁷ Crook, above n 5, 362.

⁸ See, eg, *Model Law*, UN Doc A/40/17 and UN Doc A/61/17, arts 7(1), 8(1); *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 6 June 1959) arts II(1)(3) ('*New York Convention*').

⁹ Institutional arbitrations are conducted pursuant to institutional rules, which have been incorporated by the parties' arbitration agreement and are almost always overseen by an institutional authority who administers the arbitration: Born, above n 5, 27.

¹⁰ Ad hoc arbitrations are conducted independent of any arbitration institution or pre-existing arbitration rules. Ad hoc arbitrations are subject only to the parties' arbitration agreement and applicable national legislation: Australian Centre for International Commercial Arbitration, *Frequently Asked Questions: Arbitration in Australia* (2010) ACICA <<http://acica.org.au/resources/faqs>>; Born, above n 5, 27.

¹¹ Born, above n 5, 5.

¹² Rashda Rana and Michelle Sanson, *International Commercial Arbitration* (Lawbook Co, 2011) 5.

¹³ *Ibid* 5–6.

defining attribute of international arbitration is that the arbitrator produces a final and binding determination.¹⁴ An arbitral award can be coercively enforced against the unsuccessful party or its assets, and is subject to limited grounds of appeal in national courts.¹⁵

The two systems of international arbitration upon which this article centres are investor-state arbitration and international commercial arbitration. The most fundamental distinction between investor-state arbitration and international commercial arbitration relates to the identity of the disputants.¹⁶ Investor-state arbitration involves disputes between private investors and state or state-owned entities. In contrast, international commercial arbitration is a process predominantly used to resolve disputes between two or more private parties from different states, arising out of 'commercial' transactions.¹⁷

The system of investor-state arbitration developed in the second half of the 20th century as a procedural mechanism to allow foreign

¹⁴ Born, above n 5, 5.

¹⁵ Ibid.

¹⁶ Robert Argen, 'Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration' (2015) 40 *Brooklyn Journal of International Law* 207, 207.

¹⁷ The term 'commercial' is given a wide interpretation and covers matters arising from all relationships of a 'commercial nature', whether contractual or not. Relationships of a 'commercial nature' include, but are not limited to: any trade transaction for the supply or exchange of goods and services; distribution agreements; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business corporation; carriage of goods or passengers by air, sea, rail or road: *Model Law*, UN Doc A/40/17 and UN Doc A/61/17, 1.

investors to enforce their rights directly against host states in which they had invested.¹⁸ In investor-state arbitration, an investor and its assets must typically be covered by an ‘investment treaty’ in order to have a right of recourse against a host state.¹⁹ An investment treaty is an agreement between two or more states in which each contracting state agrees to promote and protect investments made in its territory by investors of the other contracting state.²⁰ Investment treaties were developed with the fundamental intention of reducing the risks of foreign investment, thereby lowering its costs.²¹

The majority of investment treaties are bilateral, meaning they are between two states only.²² The first bilateral investment treaty (‘BIT’) was entered into by West Germany and Pakistan in 1959.²³ Around 3000 of these instruments are in force today.²⁴ Disputes arising under investment treaties are typically between private investors and the host state, hence the term ‘investor-state’

¹⁸ The typical definition of ‘investor’ extends to both nationals of, and companies incorporated in, a contracting state: Sam Luttrell, ‘Resource Nationalism: Old Problem, New Solutions’ in Gabriël A Moens and Philip Evans (eds), *Arbitration and Dispute Resolution in the Resources Sector* (Springer International Publishing Switzerland, 2015) 197, 197, 219.

¹⁹ *Ibid* 197–8, 217.

²⁰ *Ibid*.

²¹ *Ibid* 198.

²² *Ibid* 218.

²³ *Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments*, opened for signature 25 November 1959, 45 UNTS 23 (entered into force 28 April 1962).

²⁴ Luttrell, above n 18, 218.

arbitration.²⁵ In their investment treaties, states generally offer investors the option to resolve disputes arising under the treaties via international arbitration, in accordance with specified procedural rules.²⁶ States often provide investors a menu of rules to choose from and allow investors to determine which set of rules will apply.²⁷

Discourse around increasing transparency in international arbitration tends to raise three distinct, yet often conflated, concepts: privacy, confidentiality, and transparency. Delineating the boundaries of these concepts, as well as understanding their points of overlap, is necessary to evaluate the current state of transparency in international arbitration and to assess its future development.

²⁵ Natasha Marusja Saputo, 'Paradoxical Pacts: Understanding the BIT Phenomenon and the Rejection of a Multilateral Agreement on Investment' (2014) 41 *Ohio Northern University Law Review* 121, 130.

²⁶ Procedural rules frequently used by investors include the *United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)*, GA Res 68/109, UN GAOR, 68th sess, 68th plen mtg, Agenda Item 79, Supp No 49, UN Doc A/RES/68/109 (18 December 2013) ('*UNCITRAL Arbitration Rules*'); *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, ICSID/15/Rev. 1 (entered into force 14 October 1966) 99 ('*ICSID Arbitration Rules*'); *International Chamber of Commerce Rules of Arbitration* (entered into force 1 January 2012); Lise Johnson and Nathalie Bernasconi-Osterwalder, 'New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps' (Report, Columbia Centre on Sustainable Development, August 2013) 4; Luttrell, above n 18, 219.

²⁷ Johnson and Bernasconi-Osterwalder, above n 26, 4–5.

In the context of international arbitration, the term privacy refers to the fact that, under virtually all national arbitration legislation and institutional rules, only parties to the arbitration may attend arbitral hearings and otherwise participate in the arbitral proceedings.²⁸ In contrast, confidentiality ‘goes further than privacy’²⁹ and refers to the parties’ asserted obligations not to disclose information concerning the arbitration to third parties.³⁰ The distinction may, therefore, be expressed as a right to prevent someone being present, as opposed to a right to prevent publication.³¹ This article adopts the prevailing definition of ‘transparency’ as an umbrella term that encompasses:

- the publication of information about the arbitral proceedings;
- access to various documents from the arbitration;
- the involvement of third parties in the conduct of proceedings,³² and

²⁸ Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd ed, 2014) 2781.

²⁹ Kyriaki Noussia, *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law* (Springer Science and Business Media, 2010) 40.

³⁰ Born, above n 28, 2781.

³¹ Euler, above n 2, 93–4, citing ‘Expert Report of Dr Julian D M Lew (in *Esso/BHP v Plowman*)’ (1995) 11 *Arbitration International* 283, 285 [16].

³² The concept of ‘amicus curiae’, or ‘friends of the court’, allows third party participation to provide assistance to the court under certain circumstances: Euler, above n 2, 129. See also Brigitte Stern, ‘Civil Society’s Voice in the Settlement of International Economic Disputes’ (2007) *ICSID Review — Foreign Investment Law Journal* 280; Lucas Bastin, ‘The Amicus Curiae in Investor-State Arbitration’ (2012) 1(3) *Cambridge Journal of International and Comparative Law* 208; Eugenia Levine, ‘Amicus Curiae in International Investment

- access to hearings.³³

The *Rules on Transparency* overwhelmingly support this broad conception of transparency because its two pivotal provisions relate to public disclosure and public access.³⁴

The first part of this article provides a historical context as to how the *Rules on Transparency* came into existence. It conducts an analysis of comparable rules frequently used in international investment arbitration, including the *UNCITRAL Arbitration Rules*,³⁵ the *Arbitration Rules of the International Centre for Settlement of Investment Disputes* ('*ICSID Arbitration Rules*'),³⁶ and the *North American Free Trade Agreement* ('*NAFTA*').³⁷ The article

Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29(1) *Berkeley Journal of International Law* 200; Mariel Dimsey, 'Foreign Direct Investment and the Alleviation of Poverty' in Krista Nadakavukaren Schefer (ed), *Poverty and the International Economic Legal System: Duties to the World's Poor* (Cambridge University Press, 2013) 167–8.

³³ Euler, above n 2, 5.

³⁴ *Ibid* arts 3, 6.

³⁵ *United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)*, GA Res 68/109, UN GAOR, 68th sess, 68th plen mtg, Agenda Item 79, Supp No 49, UN Doc A/RES/68/109 (18 December 2013).

³⁶ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, ICSID/15/Rev 1 (entered into force 14 October 1966) 99 ('*ICSID Arbitration Rules*').

³⁷ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, signed 17 December 1992 [1994] CTS 2 (entered into force 1 January 1994) ('*NAFTA*').

then examines the *Rules on Transparency* in detail and considers their applicability to investor-state arbitration.

Next, the article discusses the value of transparency in investor-state arbitration and considers the current state of transparency in investor-state arbitration. It also analyses the extent to which the introduction of the *Rules on Transparency* has led to greater consistency and uniformity in investor-state arbitration, as well as a higher degree of openness, efficiency, and legitimacy.

The article then details analogous instruments to the *Rules on Transparency* that are most frequently adopted in international commercial arbitrations, including the *New York Convention*,³⁸ and the *Model Law*.³⁹ It also considers the extent to which transparency already exists in international commercial arbitration. Finally, the article examines whether or not the *Rules on Transparency* should be applied to international commercial arbitration.

At present there is a dearth of scholarship that considers the specific question of whether the *Rules on Transparency* should be applied to international commercial arbitration. In part, this is likely due to their relative infancy. Ultimately, this article proposes that the scope of the *Rules on Transparency* should be extended to apply to international commercial arbitration. Increased transparency promotes legitimacy and accountability in international arbitration.⁴⁰

³⁸ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

³⁹ UN Doc A/40/17 and UN Doc A/61/17.

⁴⁰ *Report: Online public consultation on protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, European Commission (13 January 2015) 80.

Transparency enables stakeholders and interested parties to be informed of and contribute to the proceedings.⁴¹ Transparency fosters accountability in arbitrators, as their decisions are open to scrutiny.⁴² Finally, transparency contributes to consistency and predictability by creating a body of jurisprudence and information that can be relied on by parties to arbitrations, arbitration institutions and arbitrators alike.⁴³

II HISTORICAL CONTEXT AND THE UNCITRAL RULES ON TRANSPARENCY

Traditionally, investor-state arbitrations have been conducted on the basis of international commercial arbitration rules, which do not provide for transparency.⁴⁴ Greater transparency in investor-state arbitration is an important objective, as it aims to provide the public with access to documents and hearings, as well as allowing interested third parties to make submissions.⁴⁵ These aims are particularly pertinent to investor-state disputes as they often raise issues relating to public policies or impact public finances.⁴⁶

In order to appreciate the significance of the *Rules on Transparency*, it is first necessary to evaluate the status quo in existing arbitration rules with regards to confidentiality, privacy and transparency. Accordingly, this section will commence with a detailed

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ *Explanatory Memorandum: Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the United Nations Convention on transparency in treaty-based investor-State arbitration*, European Commission, 2015/0012/NLE (29 January 2015) 2.

⁴⁵ Ibid.

⁴⁶ Ibid.

examination of the rules most frequently used in investor-state arbitration, including the *UNCITRAL Arbitration Rules*, the *ICSID Rules* and the *NAFTA*. This examination will be contrasted with a comprehensive review of the *Rules on Transparency*.

*A Historical Background Prior to the Rules on
Transparency*

UNCITRAL was established by the UN General Assembly in 1966 with the mandate of furthering ‘the progressive harmonization and modernization of the law of international trade’,⁴⁷ and is regarded as ‘the core legal body of the United Nations system in the field of international trade law’.⁴⁸ Despite transparency being a prototypical ‘UN value’,⁴⁹ UNCITRAL has historically lagged behind many of its peer institutions on the issue of transparency.⁵⁰ Indeed, prior to the adoption of the *Rules on Transparency* no arbitration rules used in investor-state arbitration mandated transparency throughout the entire arbitral process.⁵¹

⁴⁷ *Establishment of the United Nations Commission on International Trade Law*, GA Res 2205 (XXI), UN GAOR, 21st sess, 1497th plen mtg, UN Doc A/6396 (17 December 1966) art 1.

⁴⁸ See United Nations, *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (January 2013) UNCITRAL, 25. <<http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>>.

⁴⁹ Levander, above n 1, 508–9, citing Dugan et al, above n 1.

⁵⁰ Levander, above n 1, 509.

⁵¹ Johnson and Bernasconi-Osterwalder, above n 26, 6.

1 *UNCITRAL Arbitration Rules*

In 1976, UNCITRAL issued the *UNCITRAL Arbitration Rules*,⁵² which were ‘adopted for a broad range of disputes, including between private commercial parties, between investors and states, and between states and other states’.⁵³ The *UNCITRAL Arbitration Rules* may be used for ad hoc arbitrations as well as institutional proceedings.⁵⁴ However, the *UNCITRAL Arbitration Rules* were originally and principally drafted to apply to private commercial arbitrations.⁵⁵ Accordingly, the *UNCITRAL Arbitration Rules* do not expressly promote transparency.⁵⁶ Indeed, both the 1976 and 2010 versions of the *UNCITRAL Arbitration Rules* clearly manifest a predilection for privacy.⁵⁷ Moreover, the *UNCITRAL Arbitration Rules* do not actively promote confidentiality.⁵⁸ Despite this, the revised 2010 *UNCITRAL Arbitration Rules* are the second most frequently used rules for resolving investor-state disputes, after the

⁵² *UNCITRAL Arbitration Rules*, GA Res 31/98, UN GAOR, 31st sess, 99th plen mtg, Supp No 17, UN Doc A/31/17 (15 December 1976) (‘1976 *UNCITRAL Arbitration Rules*’).

⁵³ *Report of the United Nations Commission on International Trade Law on the work of its ninth session*, 31st sess, Supp No 17, UN Doc A/31/17 (12 April 1976), cited in Levander, above n 1, 522.

⁵⁴ Levander, above n 1, 522–3.

⁵⁵ Clyde Croft, Christopher Kee and Jeffrey Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (Cambridge University Press, 2013) 6, cited in Euler, above n 2, 93.

⁵⁶ Euler, above n 2, 93.

⁵⁷ See *UNCITRAL Arbitration Rules as revised in 2010*, GA Res 65/22, 65th sess, 57th plen mtg, Agenda Item 77, UN Doc A/RES/65/22 (10 January 2011) art 28(3) (‘2010 *UNCITRAL Arbitration Rules*’); UN Doc A/31/17, art 25(4).

⁵⁸ Euler, above n 2, 93.

ICSID Arbitration Rules.⁵⁹ The *2010 UNCITRAL Arbitration Rules*⁶⁰ modernised the procedural rules by providing for arbitration between multiple parties, creating procedures for joinder,⁶¹ revising procedures for replacing an arbitrator, and establishing more detailed provisions on interim measures.⁶² Notwithstanding these revisions, investor-state arbitrations administered under the *UNCITRAL Arbitration Rules* typically remain private and confidential.⁶³

Prior to the amendments, the transparency provisions of the 1976 and 2010 *UNCITRAL Arbitration Rules* more closely resembled international commercial arbitration rules.⁶⁴ Consequently, disputes between investors and states were often not made public, ‘even where important public policies were involved or illegal or corrupt business practices were uncovered’.⁶⁵ Article 28(3) of the *2010 UNCITRAL Arbitration Rules* creates the presumption of privacy: that hearings shall be held ‘in camera’ unless the parties agree otherwise.⁶⁶ Article 34(5) provides that awards may only be made public with the consent of all parties, or where the law requires

⁵⁹ *Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session*, UN GAOR, 41st sess, UN Doc A/CN.9/646 (29 February 2008) [58], cited in Euler, above n 2, 93.

⁶⁰ UN Doc A/RES/65/22.

⁶¹ ‘Joinder’ refers to the combination of two or more aspects of a matter to allow it to be dealt with in a single instance: LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at 13 October 2015) ‘Joinder’.

⁶² *UNCITRAL Arbitration Rules*, UN Doc A/RES/68/109, cited in Levander, above n 1, 523.

⁶³ See Johnson and Bernasconi-Osterwalder, above n 26, 4.

⁶⁴ Levander, above n 1, 521.

⁶⁵ Johnson and Bernasconi-Osterwalder, above n 26, 4.

⁶⁶ UN Doc A/RES/65/22.

disclosure.⁶⁷ The *UNCITRAL Arbitration Rules* also contain no provision allowing for submissions by third persons.⁶⁸ Article 17(5) provides that the arbitral tribunal may allow one or more third persons to join the arbitration, but requires that the third person be a party to the arbitration agreement.⁶⁹ Accordingly, the effect of art 17(5) is that a third party that is not a party to the arbitration agreement may not participate in the arbitration proceeding, even as an amicus.⁷⁰

Arbitrations under the 1976 and 2010 *UNCITRAL Arbitration Rules*, ‘therefore typically lack[ed] transparency in any meaningful sense’,⁷¹ and transparency was ‘the exception rather than the rule’.⁷²

2 *ICSID Arbitration Rules*

Cases administered by ICSID constitute the majority of all investment treaty cases in the context of investor-state arbitration⁷³

⁶⁷ 2010 *UNCITRAL Arbitration Rules*, UN Doc A/RES/65/22, art 34(5).
⁶⁸ *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fifth session*, UN GAOR, 44th sess, UN Doc A/CN.9/737 (17 October 2011) 68–77, cited in Levander, above n 1, 517.

⁶⁹ *UNCITRAL Arbitration Rules*, UN Doc A/RES/68/109.

⁷⁰ Levander, above n 1, 517.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Soloman Ebere and Blerina Xheraj, ‘Nine Years Later: Investment Treaty Arbitration’s Contribution to International Commercial Arbitration’ (2014) 25 *American Review of International Arbitration* 85, 87, citing United Nations Committee on Trade and Development, *Latest Developments in Investor-State Dispute Settlement: IIA Monitor No 1* (March 2011) <http://unctad.org/en/Docs/webdiaeia20113_en.pdf>, 2 (observing that the majority of cases have accrued under ICSID - 245 cases as of December 2010).

and are the only arbitration rules established exclusively for disputes arising between investors and States.⁷⁴ The *ICSID Arbitration Rules* entered into force on 14 October 1966.⁷⁵ The *ICSID Arbitration Rules* were amended in 2006 ‘in response to developments in investment treaty arbitration jurisprudence and above all in response to cries for increased transparency in ICSID arbitration’.⁷⁶ The 2006 amendments were enacted to make ICSID proceedings ‘more streamlined and transparent, while instilling greater confidence in the arbitral process’.⁷⁷ Consequently, despite relying heavily on arbitral rules established for commercial disputes between private parties, the ICSID system ‘can be distinguished from such rules by its approach to transparency’.⁷⁸

The 2006 amendments have led to greater transparency in investor-state arbitration, albeit not to the same extent advanced by the *Rules on Transparency*.⁷⁹ The *ICSID Arbitration Rules* r 32(2) grants the Tribunal discretionary power to allow third parties to attend hearings if none of the parties to the proceedings object. This puts *ICSID Arbitration Rules* in parity with the *UNCITRAL Arbitration Rules* with respect to open hearings.⁸⁰ However, unlike the *UNCITRAL Arbitration Rules*, r 37(2) creates standards by which third parties can submit briefs to address issues that may not be adequately addressed by the parties to the arbitration. The Tribunal is required to consult both parties before ruling on the amicus request, but may still accept an *amicus* submission if one or

⁷⁴ Euler, above n 2, 229 n 8; see also Johnson and Bernasconi-Osterwalder, above n 26, 6.

⁷⁵ *ICSID Arbitration Rules*, opened for signature 18 March 1965, ICSID/15/Rev. 1 (entered into force 14 October 1966) 99.

⁷⁶ Euler, above n 2, 139.

⁷⁷ Levander, above n 1, 517.

⁷⁸ See, Johnson and Bernasconi-Osterwalder, above n 26, 6.

⁷⁹ Euler, above n 2, 94.

⁸⁰ Levander, above n 1, 517.

both parties object, provided it ‘does not disrupt the proceeding or unduly burden or unfairly prejudice either party’.⁸¹

The *ICSID Arbitration Rules* r 48(4) mandates the prompt publication by ICSID of excerpts of the legal reasoning of the Tribunal. Consequently, most ICSID arbitral awards are now published and ICSID provides details of the composition of the arbitral Tribunal in each case on its website.⁸² However, arbitral awards may not be published without the unanimous consent of the parties.⁸³ Accordingly, despite attempts to increase transparency, the practical impact of these amendments is inhibited by the ability of any party to the dispute to unilaterally proscribe the publication of awards.⁸⁴ Nonetheless, with regard to transparency, the *ICSID Arbitration Rules* rr 37 and 48 surpass the analogous provisions of the *UNCITRAL Arbitration Rules* for amicus briefs and publication of awards.⁸⁵

Neither the *ICSID Arbitration Rules* nor the *UNCITRAL Arbitration Rules* prevent parties to a dispute from unilaterally disclosing information relating to the initiation and certain aspects of a case, or from releasing the notice of arbitration, pleadings, or briefs.⁸⁶ The financial and administrative regulations of the *ICSID Arbitration Rules* require the publication of ‘all significant data concerning the institution, conduct and disposition of each proceeding’.⁸⁷

⁸¹ *ICSID Arbitration Rules* r 37(2).

⁸² ICSID, *Cases* (2015) <<https://icsid.worldbank.org/apps/icsidweb/cases/Pages/AdvancedSearch.aspx>>; see also Ebere and Xheraj, above n 73, 85.

⁸³ *ICSID Arbitration Rules* r 48(4), cited in Argen, above n 16, 227.

⁸⁴ Argen, above n 16, 227.

⁸⁵ Levander, above n 1, 517–18.

⁸⁶ Johnson and Bernasconi-Osterwalder, above n 26, 7.

⁸⁷ ICSID Administrative and Financial Regulations, Regulation 23; see also id, Regulation 22.

Accordingly, a number of these documents are available in the public domain.⁸⁸ In recent years, ICSID has also ‘jumped ahead of the normative transparency trend curve’ by televising and streaming online certain arbitration proceedings that have significant public interest implications.⁸⁹

Although the 2006 amendments have been characterised as ‘modest, incremental and conservative’,⁹⁰ they nonetheless suggest a preference for more transparency in proceedings by making open hearings the default rule.⁹¹ They also give tribunals a clear mandate to determine whether non-party submissions will be accepted,⁹² and require that ‘excerpts of the legal reasoning of the Tribunal’ be published after the award has been issued.⁹³ The *ICSID Arbitration Rules*, therefore, provide for significantly more transparency in arbitral hearings than the *UNCITRAL Arbitration Rules*,⁹⁴ and have helped set the stage for UNCITRAL’s adoption of the *Rules on Transparency*.⁹⁵

⁸⁸ Johnson and Bernasconi-Osterwalder, above n 26, 7.

⁸⁹ Argen, above n 16, 227, citing Sofia Plagakis, ‘Webcasting: A Tool to Increase Transparency in Judicial Proceedings’ in Junji Nakagawa (ed), *Transparency in International Trade and Investment Dispute Settlement* (Routledge, 2013) 84, 84; Eberé and Xheraj, above n 73, 89.

⁹⁰ Jarrod Wong and Jason Yackee, ‘The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns’ in Karl P Sauvart (ed), *Yearbook on International Investment Law and Policy* (Oxford University Press, 2010), quoted in Euler, above n 2, 30.

⁹¹ *ICSID Arbitration Rules* r 32(2); see also Euler, above n 2, 30–1.

⁹² *Ibid* r 37(2); see also Euler, above n 2, 31.

⁹³ *Ibid* r 48(4).

⁹⁴ Levander, above n 1, 518.

⁹⁵ Argen, above n 16, 227.

3 *NAFTA*

The *NAFTA*, unlike the *UNCITRAL Arbitration Rules* or *ICSID Arbitration Rules*, is an investment treaty between sovereign states.⁹⁶ Under the *NAFTA*, the trend towards transparency in international arbitration dates back to at least 2001, when the Free Trade Commission ('FTC') of the *NAFTA* issued an interpretation of the *NAFTA*'s arbitration regime aimed at protecting public interests.⁹⁷ This interpretation stated that '[n]othing in the *NAFTA* imposes a general duty of confidentiality on the disputing parties' to an investor-state arbitration brought on the basis of the treaty.⁹⁸ However, at the time, most parties to investor-state agreements selected the 1976 *UNCITRAL Arbitration Rules* or the *ICSID Arbitration Rules*, both of which contained provisions that kept arbitral documents private and confidential.⁹⁹ Consequently, the FTC's 2001 interpretation to increase transparency brought about little change.¹⁰⁰ It did, however, 'plant the seed for the transparency trend'.¹⁰¹

⁹⁶ Levander, above n 1, 518–19.

⁹⁷ *NAFTA*'s FTC is comprised of trade ministers from each of the three member governments. The commission has the authority to interpret *NAFTA*: Julie Lee, 'UNCITRAL's Unclear Transparency Instrument: Fashioning the Form and Application of A Legal Standard Ensuring Greater Disclosure in Investor-State Arbitrations' (2013) 33 *Northwestern Journal of International Law & Business* 439, 450, cited in Argen, above n 16, 226.

⁹⁸ *NAFTA* Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001) <www.state.gov/documents/organization/38790.pdf> A(1)(2)(a), quoted in Euler, above n 2, 30.

⁹⁹ Lee, above n 97, 450–3, cited in Argen, above n 16, 226.

¹⁰⁰ Lee, above n 97, 458, cited in Argen, above n 16, 226.

¹⁰¹ *Ibid.*

The *NAFTA*'s preamble emphasises the rationale of transparency: the state parties resolve to 'establish clear and mutually advantageous rules governing their trade' and 'ensure a predictable commercial framework for business planning and investment'.¹⁰² The *NAFTA* ch 11 establishes a mechanism for the settlement of investment disputes. Members arbitrating claims under the *NAFTA* ch 11 has had the effect of expanding the transparency requirements under investor-state arbitrations.¹⁰³ Under the *NAFTA* art 1120, a disputing investor may submit a claim to a ch 11 tribunal under either the *ICSID Arbitration Rules* or *UNCITRAL Arbitration Rules*.¹⁰⁴ In such proceedings, the *NAFTA* ch 11 tribunal must refer to the terms of the treaty itself and the rules chosen by the investor when considering issues relating to confidentiality.¹⁰⁵

Article 1127 requires a disputing party to notify other parties of the notice of claim and to provide copies of all pleadings within 30 days after the submission of the claim. Article 1128 allows a non-disputing party to the agreement to make submissions on questions of the agreement's interpretation. Further, art 1129 entitles a non-disputing party to receive evidence submitted to the tribunal by the disputing parties.¹⁰⁶

The existing *NAFTA* framework contains no clear rule on open

¹⁰² *NAFTA* Preamble.

¹⁰³ Laurence Boisson De Chazournes and Rukia Baruti Dames, 'Transparency in Investor-State Arbitration: An Incremental Approach' (2015) 2(1) *BCDR International Arbitration Review* 58, 61.

¹⁰⁴ Levander, above n 1, 518.

¹⁰⁵ *Ibid* 518–19.

¹⁰⁶ Boisson De Chazournes and Baruti Dames, above n 103, 61.

access to hearings.¹⁰⁷ *NAFTA* ch 11 also contains no express provisions imposing a general duty of confidentiality on the disputing parties, and nothing precludes the parties from providing public access to documents submitted to, or issued by, a tribunal.¹⁰⁸ Indeed, some *NAFTA* arbitral decisions ‘have been on the forefront of promoting transparency in international investment arbitration’.¹⁰⁹

In *Metalclad Corporation v The United Mexican States* (*‘Metalclad’*),¹¹⁰ the *NAFTA* tribunal decided that nothing in the *NAFTA*, *ICSID Arbitration Rules* or *1976 UNCITRAL Arbitration Rules* contained an express restriction on publicising information related to the arbitration.¹¹¹ Accordingly, the tribunal rejected a motion made by the Mexican government for an order that the proceedings be confidential, and to enforce sanctions if the order was violated.¹¹²

The issue with respect to participation of third persons in investor-state arbitration first arose in the *NAFTA* context.¹¹³ In

¹⁰⁷ Hoi L Kong and L Kinvin Wrot (eds), *NAFTA and Sustainable Development: The History, Experience, and Prospects for Reform* (Cambridge University Press, 2015).

¹⁰⁸ See *NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001) <www.state.gov/documents/organization/38790.pdf>, cited in Levander, above n 1, 519.

¹⁰⁹ *Ibid.*

¹¹⁰ (*Award*) (ICSID Arbitral Tribunal, Case No ARB(AF)/97/1, 30 August 2000).

¹¹¹ Levander, above n 1, 519, citing *Metalclad (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/97/1, 30 August 2000).

¹¹² *Ibid.*

¹¹³ Euler, above n 2, 143.

Methanex Corporation v United States of America ('Methanex'),¹¹⁴ several NGOs submitted a joint application for *amicus curiae* status to intervene in support of a California law that banned a chemical additive to gasoline.¹¹⁵ The *NAFTA* tribunal held that it had the power to accept *amicus curiae* submissions.¹¹⁶ Despite being denied the request to intervene, the NGOs were permitted to submit an *amicus* brief,¹¹⁷ notwithstanding the fact that the underlying arbitration was conducted under the 1976 *UNCITRAL Arbitration Rules*, which restrict *amicus* submissions.¹¹⁸ Accordingly, the tribunal found for the first time in the *NAFTA* context that, under art 15(1) of the 1976 *UNCITRAL Arbitration Rules*,¹¹⁹ 'it has the power to accept *amicus* written submissions from the Petitioners'.¹²⁰ The *NAFTA* tribunals in both *Metalclad*¹²¹ and *Methanex*¹²² were careful to note that nothing in the 1976 *UNCITRAL Arbitration Rules* expressly restricts disclosure but stopped short of considering whether those rules favoured or disfavoured confidentiality.¹²³

¹¹⁴ (*Decision on Amici Curiae*) (NAFTA Chapter 11 Arbitral Tribunal, 15 January 2001).

¹¹⁵ See generally *Methanex (Decision on Amici Curiae)* (NAFTA Chapter 11 Arbitral Tribunal, 15 January 2001).

¹¹⁶ See generally, *ibid.*

¹¹⁷ See generally, *ibid.*

¹¹⁸ See UN Doc A/31/17, art 17(5).

¹¹⁹ *Ibid.*

¹²⁰ *Methanex (Decision on Amici Curiae)* (NAFTA Chapter 11 Arbitral Tribunal, 15 January 2001) [53]; see also Euler, above n 2, 3.

¹²¹ (*Award*) (ICSID Arbitral Tribunal, Case No ARB(AF)/97/1, 30 August 2000).

¹²² (*Decision on Amici Curiae*) (NAFTA Chapter 11 Arbitral Tribunal, 15 January 2001).

¹²³ Levander, above n 1, 519, citing *Metalclad (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/97/1, 30 August 2000).

4 Summary

Arbitration rules applicable to investment treaties are therefore typically either silent on the issue of transparency, or allow the disputing parties significant latitude to determine the degree of confidentiality in the proceedings.¹²⁴ Consequently, the majority of arbitrations conducted under these rules can remain predominantly transparent, if at least one party wishes.¹²⁵

One common aspect of the various sets of arbitral rules that apply to investor-state arbitrations is the restriction on public access to hearings.¹²⁶ The *ICSID Arbitration Rules* and *UNCITRAL Arbitration Rules* actively restrict public access to hearings, with hearings only being open to non-parties to the proceedings with the mutual consent of both disputing parties, or when required by the underlying treaty.¹²⁷ It is in this context that the UNCITRAL's Working Group II (Arbitration and Conciliation) ('*Working Group*') began to develop the *Rules on Transparency*.¹²⁸

¹²⁴ Johnson and Bernasconi-Osterwalder, above n 26, 6.

¹²⁵ *Ibid* 7.

¹²⁶ *Ibid*.

¹²⁷ Johnson and Bernasconi-Osterwalder, above n 26, 7, citing *ICSID Arbitration Rules* r 32(2); *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*, ICSID/11 (entered into force April 2006) art 39(2); *ICC Rules of Arbitration*, International Chamber of Commerce (entered into force 1 January 2012) art 26(3); *2010 Arbitration Rules*, Arbitration Institute of the Stockholm Chamber of Commerce (entered into force 1 January 2010) art 27(3).

¹²⁸ Euler, above n 2, 4.

B The UNCITRAL Rules on Transparency

The *Rules on Transparency*, which came into effect on 1 April 2014, comprise of a set of procedural rules that provide for increased transparency and public accessibility of treaty-based investor-state arbitrations.¹²⁹ In 2008, while negotiating the revisions to the 1976 *UNCITRAL Arbitration Rules*, the UN Commission determined that the issue of transparency in treaty-based investor-state arbitration would be a ‘matter of priority’.¹³⁰ After much debate over their form, UNCITRAL determined that the *Rules on Transparency* would be included as part of the *UNCITRAL Arbitration Rules*, and would be available as a stand-alone instrument for application in disputes governed by other arbitral rules.¹³¹ In February 2013, UNCITRAL further recognised the need for provisions on transparency in the settlement of treaty-based investor-state disputes.¹³² The terms of the *Rules on Transparency* were adopted at the July 2013 meeting of UNCITRAL in Vienna.¹³³

¹²⁹ UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (2015) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html>.

¹³⁰ *Report of the United Nations Commission on International Trade Law*, UN GAOR, 63rd sess, Supp No 17, UN Doc A/63/17 (16 June to 3 July 2008).

¹³¹ Johnson and Bernasconi-Osterwalder, above n 26, 8.

¹³² See *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session*, UN GAOR, 46th sess, UN Doc A/CN.9/765 (13 February 2013), cited in Levander, above n 1, 524.

¹³³ *Draft decision adopting the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the UNCITRAL Arbitration Rules (with a new article 1, paragraph 4, as adopted in 2013)*, UNCITRAL, 46th sess, UN Doc A/CN.9/XLVI/CRP.3 (9 July 2013).

1 Purpose

The *Rules on Transparency* were adopted to promote ‘the establishment of a harmoni[s]ed legal framework for a fair and efficient settlement of international investment disputes’.¹³⁴ The *Rules on Transparency* reflect a broader worldwide trend, recognising the importance of transparency ‘as a tool for promoting and ensuring effective democratic participation, good governance, accountability, predictability and the rule of law’.¹³⁵

2 Applicability

In 2013, the 2010 *UNCITRAL Arbitration Rules* were amended by the insertion of art 1(4) to expressly incorporate the *Rules on Transparency*. The *Rules on Transparency* apply to investor-state arbitrations initiated under the *UNCITRAL Arbitration Rules* that arise under investment treaties concluded on or after 1 April 2014, unless the parties agree otherwise.¹³⁶ Accordingly, the parties can agree to modify or ‘opt out’ of this default rule of application by expressly excluding the *Rules on Transparency* in their investment treaty or, for example, by making reference to a previous version of the *UNCITRAL Arbitration Rules*.¹³⁷ This ‘opt out’ provision

¹³⁴ *Draft decision adopting the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the UNCITRAL Arbitration Rules (with a new article 1, paragraph 4, as adopted in 2013)*, UNCITRAL, 46th sess, UN Doc A/CN.9/XLVI/CRP.3 (9 July 2013), cited in Johnson and Bernasconi-Osterwalder, above n 26, 3.

¹³⁵ *Delivering Justice: Programme of action to strengthen the rule of law at the national and international levels: Report of the Secretary-General*, UN GAOR, 66th sess, Agenda Item 83, UN Doc A/66/749 (16 March 2012), quoted in Johnson and Bernasconi-Osterwalder, above n 26, 4.

¹³⁶ *Rules on Transparency* art 1(1).

¹³⁷ See Boisson De Chazournes and Baruti Dames, above n 103, 65.

ensures the broadest application of the *Rules on Transparency* ‘without violating either the rules on retroactivity of laws or States’ ability to avoid international obligations to which they have not consented’.¹³⁸

Article 1(9) provides that the *Rules on Transparency* may also be used in investor-state arbitrations initiated under other arbitral rules or in ad hoc proceedings. However, the *Rules on Transparency* were designed to apply to investment treaty arbitrations only. Accordingly, there is no automatic application of the *Rules on Transparency* to purely commercial disputes arising under contracts concluded before or after the rules’ entry into force, even if the dispute is between an investor and a state.¹³⁹

3 Scope of Application

Article 1(3)(a) restricts parties from derogating from the *Rules on Transparency*, by agreement or otherwise, unless permitted to do so by the underlying investment treaty. However, art 1(3)(b) gives tribunals the discretion, after consultation with the disputing parties, to adapt the requirements of any specific provision of the *Rules on Transparency* to the particular circumstances of the case. Any adaptations must be ‘necessary to conduct the arbitration in a practical manner’, and should further the objective of promoting transparency.¹⁴⁰ In exercising its discretion, the arbitral tribunal must take into account the public interest in transparency in investor-state arbitration generally and the disputing parties’ interest in a ‘fair and efficient resolution of their dispute’.¹⁴¹

¹³⁸ Euler, above n 2, 50.

¹³⁹ *Rules on Transparency* art 1 n 1; Johnson and Bernasconi-Osterwalder, above n 26, 11.

¹⁴⁰ *Rules on Transparency*, art 1(3)(b).

¹⁴¹ *Ibid* art 1(4).

Article 1(5) provides that in UNCITRAL arbitrations where the *Rules on Transparency* do not apply, the arbitration should still be conducted in such a manner as to promote transparency. Accordingly, the level of transparency permitted by the 1976 and 2010 *UNCITRAL Arbitration Rules* is in no way intended to be reduced by any non-application of the *Rules on Transparency*.¹⁴² Article 1(6) aims to limit the ability of states to evade the application of the *Rules on Transparency*.¹⁴³

Pursuant to art 1(7), the *Rules on Transparency* prevail over any conflicting provisions in applicable arbitration rules.¹⁴⁴ Furthermore, art 1(7) prevents *Rules on Transparency* from limiting transparency by expressly noting that any broader disclosure requirements in the governing treaty shall prevail in the event of any inconsistency with the *Rules on Transparency*.¹⁴⁵ Article 1(8) notes that domestic laws prevail over any inconsistent provisions in the *Rules on Transparency*.

4 Substantive Content

The *Rules on Transparency* address four substantive aspects of transparency:

- notification of new arbitrations;
- disclosure of documents;
- standards for third party submissions; and

¹⁴² Johnson and Bernasconi-Osterwalder, above n 26, 12.

¹⁴³ *Ibid.*

¹⁴⁴ For example, if the applicable arbitration rules permit the disputing parties to agree to modify the rules governing the dispute (eg, through art 1(1) of UNCITRAL Arbitration Rules 1976, 2010, and 2013), the *Rules on Transparency* will prevail and prevent modification: Johnson and Bernasconi-Osterwalder, above n 26, 12–13.

¹⁴⁵ *Ibid.* 15.

- open hearings.¹⁴⁶

This section will analyse the key provisions of the *Rules on Transparency* that affect the transparency of proceedings in investor-state arbitration.

(a) Notification of Arbitrations

Article 2 is the first article provision of the *Rules on Transparency* that deals substantively with the issue of transparency. It regulates the publication of information at the commencement of arbitral proceedings.¹⁴⁷ The disputing parties have an obligation to transmit a notice of arbitration to the UNCITRAL Transparency Registry, which is the central repository for the publication of information and documents.¹⁴⁸ The purpose of the repository accords with the object of the *Rules on Transparency*: ‘to ensure that information on treaty-based investor-state arbitration cases are made known to the interested public’.¹⁴⁹ Upon receipt of the notice of arbitration, and evidence that the respondent has been sent and has received the notice of arbitration, the repository is required to disclose promptly the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being made.¹⁵⁰

¹⁴⁶ Levander, above n 1, 524.

¹⁴⁷ Euler, above n 2, 64.

¹⁴⁸ 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: *Rules on Transparency* art 8.

¹⁴⁹ *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session*, UN GAOR, 46th sess, UN Doc A/CN.9/765 (13 February 2013) [87], quoted in Euler, above n 2, 317–18.

¹⁵⁰ Johnson and Bernasconi-Osterwalder, above n 26, 12–13; Boisson De Chazournes and Baruti Dames, above n 103, 69.

(b) Publication of Documents

The *Rules on Transparency* art 3 identifies three categories relating to the disclosure of documents, subject to the exceptions in art 7.¹⁵¹ The first category encompasses documents that are to be mandatorily and automatically disclosed, including documents submitted by the disputing parties, orders, decisions, and awards issued by the tribunal during the proceedings, including transcripts of the hearings.¹⁵² The second category refers to documents that are to be mandatorily disclosed once any person requests their disclosure from the tribunal, including witness statements and expert reports.¹⁵³ The third category relates to documents that do not fall under either of the above categories, for which the tribunal has discretion, after consultation with the disputing parties, to determine whether and how to make available such documents.¹⁵⁴

(c) Third-Party Submissions

Amici curiae are central to making investor-state arbitral proceedings more transparent.¹⁵⁵ The underlying rationale for allowing amicus submissions is to provide the decision-making body with additional information falling outside its expertise, or which would otherwise not have been adequately considered.¹⁵⁶ Article 4 of the *Rules on Transparency* creates a standard for third persons to make written submissions regarding matters within the

¹⁵¹ ‘Confidential or protected information’ shall not be made available to the public: *Rules on Transparency* art 7(1)(2).

¹⁵² *Ibid* art 3(1).

¹⁵³ *Ibid* art 3(2).

¹⁵⁴ *Boisson De Chazournes and Baruti Dames*, above n 103, 69.

¹⁵⁵ *Euler*, above n 2, 129. See generally *Stern*, above n 32; *Bastin*, above n 32; *Levine*, above n 32; *Dimsey*, above n 32, 167–8.

¹⁵⁶ *Euler*, above n 2, 129–30.

scope of the dispute.¹⁵⁷

Article 4(1) expressly affirms the authority of investment tribunals to accept such submissions. In determining whether to allow an amicus submission, the tribunal must take into consideration the third person's interest in the arbitration. It must also consider the extent to which the third person's submissions will assist the tribunal in the determination of an issue in the proceedings by bringing a different perspective to that of the disputing parties.¹⁵⁸

Article 5 discusses submissions from non-disputing state parties to an investment treaty.¹⁵⁹ In contrast to submissions under art 4, these submissions are not restricted to written submissions. A non-disputing party to the treaty may make submissions on treaty interpretations,¹⁶⁰ and other matters relevant to the dispute,¹⁶¹ subject to the same considerations outlined for third party submissions.¹⁶² To protect against the risk of a non-disputing state party abusing this article, the tribunal may not accept any submissions 'which would support the claim of the investor in a manner tantamount to diplomatic protection'.¹⁶³

Under both arts 4 and 5, submissions may be allowed at the discretion of the tribunal after consulting the parties, provided the submissions do not 'disrupt or duly burden the arbitral process or

¹⁵⁷ Article 4 deals with submissions from non-parties to the dispute who are also not parties to the treaty: *Rules on Transparency* art 4(1).

¹⁵⁸ *Ibid* art 4(3); see *Boisson De Chazournes and Baruti Dames*, above n 103, 70.

¹⁵⁹ See *Boisson De Chazournes and Baruti Dames*, above n 103, 70.

¹⁶⁰ *Rules on Transparency* art 5(1).

¹⁶¹ *Ibid* art 5(2).

¹⁶² *Ibid* art 4(3); see also *Boisson De Chazournes and Baruti Dames*, above n 103, 70–1.

¹⁶³ *Rules on Transparency* art 5(3).

unfairly prejudice a disputing party'.¹⁶⁴ The tribunal must also ensure that the disputing parties are afforded a reasonable opportunity to respond to the submissions.¹⁶⁵

(d) Open Hearings

The *Rules on Transparency* have a 'symbolic significance' in that they facilitate public access to investor-state proceedings, and provide certain tools for doing so.¹⁶⁶ Article 6 creates a default rule that all hearings 'shall be public'.¹⁶⁷ This is subject to the need to protect confidential information and the integrity of the arbitral process under art 7.¹⁶⁸ This rule is also subject to circumstances where, for logistical reasons, and in consultation with the parties, the tribunal decides that it is necessary to hold hearings 'in camera'.¹⁶⁹ Where possible, the tribunal is to make arrangements to facilitate public access to hearings, including, where appropriate, through means such as video links.¹⁷⁰

(e) Exceptions

Article 7 limits the principle of transparency as articulated in arts 2 to 6 of the *Rules on Transparency*.¹⁷¹ Article 7 lists two exceptions to the obligations of transparency:

- information that is 'confidential or protected'; and

¹⁶⁴ Ibid arts 4(5), 5(4). See Boisson De Chazournes and Baruti Dames, above n 103, 71.

¹⁶⁵ *Rules on Transparency* arts 4(6), 5(5).

¹⁶⁶ Euler, above n 2, 5.

¹⁶⁷ *Rules on Transparency* art 6(1).

¹⁶⁸ Ibid art 6(2).

¹⁶⁹ Ibid art 6(3).

¹⁷⁰ Ibid.

¹⁷¹ Euler, above n 2, 250.

- information that, if made available to the public, would jeopardise the ‘integrity of the arbitral process’.¹⁷²

Article 7(2) lists four categories of information that will be exempt from disclosure for being ‘confidential or protected’:

- confidential business information;
- protected information under the treaty;
- protected information under the law of the respondent; and
- other protected information under any law determined by the tribunal to be applicable, or information that would impede law enforcement.¹⁷³

C The Mauritius Convention

As drafted, the *Rules on Transparency* do not apply to investment treaties concluded before 1 April 2014, unless state parties ‘opt in’ to the rules.¹⁷⁴ Excluding such pre-existing treaties significantly limits its otherwise far-reaching transparency provisions. On 10 December 2014 the UN General Assembly formally adopted the *Mauritius Convention*.¹⁷⁵ The *Mauritius Convention* operates as an efficient mechanism to facilitate the ‘opt in’ process for applying the *Rules on Transparency* to arbitrations arising out of investment

¹⁷² *Rules on Transparency* art 7(1)(6).

¹⁷³ See Boisson De Chazournes and Baruti Dames, above n 103, 71.

¹⁷⁴ Johnson and Bernasconi-Osterwalder, above n 26, 11.

¹⁷⁵ Opened for signature 17 March 2015 (not yet in force); *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, GA Res 69/116, UN GAOR, 69th sess, 68th plen mtg, Agenda Item 76, UN Doc A/RES/69/166 (18 December 2014).

treaties concluded before April 2014.¹⁷⁶

D Summary

The adoption of the *Rules on Transparency* is a reflection of the significance of transparency in the context of disputes between states and private parties.¹⁷⁷ UNCITRAL introduced the *Rules on Transparency* in acknowledgment of the fundamental role of the public as a stakeholder in investor-state disputes.¹⁷⁸ The *Rules on Transparency* ‘provide a level of transparency and accessibility to the public of these disputes that is to date unprecedented’.¹⁷⁹

The *Rules on Transparency*, therefore, represent a fundamental change from the status quo of arbitrations being conducted outside the public spotlight.¹⁸⁰ Importantly, they also set up a procedural and institutional framework to ensure that transparency is ‘clearly and consistently put into practice’.¹⁸¹ As a result, the *Rules on*

¹⁷⁶ João Ribeiro and Michael Douglas, ‘Transparency in Investor-State Arbitration: The Way Forward’ (2015) 11 *Asian International Arbitration Journal* 49, 63, citing *Settlement of Commercial Disputes: Applicability of the UNCITRAL Rules on Transparency to the Settlement of Disputes Arising Under Existing Investment Treaties — Note by the Secretariat*, UN GAOR, 46th sess, UN Doc A/CN.9/784 (6 March 2013) 2. The *Mauritius Convention* will enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession: *Mauritius Convention* art 7(1).

¹⁷⁷ Boisson De Chazournes and Baruti Dames, above n 103, 68.

¹⁷⁸ Timothy Lemay, ‘General Assembly Adopts the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration’ (Press Release, UNIS/L/210, 11 December 2014) <<http://www.unis.unvienna.org/unis/en/pressrels/2014/unisl210.htm>>.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ Johnson and Bernasconi-Osterwalder, above n 26, 7.

Transparency signify a significant departure from the presumption that arbitrations are typically private and confidential.¹⁸²

However, questions remain as to the necessity and effectiveness of the *Rules on Transparency* in treaty-based investor-state arbitrations. What value does transparency have in investor-state proceedings? To what extent has the introduction of the *Rules on Transparency* led to greater legitimacy and consistency in investor-state arbitration? These questions are examined in the following section.

III TRANSPARENCY IN INVESTOR-STATE ARBITRATION

There is an ‘inherent tension’ between confidentiality and transparency in investor-state arbitration.¹⁸³ Despite confidentiality traditionally being considered an important distinguishing feature of international arbitration,¹⁸⁴ there has been a recent trend towards increased transparency in investor-state arbitration.¹⁸⁵ This shift in opinion away from confidentiality and towards transparency has been reflected in various arbitral procedural rules.¹⁸⁶ Consequently,

¹⁸² Ribeiro and Douglas, above n 176, 59, citing Joachim Delaney, ‘Investor-State Arbitrations: UNCITRAL Adopts New Transparency Rules’ (2013) 1(1) *Australian Centre for International Commercial Arbitration Review* 1, 33; Johnson and Bernasconi-Osterwalder, above n 26, 7.

¹⁸³ Levander, above n 1, 509, citing Cindy G Buys, ‘The Tensions Between Confidentiality and Transparency in International Arbitration’ (2003) 14 *American Review of International Arbitration* 121.

¹⁸⁴ *Ibid* 509, citing Olivier Oakley-White, ‘Confidentiality Revisited: Is International Arbitration Losing One of its Major Benefits?’ (2003) 6 *International Arbitration Law Review* 29.

¹⁸⁵ *Ibid* 515.

¹⁸⁶ *Ibid*.

a dynamic debate about the continuing value of confidentiality in international arbitration has emerged.¹⁸⁷

Advocates of increased transparency emphasise that investor-state proceedings should be conducted openly because they often concern key public policy issues and involve the expenditure of public funds.¹⁸⁸ However, it is unclear why confidentiality has been deemed to be of less importance in investor-state arbitration than in other contexts.¹⁸⁹ Indeed, Born argues that the rationales advanced for increased transparency in the context of investor-state arbitration ‘are often overstated’.¹⁹⁰

This section assesses the value of transparency in investor-state arbitration and the comparative worth of confidentiality. In doing so, the advantages and disadvantages of transparency in investor-state arbitration are considered with regard to:

¹⁸⁷ See, eg, Levander, above n 1; Born, above n 28, 2827; Ribeiro and Douglas, above n 176; Euler, above n 2; Argen, above n 16; Daniel Behn, ‘Legitimacy, evolution and growth in investment treaty arbitration: empirically evaluating the state-of-the-art’ (2015) *Georgetown Journal of International Law* 363; Boisson De Chazournes and Baruti Dames, above n 103; Richard C Reuben, ‘Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice’ (2000) 47 *UCLA Law Review* 949; Loretta Malintoppi and Natalie Limbasan, ‘Living in Glass Houses? The Debate on Transparency in International Investment Arbitration’ (2015) 2(1) *BCDR International Arbitration Review* 31; Buys, above n 183; Oakley-White, above n 184; Carl-Sebastian Zoellner, ‘Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law’ (2006) 27 *Michigan Journal of International Law* 579.

¹⁸⁸ Malintoppi and Limbasan, above n 187, 31–2.

¹⁸⁹ Born, above n 28, 2827.

¹⁹⁰ *Ibid.*

- the public interest;
- legitimacy, consistency and uniformity of the system;
- the nature of the disputants; and
- the interests of stakeholders.

This section then evaluates the current state of transparency in investor-state arbitration and pertinent critiques of the system, which centre on its legitimacy, pro-investor bias, and ‘democratic deficit’. It then considers the potential for the *Rules on Transparency* to function as a remedial tool to alleviate these perceived shortcomings. Finally, this section assesses the current and future implementation of the *Rules on Transparency* in investor-state arbitration.

A The Value of Transparency

1 Public Interest

Due to the involvement of a state, investment disputes often involve matters of public interest; that is, issues concerning a broader section of the public than the parties to the dispute.¹⁹¹ Such public interest issues encompass a vast number of areas, such as: public health; environmental protection; energy and water supplies; workers’ rights; corruption;¹⁹² public governance; and sustainable development.¹⁹³ Investor-state disputes frequently arise when the application of government regulations regarding one of these public

¹⁹¹ Euler, above n 2, xxiii.

¹⁹² Organisation for Economic Co-operation and Development, *2015 Update of the Policy Framework for Investment* (3 June 2015) OECD <<http://www.oecd.org/investment/investment-policy/pfi-update.htm>>.

¹⁹³ Euler, above n 2, 351; Levander, above n 1, 513.

interests adversely affects a foreign investor.¹⁹⁴

Notably, both scholars and investor-state tribunals have acknowledged the need for arbitral tribunals to be sensitive to the human rights implications of their decisions, particularly in cases concerning issues of ‘great social and political instability’.¹⁹⁵ Indeed, because it is ‘often impossible’ for the public to learn about investor-state arbitrations, even those that impact basic human rights such as access to sanitary drinking water,¹⁹⁶ interested parties are unable ‘to monitor [and] much less have a stake or influence in, this

¹⁹⁴ Levander, above n 1, 513. See also European Commission, ‘Investor-to-State Dispute Settlement (ISDS): Some facts and figures’ (Media Release, 12 March 2015) 4 <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf>. The two types of state conduct most frequently challenged by investors in 2014 were cancellations or alleged violations of contracts or concessions (at least nine cases), and revocation or denial of licenses or permits (at least six cases): *World Investment Report*, UNCTAD, UN Doc UNCTAD/WIR/2015 (25 June 2015) 115.

¹⁹⁵ Tamar Meshel, ‘Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond’ (2015) 6(2) *Journal of International Dispute Settlement* 277, 282, citing Jorge Daniel Taillant and Jonathan Bonnitcha, ‘International Investment Law and Human Rights’ in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, 2011) 53, 78.

¹⁹⁶ Center for International Environmental Law and International Institute for Sustainable Development, *Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations* (February 2007) IISD, 5 <http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf>. The UN General Assembly has explicitly recognised the human right to water and sanitation: see *The human right to water and sanitation*, GA Res 64/292, UN GAOR, 64th sess, 108th plen mtg, Agenda Item 48, UN Doc A/RES/64/292 (3 August 2010).

system'.¹⁹⁷ Accordingly, Fry argues that international investment law and arbitration 'have an adverse impact on the promotion and protection of human rights'.¹⁹⁸ Conversely, it has been argued that greater transparency 'could heighten awareness of and focus on human rights'¹⁹⁹ by allowing non-parties to file amicus curiae submissions or attend hearings, and by making arbitral hearings open to the public.²⁰⁰

The public interest implications of investor-state arbitration also raise concerns about democratic accountability.²⁰¹ A key criticism of investor-state arbitration is that, while investment treaty disputes often involve matters of public policy and public law, the regime is based on rules formulated for the international commercial

¹⁹⁷ Luke Eric Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration* (2009) International Centre for Human Rights and Democratic Development, 25 <http://publications.gc.ca/collections/collection_2012/dd-rd/E84-36-2009-eng.pdf>; Marc Jacob, *International Investment Agreements and Human Rights* (March 2010) Institute for Development and Peace, University of Duisburg Essen (2010) 23–4.

¹⁹⁸ James D Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 *Duke Journal of Comparative and International Law* 77, 77.

¹⁹⁹ Susan L Karamanian, 'Business Law Forum: Balancing Investor Protections, the Environment, and Human Rights: the Place of Human Rights in Investor-State Arbitration' (2013) 17 *Lewis and Clark Law Review* 423, 423, citing 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, 831–2.

²⁰⁰ *Ibid* 423.

²⁰¹ See *Trade and Development Report, 2014*, UNCTAD, UN Doc UNCTAD/TDR/2014 (10 September 2014) 139.

arbitration system.²⁰² Such rules rarely contemplate the public interests that may be affected in investor-state arbitrations.²⁰³ The traditional preference for confidentiality in investor-state arbitration, therefore, becomes problematic because those affected by arbitrations ‘cannot receive information about proceedings that impact their interests and their government’s conduct’.²⁰⁴ Accordingly, transparency is particularly important when vital public interests are at stake.²⁰⁵ States and non-government organisations (NGOs) have also emphasised that the unique public demands of investor-state arbitration require greater transparency and accountability.²⁰⁶ Similarly, the importance of public policy has led to criticism of the traditional lack of transparency in investor-state arbitration as ‘deeply unsatisfactory in an era when investment agreements are starting to be wielded as trump cards against sensitive public policies’.²⁰⁷

²⁰² Sundaresh Menon, ‘The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions’ (2015) 5(2) *Asian Journal of International Law* 219, 232; *Trade and Development Report, 2014*, UN Doc UNCTAD/TDR/2014.

²⁰³ *Trade and Development Report, 2014*, UNCTAD, UN Doc UNCTAD/TDR/2014 (10 September 2014) 139, citing Benedict Kingsbury and Stephan Schill, ‘Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law’ in A J Van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer Law International, 2009) 5, 5–68.

²⁰⁴ *Trade and Development Report, 2014*, UN Doc UNCTAD/TDR/2014, 139.

²⁰⁵ Levander, above n 1, 508.

²⁰⁶ *Ibid* 510.

²⁰⁷ *Ibid* 513, citing Luke Eric Peterson, ‘Changing Investment Litigation, Bit by BIT’ (2001) 5(4) *Bridges Between Trade and Sustainable Development* 8, 11.

Notwithstanding these arguments, Born posits that it is ‘unpersuasive’ to suggest that investor-state arbitrations automatically attract public interest in a manner that is dramatically different from international commercial arbitrations.²⁰⁸ Indeed, investor-state arbitrations may concern small amounts of money and narrow public constituencies, whereas international commercial arbitrations involving states as private parties may have dramatic impacts on a state’s economy and affect a wide range of constituencies.²⁰⁹ Nonetheless, while the ‘public’ nature of investor-state disputes is ‘often exaggerated’, it is clear that such disputes do tend to implicate generalised public interests to a greater extent than international commercial arbitrations.²¹⁰

2 Legitimacy, Consistency and Uniformity

Various scholars have identified concerns relating to the legitimacy of investor-state arbitration.²¹¹ Indeed, legitimacy is perhaps the reason most often cited in the context of proclaiming a need for transparency in investment arbitration.²¹² As articulated by Professor Stern:

this system, which was traditionally based on private legitimacy arising from the consent of the parties, seems to now be in search of public legitimacy, which it is thought can be obtained from a certain degree of openness to

²⁰⁸ Born, above n 28, 2828.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ Levander, above n 1, 511–12. At its most fundamental level, the legitimacy debates in investor-State arbitration question whether or not foreign investment disputes should be resolved by investor-State tribunals at all: Behn, above n 187, 367.

²¹² Euler, above n 2, 132.

civil society.²¹³

The legitimacy of the process of investor-state arbitration largely depends on whether the arbitral tribunal ‘can fairly and objectively determine investors’ rights vis-à-vis states’ interests’.²¹⁴ Accordingly, increased transparency has the potential to promote the legitimacy of the process among stakeholders by enhancing the perception that arbitral tribunals engage in just and honest decision-making and by creating reasonable expectations of investment stability.²¹⁵

Moreover, it is important for the public to perceive investor-state arbitration as legitimate, since ‘the vitality of the investor-state arbitration process, and its continued utility as a catalyst for investment flows, to some degree depends on solid legitimacy in the court of public opinion’.²¹⁶ Notably, Schill argues that transparency positively affects the public’s perception of investor-state arbitration, by showing that the system constitutes an adjudicatory process that is, ‘despite its idiosyncrasies, similar to that of any other domestic or international court’.²¹⁷

Increased transparency could also lead to ‘greater consistency and uniformity, which reduces risk and creates reasonable expectations

²¹³ Stern, above n 32, 347, quoted in Euler, above n 2, 132.

²¹⁴ Levander, above n 1, 512–13, citing Susan D Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521, 1584–5.

²¹⁵ Levander, above n 1, 512–13.

²¹⁶ Dugan et al, above n 1, cited in Levander, above n 1, 512.

²¹⁷ Stephan Schill, ‘Transparency as a Global Norm in International Investment Law’ on Wolters Kluwer, *Kluwer Arbitration Blog* (15 September 2014) <<http://kluwerarbitrationblog.com/blog/2014/09/15/transparency-as-a-global-norm-in-international-investment-law/>>.

for all interested parties'.²¹⁸ In particular, the publication of arbitral awards is 'desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence'.²¹⁹

3 *Nature of the Disputants*

The mere presence of state actors is often cited as a factor contributing to the need for greater transparency in investor-state arbitrations.²²⁰ However, simply distinguishing between states and private commercial parties as entities does not in itself provide a convincing justification for increasing transparency, as an agreement to arbitrate typically waives a state's immunities and subjects it to the same standards as private parties.²²¹ This is demonstrated by the fact that confidentiality obligations remain applicable to states that enter into international commercial arbitration agreements.²²² These obligations apply equally to both states and private parties.²²³ Accordingly, Born argues, 'there is nothing inherent in the status of a foreign state which demands that confidentiality obligations be dispensed with'.²²⁴

²¹⁸ Levander, above n 1, 508, 511–12.

²¹⁹ Organisation for Economic Co-operation and Development, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures* (June 2005) OECD Working Papers on International Investment <http://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf>, quoted in Levander, above n 1, 511–12; see also Reuben, above n 187, 1085.

²²⁰ Levander, above n 1, 510; see generally Buys, above n 183.

²²¹ Born, above n 28, 2827.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Ibid.*

4 Balancing the Interests of Investors Against States

Investor-state tribunals also ‘amplify the reputational effects of treaty breaches’, making it easier to detect and publicly expose both investor and state violations.²²⁵ Accordingly, another significant challenge currently facing investor-state arbitration is ‘the need to balance the interests of investors in the protection of their investment with the regulatory interests of host states’.²²⁶

Investors’ reasons for wanting to maintain confidentiality in investor-state arbitration largely mirrors the arguments in favour of maintaining confidentiality in international commercial arbitration.²²⁷ In particular, investors have expressed concern about being required to disclose confidential business information, trade secrets, investment strategies, and other sensitive information that has the potential to harm their business interests.²²⁸ However, this concern is mitigated by the additional safeguards for protecting such information provided by almost every system of domestic and international arbitration and litigation.²²⁹

States have expressed concern about revealing the inner workings of their administrative and regulatory structures to the public, as they fear doing so may adversely affect their reputation as a host for foreign investment.²³⁰ On the other hand, exposing the inner workings of government could function as an incentive for states to

²²⁵ Charles N Brower and Sadie Blanchard, ‘What’s in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States’ (2014) 52 *Columbia Journal of Transnational Law* 689, 718.

²²⁶ Euler, above n 2, xxiii.

²²⁷ Ibid 514 n 32, citing Oakley-White, above n 184.

²²⁸ Levander, above n 1, 514, citing Dugan et al, above n 1.

²²⁹ See Levander, above n 1, 510.

²³⁰ Levander, above n 1, 514, citing Dugan et al, above n 1.

act more responsibly with regard to foreign investment.²³¹ Transparency, therefore, functions to protect investors and market participants by promoting democratic principles, whilst also offering a greater degree of certainty to states when deciding on available policy objectives.²³²

There are also clear economic incentives connected with transparency and predictability, as ‘foreign investors are more likely to invest in a country if they believe that they can ascertain accurately the laws that will govern their investments’.²³³ These incentives would particularly apply to states ‘whose administrative and regulatory procedures prove to be consistent with international norms of good governance’.²³⁴ Transparency, therefore, serves as an important ‘interpretive device’ in evaluating the formation and application of those laws and regulations, and the parties’ obligations under them.²³⁵ Moreover, Zoellner posits that investor-state arbitration’s underlying rationales ‘to create predictability and foster trade and investment’ are ‘greatly enhanced’ by applying transparency disciplines to the field’s substantive provisions.²³⁶

Finally, transparency has the potential to operate as an effective analytical tool ‘to distinguish legitimate state regulatory action from protectionist or indirectly expropriatory conduct’.²³⁷ By allowing international judicial bodies and tribunals to consider a state’s

²³¹ Levander, above n 1, 514–15.

²³² Zoellner, above n 187, 628.

²³³ *Bilateral Investment Treaties in the Mid-1990s*, UNCTAD, UN Doc No UNCTAD/ITE/IIT/7 (1998) 65–6, quoted in Zoellner, above n 187, 598–9.

²³⁴ See Levander, above n 1, 515.

²³⁵ Zoellner, above n 187, 595–6, 627.

²³⁶ *Ibid* 579, 627.

²³⁷ *Ibid* 628.

domestic decision-making process, ‘transparency thus guarantees a role for civil society’s input on the international level’.²³⁸

5 Disadvantages

Despite the advantages of increasing transparency identified in this article, there are also associated disadvantages including intangible cultural barriers, delays, quantifiable administrative costs, and other procedural burdens.²³⁹ For example, third party submissions would require the consideration of more material, ‘requiring more time and, consequently, higher legal fees’,²⁴⁰ the costs of which would ultimately be borne by taxpayers.²⁴¹ However, these disadvantages could be minimised by limiting the length of such submissions and by establishing a threshold that third parties must meet as a prerequisite to involvement, to demonstrate they have sufficient interest in the matter.²⁴²

Nonetheless, given transparency’s ‘vast economic benefits’, it is in the self-interest of states seeking foreign direct investment to overcome these obstacles and to establish ‘transparent and predictable procedures’, even in areas where international economic law provides states with discretion.²⁴³ Indeed, in the view of various scholars, the disadvantages of transparency in investor-state arbitration are ‘vastly outweighed’ by the advantages of

²³⁸ Ibid 627–8.

²³⁹ Ribeiro and Douglas, above n 176, 59; Zoellner, above n 187, 627; Delaney, above n 182, 34.

²⁴⁰ Ribeiro and Douglas, above n 176, 59.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Zoellner, above n 187, 627–8.

transparency.²⁴⁴ The introduction of the *Rules on Transparency* corroborates this view.

B *The Current State of Transparency in Investor-state Arbitration*

1 *The Extent to Which Transparency Exists*

As has been illustrated, the topic of transparency in investor-state arbitration has gained, and continues to gain, increased visibility and momentum.²⁴⁵ Indeed, this was reflected in a recent public consultation on the Transatlantic Trade and Investment Partnership conducted by the European Commission, which indicated general support for increased transparency in investor-state dispute settlement.²⁴⁶

Despite recent claims that treaty-based investor-state arbitrations are kept secret,²⁴⁷ investor-state arbitration is clearly becoming a more transparent method of dispute resolution.²⁴⁸ Measures promoting

²⁴⁴ See, eg, Ribeiro and Douglas, above n 176, 59; Robert Argen, ‘Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration’ (2015) 40 *Brooklyn Journal of International Law* 207; Behn, above n 187.

²⁴⁵ Ribeiro and Douglas, above n 176, 64; Euler, above n 2, 2.

²⁴⁶ *Report: Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, European Commission (13 January 2015) 15–16, cited in Malintoppi and Limbasan, above n 187, 31, 32.

²⁴⁷ See, eg, TPP Legal ‘Eminent Jurists Say “No” to Investor Right to Sue in TPP’ (Media Release, 7 May 2012) <<https://tpplegal.wordpress.com/2012/05/07/eminant-jurists-say-no-to-investor-right-to-sue/>>.

²⁴⁸ Brower and Blanchard, above n 225, 717.

transparency are increasingly becoming the norm, and most commentators and arbitral institutions accept that a certain degree of transparency is required in order for investor-state arbitration to attain widespread legitimacy.²⁴⁹ Moreover, an increasing number of states have shown public support for the publication of arbitration documents, open hearings, and the inclusion of transparency provisions in their investment treaties.²⁵⁰ Consequently, a growing number of investor-state arbitrations involve open hearings, most awards are public, and many investor-state arbitration documents are publicly available in online repositories.²⁵¹ Further, even where the parties to an investor-state dispute do not agree to publish arbitration documents, the public interest nature of many investor disputes results in details of the arbitrations being reported by the media.²⁵²

Notwithstanding these developments, transparency remains an evolving concept in international arbitration.²⁵³ A significant number of awards in recent years have remained confidential,²⁵⁴ and the ‘continued opaqueness’ of investor-state arbitration proceedings continues to raise legitimacy concerns.²⁵⁵ There also continues to be no legal requirement that investment treaty arbitration awards be made public.²⁵⁶

²⁴⁹ Matthew Weiniger QC and Vanessa Naish, *The future of investor-state arbitration* (20 November 2014) Herbert Smith Freehills <<http://hsfnotes.com/arbitration/2014/11/20/the-future-of-investor-state-arbitration/>>.

²⁵⁰ Brower and Blanchard, above n 225, 718.

²⁵¹ *Ibid* 717.

²⁵² *Ibid* 718.

²⁵³ Boisson De Chazournes and Baruti Dames, above n 103, 61.

²⁵⁴ Behn, above n 187, 379.

²⁵⁵ *Ibid*.

²⁵⁶ *Ibid*.

In 2014, investors initiated 42 known investor-state arbitration cases pursuant to international investment agreements, bringing the overall number of known investor-state arbitration claims to 608.²⁵⁷ However, as most investment agreements allow for fully confidential arbitration, the actual number of cases is likely to be higher.²⁵⁸ A recent empirical study revealed that approximately 39 per cent of final awards in concluded investor-state disputes were not publically available.²⁵⁹

2 Criticisms of the Current Regime

In recent years, arguments criticising the confidentiality regime in investor-state arbitration have gained traction in the transparency debate, particularly in respect of disputes arising in areas of public concern.²⁶⁰ With the establishment of the system of investor-state dispute settlement, it was expected that the process would generate an accepted legal framework for international investment.²⁶¹ However, to date, the procedure ‘has not been transparent and balanced enough for generating an accepted body of law’.²⁶² Consequently, arbitral tribunals:

emerge as important lawmakers in investor-State arbitrations when transforming the broad principles of investment protection into more precise rules which govern the way the executive, legislature and judiciary of a host state must conduct

²⁵⁷ *Investor-State Dispute Settlement: Review of Developments in 2014*, IIA Issue Note No 2, UNCTAD, UN Doc UNCTAD/WEB/DIAE/PCB/2015/2 (15 July 2015) 2.

²⁵⁸ *Ibid.*

²⁵⁹ Behn, above n 187, 381.

²⁶⁰ Levander, above n 1, 511.

²⁶¹ *Trade and Development Report, 2014*, UNCTAD, UN Doc UNCTAD/TDR/2014 (10 September 2014) 138.

²⁶² *Ibid.*

activities affecting foreign investors.²⁶³

3 The 'Legitimacy Crisis'

Various scholars have pointed to a growing 'legitimacy crisis' in investor-state arbitration.²⁶⁴ The legitimacy crisis is informed in part by the 'hybrid nature' of investor-state arbitration, which refers to the system traversing both the public and private spheres.²⁶⁵ Critics argue that investor-state arbitral awards often fall on the wrong side of the public/private divide, in a manner that erroneously privatises disputes that should be heard in public forums.²⁶⁶ The 'hybrid nature' of investor-state arbitration, therefore, affects the debate as to whether, and to what extent, transparency is required.²⁶⁷

From one perspective, investment arbitration is a 'creature of public international law'.²⁶⁸ Treaty-based investment arbitration involves a sovereign state, and the parties' substantive rights and agreement to arbitrate arise out of an instrument of public international law.²⁶⁹ Moreover, investment disputes often involve matters of legitimate

²⁶³ *Trade and Development Report, 2014*, UNCTAD, UN Doc UNCTAD/TDR/2014 (10 September 2014) 138, citing M Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration' in Karl P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) 39.

²⁶⁴ Levander, above n 1, 512. See also Robert Argen, 'Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration' (2015) 40 *Brooklyn Journal of International Law* 207; Born, above n 28, 2827; Ribeiro and Douglas, above n 176; Euler, above n 2, 2.

²⁶⁵ Euler, above n 2, 2.

²⁶⁶ Behn, above n 187, 367–8.

²⁶⁷ Euler, above n 2, 2.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

public concern, and their outcomes may affect large numbers of individuals and the host state's economy.²⁷⁰ Therefore, concerns arise as to why such proceedings ought to enjoy the same protections of confidentiality typically afforded in private commercial arbitrations.²⁷¹

From another point of view, irrespective of the identity of the disputants or the source of the arbitration agreement, investor-state arbitration remains a private dispute resolution mechanism and occurs under procedural rules shaped and chosen by the parties.²⁷² As such, where the parties have elected to submit a dispute to arbitration, rather than litigate in a state court, their right to confidentiality should be respected.²⁷³

Furthermore, the recently invoked notion that arbitral tribunals act as 'secret courts' is undeniably harmful to the image of investor-state arbitration as a reliable and efficient method of dispute resolution,²⁷⁴ and has contributed to a growing dissatisfaction with the system.²⁷⁵ There is undoubtedly merit in the contention that more transparent arbitral proceedings would 'assist in legitimising investor-State arbitration and in dispelling existing preconceptions against the system'.²⁷⁶

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Ibid 2–3.

²⁷³ Ibid 3.

²⁷⁴ Jean-Claude Juncker, 'Setting Europe in Motion' (Speech delivered at the European Parliament plenary session ahead of the vote on the College, Strasbourg, 22 October 2014), quoted in Malintoppi and Limbasan, above n 187, 31–2.

²⁷⁵ Including, for example, Indonesia, Venezuela, Bolivia and Ecuador: Euler, above n 2, 2 n 3.

²⁷⁶ Malintoppi and Limbasan, above n 187, 31–2.

4 *Pro-Investor Bias*

Related to the legitimacy debate is the perception that investor-state tribunals exhibit a ‘pro-investor bias’ in determining disputes.²⁷⁷ This has led to claims that investor-state arbitrations are ‘unfairly rigged’ in favour of large companies from developed states against the less powerful developing states hosting their investments.²⁷⁸ However, this perceived ‘lack of deference to national sovereignty’ more likely stems from an uneven distribution of claimants and respondents in investment treaty arbitrations.²⁷⁹ A recent empirical evaluation of investor-state disputes did not appear to indicate that a pro-investor bias exists among tribunals, as less than half of the claims surveyed were successful.²⁸⁰ Previous empirical scholarship also reveals that the win rate for claimant investors remains relatively low.²⁸¹

Accordingly, while it is clear that the majority of investment treaty claims involve developed state claimants and developing state respondents, it is less clear that investor-state arbitration favours claimant investors.²⁸² Indeed, Brower and Blanchard reject contentions that investment arbitrators and the system of

²⁷⁷ Behn, above n 187, 368. See also Euler, above n 2, 352. See *Trade and Development Report, 2014*, UNCTAD, UN Doc UNCTAD/TDR/2014 (10 September 2014) 138; Meshel, above n 195; Brower and Blanchard, above n 225, 689.

²⁷⁸ Behn, above n 187, 368.

²⁷⁹ *Ibid.*

²⁸⁰ In 77 fully resolved decisions, the claimant was successful in 43 per cent of cases, lost on jurisdiction in 33 per cent of cases, and lost on the merits in 24 per cent of cases: see Behn, above n 187, 364, 371–2.

²⁸¹ See Susan Franck, ‘Development and Outcomes of Investment Treaty Arbitration’ (2009) 50 *Harvard International Law Journal* 435, cited in Behn, above n 187, 368.

²⁸² Behn, above n 187, 370.

investor-state arbitration are biased against respondent states as ‘nothing more than empty rhetoric’.²⁸³ First, investors are bound by the law of the host state and by their contractual obligations.²⁸⁴ Second, as sovereigns, host states have tools at their disposal for responding to investor breaches, including civil and criminal penalties.²⁸⁵ Third, the very nature of the relationship means that the foreign investor will typically have assets in the host state, providing ‘enforcement leverage’.²⁸⁶ Finally, resort to treaty-based arbitration is also ‘often the sole lever available to an investor to enforce its rights if a host state treats it inequitably’.²⁸⁷

5 Democratic Deficit

A key distinction between investor-state arbitration and international commercial arbitration is that, in the former system, the ‘very presence’ of a state or state-owned entity as a party to the dispute ‘yields a public interest’.²⁸⁸ Furthermore, citizens arguably have an interest in knowing how their government conducts itself during arbitrations.²⁸⁹ This concept invokes the ‘democratic deficit’ principle.²⁹⁰

²⁸³ Brower and Blanchard, above n 225, 716–17.

²⁸⁴ *Ibid* 713.

²⁸⁵ *Ibid*.

²⁸⁶ *Ibid*.

²⁸⁷ *Ibid*.

²⁸⁸ Argen, above n 16, 228.

²⁸⁹ Center for International Environmental Law, *CIEL 2007 Annual Report* (2007) CIEL <http://www.ciel.org/Publications/Annual_Reports/CIEL_Report_2007.pdf>, cited in Argen, above n 16, 228.

²⁹⁰ Choudhury, above n 199, 784, cited in Argen, above n 16, 228. See also *World Investment Report*, UNCTAD, UN Doc UNCTAD/WIR/2015 (25 June 2015); Karamanian, above n 199; Zoellner, above n 187.

A system produces a ‘democratic deficit’ when it ‘curtails democratic principles’ by making issues that directly impact citizens ‘structurally isolated from public input’.²⁹¹ Accordingly, the system of investor-state arbitration creates a ‘democratic deficit’ because the process typically lacks public involvement, citizens of the arbitrating state are generally unaware of disputes, and state conduct is often isolated from public input.²⁹² To reduce such a deficit, some commentators opine that remedial measures such as the *Rules on Transparency* are necessary to promote ‘democratic participation’.²⁹³

However, Argen posits that the ‘democratic deficit’ argument is not a legitimate basis to advocate for greater transparency in investor-state arbitration, ‘because such an argument presupposes that non-democratic forms of government are inherently bad governance’.²⁹⁴ As democratic principles are not globally accepted, and investor-state arbitration is a global system, the ‘democratic deficit’ argument is ‘fundamentally flawed’.²⁹⁵ Further the ‘democratic deficit’ argument also ‘presupposes that covert state action is never beneficial to the people of a democratic state’.²⁹⁶ Nonetheless, even in non-democratic societies, it is arguable that the

²⁹¹ Choudhury, above n 199, 784, cited in Argen, above n 16, 228 n 129.

²⁹² Argen, above n 16, 228.

²⁹³ Ibid quoting Center for International Environmental Law and International Institute for Sustainable Development, *New UNCITRAL Arbitration Rules on Transparency: Application Content and Next Steps* (2013) 4; Center for International Environmental Law and International Institute for Sustainable Development, *Revising the UNCITRAL Arbitration Rules to address Investor-State Arbitrations*, above n 196, 5.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Ibid 229 n 133.

principle of transparency is fundamentally important:²⁹⁷ any society that espouses the rule of law ought to be open in matters that affect the public interest.²⁹⁸

C The Rules on Transparency as a Remedial Tool

1 Public Interest

A major objective of the *Rules on Transparency*, and the transparency trend in general, is to protect public interests.²⁹⁹ Subject to certain exceptions,³⁰⁰ the *Rules on Transparency* clearly accommodate for public interest in investment disputes in various ways:³⁰¹

- they require mandatory disclosure of certain information on the outset of proceedings, allowing public awareness of disputes,³⁰²
- the public may request access to certain information;³⁰³
- third persons and non-disputing parties may make submissions;³⁰⁴
- hearings ‘shall be public’;³⁰⁵ and

²⁹⁷ Ribeiro and Douglas, above n 176, 55.

²⁹⁸ Ibid, citing Brian Z Tamanaha, ‘The Rule of Law for Everyone?’ (2002) 55 *Current Legal Problems* 97, 98–100.

²⁹⁹ Argen, above n 16, 209, citing Center for International Environmental Law and International Institute for Sustainable Development, *Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations*, above n 196.

³⁰⁰ See *Rules on Transparency* art 7.

³⁰¹ Euler, above n 2, 14.

³⁰² See *Rules on Transparency* art 2.

³⁰³ See *ibid* art 3.

³⁰⁴ See *ibid* arts 4, 5.

³⁰⁵ See *ibid* art 6(1).

- the central repository acts as an ‘information custodian’.³⁰⁶

Accordingly, the *Rules on Transparency* broadly address the various public interest concerns identified in this article. Relatedly, by promoting public participation, the *Rules on Transparency* also serve to alleviate concerns posed by the alleged ‘democratic deficit’ created by the system of investor-state arbitration.

2 *Leveling the Playing Field*

As discussed, the investor-state arbitration system has been said to have an inherent ‘pro-investor bias’.³⁰⁷ While there is no conclusive evidence to this effect, the real or perceived pro-investor bias of arbitral tribunals has contributed to the legitimacy crisis in investor-state arbitration.³⁰⁸ The *Rules on Transparency* address this perceived imbalance by subjecting both investors and host states ‘to increased public scrutiny and thus accountability of their actions in relation to foreign investments’.³⁰⁹ Accordingly, the *Rules on Transparency* creates ‘a level playing field in which investors and host states alike will have to manage this increased scrutiny and its consequences’.³¹⁰

³⁰⁶ See *ibid* art 8.

³⁰⁷ Behn, above n 187, 368.

³⁰⁸ Euler, above n 2, 352.

³⁰⁹ *Ibid* 353. Euler et al note that, to an extent, the *Rules on Transparency* also allow States to define their policies as to the adequate level of transparency in investor-State disputes. For a more detailed discussion of this see: Euler, above n 2, 352–3.

³¹⁰ Euler, above n 2, 354.

*D The Rules on Transparency: Present and Future
Implementation*

1 Current Implementation

Recently, the view that investor-state arbitration should be transparent has gained momentum.³¹¹ Indeed, the fact that the *Rules on Transparency* were adopted indicates ‘at least some contemporaneous support for transparency among the international community’.³¹² This is illustrated by UNCITRAL having 60 state members that contributed to their implementation.³¹³ Moreover, various NGOs from around the world engaged in the sessions that led to their formulation.³¹⁴ Significantly, both the *Rules on Transparency* and the *Mauritius Convention* were ‘approved by consensus’.³¹⁵ The *Rules on Transparency* are the most advanced set of procedural rules for ensuring that the proceedings of international tribunals are transparent.³¹⁶ They ‘have introduced a more transparent and open system, whilst still offering necessary protection for commercially sensitive information’.³¹⁷

³¹¹ Ribeiro and Douglas, above n 176, 64.

³¹² Ibid.

³¹³ Ibid 65.

³¹⁴ Ibid.

³¹⁵ Ibid citing *Report of the United Nations Commission on International Trade Law, forty-sixth session*, UN GAOR, 68th sess, Supp No 17, UN Doc A/67/17 (8–26 July 2013) 2.

³¹⁶ European Commission, ‘Factsheet on Investor-State Dispute Settlement’ (Media Release, 3 October 2013) 5 <http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf>.

³¹⁷ Weiniger and Naish, above n 249.

At the time of writing, at least 13³¹⁸ new investment treaties have been concluded that provide for investor-state arbitration under the *UNCITRAL Arbitration Rules*. Accordingly, arbitrations conducted under these investment treaties will likely be subject to the *Rules on Transparency*.³¹⁹ However, even when the *UNCITRAL Arbitration Rules* are selected, the application of the *Rules on Transparency* is not guaranteed. As discussed previously, parties to an investment treaty may opt for the *Rules on Transparency* to not apply.³²⁰ Moreover, limiting the applicability of the *Rules on Transparency* to treaty-based investor-state arbitrations excludes a whole class of arbitrations from their scope; those being contract-based claims and state-to-state arbitrations.³²¹ Nonetheless, in adopting the *Rules on Transparency*, UNCITRAL has far exceeded any efforts made by any other arbitration centres.³²²

2 Future Implementation

Transparency has been described as ‘the only way forward’ for investor-state arbitration.³²³ While the *Rules on Transparency* are an important step towards increasing the public awareness and acceptance of investor-state arbitration mechanisms, substantial room for improved transparency remains.³²⁴ For example, there is

³¹⁸ UNCITRAL, *Status: UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014)* United Nations (2015) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

³¹⁹ Even if investor-State arbitration is initiated under one of these investment treaties, the application of the *UNCITRAL Arbitration Rules* is not guaranteed: Ribeiro and Douglas, above n 176, 61.

³²⁰ *Rules on Transparency* art 1(1).

³²¹ Euler, above n 2, 62–3.

³²² Behn, above n 187, 413.

³²³ Ribeiro and Douglas, above n 176, 67.

³²⁴ Euler, above n 2, 63.

no single institution that can provide a collective registry of all cases; consequently, cases ‘remain scattered among a number of institutions’.³²⁵ States are also permitted to circumvent improvements in transparency by allowing mandatory provisions in the law applicable to the arbitration to override the *Rules on Transparency*.³²⁶ The lack of a minimum standard of transparency could thus ‘slow the spread of transparency in those contexts in which it may be most beneficial’.³²⁷

Investor-state arbitrations commenced under an existing investment treaty also remain unaffected by the *Rules on Transparency* unless the parties agree otherwise.³²⁸ As discussed previously, the *Mauritius Convention* provides a streamlined mechanism for states to opt into the *Rules on Transparency* in respect of their investment treaties concluded prior to April 2014. The adoption of the *Mauritius Convention* should, therefore, assist in increasing the impact of the *Rules on Transparency*.³²⁹ However, the future uptake of the *Mauritius Convention* and the future application of the *Rules on Transparency* more broadly ‘will be dependent on international attitudes towards the importance of transparency’.³³⁰

As outlined in this section, increased transparency and public participation in investment arbitrations conducted under the *UNCITRAL Arbitration Rules* is a positive development.³³¹ Given the public interest in investor-state arbitration and the growing pressure on states, investors and tribunals to increase transparency

³²⁵ Behn, above n 187, 413.

³²⁶ *Rules on Transparency* art 1(8).

³²⁷ Euler, above n 2, 63.

³²⁸ Delaney, above n 182, 34.

³²⁹ *Ibid.*

³³⁰ Ribeiro and Douglas, above n 176, 64.

³³¹ Delaney, above n 182, 34.

and public participation, it is increasingly likely that tribunals and parties to investor-state arbitrations will agree to the application of the *Rules on Transparency*.³³² If this occurs, then the manner in which those arbitral proceedings will be conducted is likely to change substantially.³³³ In any event, the *Rules on Transparency* will take time to significantly alter the treaty-based investor-state arbitration landscape.³³⁴ Due to their relative infancy, it will likely be some time until the aims of *Rules on Transparency* are realised, and their full benefits appreciated.

E Summary

Despite permitting parties to ‘opt out’, the *Rules on Transparency* generally reverse the presumptions of confidentiality and privacy in investor-state arbitration, in favour of a presumption of transparency. The *Rules on Transparency* promote beneficial features of transparency including consistency, furthering democratic principles, decreasing party uncertainty, and increasing the legitimacy of the system.³³⁵ The *Rules on Transparency* contain exceptions, but importantly provide for transparency in ‘all phases of investment treaty-based arbitral proceedings, including submissions to arbitral tribunals and arbitral awards’.³³⁶

It is in this context that Part Three will examine the central theme of this article: whether the *Rules on Transparency* should be applied to international commercial arbitration.

³³² Ibid.

³³³ Ibid.

³³⁴ Argen, above n 16, 210 n 20.

³³⁵ Levander, above n 1, 511; see generally Buys, above n 183.

³³⁶ Schill, above n 217.

IV THE SUITABILITY OF THE RULES ON TRANSPARENCY
TO INTERNATIONAL COMMERCIAL ARBITRATION

The trend toward transparency in international arbitration derives from the system of investor-state arbitration and is consequently primarily limited to that system of arbitration.³³⁷ In particular, the *Rules on Transparency* reverses the presumptions of confidentiality and privacy in investor-state arbitration, while leaving international commercial arbitration ‘in the dark’.³³⁸ However, there have been calls for a broadening of the trend to the system of international commercial arbitration.³³⁹

Evaluating the merits of transparency by comparing these two systems is a complex task. As has been variously expressed, international commercial arbitrations are ‘supposed to have little impact beyond the disputing parties and their immediate affiliates’.³⁴⁰ On the other hand, investor-state arbitrations have the potential to affect state conduct and legislation, which may result in payment obligations incurred by the state and, inevitably, its taxpayers.³⁴¹

Buyts proposes that ‘a more nuanced approach to confidentiality in arbitration may preserve the values of arbitration while at the same time enhancing the competing values to be gained by greater transparency’.³⁴² Indeed, Born posits that the confidentiality

³³⁷ Argen, above n 16, 226.

³³⁸ Ibid 208.

³³⁹ See, eg, *ibid* 226.

³⁴⁰ 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) 142, 148, quoted in Euler, above n 2, 43.

³⁴¹ Euler, above n 2, 86–7, citing Buyts, above n 183, 134.

³⁴² Buyts, above n 183, 121.

obligations arising from an international arbitration agreement 'should not be regarded as absolute'.³⁴³ Rather, 'they are nuanced and subject to important exceptions'.³⁴⁴

It is in this tensile context that the key theme of this article rears its head. This section will examine the current legal framework in international commercial arbitration and elucidate the extent to which transparency exists in international commercial arbitration. It will address the inadequacies of the current system with regards to transparency. The section will then detail the various benefits that transparency would confer on the system of international commercial arbitration. Ultimately, it is proposed that the scope of the *Rules on Transparency* should be extended to apply international commercial arbitrations, in addition to investor-state arbitrations.

A International Commercial Arbitration

A complex legal framework governs the system of international commercial arbitration, notably:³⁴⁵

- international arbitration conventions, in particular, the *New York Convention*;
- national arbitration legislation; and
- institutional arbitration rules, in particular the *Model Law*.³⁴⁶

This section will examine the key instruments within this framework and consider the extent to which they promote transparency, or uphold confidentiality.

³⁴³ Ibid 2817.

³⁴⁴ Ibid.

³⁴⁵ Ibid 18.

³⁴⁶ Ibid.

1 *New York Convention*

International arbitration conventions do not directly address the subject of confidentiality in international arbitration. Indeed, the *New York Convention*, the *European Convention*,³⁴⁷ and the *Inter-American Convention*³⁴⁸ are all silent on the subject of confidentiality in arbitral proceedings.³⁴⁹ The *New York Convention* is the ‘most significant contemporary legislative instrument’ relating to current international commercial arbitration.³⁵⁰ As at 14 October 2015, 156 nations have ratified the *New York Convention*.³⁵¹ Yet, the *New York Convention* does not provide a detailed legislative regime for all aspects of international arbitration, unlike the *Model Law*.³⁵² In particular, the *New York Convention* focuses on the recognition and enforcement of arbitration agreements and arbitral awards, without specifically regulating the conduct of the arbitral proceedings or other aspects of the arbitral process.³⁵³ Despite this, the *New York Convention* is widely regarded as ‘the cornerstone of

³⁴⁷ *European Convention on International Commercial Arbitration*, opened for signature 21 April 1961, 484 UNTS 349 (entered into force 7 January 1964) (*‘European Convention’*).

³⁴⁸ *Inter-American Convention on International Commercial Arbitration*, opened for signature 30 January 1975, 1438 UNTS 249 (entered into force June 16 1976) (*‘Inter-American Convention’*).

³⁴⁹ Born, above n 28, 2782.

³⁵⁰ *Ibid* 19.

³⁵¹ UNCITRAL, *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (17 September 2015) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

³⁵² Born, above n 5, 19.

³⁵³ *Ibid*.

current international commercial arbitration'.³⁵⁴

A key objective of the *New York Convention* was uniformity: its drafters sought to establish a single set of international legal standards for the enforcement of arbitration agreements and awards.³⁵⁵ The *New York Convention*'s provisions prescribe uniform international rules that:³⁵⁶

- require national courts to recognise and enforce foreign arbitral awards,³⁵⁷ subject to specified exceptions;³⁵⁸
- require national courts to recognise the validity of arbitration agreements, subject to specified exceptions,³⁵⁹ and
- require national courts to refer parties to arbitration when they have entered into a valid agreement to arbitrate that is subject to the *New York Convention*.³⁶⁰

However, the practical efficacy of the *New York Convention* is largely dependent on the content of national arbitration legislation, and interpretations given by national courts of such legislation and the *New York Convention*.³⁶¹ Achieving the original drafters' aim of uniformity requires national legislatures and courts to adopt uniform interpretations of the *New York Convention*.³⁶² The *New York Convention* has therefore been implemented through national

³⁵⁴ A J van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law International, 1st ed, 1981) 1, quoted in Born, above n 5, 19.

³⁵⁵ Born, above n 5, 19.

³⁵⁶ *Ibid* 19–20.

³⁵⁷ *New York Convention* arts III, IV.

³⁵⁸ *Ibid* art V.

³⁵⁹ *Ibid* art II.

³⁶⁰ *Ibid* art II(3).

³⁶¹ Born, above n 5, 21.

³⁶² *Ibid*.

legislation in virtually all contracting states.³⁶³

2 *National Arbitration Legislation*

In the absence of international norms, national legal systems take varying approaches to both the question of whether international arbitrations are presumptively confidential, and to the scope of any implied confidentiality obligations.³⁶⁴ These disparities are reflected in both national arbitration legislation and judicial consideration of such legislation.³⁶⁵

It is essential that national courts ‘give effect to arbitration agreements and awards, and provide support for the arbitral process’, for the process to function effectively, and to realise the parties’ objectives in agreeing to arbitrate.³⁶⁶ Broadly speaking, there are two categories of arbitration legislation: statutes that are supportive of the arbitral process, which are increasingly modelled on the *Model Law*, and statutes that are not supportive of the arbitral process.

However, very few national arbitration statutes encompass provisions outlining general standards on the subject of confidentiality in international arbitration.³⁶⁷ Most national courts and authorities have held that parties are in principle free to determine the confidentiality requirements in their arbitrations, and that their agreements should generally be given effect as an element of the parties’ procedural autonomy.³⁶⁸ Moreover, national courts in

³⁶³ *Ibid.*

³⁶⁴ *Ibid* 2783.

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid* 22.

³⁶⁷ *Ibid* 2783.

³⁶⁸ *Ibid* 2783–4.

many jurisdictions have cited a general implied obligation of confidentiality for parties to international arbitration agreements.³⁶⁹ In contrast, courts in other jurisdictions have held that there is no implied duty of confidentiality on parties to international arbitration agreements.³⁷⁰

The High Court in *Esso Australia Resources Ltd v Plowman*³⁷¹ held that a general duty of confidentiality is not to be implied in an agreement to arbitrate, since confidentiality is not ‘an essential attribute’ of a private arbitration.³⁷² Mason CJ held that arbitral proceedings in Australia were ‘private’, but that ‘private’ does not necessarily connote ‘private and confidential’.³⁷³ His Honour said that privacy means ‘no more than that persons who are strangers are excluded from the arbitration’.³⁷⁴ However, the Court was cautious to limit its observations to arbitrations seated in Australia, and not to international arbitrations. The Court also held that parties were free to expressly agree to confidentiality obligations.³⁷⁵

Since the decision in *Esso*, legislation has been adopted with respect to confidentiality in both domestic³⁷⁶ and international

³⁶⁹ Ibid 2784.

³⁷⁰ Ibid.

³⁷¹ (1995) 183 CLR 10 (*Esso*).

³⁷² Ibid 30 (Mason CJ).

³⁷³ Ibid citing *Dolling-Baker v Merrett* [1990] 1 WLR 1205.

³⁷⁴ Ibid.

³⁷⁵ Ibid.

³⁷⁶ Uniform legislation has been introduced in Australian states and territories, which includes provisions on confidentiality on an opt-out basis: see *Commercial Arbitration Act 2010* (NSW) ss 27E–27I; *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) ss 27E–27I; *Commercial Arbitration Act 2011* (SA) ss 27E–27I; *Commercial Arbitration Act 2011* (Vic) ss 27E–27I; *Commercial Arbitration Act 2012* (WA) ss 27E–27I.

arbitrations.³⁷⁷ In particular, s 23C of the *International Arbitration Act 1974* (Cth) ('the Act') provides that, in international arbitrations seated in Australia, the parties and arbitrators may not disclose confidential information unless permitted by one of the exceptions contain in ss 23D–23G of the Act.³⁷⁸ Importantly, this confidentiality regime for international arbitrations operates on an 'opt in' basis.³⁷⁹ In other cases, the pre-existing rule adopted in *Esso*, that no general duty of confidentiality is to be implied in an agreement to arbitrate, applies.³⁸⁰

3 *UNCITRAL Model Law*

The *Model Law* was drafted with the aim of harmonising national arbitration laws and has been described as 'the single most important statutory instrument in the field of international commercial arbitration'.³⁸¹ However, the *Model Law* does not have independent legal effect and must instead be adopted by national

³⁷⁷ See *International Arbitration Act 1974* (Cth) ss 23C–23G.

³⁷⁸ Section 23D allows disclosure by consent, disclosure to professional advisors, disclosure in order to safeguard a party's legal rights, or disclosure as required by law. Section 23E permits disclosure where authorised by an order of an arbitral tribunal, provided disclosure is not prohibited by a court order pursuant to s 23F or s 23G: see: Born, above n 28, 2796.

³⁷⁹ Born, above n 28, 2796–7.

³⁸⁰ *Ibid* 2797. In contrast, the accepted position under English law with regards to confidentiality in the arbitral process is that, although the parties consensually submit to arbitral proceedings, there is an implied obligation on both parties not to disclose any documents or evidence relating to the arbitration, arising out of 'the nature of arbitration itself': *Dolling-Baker v Merrett* [1990] 1 WLR 1205, 1213 (Parker LJ).

³⁸¹ Born, above n 5, 24.

legislation.³⁸² Legislation based on the *Model Law* has been adopted in 70 states in a total of 100 jurisdictions.³⁸³

The *Model Law* is ‘entirely silent’ on the subject of confidentiality in the international arbitral process, which is representative of most national arbitration legislation.³⁸⁴ Indeed, the drafters of the *Model Law* expressly rejected proposals to provide for the confidentiality of arbitral awards and hearings, reasoning that determining the level of confidentiality in proceedings should be left to the parties or the arbitration rules chosen by them.³⁸⁵ Accordingly, no provisions in the *Model Law* address the subject of confidentiality.³⁸⁶

B *The (In)Adequacies of the Current System*

1 *The Presumption of Confidentiality*

One of the most cited advantages of international commercial arbitration, as opposed to litigation, is the level of confidentiality that the parties enjoy.³⁸⁷ The existence of the dispute is typically unknown to the public; hearings are kept private and the publication of awards is often at the discretion of the parties.³⁸⁸ Fundamentally,

³⁸² Ibid 25.

³⁸³ Figures accurate as at 14 October 2015: see United Nations Commission on International Trade Law, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006* (2015) UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

³⁸⁴ Born, above n 28, 2784.

³⁸⁵ Ibid 2784.

³⁸⁶ Ibid.

³⁸⁷ Euler, above n 2, 8.

³⁸⁸ Ibid.

confidentiality in international commercial arbitration is:

perceived as encouraging efficient, dispassionate dispute resolution, rather than emotive ‘trial by press release’ or efforts to gain extraneous leverage; reducing the risks of damaging disclosure of commercially-sensitive information to competitors, customers and others; and facilitating settlement by minimizing the role of public posturing.³⁸⁹

Indeed, there is extensive empirical evidence that international businesses place substantial value on these aspects of the arbitral process.³⁹⁰ Consequently, it is widely regarded as ‘good practice for the tribunal and the parties to treat as confidential the existence of the arbitral proceedings, any materials disclosed and pleadings exchanged during the proceedings, and the arbitral award itself’, unless the parties agree otherwise.³⁹¹ Nonetheless, the debate about the role and scope of confidentiality in international commercial proceedings remains contentious.³⁹² Statutes and case law do not typically address the issues of confidentiality and privacy; when they do, the decisions they reach often vary from one jurisdiction to another.³⁹³

³⁸⁹ Born, above n 28, 2780; see also Argen, above n 16, 216–17.

³⁹⁰ Ibid. See, eg, School of International Arbitration at Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015), 6 <<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>>; ‘Expert Report of Dr Julian D M Lew (in *Esso/BHP v Plowman*)’ (1995) 11 *Arbitration International* 273, 273.

³⁹¹ Maintaining confidentiality may also be subject to conflicting obligations stemming from domestic or international law or from judicial proceedings: Georgios Petrochilos, *Procedural Law in International Arbitration* (Oxford University Press, 2004) 223, quoted in Euler, above n 2, 87.

³⁹² Euler, above n 2, 87, citing Born, above n 28, 2252.

³⁹³ Euler, above n 2, citing Born, above n 28, 2253.

However, arbitration is also a ‘creature of contract’.³⁹⁴ During contract negotiations, the parties may easily modify a standard arbitration clause to include a confidentiality agreement that requires them to keep the existence of future arbitral disputes secret.³⁹⁵ Under such a clause, the disputants would be bound to keep the arbitration secret unless required by law to disclose certain information.³⁹⁶

2 *Private Hearings*

There is ‘essentially universal acceptance’ that hearings in international commercial arbitrations are ‘private’, and that third parties typically may not attend or participate in such hearings.³⁹⁷ The general rule that arbitral proceedings are ‘private’ is often cited as requiring that arbitrations also be ‘confidential’.³⁹⁸ However, arbitration hearings are private not merely for reasons of confidentiality, but also to prevent both the disruption of the arbitral process and the involvement of third parties in that process.³⁹⁹ Accordingly, it is feasible for arbitral hearings to remain private, while at the same time permitting parties to publicise the conduct of the proceedings, and materials submitted in those proceedings.⁴⁰⁰

Notwithstanding the material distinctions between obligations of ‘privacy’ and ‘confidentiality’ in international arbitration, both concepts ‘arise from the same expectations and objectives of the

³⁹⁴ Argen, above n 16, 216, citing *Steelworkers of America v American Manufacturing Co*, 363 US 564, 570 (1960) (Brennan J, Harlan J concurring).

³⁹⁵ Argen, above n 16, 216.

³⁹⁶ *Ibid.*

³⁹⁷ Born, above n 28, 2815–16.

³⁹⁸ *Ibid.* 2816.

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

arbitral process'.⁴⁰¹ Namely, the resolution of parties' disputes in a single, centralised, efficient and commercially sensible proceeding.⁴⁰² Accordingly, conducting arbitrations in a private, but non-confidential manner would undermine important aspects of the privacy of the arbitral hearing, and be contrary to the expectations and purposes of the arbitral process to which the parties have agreed.⁴⁰³ However, the implied obligation of confidentiality is only presumptive, and can be overcome by express or implied agreement between the parties.⁴⁰⁴ As discussed, the position in Australia is that confidentiality is not 'an essential attribute' of a private arbitration.⁴⁰⁵ However, Born argues that the decision in *Esso* is 'ill-considered with regard to international arbitrations and ... based primarily on domestic considerations'.⁴⁰⁶

*C Should the Rules on Transparency be Applied to
International Commercial Arbitration?*

The limitation of the *Rules on Transparency* 'to investor-state arbitration' becomes explicitly apparent in the title of the instrument as well as in art 1(1).⁴⁰⁷ The notion that the *Rules on Transparency* would apply only to investor-state arbitrations was present from the

⁴⁰¹ Ibid.

⁴⁰² Ibid.

⁴⁰³ Ibid.

⁴⁰⁴ Ibid.

⁴⁰⁵ See *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 30 (Mason CJ).

⁴⁰⁶ Born, above n 28, 2817.

⁴⁰⁷ Ibid.

beginning of their negotiation by the UN Working Group.⁴⁰⁸ Pursuant to art 1(1), only the identity of the parties, not the content of the dispute, determines whether or not the *Rules on Transparency* will apply to an arbitration.⁴⁰⁹

The reference to ‘investor-state’ reflects the Working Group’s conception of why transparency is important: as a constituent element of good governance and for the legitimacy of the arbitration system in disputes affecting state policymaking and finance.⁴¹⁰ Transparency is therefore ‘important for shedding light on state activities’.⁴¹¹ Many commentators agree that investor-state arbitrations should be subject to standards of transparency to promote good governance, which ‘requires the opportunity for public participation in matters that affect policymaking and public

⁴⁰⁸ The ‘specific situation’ of investor-State arbitration was recognised at the beginning of the revisions of the *UNCITRAL Arbitration Rules*, GA Res 31/98, UN GAOR, 31st sess, 99th plen mtg, Supp No 17, UN Doc A/31/17 (15 December 1976). See *Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session (Vienna, 11–15 September 2006)*, UN GAOR, 40th sess, UN Doc A/CN.9/614 (5 October 2006) [19], cited in Euler, above n 2, 42.

⁴⁰⁹ Euler, above n 2, 42.

⁴¹⁰ Transparency is just one of the constituent elements of good governance. Accountability, legitimacy and rule of law are also seen as necessary in ensuring that power and authority are well organised and exercised: see Juanita Olaya, ‘Good Governance and International Investment Law: The Challenges of Lack of Transparency and Corruption’ (Paper presented at Society of International Economic Law Second Biennial Global Conference, Barcelona, 8–10 July 2010), cited in Euler, above n 2, 42 n 62.

⁴¹¹ Euler, above n 2, 42.

finances'.⁴¹² Further, it has been argued that arbitration awards will only be recognised as legitimate by the public 'if they have access to information about the process through which the decisions are made'.⁴¹³ This view of transparency 'eliminates any reason for the Rules to apply to non-State arbitration processes': openness is not essential for the arbitration process itself; it is necessary for the public.⁴¹⁴ In subscribing to this view, the Working Group reiterated its commitment to maintaining confidentiality in private commercial arbitrations.⁴¹⁵

However, there are arguments that such a narrow view of the advantages of transparency 'is fundamentally problematic'.⁴¹⁶ Maupin contends that the debate over the form and content of transparency norms in investor-state arbitration should not be restricted to increasing transparency.⁴¹⁷ Nor should it be conflated with discussions about how to promote the legitimacy, consistency, and predictability of the system.⁴¹⁸ Although transparency plays an instrumental role in all of these debates, it also 'has an inherent

⁴¹² Ibid, citing Joachim Delaney and Daniel Barstow Magraw, 'Procedural Transparency' in Peter Muchlinski et al (eds), *Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 721, 761; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2008) 159–64; Buys, above n 183, 134.

⁴¹³ Euler, above n 2, 43.

⁴¹⁴ Ibid.

⁴¹⁵ See, eg, *Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session*, UN GAOR, 41st sess, UN Doc A/CN.9/646 (29 February 2008) [57], cited in Euler, above n 2, 43.

⁴¹⁶ Euler, above n 2, 43.

⁴¹⁷ Maupin, above n 340, 148–50, quoted in Euler, above n 2, 43.

⁴¹⁸ Ibid.

value which transcends them'.⁴¹⁹

1 *The Case For Transparency*

Recent scholarship reveals that, in the past decade, there have been a number of developments towards increasing transparency in international commercial arbitration.⁴²⁰ This shift towards transparency has, among other things, seen:

- arbitral institutions begin to publish decisions;
- press releases and trade publications publish pending international disputes;
- awards published in redacted or complete form;
- harmonisation resulting in published codifications of arbitral procedures; and
- the development of projects for enhanced availability of information about arbitrators.⁴²¹

These developments have clearly made the international arbitration process more accessible. Nonetheless, they have had minimal effect on the disclosure requirements regarding the submissions and evidence in ongoing arbitrations, the arbitral hearings, or the arbitrators' deliberations.⁴²² These aspects of the arbitral procedure have 'retained their presumptively confidential character, precisely because they most directly serve the basic objectives of the arbitral process'.⁴²³

⁴¹⁹ Ibid.

⁴²⁰ Born, above n 28, 2820, citing Catherine A Rogers, 'Transparency in International Commercial Arbitration' (2006) 54 *University of Kansas Law Review* 1301, 1312–25.

⁴²¹ Ibid.

⁴²² Ibid 2821.

⁴²³ Ibid.

Regardless of whether there is a state party involved, arbitral transparency has various potential benefits including the increased consistency of awards, further development of the law of arbitration, better avoidance of future disputes, greater opportunities to improve the system, and more efficiency in determining which arbitrator is most suitable to one's case.⁴²⁴ In particular, Buys advocates the adoption of a presumption that arbitral awards be made publicly available, unless both parties object.⁴²⁵ However, despite such calls for more transparency in international commercial arbitration as well as in investor-state arbitration, the *Rules on Transparency* clearly do not challenge the presumption of confidentiality in arbitration between private parties.⁴²⁶

Using this framework of proposed benefits, balanced against countervailing considerations, as its starting point, this section addresses the primary theme of this article: whether the *Rules on Transparency*'s scope of application should be extended to international commercial arbitrations.

(a) *Public Interest*

The transparency trend is based on the notion that the public is a 'significant stakeholder' in international arbitration.⁴²⁷ The rationale for the application of the *Rules on Transparency* being restricted to investor-state arbitration is that a 'public interest difference' exists between investor-state arbitration and international commercial arbitration.⁴²⁸ In light of this difference, some scholars and institutions conclude that a lack of transparency in international

⁴²⁴ Ibid 135–8.

⁴²⁵ Ibid 121.

⁴²⁶ Euler, above n 2, 44; Buys, above n 183, 121.

⁴²⁷ Argen, above n 16, 209.

⁴²⁸ Ibid 210.

commercial arbitration ‘is tolerable’, even though private commercial disputes may profoundly affect important public policy issues.⁴²⁹ However, Argen contends that the ‘public interest difference’ is not a sufficient basis to exclude international commercial arbitration from the transparency trend, because commercial disputes can impact profoundly upon these issues of public policy.⁴³⁰

As noted previously, international commercial arbitrations between private actors clearly have the potential to impact on issues of the public interest or issues of which the public should be informed.⁴³¹ For example, ‘commercial’ arbitrations may significantly affect a public company’s shareholders, or concern a state entity’s obligations with respect to power generation, water, or infrastructure, with potentially massive public consequences.⁴³² The global financial crisis of 2007/2008 demonstrated the effect that multi-billion dollar transactions of private multinational corporations can have on policymaking and public finances, as well as on individuals and communities.⁴³³ The state may have also an interest in international commercial arbitrations, particularly when awards are brought to domestic courts for enforcement.⁴³⁴ Although disputants could theoretically agree to notify regulators or the media about an arbitration that impacts public interests, such voluntary

⁴²⁹ Ibid 211.

⁴³⁰ Ibid 235.

⁴³¹ Euler, above n 2, 44.

⁴³² Born, above n 28, 2828 n 260. Private arbitrations may also affect public policy issues such as environmental protection, public safety and health, and market competition: Argen, above n 16, 235.

⁴³³ Euler, above n 2, 44.

⁴³⁴ Ibid, citing Anjanette H Raymond, ‘Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?’ (2005) 16 *American Review of International Arbitration* 479, 486.

public notice rarely occurs because private commercial parties typically prefer to keep their disputes out of the spotlight to avoid ‘public scrutiny’.⁴³⁵ Accordingly, the current system of international commercial arbitration permits disputes that impact profoundly upon important public policy interests to be resolved outside of the public’s view.⁴³⁶

(b) Consistency, Predictability and Efficiency

Various proponents of increased transparency have advocated that the publication of reasoned arbitral awards would result in greater consistency and predictability in the law of arbitration,⁴³⁷ by developing ‘precedential authority or guidance for future tribunals (in deciding cases) and parties (in predicting the outcome of possible disputes)’.⁴³⁸ Parties are likely to value certainty and predictability, including the application of known legal principles, as uncertainty makes it difficult for parties to formulate strategies and prepare for disputes.⁴³⁹

⁴³⁵ Argen, above n 16, 210, quoting Center for International Environmental Law and International Institute for Sustainable Development, *Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations*, above n 196.

⁴³⁶ Argen, above n 16, 212.

⁴³⁷ See Born, above n 28, 2821; Argen, above n 16, 212, 244; Buys, above n 183, 136–7; Eberé and Xheraj, above n 73, 88; Dora Marta Gruner, ‘Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform’ (2003) 41 *Columbia Journal of Transnational Law* 923; Alexis Mourre, ‘Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards’, in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in International Arbitration* (Juris Publishing Inc, 2008) 39.

⁴³⁸ Born, above n 28, 2821.

⁴³⁹ Buys, above n 183, 136.

Despite arbitral awards only being binding on the parties to the dispute, reasoned awards have persuasive value in individual cases, akin to a consistent body of common law based on precedent.⁴⁴⁰ Publishing such awards would, therefore, provide a degree of predictability.⁴⁴¹ More broadly, the published awards could ‘coalesce into a collective arbitral wisdom’ that may be drawn upon by future parties and arbitrators.⁴⁴² By providing this persuasive and educational value, published awards also contribute to both the parties’ acceptance of the award and their ability to use it to adapt future commercial relationships.⁴⁴³ In this regard, they serve ‘a powerful informational function’, providing information about potential arbitrators and how such arbitrators might evaluate their cases.⁴⁴⁴ Further, increasing transparency in this manner could also assist in avoiding future disputes by allowing parties to learn from the mistakes of others.⁴⁴⁵ It also provides practitioners and academics with the opportunity ‘to understand analy[s]e, critique, and improve the dispute resolution system’.⁴⁴⁶

A more consistent and predictable body of arbitral jurisprudence would also fulfil an important democratic function by ‘enhancing the integrity and legitimacy of the arbitration process’.⁴⁴⁷ In particular, written and reasoned opinions ‘provide rationality and

⁴⁴⁰ Argen, above n 16, 212 n 34.

⁴⁴¹ Reuben, above n 187, 1085.

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.*

⁴⁴⁴ *Ibid.*

⁴⁴⁵ Buys, above n 183, 136.

⁴⁴⁶ *Ibid.*, citing Alexis C Brown, ‘Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration’ (2001) 16 *American University International Law Review* 969, 1018.

⁴⁴⁷ Reuben, above n 187, 1085; Eber and Xheraj, above n 73, 88.

transparency to an otherwise arbitrary and potentially awesome process'.⁴⁴⁸ Moreover, publication of awards could improve the speed of decision-making, as arbitrators would be aware of the timing of their decisions being subject to public scrutiny that 'would provide additional motivations to conduct arbitral proceedings with expedition and efficiency'.⁴⁴⁹ For all of these reasons, the publication of arbitral awards would benefit both parties and arbitrators.⁴⁵⁰

Opponents of increased transparency have presented the rather weak argument that there is no need for developing a consistent and predictable set of rules because international commercial arbitration is not concerned with consistency since it deals with one-off contracts.⁴⁵¹ Further, as commercial awards are delivered under the laws of one particular jurisdiction, it is argued that 'many sources are already available to arbitral tribunals and parties to educate them about what the laws say'.⁴⁵²

Accordingly, weighing these considerations, increased transparency in the international commercial arbitration system has substantial value in promoting its consistency, predictability and efficiency.

(c) Quality and Implementation of Awards

Increased transparency could also have positive effects on the quality of decision-making and of the reasons given. Public scrutiny

⁴⁴⁸ Reuben, above n 187, 1085.

⁴⁴⁹ Born, above n 28, 2821.

⁴⁵⁰ Reuben, above n 187, 1085.

⁴⁵¹ Eberé and Xheraj, above n 73, 89, citing Gabrielle Kauffman-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture' (2007) 23 *Arbitration International* 357, 375–6.

⁴⁵² Eberé and Xheraj, above n 73, 89.

resulting from the publication of awards would provide tribunals with ‘greater incentives to make defensible, persuasive and careful decisions’.⁴⁵³ Moreover, Schill argues that transparency is likely to increase the quality of reasoning, as arbitrators will know that their words will be published, read and critically assessed.⁴⁵⁴ Furthermore, publishing awards would give the public confidence that the process is fair, which will make implementation of the award more likely.⁴⁵⁵ Publication of awards could also lead to greater pressure to implement awards.⁴⁵⁶

By contrast, opponents believe that enhanced transparency would lead to a ‘slower and more expansive arbitral process’.⁴⁵⁷ Arbitrators may also feel compelled to do more than resolve the commercial dispute at hand, by having to develop the law and demonstrate their abilities to receive future appointments.⁴⁵⁸

On balance, the potential for increased transparency and accountability to improve the quality of decision-making and reasons should clearly prevail over minor concerns about the system becoming less efficient.

2 Promoting Democratic Principles

The notion of promoting democratic principles or values is an

⁴⁵³ Born, above n 28, 2821; Ebere and Xheraj, above n 73, 89.

⁴⁵⁴ Schill, above n 217.

⁴⁵⁵ Buys, above n 183, 136.

⁴⁵⁶ Ibid.

⁴⁵⁷ Ebere and Xheraj, above n 73, 90.

⁴⁵⁸ Ibid, citing Paula Hodges, ‘The Perils of Complete Transparency in International Arbitration — Should Parties Be Exposed to the Glare of Publicity?’ (2012) 3 *Paris Journal of International Arbitration* 589, 596.

extension of the ‘democratic deficit principle’,⁴⁵⁹ discussed previously. Greater transparency would promote democratic principles because the affected public, such as the shareholders of a publicly held corporation and consumers, gain an opportunity to observe and evaluate the outcome of arbitrations.⁴⁶⁰ Increasing transparency would also make parties’ positions in arbitrations better known, which would enable the public to hold the parties accountable for their actions, particularly where large publicly held corporations or government parties are involved.⁴⁶¹

3 The ‘Repeat Player’ Problem

Raymond urges businesses to reject confidentiality in arbitration in order to restrict the benefits enjoyed by ‘repeat players’ in arbitration.⁴⁶² This would ensure that ‘competitive information’ circulates among all players, not just those who repeatedly engage in arbitration, the lessons of which are then kept confidential.⁴⁶³ This notion stems from the suggestion by Galanter that repeat players enjoy significant advantages over ‘one shot’ players, including:

- the benefit of experience for purposes of developing long-term strategies and structuring future transactions;
- developing expertise;
- cultivating relationships with institutional incumbents; and

⁴⁵⁹ Argen, above n 16, 212 n 34.

⁴⁶⁰ Buys, above n 183, 136.

⁴⁶¹ Ibid 137.

⁴⁶² Raymond, above n 434, 498–501, cited in Euler, above n 2, 44 n 68.

⁴⁶³ Ibid 479, 502.

- developing a reputation and credibility with the arbitrator.⁴⁶⁴

4 Enforcement

It is widely accepted that ‘the success of arbitration lies in the successful enforcement of an arbitral award’.⁴⁶⁵ Enforcement is also consistently cited as a key benefit of international commercial arbitration for parties.⁴⁶⁶ Notably, both the *New York Convention* and the *Model Law* ensure that international arbitration agreements are more readily and expeditiously enforced, with limited grounds for denying recognition of an arbitral award.⁴⁶⁷ This is consistently cited as a key benefit of international commercial arbitration.⁴⁶⁸

The *Rules on Transparency* do not directly address enforcement proceedings. Article 7(2)(d) contains an exception for ‘information, the disclosure of which would impede law enforcement’. ‘Law enforcement’ is not defined in the *Rules on Transparency*. However, it has been suggested that the term ‘relates to institutions, principles, operations and arrangements with the duty to enforce the application of the laws of a state’.⁴⁶⁹ The United States *Freedom of Information Act* contains a similar publication exception for information compiled for law enforcement purposes, when such information ‘could reasonably be expected to interfere with enforcement

⁴⁶⁴ Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Review* 95, 98–103, cited in Reuben, above n 187, 1065.

⁴⁶⁵ Eberé and Xheraj, above n 73, 94, citing Hong-lin Yu, ‘A Theoretical Overview of the Foundations of International Commercial Arbitration’ (2008) 1(2) *Contemporary Asia Arbitration Journal* 255, 283.

⁴⁶⁶ Born, above n 5, 11.

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Ibid.*

⁴⁶⁹ Euler, above n 2, 274.

proceedings'.⁴⁷⁰ This exemplifies how the analogous *Rules on Transparency* art 7(2)(d) could potentially operate.

Accordingly, it appears likely that tribunals would be required to exempt information that has the potential to negatively impact the enforceability of arbitral awards from the transparency principles of the *Rules on Transparency*. Consequently, if the *Rules on Transparency* were applied to international commercial arbitration, the ability for parties to enforce arbitral awards would likely remain intact.

Commentators have lamented arbitration's 'opacity' and proposed that the solution might be for the courts to refuse the enforcement of arbitral awards that do not comply with transparency requirements.⁴⁷¹ However, it is likely that this could have a detrimental effect on the attractiveness of international arbitration as a dispute resolution mechanism. Moreover, this would require a fundamental restructuring of the *New York Convention*.

5 Potential Application of the Rules on Transparency

If the *Rules on Transparency* were modified to extend their application to international commercial arbitration, they would not apply compulsorily. As is the case in investor-state arbitration, the *Rules on Transparency* would merely be presumed to apply, unless the parties expressly 'opt out' of their application.

If confidentiality is still regarded by many people as a real, or alleged, value of arbitration, then an 'opt out' system should be

⁴⁷⁰ *The Freedom of Information Act*, 5 USC § 552(b)(7) (2014), quoted in Euler, above n 2, 274.

⁴⁷¹ Rogers, above n 420, 1327; Lynn M LoPucki, 'Court-System Transparency' (2009) 94 *Iowa Law Review* 481, 536.

considered. This type of mechanism would be compatible with the current system of investor-state arbitration, in which the *Rules on Transparency* only apply in circumstances where the parties do not expressly 'opt out'. This would serve the objectives of transparency, whilst not defeating the interests of private parties in international commercial arbitration. Notably, it would address any concerns that parties have about protecting their reputations against negative publicity. Similarly, it would allow for parties to protect sensitive information such as trade secrets, which, in any event, are exempted from disclosure or publication under the *Rules on Transparency*.

D Summary

This section presented the central proposition of this article: that the scope of the *Rules on Transparency* should be extended to apply international commercial arbitrations, in addition to investor-state arbitrations. It advanced the argument that applying the *Rules on Transparency* would increase the legitimacy of the system, be in the public interest by allowing for 'public scrutiny of proceedings, promote consistency, predictability and efficiency, which would decrease party uncertainty, and further democratic principles.⁴⁷² Crucially, it was established that applying the *Rules on Transparency* would likely have no substantial impact on the recognition and enforcement of arbitral awards. Furthermore, the *Rules on Transparency* would not mandatorily apply to international commercial arbitrations. They would merely be presumed to apply unless the parties expressly 'opt out' of their application.

⁴⁷² Levander, above n 1, 511; see generally Buys, above n 183.

V CONCLUSION

The present state of privacy and confidentiality in international commercial arbitration is unsatisfactory.⁴⁷³ The traditional prioritisation of confidentiality inadequately balances the advantages of transparency identified in this article. First, transparency would function to remedy the fact that the current system permits disputes that impact profoundly upon important public policy interests to be resolved outside of the public's view. Second, increased transparency would promote consistency, predictability and efficiency in the system. Third, transparency would have positive effects on the quality of decision-making and of the reasons given by arbitrators. Fourth, transparent proceedings would enable the public to hold parties accountable for their actions. Fifth, it would limit the benefits enjoyed by 'repeat players' in arbitration. Finally, but significantly, there is no evidence that increasing transparency in international commercial arbitration would have any material impact on the enforceability of awards.

It would be beneficial for the system as a whole to embrace the shift towards transparency that has been largely recognised as desirable in investor-state arbitration. However, for this transformation to occur on a widespread scale, the traditional presumption that international commercial arbitrations are automatically private and confidential must be overturned. This article proposes the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*⁴⁷⁴ as the means by which this change may commence.

⁴⁷³ See Born, above n 28, 2814.

⁴⁷⁴ UN GAOR, 67th sess, Supp No 17, UN Doc A/68/17 (16 December 2013) annex I.

Comments

COMPETITION AND PREFERENTIAL TRADE AGREEMENTS: OBSERVATIONS ON NEW ZEALAND'S APPROACH

RUTH NICHOLS*

Abstract

*International Trade Agreements — Anti-Competitive Practices —
Preferential Trade Agreements — New Zealand*

International trade agreements are increasingly seen as a mechanism to help mitigate the risk of firms suffering from anti-competitive practices when operating in third countries and protect investors' interests both within and across borders. Anti-competitive practices act as a barrier not only to trade liberalisation, but also to the development of domestic industries, as they struggle to overcome the anti-competitive effects of international mergers and acquisitions in their own markets. While preserving the sovereign rights of each party to the agreement to develop, set, administer and enforce its own competition laws and policies, competition provisions in international trade agreements encourage robust competition law within the parties' domestic jurisdictions, cooperation between parties' competition authorities, transparency of competition authorities' regulations and decisions, and procedural fairness in enforcement proceedings.

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This paper explores New Zealand's approach to competition provisions in the competition chapter of preferential trade agreements. It compares the relevant provisions in concluded agreements and reflects on how New Zealand's approach has developed over time. Finally, the paper discusses two challenges in developing competition provisions in international trade agreements, global value chains and the circumstances facing developing countries.

I WHAT IS COMPETITION AND WHY DOES IT MATTER?

Workable and effective competition is the global policy standard for competition policy, reflected in s 3(1) of the *New Zealand Commerce Act 1986*. It requires that prices reflect the forces of supply and demand, and that firms should have to consider the likely reactions of consumers, competitors and potential entrants. It reflects competition as a dynamic process; a continual evolvement of new marketing, economic conditions and technological developments with which market participants have to contend. It also reflects that the importance of competition policy is not contingent on the balance a country favours between private and state-owned enterprises; what matters is inter-firm rivalry.

Competition stimulates innovation and productivity, contributing to an effective business environment that generates economic growth and employment.¹ It removes the barriers that protect entrenched elites and reduces opportunities for corruption. It increases a

¹ For a useful summary of the macroeconomic outcomes of competition, see: Organisation for Economic Cooperation and Development, *Competition and macroeconomic outcomes factsheet* (10 October 2014) <<http://www.oecd.org/daf/competition/factsheet-macroeconomics-competition.htm>>.

country's attractiveness as a business location, triggering national and foreign investment. It also delivers benefits to consumers through lower prices, improved services and greater choice, thereby contributing to improved consumer welfare.

Consumer protection is often seen as a corollary of competition, ensuring that consumers have adequate information to enable them to make informed choices, the right of access to safe products and to have effective redress. In turn, this contributes to creating a level playing field for businesses, requiring the application of a common set of standards, and hence supports competition.

An example of the benefits of competition in the Pacific region, which has a long history of government-owned communications monopolies, can be seen in the impact of the entry of Digicel into the region. Digicel has revolutionised the telecommunications market in the Pacific since its entry in 2006; driving down the prices of phones and internet access, improving access to health and banking services, and helping boost small business enterprise. For example, in less than three years, the number of Papua New Guinea mobile subscribers increased at least ten-fold,² while it has been reported that the 'central bank estimated the newly liberalised industry added more than half-a-percent to GDP'.³

² The World Bank, *Development Indicators: Mobile cellular subscriptions* (2015) <http://data.worldbank.org/indicator/IT.CEL.SETS.P2?page=1&order=wbapi_data_value_2013%20wbapi_data_value&sort=asc>.

³ Talek Harris, 'Mobile 'revolution' eases Pacific isolation, poverty', *Sydney Morning Herald* online <<http://www.smh.com.au/technology/mobile-revolution-eases-pacific-isolation-poverty-20101210-18sds.html>>.

II COMPETITION AND TRADE AGREEMENTS

Since the 1990s, there has been a proliferation of international trade agreements that have moved from the traditional focus on tariff reduction towards ‘behind-the-border’ issues. An issue that has received heightened attention is competition policy, together with consumer protection. It is appropriate to refer to the attention as ‘heightened’ so as to not diminish the historic antecedents of competition policy as part of trade agreements. For example, from the *Havana Charter for an International Trade Organization* (‘*Havana Treaty*’)⁴ and the incorporation of competition principles found in various parts of the *General Agreement on Tariffs and Trade*⁵ (‘*GATT*’) and World Trade Organisation (‘WTO’) agreements, through to the inclusion of a specific competition chapter in earlier preferential trade agreements (‘PTAs’) such as the *North American Free Trade Agreement*.⁶

This heightened attention has occurred despite the WTO General Council’s 2004 decision that trade and competition would no longer form part of the work programme of the WTO,⁷ despite preliminary work in this area following the Singapore Ministerial Conference in

⁴ The Havana Charter of the International Trade Organisation is formally known as the Final Act of the United Nations Conference on Trade and Employment, March 24 1948, UN Doc E/Conf.2/78.

⁵ *General Agreement on Tariffs and Trade*, signed 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948) (‘*GATT*’).

⁶ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, signed 17 December 1992 [1994] CTS 2 (entered into force 1 January 1994) (‘*NAFTA*’).

⁷ Decision adopted by the General Council of the World Trade Organisation, 1 August 2004, WT/L/579.

1996. Even though it is not part of the Doha Round,⁸ plenty of negotiations around competition policy have been occurring at regional and bilateral levels, both within and outside of the PTA context, for example, the Asia Pacific Economic Cooperation ('APEC') *Principles to Enhance Competition and Regulatory Reform*, which was agreed in Auckland in 1999⁹ and the Association of South East Asian Nations ('ASEAN') *Regional Guidelines on Competition Policy*.¹⁰

The inclusion of competition provisions in PTAs reflects the general globalisation of competition policy and aims to achieve a number of outcomes.¹¹ The rationale for including provisions focuses firstly on the need to ensure that gains from tariff liberalisation are not eroded by substituting private restrictive practices for government trade barriers. The inclusions promote market access and support the trade-enhancing objectives of the PTA. Secondly, the inclusions reflect the need for increased inter-agency cooperation across borders, particularly in the area of mergers, to streamline and harmonise procedures and operations. International businesses are eager to minimise the number of agencies they are accountable to in

⁸ The Doha Development Round is the current trade-negotiation round of the World Trade Organization.

⁹ Asia Pacific Economic Cooperation, *Principles to Enhance Competition and Regulatory Reform* (1999) <www.apec.org/Meeting-Papers/.../1999_LeadersDeclaration.ashx>.

¹⁰ Association of South East Asian Nations, *Regional Guidelines on Competition Policy* (2010) <www.asean.org/.../ASEANRegionalGuidelinesonCompetitionPolicy.pdf>.

¹¹ Competition policy is a broader set of measures and instruments that may be pursued by governments to promote and protect competition. It consists of competition law such as rules and regulations to foster competition environment in an economy, and policies achieving the same aims, for example, deregulation, efforts to privatise state-owned enterprises, encouraging foreign direct investment.

order to reduce transaction costs and jurisdictional difficulties. Thirdly, competition provisions, such as establishing competition law regulatory authorities and inter-agency cooperation and coordination across borders, promote a common foundation for the rules that are applicable to the relevant goods and services, building confidence in both importers and exporters.

The inclusion of competition provisions, however, does not guarantee particular outcomes; the provisions are designed to protect the competitive process rather than competitors themselves. Even government officials may perceive the objectives of competition provisions differently.¹² For example, a trade official might consider improved market access to be the objective of such provisions, while a competition official might hope for the increased exchange of information and enforcement cooperation. In the European Union, competition provisions can be seen as a key instrument for market integration.¹³ The actual negotiated text can reflect the objective that is of greater priority in that particular bilateral or regional relationship.

Competition provisions address the two key types of anti-competitive conduct that have occurred following the liberalisation of trade and investment: conduct outside the jurisdiction having an anticompetitive effect on domestic consumers, for example, international cartels, anticompetitive mergers and abuses of dominance; and conduct within the jurisdiction having an anticompetitive effect on domestic consumers

¹² A M Alvarez, S T Evenett and L Wilse-Sanson, *Implementing competition-related provisions in regional trade agreements: is it possible to obtain development gains?* (2007) United Nations Conference on Trade and Development, <www.unctad.org> <unctad.org/en/Docs/ditclp20064_en.pdf>.

¹³ *Ibid* 60.

and foreign business interests through anticompetitive arrangements or mergers foreclosing markets to import competition. In addition, behind-the-border state aid, government industry policy and government regulation can result in a lack of competitive neutrality, which may impede trade and investment.

III HOW HAVE COMPETITION PROVISIONS IN PTAS ADDRESSED ANTI-COMPETITIVE BEHAVIOUR?

A Facilitating Domestic Reform

Birdsall and Lawrence consider that the principal benefit of trade agreements aimed at measures behind the border can be to facilitate domestic policy reforms, by providing a mechanism for overcoming domestic constituencies that could otherwise block the reform process.¹⁴

Competition provisions in PTAs can strengthen domestic competition and legal frameworks in a number of ways, including:

- bringing forward the enactment date of competition law;
- strengthening the deterrent effect of national law;
- changing the political economy of domestic competition enforcement;
- contributing to the strengthening of powers, budget and resources of competition agencies; and
- bringing about a change of mindset, whereby competition policy is seen less as a tool to protect domestic industry

¹⁴ Nancy Birdsall and Robert Z Lawrence, *Deep Integration and Trade Agreements: Good for Developing Countries?* in Inge Kaul, Isabelle Grunberg and Marc Stern I (eds), *Global Public Goods: International Cooperation in the 21st Century* (Oxford University Press, 1999).

and more as a means of protecting the competitive process.

Both direct and indirect benefits to suppliers and consumers can result from such changes, strengthening the relevance of PTAs domestically. These developments also strengthen a national competition culture.

B Promoting Cooperation Between Competition Agencies

PTAs promote cooperation between competition agencies of participating countries in order to strengthen agency capability and, in particular, to assist them in investigating particular competition law enforcement cases. To that end, effective competition law enforcement strengthens competition.

New Zealand, along with many other countries, is very aware of the need to fight international cartels. This is necessary not only because of the negative effect they may have in New Zealand, but also because of the large cost implications of cartels for emerging economies and the negative impact cartels can have on their economic development. The evidence required in the detection and punishment of international cartels is, in many cases, scattered across different jurisdictions, and an agency may require information from other those jurisdictions to carry out successful prosecution. If it cannot acquire that information, the result is under-enforcement and under-scrutiny, which in turn affects economic development in the jurisdictions affected.

One critical element, which determines to a large extent the parameters and success of cooperation in competition law enforcement, is the definition and use of confidential information. This issue is addressed in a number of PTAs. In reality, a large

degree of cooperation is still possible within the constraints of confidentiality, for example, discussion of hypothetical cases and sharing of investigation techniques and enforcement experiences. One practical way to deal with confidentiality concerns is to go to the source and get the 'leniency party'¹⁵ to agree to a waiver instead. In that regard, New Zealand has formal cooperation agreements with a number of other countries. However, informal cooperation is also crucial to this process, such as networking with other agencies and observing jurisdictions that have more experience such as, for example, the United States Department of Justice in criminal matters.

Smaller jurisdictions can benefit from learning how larger ones have managed particular conduct or have dealt with the issues involved. Investigation and prosecution can also be facilitated by accessing information about the nature and organisation of the anti-competitive arrangement from another jurisdiction that has successfully completed such an investigation. Clarke and Evenitt postulate that public announcements of cartel enforcement action in one country tend to stimulate enforcement efforts in other countries, particularly where there is an established relationship between the relevant enforcement authorities.¹⁶

¹⁵ Leniency may be shown to a party in a cartel, by way of conditional immunity or a lower level of enforcement action, or, in exceptional cases for individuals, no action at all, in exchange for information and full, continuing and complete cooperation throughout a cartel investigation and any subsequent proceedings taken by the competition authority.

¹⁶ J Clarke and S J Evenett, 'A Multilateral Framework for Competition Policy?' in State Secretariat of Economic Affairs and Simon Evenett (eds), *The Singapore Issues and the World Trading System: The Road to Cancun and Beyond* (State Secretariat for Economic Affairs 2003); Jacques Bourgeois, Kamala Dewar and Simon Evenett, *A Comparative Analysis of Selected Provisions in Free Trade*

Of particular note is the extensive level of cooperation between New Zealand and Australia in the development and implementation of competition policy and the enforcement of competition law. The New Zealand Commerce Commission ('NZCC') and the Australian Competition and Consumer Commission ('ACCC') signed a cooperation agreement in April 2013, which allows for the sharing of confidential information. There is even cross-appointment of Commissioners involved in decision-making on some merger cases affecting both Australian and New Zealand markets. Although this sits alongside the trade agreement rather than being an integral part of it, it is the context of international trade that has given rise to the need for such cooperation.

Cooperation under the auspices of New Zealand's PTAs is growing. An example is the Competition Law Implementation Programme ('CLIP'), under the ASEAN, *Australia and New Zealand Free Trade Agreement* ('AANZFTA'),¹⁷ whereby Australia is leading a multi-year programme of work assisting ASEAN countries to boost skills transferral and institutional capacity within the region's emerging competition authorities. To that end, the type of assistance varies according to individual country needs. In Myanmar and Laos, for instance, the assistance is more focused on policy formation;¹⁸ in Vietnam it is more focused on technical training such as the carrying out of investigations;¹⁹ in other countries with more developed competition law and policy such as Malaysia and

Agreements (report prepared at the request of the Chief Economist, Unit of DG Trade, European Commission, October 2007) 166.

¹⁷ AANZFTA Economic Cooperation Support Program — Supporting Competition in ASEAN Member States through the Competition Law Implementation program (CLIP) — Factsheet August (2015) <https://www.accc.gov.au/system/.../AECSP_Fact_Sheet_CLIP_Aug_2015>.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

Singapore, it is focused on strengthening international cooperation between competition agencies.

In 2014, the Philippines proposed a two-day workshop under the CLIP entitled ‘Building Blocks for Effective Enforcement of Competition Policy and Law’. The workshop was open to all *AANZFTA* parties and was held in Manila in late 2014. New Zealand sent a senior Commerce Commission staff member to present at the workshop on the topic ‘New Strategies for Cartel Detection and Deterrence’. There was strong attendance and feedback on the presentations was very positive. In 2015, a workshop on developing institutional core competencies for competition regulation was held in Indonesia — Regulator Perspectives was held on 2–4 March in Surabaya, Indonesia.²⁰ Also, in 2015, the CLIP project facilitated an ASEAN study tour to Sydney, involving about 35 ASEAN officials who focused on the practical day-to-day running of competition agencies and the policy-making process. Such events strengthen the capacity of domestic competition agencies and also the globalisation of competition policy. International connections are forged, which enhance the opportunities to share learnings and experience in dealing with anti-competitive practices.

Cooperation also occurs at an international agency level, ably led by such entities as the Organisation for Economic Cooperation and Development (‘OECD’).²¹ An example in the Asia-Pacific region is

²⁰ Workshop on Developing Institutional Core Competencies for Competition Regulation — Regulator Perspectives was held on 2–4 March in Surabaya, Indonesia, see: <<http://www.asean.org/news/asean-secretariat-news/item/asean-ensures-effective-implementation-of-competition-policies-and-laws>>.

²¹ For instance, close to 90 competition authorities from all over the world participate in the annual OECD Global Competition Forum.

the Asia-Pacific Economic Cooperation ('APEC') forum and its Competition Policy and Law Group ('CPLG'), which works to promote an understanding of regional competition laws and policies, to examine the impact on trade and investment flows, and to identify areas for technical cooperation and capacity building among member economies. Also on a multilateral basis, the International Competition Network encourages networking between agencies on enforcement practices, if not particular cases. There are also other regional blocs that have strong cooperation such as the European Union under the jurisdiction of the European Commission, Nordic countries and Africa.

Through these events and networks, competition authorities increase their understanding about how to identify and address anti-competitive activities. Practical knowledge is gained and information is shared, enhancing the globalisation of competition policy.

C Focus Includes Consumer Welfare

Competition provisions in PTAs can also be seen as correcting the 'balance' in trade agreements between the rights of producers and the protection provided for consumers and other members of society. From a trade negotiator's perspective, however, trade liberalisation objectives of PTAs can be seen as being as much in the interests of consumers — for example, by granting access to a wider variety of competitively priced goods and services — as they are of producers. In other words, the objective is seen as one of overall economic welfare through trade, with the trade liberalisation, competition and

Also, a joint venture between the Korean government and the OECD, the OECD/Korea Policy Centre, works with competition authorities in the Asian region to develop and implement effective competition law and policy.

consumer provisions each contributing to that objective. Increasingly, New Zealand and other countries are viewing provisions concerning consumer protection as a key ingredient of competition chapters within PTAs.

IV HOW SUCCESSFUL HAVE COMPETITION PROVISIONS BEEN IN ADDRESSING ANTI-COMPETITIVE CONDUCT?

It is difficult to determine progress in competition policy and the level of its application by PTA parties as a result of the agreements, largely because of the absence of any monitoring or assessment device in the agreements. However, the growing number of PTA member states that have developed competition laws and established competition authorities as a result of that membership in the last 10 to 15 years is evidence of the regional strengthening of competition policy and indirect evidence of greater application of competition laws.

Cynics — or perhaps some would say, realists — consider that competition chapters are as much symbolic gesture as legal text.²² Given their context, one can argue that they emphasise international relationships over international law; prioritising form over substance. Certainly, enforcement of obligations in the competition chapter in PTAs is discouraged by restricting access to dispute resolution. However, on balance, this is an unfair assessment. As with any agreement between sovereign nations, the diverse legal circumstances of the parties must be considered and will be reflected in what can be achieved by a PTA. Identifying a shared goal such as the promotion of competition is a major achievement, the pursuit of which requires collective action.²³ Competition

²² See generally Jane Rennie, 'Competition Provisions in Australian and New Zealand FTAs' (2007) *New Zealand Law Journal* 227.

²³ *Ibid.*

provisions can add legitimacy to the PTA in its entirety, emphasising the seriousness each party gives to ensuring that the objectives of the trade agreement are not undermined by anti-competitive conduct.

Effective competition policy may replace the need for trade remedy action such as anti-dumping duties. The possibility of anti-dumping action between New Zealand and Australia has been removed under the PTA between these two countries under the *New Zealand Australia Closer Economic Relations Trade Agreement* ('CER').²⁴ Competition provisions have also assisted in identifying parties who will intervene to facilitate market access. This in turn sends a message to other trading nations that they are committed to open markets.

A Features of Competition Chapters in PTAs

There are often provisions relating to competition in other PTA chapters. For example, requirements for access and use of public telecommunications networks and services on reasonable and non-discriminatory terms and conditions, reflecting the *Marrakesh Agreement Establishing the World Trade Organization*²⁵ Annex on Telecommunications.²⁶ The commitments reflected in the

²⁴ *Protocol to the Australia New Zealand Closer Economic Relations — Trade Agreement on Acceleration of Free Trade in Goods*, signed 18 August 1988 [1988] ATS 18 (1988) (fully implemented 1 July 1990).

²⁵ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1B ('*General Agreement on Trade in Services*').

²⁶ *Ibid*, Annex on Telecommunications para 5(a) provides:
 Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public

competition chapter fall into three broad categories: procedural commitments; substantive commitments concerning the domestic regime of the parties; and substantive commitments limited to trade between parties to the PTA.²⁷

The OECD Trade Policy Working Paper No 31 identifies a useful taxonomy of the types of provisions that reflect these commitments,²⁸ including:

- Adopting, maintaining and applying competition measures, which can range from the adoption of certain measures to merely stating a party's intention to adopt competition-related provisions.²⁹
- Coordination and cooperation provisions, including general cooperation, notification with respect to enforcement action and the exchange of information, including specifications on information sharing.³⁰
- Consultation on competition policy and enforcement; a means of enforcement coordination, including negative comity, where a party considers information that may affect important interests of another party in its enforcement activities, and positive comity, where one party to an agreement can require the other to take enforcement action.³¹

telecommunications transport networks and services on reasonable and nondiscriminatory terms and conditions, for the supply of a service included in its Schedule. This obligation shall be applied, inter alia, through paragraphs (b) through (f).

²⁷ Bourgeios, Dewar and Evenett, above n 16, 168.

²⁸ Oliver Solano and Andreas Sennekamp, 'Competition Provisions in Regional Trade Agreements' (OECD Trade Policy Paper No 31, OECD Publishing, 21 March 2006).

²⁹ *Ibid* 7.

³⁰ *Ibid*.

³¹ *Ibid*.

- Provisions affecting anti-competitive behaviour, which may amount to an explicit prohibition of very specific practices such as price fixing, bid rigging, sharing or dividing markets in order to reduce the abuse of dominance and monopolisation and set restrictions on state aid that threatens to distort competition or the regulation of subsidies.³²
- Provisions on anti-competitive mergers and state monopolies, which are as applicable to state enterprises as they are for private businesses. The provisions may also provide certain exemptions for state-owned enterprises or state monopolies.³³
- Competition-specific provisions concerning non-discrimination, due process and transparency, the exclusion of anti-dumping measures between the parties and recourse to trade remedies such as safeguards when a trading partner is not compliant with the agreement.³⁴
- Dispute settlement provisions to include consultation and arbitration and the exclusion of competition provisions from general dispute settlement mechanisms in the trade agreement.³⁵
- Flexibility and progressivity — that is, special and differential treatment — including transition periods, flexibility of commitments and competition-specific technical assistance and capacity building.³⁶

Also of note is that if the PTA includes provision for an official or Ministerial committee to oversee the implementation of the

³² Ibid.

³³ Ibid 8.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid 9.

agreement, then this would include oversight of implementation of the competition chapter. While not all of these provisions will be included in every competition chapter, this list provides a useful mechanism to compare competition chapters across PTAs.

V KEY FEATURES OF COMPETITION PROVISIONS IN NEW ZEALAND PTAS

New Zealand has entered into PTAs with: the separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu;³⁷ Hong Kong;³⁸ Malaysia;³⁹ ASEAN and Australia;⁴⁰ Brunei Darussalam, Chile, and Singapore;⁴¹ China;⁴² Thailand;⁴³ Singapore;⁴⁴ Australia,⁴⁵ and Korea.⁴⁶

³⁷ *Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Cooperation*, signed 10 July 2013 (entered into force 1 December 2013) ('ANZTEC').

³⁸ *New Zealand-Hong Kong, China Closer Economic Partnership Agreement*, signed 29 March 2010 (entered into force 1 January 2011) ('*New Zealand-Hong Kong CEP*').

³⁹ *New Zealand-Malaysia Free Trade Agreement*, signed 26 October 2009 (entered into force 1 August 2010) ('*Malaysia-New Zealand FTA*').

⁴⁰ *ASEAN-Australia-New Zealand Free Trade Agreement*, signed 27 February 2009 (entered into force 1 January 2010) ('*AANZFTA*').

⁴¹ *Trans-Pacific Strategic Economic Partnership Agreement*, signed 18 July 2005 (entered into force 28 May 2006) ('*P4*').

⁴² *Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China*, signed 7 April 2008 (entered into force 1 October 2008) ('*China-New Zealand FTA*').

⁴³ *New Zealand-Thailand Closer Economic Partnership Agreement*, signed 19 April 2005 (entered into force 1 July 2005) ('*New Zealand-Thailand CEP*').

Trade is the overriding consideration in the competition chapters of each of New Zealand's PTAs. This is because trade is essential to New Zealand's economic prosperity with exports of goods and services making up over 30 per cent of gross domestic product ('GDP'). It follows that it is no accident that the majority of New Zealand's PTA partners are centred in the Asia-Pacific region; more than 70 per cent of New Zealand's exports are to APEC countries, with APEC countries also providing 71 per cent of New Zealand's tourist visitors and 74.5 per cent of New Zealand's investment.⁴⁷ However, it is also evident that New Zealand sees competition provisions as a tool for development of the region, rather than reflecting a 'mercantile' approach.

New Zealand supports a principles-based approach, rather than a prescriptive approach. Those principles include non-discrimination, comprehensiveness, transparency and accountability; reflecting the principles endorsed by APEC Leaders in Auckland on 13 September 1999 ('APEC principles').⁴⁸ Of these principles, the most prominent

⁴⁴ *Agreement between New Zealand and Singapore on a Closer Economic Partnership*, signed 14 November 2000 (entered into force 1 January 2001) ('*New Zealand-Singapore CEP*').

⁴⁵ *Australia-New Zealand Closer Economic Relations Trade Agreement*, signed 28 March 1983 (entered into force 1 January 1983) ('*ANZCERTA*').

⁴⁶ *Free Trade Agreement between New Zealand and the Republic of Korea*, signed 23 March 2015 (not yet in force) ('*New Zealand-Korea FTA*').

⁴⁷ New Zealand Treasury, 'New Zealand Economic and Financial Overview 2014' <www.treasury.govt.nz/economy/overview/archive/pdfs/nzefo-14.pdf>.

⁴⁸ Asia Pacific Economic Cooperation, *1999 Leaders' Declaration: Auckland Declaration, the Auckland Challenge* (13 September 1999) <http://www.apec.org/Meeting-Papers/Leaders-Declarations/1999/1999_aelm.aspx>.

are the principles of transparency, particularly of policies, laws and rules,⁴⁹ and non-discrimination between or among economic activities⁵⁰ in like circumstances,⁵¹ and between origin and destination of production.⁵² *ANZTEC* also includes non-discrimination on the basis of nationality when enforcing competition laws.⁵³

Procedural fairness for a person subject to the imposition of a sanction or remedy is another feature of New Zealand PTAs; there is provision for the opportunity to be heard and to present evidence⁵⁴ and to seek review in domestic courts⁵⁵ or an independent tribunal.⁵⁶

Although New Zealand's PTAs reflect a principles-based approach, there is a commitment to establish or maintain competition laws that proscribe anti-competitive business conduct. This commitment is expressed with varying degrees of granularity across PTAs. The *P4* agreement requires the parties to give particular attention to certain business conduct such as anti-competitive agreements, concerted practices or arrangements by competitors and abusive behaviour resulting from market dominance.⁵⁷ A similar approach is adopted

⁴⁹ See, eg, *ANZTEC* ch 8 art 3.4; *New Zealand-Hong Kong CEP* ch 9 arts 2.1(a), 3; *New Zealand-Thailand CEP* ch 1 arts 11.1, 11.3(c), 11.4(2), 11.9.

⁵⁰ See, eg, *New Zealand-Korea FTA* ch 12 art 2(b); *P4* ch 9 art 2(b).

⁵¹ See, eg, *ANZTEC* ch 8 art 2.1(b); *New Zealand-Hong Kong CEP* ch 9 art 2.1(b).

⁵² See, eg, *P4* ch 9 art 2(b); *New Zealand-Korea FTA* ch 12 art 2(b).

⁵³ See, eg, *ANZTEC* ch 8 art 3.4.

⁵⁴ See, eg, *P4* ch 9 art 9.2(5); *New Zealand-Korea FTA* ch 12 art 12.3(3).

⁵⁵ See, eg, *New Zealand-Korea FTA* ch 12 art 12.3(3); *ANZTEC* ch 8 art 5.1; *P4* ch 9 art 9.2(5).

⁵⁶ See, eg, *P4* ch 9 art 9.2(5).

⁵⁷ *Ibid* ch 9 art 9.2(2).

in the *New Zealand-Korea FTA*, with the agreement also listing the relevant competition legislation.⁵⁸ The *New Zealand-Thailand CEP* includes more granular examples of business conduct that adversely affects competition, including predatory pricing, and anti-competitive mergers and acquisitions.⁵⁹ There is also a commitment in New Zealand PTAs to establish and maintain an authority responsible for the enforcement of those competition laws.⁶⁰

Commitments regarding cooperation typically relate to ‘technical assistance’, rather than cooperation in investigations which might give rise to the need for confidentiality provisions. However, in some PTAs this extends to notification of enforcement activity likely to substantively affect the other party’s interests and at an early stage in enforcement activity, if it is not contrary to a party’s competition laws.⁶¹ It also extends to notifying the other party of intent to disclose shared information, and to consulting on issues adversely affecting trade interests or investment within another party’s jurisdiction.⁶²

New Zealand PTAs also recognise the strategic importance of open and competitive markets. Competition policy is seen as an essential ingredient of a stable international economic order. Reflecting this view, New Zealand has endeavoured to ensure that all commercial activities, whether carried out by private or public bodies, are subject to competition laws. While exemptions are permitted, they must be transparent, undertaken on policy grounds or in the public

⁵⁸ *New Zealand-Korea FTA* ch 12 art 12.2.

⁵⁹ *New Zealand-Thailand CEP* ch 11 art 11.1(2).

⁶⁰ See, eg, *ANZTEC* ch 8 art 3.3; *P4* ch 9 art 9.2(4).

⁶¹ See, eg, *P4* ch 9 art 9.4; *New Zealand-Korea FTA* ch 12 art 12.5.

⁶² See, eg, *New Zealand-Korea FTA* ch 12 art 12.5.

interest, minimise trade distortion⁶³ and minimise distortion to fair and free competition.⁶⁴

The competition chapter is exempt from general dispute settlement procedures.⁶⁵ There has also been a consumer protection focus in more recent PTAs; for example, provisions requiring domestic laws to prevent false or misleading descriptions in trade.⁶⁶

The final key feature of New Zealand PTAs is the exclusion of certain matters, perhaps reflecting a cooperative rather than a rules-based approach. There is no use of positive or negative comity, and there is minimal reference to specific anti-competitive practices such as price fixing, bid rigging, sharing or dividing markets. Further, these provisions do not restrict state aid that distorts or threatens to distort competition or regulation of subsidies. However, restrictions on subsidies are included in other parts of New Zealand PTAs.⁶⁷

In addition, in New Zealand PTAs there is no exclusion of anti-dumping measures or other trade remedies such as countervailing duties and safeguards between parties, apart from between Australia and New Zealand under the *ANZCERTA*.⁶⁸

⁶³ See, eg, *P4* ch 9 art 9.2(3).

⁶⁴ See, eg, *ANZTEC* ch 8 art 4.

⁶⁵ See, eg, *AANZFTA* ch 14 art 4; *ANZTEC* ch 8 art 9; *New Zealand-Hong Kong CEP* ch 9 art 6; *Malyasia-New Zealand FTA* ch 12 art 12.5(1); *P4* ch 9 art 9.7(2); *New Zealand-Thailand CEP* ch 11 art 11.10(1).

⁶⁶ See, eg, *New Zealand-Korea FTA* ch 12 art 12.6(1).

⁶⁷ See, eg, *P4* ch 3 art 3.11; *Malyasia-New Zealand FTA* ch 2 art 2.6; *China-New Zealand FTA* ch 3 art 10.3.

⁶⁸ See generally *Protocol to the Australia New Zealand Closer Economic Relations — Trade Agreement on Acceleration of Free*

Further, no transition period for implementation of new rules is recognised and there are no detailed cooperation mechanisms; such mechanisms are left to the parties' competition authorities to establish. Nor is there is specific provision for review of the scope and operation of the competition chapter itself.⁶⁹

Overall, New Zealand's approach encourages partners to match its commitment to competition policy, as far as they are able. Fundamentally, New Zealand's philosophy towards competition provisions in PTAs has been relatively consistent over time. While there is a slight move from principles⁷⁰ to prescription,⁷¹ from 'may'⁷² or 'shall endeavour',⁷³ to 'shall',⁷⁴ this more likely reflects the status of parties' competition law at the time the PTA was negotiated. What we do see, however, is an emphasis on including consumer protection provisions in latter PTAs.⁷⁵

Although there has not been a significant shift in approach, as with any negotiation, the outcomes are the result of negotiations on individual agreements and reflect partners' circumstances. So, not surprisingly, there is some variation in the wording across agreements. Specific provisions included in a PTA are the result of negotiations on a number of matters such as goods, services and investment. What ends up in the final version of the competition

Trade in Goods, signed 18 August 1988 [1988] ATS 18 (1988) (fully implemented 1 July 1990).

⁶⁹ Most PTAs have overarching review provisions which would cover the competition chapter. See, eg, *ANZTEC*.

⁷⁰ See, eg, *New Zealand-Singapore CEP* pt 2 art 3.2.

⁷¹ See, eg, *P4* ch 9 art 9.2(1); *Malyasia-New Zealand FTA* ch 12.1(1); *New Zealand-Korea FTA* ch 12 art 12.3(1).

⁷² See, eg, *AANZFTA* ch 14 art 2.1.

⁷³ See, eg, *Malyasia-New Zealand FTA* ch 12 art 12.3(1).

⁷⁴ See, eg *New Zealand-Korea FTA* ch 12 art 12.1(2).

⁷⁵ See, eg, *ANZTEC* ch 8 art 6; *New Zealand-Korea FTA* ch 12 art 12.9.

provisions may in fact not be the ideal outcome for any one contracting party and may not reflect any one party's 'wish list' but reflect the compromises inherent in a complex multi-factor negotiated settlement.

VI COMPARISON ACROSS PTAs

Further insight into New Zealand's approach to competition provisions in PTAs can be found by comparing the *New Zealand-Korea FTA*, which is scheduled to come into force in 2015, against the PTAs Korea has signed with the United States and Australia; the *Korea-United States Free Trade Agreement* ('*KORUS FTA*'),⁷⁶ and the *Korea-Australia Free Trade Agreement* ('*KAFTA*').⁷⁷

Firstly, there are clear similarities across the agreements. All three have obligations to maintain competition laws and an authority responsible for the enforcement of those laws,⁷⁸ as well as to provide for due process for persons subject to sanction or remedy for violation of competition laws, with *KORUS FTA* and *New Zealand-Korea FTA* providing for the right to seek review in a Court of law.⁷⁹ Further, all provide for transparency of competition laws,⁸⁰ and for cooperation in relation to enforcement.⁸¹ In addition,

⁷⁶ *United States-Korea Free Trade Agreement*, signed 30 June 2007 (entered into force 15 March 2012) ('*KORUS FTA*').

⁷⁷ *Korea-Australia Free Trade Agreement*, signed 8 April 2014 (entered into force 12 December 2014) ('*KAFTA*').

⁷⁸ *New Zealand-Korea FTA* ch 12 arts 12.3(1), (2); *KAFTA* ch 14 arts 14.2(1), (2); *KORUS* ch 16 arts 16.1(1), (2).

⁷⁹ *New Zealand-Korea FTA* ch 12 art 12.3(3); *KAFTA* ch 14 art 14.3(1); *KORUS* ch 16 art 16.1(4).

⁸⁰ *New Zealand-Korea FTA* ch 12 art 12.3(1); *KAFTA* ch 14 art 14.3(1); *KORUS* ch 16 art 16.5.

all three of the agreements provide for exemptions from competition laws, with *KAFTA* and the *New Zealand-Korea FTA* requiring that any exemptions are transparent and undertaken on grounds of public policy or public interest.⁸² They each also include an article on cross-border consumer protection.⁸³

However, there are some interesting differences. Unlike the other two agreements, *KORUS* includes articles about monopolies and state enterprises,⁸⁴ has a standalone article dedicated to transparency,⁸⁵ includes more detail on enforcement action, and lists the information that will be exchanged.⁸⁶ The *New Zealand-Korea FTA* uses the words ‘shall endeavour to’ in relation to information exchange⁸⁷ and both *New Zealand-Korea FTA* and *KORUS* provide that information can be exchanged on the request of a party.⁸⁸ In this context, there is nothing specific in *KAFTA* except that detail may be subsumed in the ACCC agreement with its counterpart agency, which is specifically referenced.⁸⁹

The *New Zealand-Korea FTA* and *KAFTA* each include an obligation that laws and enforcement ‘shall’ be consistent with principles of transparency, non-discrimination, comprehensiveness and procedural fairness,⁹⁰ whilst *KAFTA* also provides for

⁸¹ *New Zealand-Korea FTA* ch 12 art 12.4(2); *KAFTA* ch 14 art 14.5(2); *KORUS* ch 16 art 16.1(7).

⁸² *New Zealand-Korea FTA* ch 12 art 12.3(4); *KAFTA* ch 14 art 14.3(3).

⁸³ *New Zealand-Korea FTA* ch 12 art 12.9; *KAFTA* ch 14 art 14.8; *KORUS* ch 16 art 16.6.

⁸⁴ *KORUS* art 11.8

⁸⁵ *Ibid* art 16.5.

⁸⁶ *Ibid* art 16.5.

⁸⁷ *New Zealand-Korea FTA* ch 12 arts 12.6(2), (3).

⁸⁸ *Ibid* ch 12 art 12.3(1); *KORUS* ch 16 art 16.5(2).

⁸⁹ *KAFTA* ch 14 art 14.5(2).

⁹⁰ *New Zealand-Korea FTA* ch 12 art 12.3(1); *KAFTA* ch 14 art 14.3(1).

timeliness.⁹¹ *KORUS* includes a provision widening the agreement to cover persons who are not persons of the party and to treat them ‘no less favourably than persons of the Party in like circumstances’.⁹²

There are different levels of obligations as concerns consumer protection. For example, *KORUS* uses ‘shall endeavour to strengthen cooperation on such matters’,⁹³ *KAFTA* uses ‘shall promote cooperation’,⁹⁴ while the *New Zealand-Korea FTA* has more detail, providing that parties ‘shall cooperate, in appropriate cases of mutual concern, in enforcement of consumer protection laws, including in such areas as the monitoring international scams’.⁹⁵ *New Zealand-Korea FTA* also includes an obligation to provide the legal means under its domestic laws to prevent false, deceptive or misleading labelling of products within a party’s territory.⁹⁶

KAFTA includes an article on competitive neutrality; ‘recognising the importance of ensuring governments do not provide any competitive advantage to any state enterprise’,⁹⁷ which only applies to state enterprises’ business activities.⁹⁸ However, the article does not obstruct the performance of any particular public tasks assigned to the state enterprise. The article in *KORUS* concerning monopolies has a similar intent, but provides a carve-out for out government procurement.⁹⁹

⁹¹ *KAFTA* ch 14 art 14.3(1).

⁹² *KORUS* art 16.1 .

⁹³ *Ibid* art 16.6(2).

⁹⁴ *KAFTA* art 14.8.

⁹⁵ *New Zealand-Korea FTA* art 12.9.

⁹⁶ *Ibid* art 12.9.

⁹⁷ *KAFTA* art 14.4.

⁹⁸ *Ibid* art 14.4.

⁹⁹ *KORUS* art 16.2.

KORUS also restricts the articles in the chapter to which the PTA's dispute settlement procedures apply to, for example, there is a partial carve-out of dispute settlement procedures,¹⁰⁰ while *KAFTA* and the *New Zealand-Korea FTA* carve these procedures out for any matter under the chapter.¹⁰¹

By way of conclusion, while there are some differences in specific articles, New Zealand's approach in its PTA with Korea appears to be fundamentally similar to that of Korea's agreements with Australia and the United States, with the competition chapter being oriented towards cooperation rather than substantive rules.

VII CHALLENGES FACING THE DEVELOPMENT OF COMPETITION PROVISIONS IN PTAS

It is instructive to briefly discuss some of the challenges facing the development of competition provisions in PTAs, whether in a standalone chapter or embedded in particular subject-matter chapters. First is the globalisation of business entities and how to establish governance of an international market. Increasingly, production crosses borders and so is 'lifted' to an international platform. However, competition law and enforcement is still predominantly constrained within domestic jurisdictions. Individual states have struggled to address anti-competitive practices at the international level given that competition laws and enforcement agencies are primarily domestic. As companies and supply chains increasingly cross borders, regional and global collaboration to set and enforce competition rules will be necessary.

Ideally, this globalisation of competition policy would be occurring at the global multi-lateral level; nevertheless, PTAs provide a useful

¹⁰⁰ Ibid art 16.8.

¹⁰¹ *New Zealand-Korea FTA* ch 12 art 12.10; *KAFTA* ch 14 art 14.9.

vehicle to achieve the same ends. The proliferation of PTAs, and the increasingly larger networks involved in single PTAs, means that more of the international community is ‘linked up’ through trade agreements. However, it also means that not all players in the product supply chain may be parties to the PTA. Events in other regions may impact on a party’s ability to implement the PTA. Also, ‘private’ standards, for instance, produced by industry groups or international organisations, and the power of international organisations, may impact on the negotiation and implementation of a PTA. The challenge for PTAs, therefore, is to promote consistency of competition policy and increased cooperation and coordination in competition law enforcement across different jurisdictions.

Globalisation of the supply chain also reinforces the need for transparency of rules and regulations, and easy access to information about how each domestic system works. As illustrated earlier in this paper, the competition chapter of PTAs, as well as other provisions, attempt to address this need.

Another challenge facing the development of competition provisions in PTAs are the circumstances facing developing countries. In 2005, the secretariat of the United Nations Conference on Trade and Development examined the effects of competition provisions on developing countries.¹⁰² It conducted a follow-up in 2007, which looked at the interrelationship between competition law and policy, economic development and trade.¹⁰³ These reviews indicated that developing countries have common competition

¹⁰² Secretariat of the United Nations Conference on Trade and Development, ‘Trade and Development Report 2005’ (United Nations Conference on Trade and Development, UNCTAD/TDR/2005, United Nations, 2005) <unctad.org/en/docs/tdr2005_en.pdf>.

¹⁰³ *Ibid* 63–5.

problems related to small markets, high levels of income inequality, local institutional dependency, data shortages and human resource constraints. For instance, small island developing states often have minimal, if any, economies of scale, are located a long way from other markets, and often have small domestic markets.¹⁰⁴ Their market issues centre more around monopoly providers of goods and services, where the market is dominated by the public sector. They also often lack an awareness of competition concerns as well as lacking competition law and policy expertise.

So, should the goal of competition provisions in PTAs differ when one or more of the parties is a developing country? The simple answer is ‘no’. The goal of a PTA should not be any different, however, the path to reach that goal may need to be longer and wider, particularly for the least developed countries. Flexibility is required, taking into account the diverse economic conditions and levels of economic activity of the particular party. The scope of competition law is a political decision, and no country sees competition law as a national goal for its own sake.

To develop a competition culture, it is necessary to build synergies with local institutions; not only government authorities and the judicial branch but also academic bodies, NGOs, consumer and trade associations, think tanks and the like. These can all build momentum towards the creation of a general competition culture. Jurisdictions which are new to competition policy need support

¹⁰⁴ Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, ‘Small Island Developing States: Small Islands Big(ger) Stakes’ (UNITED NATIONS OH-RLLS, Advocacy Booklet, 2012) <<http://unohrrls.org/custom-content/uploads/2013/08/SIDS-Small-Islands-Bigger-Stakes.pdf>>.

from the more experienced agencies, and PTAs are a vehicle to facilitate this.

VIII CONCLUSION

New Zealand's approach to competition provisions in PTAs reflects a desire for cooperation and coordination across jurisdictions, in order to combat anti-competitive behaviour. New Zealand's approach is ambitious yet realistic; respectful of State sovereignty yet 'demandeur' of key principles. It ensures there is the mandate for officials and subject-matter experts in respective competition authorities to work together and allows them the freedom to explore how that is realised. It also recognises the synergy that can result from collaboration; an approach that is a useful platform for the international community.

In conclusion, PTAs are a valuable instrument to achieve the globalisation of competition policy and to facilitate the efficiency and sustainability of world trade. While the path to achievement of workable and effective competition in international trade may differ across PTAs, their competition provisions, including a standalone competition chapter, should remain an integral component of international trade agreements.