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WHO IS IN? WHO IS OUT?

HOW CAN THE UNCITRAL TRANSPARENCY RULES INFLUENCE THE UPCOMING AMENDMENTS OF THE ICSID ARBITRATION RULES

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ICSID (International Centre for Settlement of Investment Disputes) began its fourth amendment process on 7 October 2016.[1] The amendment attempts to deliver the goals of: (1) modernise the ICSID Arbitration Rules, (2) address the practical issues arising from case experience, (3) increase effectiveness and due process, and (4) maintain a balance of rights and duties between investors and its 153 Member states. [2] The issue of wider transparency is highlighted as one of the priorities of the current amendment after a wider consultation in 2017. Prior to the current amendment, the third amendment 2006[3] brought in the limited practice of publication of the excerpt of awards, open hearings and filing *amicus curiae* briefs. Following the changes, Rule 48 of Arbitration Rules provides publication of awards with parties' consent or publication of excerpts of awards without parties' consent; Rule 32, subject to either party's objection, opens up hearings and non-disputing parties are given the rights to apply for filing *amicus curiae* briefs with the relevant criteria for their participation set in Rule 37.

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[1] 2017 The ICSID Rules Amendment Process, at 1.
https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf
<accessed on 30 March 2018>
[2] Pursuant to Article 6 of the ICSID Convention, the amendments to the ICSID Rules will require the approval of two-thirds of the member States.
[3] The third amendment was conducted between 2004 and 2006.

The needs of a good international transparency policy can be seen by the number of times this issue has been raised by non-party stakeholders,[4] such as environmental groups or the European Union[5] among the cases administrated by ICSID annually.[6] The initial document issued in 2016 advising States about the potential areas for amendment[7] overlooked the issue of transparency.[8] After a re-think, ICSID now places transparency as one of the priorities for amendment, referring directly to the Mauritius Convention and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules). Aided by the development in investment arbitration under the Mauritius Convention in its continuously increasing number of signatory countries[9] and a wider application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules)[10]

[4] The need to address a balanced investment protection with varied societal concerns was raised in various earlier literature, such as Organisation for Economic Co-operation and Development, Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures. See OECD Working Papers on International Investment, 2005/01, OECD Publishing (2005) at 2, available at http://dx.doi.org/10.1787/524613550768 <accessed on 30 March 2018>; M. Kinnear, Transparency and Third Party Participation in Investor-State Dispute Settlement, Symposium Co-Organized by ICSID, OECD and UNCTAD, Making the Most of International Investment Agreements: A Common Agenda, 12 December 2005, Paris, at 2, available at: http://www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf <accessed on 30 March 2018>

[5] List of Topics for Potential ICSID Rule Amendment https://icsid.worldbank.org/en/Documents/about/List%20of%20Topics%20for%20Potential%20ICSID%20Rule%20Amendment-ENG.pdf , point 13 <accessed on 30 March 2018>

[6] According to the statistics provided by the ICSID, more than 600 cases are administered by ICSID annually, *supra* note, at 1.

[7] The original areas of amendments include appointment of arbitrators, code of conduct for arbitrators, challenge of arbitrators, third party funding, consolidation, modernize means of communication: preliminary objections, first session, witnesses, experts and other evidence, discontinuance, awards and dissents, security for costs, security for stay of enforcement of awards, allocation of costs: annulment and publication of decisions and orders. See the ICSID Rules Amendment Process, at 2 -3 https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf <accessed on 30 March 2018>

[8] Transparency was not mentioned in the initial document titled The ICSID Rules Amendment Process, see https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf <accessed on 30 March 2018>

[9] The United Nations Convention on Transparency in Treaty-based Investor –State Arbitration ("The Mauritius Convention on Transparency") entered into force 18 April 2018 after Switzerland ratified the convention in 18 October 2017. Currently, 18 States have signed the Mauritius Convention on Transparency. They are Canada, Finland, France, Germany Mauritius, Sweden, the United Kingdom, the United States (above are the original signatory countries), Australia, Belgium, Benin, Bolivia (Plurinational State of), Cameroon, Congo, Gabon, Gambia, Italy, Luxembourg, Madagascar, the Netherlands, Iraq, Switzerland and Syria Arab Republic. available at https://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transaprency_Convention -status.html <accessed 4 May 2018 >.

[10] The UNCITRAL Rules on Transparency in Treaty-based Investor- State Arbitration, available at https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf

through investment treaty dispute resolution mechanism, unsurprisingly transparency is mentioned in point 13 of the areas for amendments which explores possible provisions on transparency and clarify rules on non-disputing party participation in its publication in late 2017.

The importance of transparency has also been raised by the World Bank which highlights transparency "as an essential element of good international practice."[11] Similarly, the relationship between transparency and accountability is invoked in Goal 16 of the Sustainable Development Goals.[12] The doucment highlights that the integrity of investment arbitration process and accountability of the host states can be undermined without a policy of transparency.[13] Columbia Centre for Sustainable Investment suggests that there is a consensus on such a policy to provide responsible investment.[14] A similar view is expressed by the Law Council of Australia[15] which believes that amending the ICSID Rules on Transparency can be more effective than encouraging States to sign up to the Mauritius Convention.

<accessed 30 March 2018 >. The Rules applying to investment arbitration were introduced on 11 July 2013, and cam in force from 18 October 2017.

[11] World Bank Environmental and Social Framework (August 4, 2016), available at http://pubdocs.worldbank.org/en/748391470327541124/SafeguardsFactSheetenglishAug42016.pdf <accessed on 30 March 2018>

[12] UN Sustainable Development Goals (SDGs) Targets 16.3 and 16.6, available at http://www.undp.org/content/undp/en/home/sustainable-development-goals.html <access on 30 March 2018>

[13] Lise Johnson and Lisa Sachs, "International investment agreements, 2013: A review of trends and new approaches" in Andrea K Bjorklund (ed), *Yearbook on International Investment Law & Polic 2013–2014* (Oxford University Press 2015) 59-64; Columbia Centre for Sustainable Investment submitted for Amendment of ICSID's Rules and Regulations (2016-2018) at 3 https://icsid.worldbank.org/en/Documents/about/Public%20Comments%20to%20Amendment%20to%20ICSID%20Rules%20and%20Regulations.pdf <access on 30 March 2018>

[14] *Id*. at 3, (Columbia Centre for Sustainable Investment submitted for Amendment of ICSID's Rules and Regulations).

[15] *Id*. at 4, the suggestion made by the Law Council for Australia for Amendment of ICSID's Rules and Regulations (2016-2018), at 4.

With the amendment of the ICSID Arbitration Rules on the horizon, it is essential to highlight the current practice of and the concerns over transparency. In general privacy dictates who can obtain access to the proceedings, confidentiality deals with the revelation of any information arising from commercial arbitration proceedings, whereas one viewing "transparency" being used to cover both perspectives in the context of investment arbitration. The centre of the debate on the issues of transparency, confidentiality and privacy in investment arbitration lie in the battle between the public's right to know and disputing parties' right to privacy. Although rooted in the same family, commercial and investment arbitration places different emphasis on these issues. The feature of privacy in commercial arbitration has been taken for granted. While there is no international consensus on confidentiality, it is sometimes discussed in the same breath as privacy.[16] The issue of confidentiality in commercial arbitration receives different treatment[17] from different jurisdictions ranging from statutory duty, [18] implied duty, to non-duty.[19] Turning to investment arbitration, information disclosure is the centre of the debate concerning whether the parties or arbitration institutions should make information related to arbitration public. In the debate, the philosophy of the public interest and the right to information dominates the discussions on transparency in investment arbitration. However, there are differences existing between investment arbitration carried out under the framework of the UNCITRAL International Arbitration Rules and Transparency Rules and investment arbitration under the ICSID framework.

[16] F. De Ly, L. di Brozolo and M. Friedman, Confidentiality in international commercial arbitration, (2012) 28(3) *Arbitration International*, 355–396, 355.

[17] The issue was discussed extensively in H Yu, 'Duty of confidentiality -Myth or reality?' (2012) 31(2) *Civil Justice Quarterly*, 68-88.

[18] Australia, Scotland, New Zealand.

[19] *Esso Australia Resources Ltd v Plowman* [1995] HCA 19; (1995) 128 ALR 391; (1995) 69 ALJR 404; (1995) 183 CLR 10 (7 April 1995), para 35 as Chief Justice Mason once stated: '…, I do not consider that, … that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration.' However, the statutory duty of confidentiality provided in the later amendments in the Australian International Arbitration Amendment Act 2010 made this decision redundant.

The purpose of this article is to examine and demonstrate the similarities and differences between the UNCITRAL Arbitration Rules and the ICSID Rules on the issue of transparency and draw attention to ICSID's amendments of its Arbitration Rules. To do so, this article will briefly present the different emphasis placed by both commercial and investment arbitration on this issue. This will allow readers to see that confidentiality is viewed as an attribute of commercial arbitration. This is at odds with information disclosure in investment arbitration in the later discussion. Discussion will be followed by a critical examination on the differences in the information disclosure required in the UNCITRAL and the ICSID investment arbitration. The issue will be further analysed, by taking up the public right to know, to stress the presumption of openness in investment arbitration. The paper will conclude with a critical analysis of the role public policy plays in this issue and considerations to be taken into account in the ICSID's proposed amendments in order to frame its transparency policy.

I. IS PRIVACY / CONFIDENTIALITY AN ATTRIBUTE OR A NON-ATTRIBUTE OF COMMERCIAL ARBITRATION?

While privacy is viewed as one of the inherent characteristics of commercial arbitration,[20] the attention to the duty of confidentiality over access to information used in arbitration was brought in by a series of English cases and the infamous *Esso*[21] case by Chief Justice Mason in Australia. The inherent characteristics of arbitration was extensively articulated and debated in the context of duty of confidentiality. England is renowned for its support for implied duty of confidentiality. The English Arbitration Act 1996 is silent on the issue of duty of confidentiality, nevertheless, from the decision delivered in *Dolling-Baker v Merret,*[22] it is clear that England has always insisted that confidentiality is an essential attribute to a private arbitration and the duty of confidentiality is implied into the parties' arbitration agreement. Parker L. J. of the English Court of Appeal held the view that the duty of confidentiality is in fact an implied obligation arising from the essentially private nature of arbitration.[23] He stated: "their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose…." [24] Consequently, there is no need for any agreement to secure such a duty. Such a duty can only be breached if discovery was necessary for disposing fairly of the proceedings by parties' agreement or by law.

[20] *Supra* note 17, 68-88.
[21] *Supra* note 18.
[22] [1990] 1 WLR 1205.
[23] *Dolling-Baker v Merret and Another* [1990] 1WLR 1205, 1213.
[24] *Id*. 1213.

Similar language such as the duty arising from "an essential corollary of the privacy of arbitration proceedings" due to "the nature of the contract itself implicitly requires"[25] is spoken by Justice Colman in *Hassneh Insurance* v *Mew.*[26] The interaction between the duty of confidentiality and arbitration clause is seen by Potter LJ as "a good example of the latter type of implied term" [27] in order to "give business efficacy to a particular contract"[28] in *Ali Shipping Corp. v Shipyard Trogir.*[29] This view was supported by Lord Justice Lawrence Collins in *John Foster Emmott v Michael Wilson & Partners Limited*[30] in the words "[T]he case law over the last 20 years has established that there is an obligation, implied by law and arising out of the nature of arbitration, ..."[31]

Doubts over the inherent nature of the duty was raised by Chief Justice Mason's direct rejection of confidentiality as the essential attribute of a private arbitration in 1995[32]. His view, later being replaced by a statutory duty provided in section 23C of the Australian International Arbitration Amendment Act 2010 (AIAAA 2010 hereinafter), was that confidentiality should be secured by a private agreement between the parties. Such an agreement imposes contractual obligations upon the parties to keep confidential information from the public domain.[33] He strongly disagreed with the decision held by Parker LJ that the duty of confidentiality should be implied into an arbitration agreement.[34] His view was that to have the duty of confidentiality to be implied into an arbitration agreement, the duty must be proven to be "the inherent nature

[25] *Hassneh Insurance Co. of Israel and Others v Steuart J Mew* [1993] 2 Lloyd's Rep. 243.
[26] [1993] 2 Lloyd's Rep. 243.
[27] *Ali Shipping Corp. v Shipyard Trogir* [1999] 1 WLR 314; [1998] 2 All E.R. 136; [1998] 1 Lloyd's Rep. 643; [1998] CLC 566, 576; *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, 307A
[28] *Id.*
[29] *Supra* note 27 (*Ali Shipping*).
[30] [2008] EWCA Civ 184.
[31] *Id*. para.107.
[32] *Supra* note 19, para. 35.
[33] *Id, para.33*.
[34] *Supra* note 23 at 1213.

of a contract and of the relationship thereby established"[35] to allow such obligation to "be read into the contract as the nature of the contract itself implicitly requires, no more, no less."[36] However, he disagreed that confidentiality falls into this category and stated that "once it is accepted that confidentiality is not such a characteristic, there can be no basis for implication as a matter of necessity."[37]

Chief Justice Mason's view was to utilise the principle of party autonomy in order to have the duty of confidentiality being directly imposed by the parties' agreement or indirectly imposed by the parties' choice of arbitration institutional rules governing the parties' submission.[38] The use of an agreement would allow the parties to determine the scope of the imposition of the duty of confidentiality as well as have the duty contractually imposed upon the parties, the members of the tribunal and third parties taking part in the arbitration proceedings, even the employee or agents of the arbitrators. Alternatively, the parties can choose to impose the duty of confidentiality indirectly by submitting their disputes to an arbitration institution which has rules containing provisions on the duty of confidentiality.

While England chooses to deal with this issue by implied terms, some jurisdictions, such as Scotland, New Zealand, Australia and France decided to provide the arbitrating party with a statutory duty of confidentiality. Scots law provides a clear definition of "confidential information" which is stipulated in rule 26 of the Scottish Arbitration Rules, schedule one of

[35] *Lister v. Romford Ice and Cold Storage Co. Ltd.* [1957] AC 555, Viscount Simonds, 579
[36] *Hawkins v Clayton* [1988] HCA 15; (1988) 164 CLR 539 (8 April 1988) High Court of Australia, per Justice Deane, 569.
[37] *Id.* paras 36-37.
[38] However, Chief Justice Mason's view was replaced by section 23C of the Australian International Arbitration Amendment Act 2010.

the Arbitration (Scotland) Act 2010, section 23C of AIAAA 2010 and section 14B of the New Zealand Arbitration Amendment Act 2007 (NZAAA 2007 hereinafter). The drafting language applied in these statues evidently views the duty as the principle. For instance, the words "must not disclose confidential information" was used in section 14B (1) of the NZAAA 2007, section 23(C) of the AIAAA 2010. Although the language used in rule 26(1) of the Scottish Arbitration Rules is less forceful than the Australian and New Zealand version, it provides that confidentiality is an obligation which is actionable in the event of a breach.

II. IS TRANSPARENCY THE RULE IN INVESTMENT ARBITRATION FRAMEWORKS?

Turning to the investment context, the focus on this issue is centred on "the public's right to know", rather than the inherent nature of confidentiality debated in the context of commercial arbitration. The debates over privacy and confidentiality in investment arbitration were looked into but more in the context of the "public's right to know and the need for transparency" rather than the inherent nature of the duty. The inherent nature of the duty has been brushed aside following the introduction of the Mauritius Convention on Transparency applying the UNCITRAL Transparency Rules 2014.

In investment arbitration, the provisions in both the UNCITRAL Transparency Rules and the ICSID Arbitration Rules place the right to information at the centre of the issue. In an investment arbitration subject to the UNCITRAL Arbitration Rules, the Transparency Rules[39]

[39] The UNCITRAL Rules on Transparency in Treaty-based Investor- State Arbitration. Its effective date is 1 April 2014.

have been automatically applied to any investment arbitration proceedings since 2014. Under the Transparency Rules, the duty of confidentiality prevailing in commercial arbitration has turned into information disclosure in investment arbitration. In other words, similar documents presented in investment arbitration is not strictly between the parties but subject to transparency rules. Consequently, all the documents are subject to disclosure under Articles 2, 3 and 8 of the Rules. Although such a duty is provided in Article 48(5) of the ICSID Arbitration Convention and Rule 48(4) of the ICSID Arbitration Rules, ICSID operates a higher level of privacy and confidentiality than the Transparency Rules in relation to documents and non-party access to the proceedings.

A. Documents

1. Transparency Rules related to documents

The evolution of international investment on "public interest" has witnessed its own shift from making concessions to attract foreign investment by guaranteeing investors' rights to more "public's access to information" following the increasing awareness of right among the local communities and pressure exercised from the NGOs. On this point investment arbitration has departed from duty of confidentiality and evolved towards an independent and specific system on this issue.[40] Instead of being perceived as a "non-transparent and non-accountable arbitral tribunals that usually provided no opportunity for public participation,"[41] the ever-increasing demands on the pubic right to know has paved the way for the UNCITRAL's response to the call for transparency and accountability in the party-led dispute resolution process.

[40] See generally S Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 Harv. Int'l L. J. 435.

[41] See generally D Magraw and N Amerasinghe, 'Transparency and Public Participation in Investor-State Arbitration' (2008-2009) 15 ILSA J. Int'l & Comp. L. 337.

To address the issue of transparency in arbitration proceedings involving States, the Transparency Rules evidently place the importance of public's right to information[42] at the centre of investment arbitration subject to BITs or other multi-national investment treaties.[43] For instance, in the case of the UNCITRAL Arbitration, Article 1(3)(a) of the Transparency Rules stipulates that transparency is a compulsory duty which does not allow the disputing parties to derogate from the Rules by agreement or otherwise, unless permitted to do so by the treaty. The background to such a compulsory transparency is to fulfil the expectation of openness[44] in investment arbitration to ensure the public right to know and reduce the level of distrust on the host state.[45] The transparency provided by the UNCITRAL framework is only subject to the exceptions of the safeguard of privileged information or the preservation of procedural integrity.[46] The tribunal, as the gatekeeper, possesses the powers and discretion in allowing exceptions to the rule of transparency "unless permitted to do so by the treaty".[47]

Looking closer at the Transparency Rules, the duty to disclose information is imposed upon the parties by Article 2 of the Rules. The word "shall" used in the Rules imposes upon the

[42] Report of the United Nations Commission on International Trade Law, 41st session (June 16–July 3, 2008), Gen. Ass. 63rd session, supp. no. 17, A/63/17, para. 314; Report of the United Nations Commission on International Trade Law, 44th session (June 27-July 8, 2011), Gen. Ass. 66th session, supp. no. 17, A/67/17, para. 200; Report of the United Nations Commission on International Trade Law, 45th session (June 25-July 6, 2012), Gen. Ass. 67th session, supp. no. 17, A/67/17, para. 69.
[43] Barton Legum, 'The Innovation of Investor-State Arbitration under NAFTA' (2002) 43 Harv. Int'l L.J. 531, 531-532.
[44] Yuka Fukunaga, 'Transparency and the role of domestic process – connecting citizens to the WTO dispute settlement', in Junji Nakagawa (ed.) *Transparency in International Trade and Investment Dispute Settlement*, (Routledge, 2013) 30, 30-32.
[45] J. Coe Jr, "Transparency in the Resolution of Investor-State Disputes—Adoption, Adaptation, and NAFTA Leadership" (2006) 54 *University of Kansas Law Review* 1339, 1339 and 1353.
[46] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, 12-14 (2007) [140] where the tribunal imposed a strict restriction on confidentiality.
[47] Art 1(3)(b), The Transparency Rules, such discretion is subject to the considerations of public interest, fairness and efficiency stipulated in Art 1(4)(a) and (b).

disputing parties a prompt duty to communicate their notice of arbitration to the UNCITRAL repository as well as a reciprocal duty on the repository to publish "the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made."[48]

Importantly, the duty to disclose materials is brought into the UNCITRAL investment arbitration by Articles 3(1) and 8 where one witnesses that the Transparency Rules make the revelation of documents, such as the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing parties, a table listing all exhibits to the relevant documents, expert reports and witness statements, written submissions by third party or the non-disputing parties to the treaty, transcripts of hearings, order decisions and awards of the arbitral tribunal[49] as an obligation of the tribunal and the Secretary-General of the UNCITRAL.[50] A tribunal also has the duty to ensure that expert reports and witness statements are available to the public if "anyone" so requests. The only exception is the classification of confidential or protected information.[51] The tribunal's duty is stipulated in Article 3(4) of the Rules where "[t]he documents to be made available to the public … shall be communicated by the arbitral tribunal to the repository referred to under Article 8 as soon as possible." Once those documents are communicated by the tribunal to the repository, the repository "shall make all documents available in a timely manner, in the form and in the language in which it receives them." Consequently, the duties of disclosure were imposed upon the parties, the tribunal and the repository. Furthermore, a broad discretion to order the disclosure of exhibits or any other documents provided to, or issued by the tribunal is also stipulated in the Rules. For instance,

[48] The Transparency Rules, Article 2.
[49] The Transparency Rules, Article 3(1).
[50] The Transparency Rules, Article 8.
[51] The Transparency Rules, Article 3(2).

any documents which do not fall into the scope of Article 3(1) and (2) mentioned above, may be subject to disclosure if the arbitral tribunal, after consultation with the disputing parties, decides to make such documents available at the specified site by exercising its discretion, on its own initiative or upon request from any person under Article 3(3).

2. ICSID Arbitration Rules Related to Documents

The ICSID investment arbitration presents this issue with a different twist in the information which is subject to disclosure. The material which may be disclosed is limited in the ICSID investment arbitration. The publication of material is only allowed by consent, by tribunal's mandate and by treaty application. Under Article 48(5) of ICSID Arbitration Convention and Rule 48(4) of the ICSID Arbitration Rules, awards and the excerpts of legal reasoning may be subject to publication. According to Rule 48(4) of the ICSID Arbitration Rules,[52] the excerpts of the legal reasoning of the Tribunal is to be published. Significantly, the publication of an award is not compulsory but subject to parties' consent. Under the Regulations 22(1) and 23 of the ICSID Administrative and Financial Regulations, the Centre must obtain the parties' consent before publishing the award or other material related to the arbitration.[53] In the absence of consent, the Centre is only permitted to publish the excerpts of the legal reasoning[54] and the publication of the registration of requests for arbitration, conciliation and post-award remedies for the registered cases.

[52] The ICSID Arbitration Rules, Rule 48(4) reads: "The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal."
[53] ICSID Administrative and Financial Regulations, regulation 22(2). The non-exhaustive examples given by ICSID include decisions of the Tribunal, procedural orders, parties' submissions, transcripts and minutes of hearings.
[54] ICSID Convention, Article 48(4) and ICSID Arbitration Rules, Rule 48(4).

Rule 15 of the ICSID Arbitration Rules requires the tribunal to keep all information obtained through their roles in arbitration confidential. This includes the contents of the award[55] and the tribunal's deliberation.[56] This duty can only be breached under Article 47 of the ICSID Convention[57] and Rule 39 of the Arbitration Rules[58] in the form of provisional measures to reveal documents. Potentially the tribunal can also use its inherent powers to determine "any question of procedure arising which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."[59] Other than the parties' consent and arbitrator's mandate, a full disclosure can also be made if the parties adopt transparency measures in the arbitration proceedings on the basis of treaty application, such as the incorporation of the Transparency Rules. In this case, one may see that the parties agree to have the ICSID acting in the capacity of the repository required under the Transparency Rules[60] in an investment treaty or parties' agreement.

ICSID's "parties led and consented" position is different from the presumed and compulsory disclosure of information currently operated under the UNCITRAL Transparency Rules. Although exceptions allow parties to agree to the revelation of certain or all documents used in

[55] ICSID Arbitration Rules, Rule 6(2).
[56] ICSID Arbitration Rules, Rule 15.
[57] The ICSID Convention, Article 47 reads: "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."
[58] ICSID Arbitration Rules, Rule 39 reads: "(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures."
[59] The ICSID Convention, Article 44 and ICSID Arbitration Rules, Rule 19. Both provisions use the word "shall" in relation to the tribunal's inherent powers.
[60] *BSG Resources Limited v. Republic of Guinea* (ICSID Case No. ARB/14/22), Procedural Order No. 2, paras 11-17; available at https://www.italaw.com/sites/default/files/case-documents/italaw4400.pdf <accessed on 30 March 2018>

the arbitration during the first session of the proceedings, it is the limited presumption of disclosure operated within the ICSID arbitration.[61] Instead, it allows the level of transparency to be varied by the parties' agreement, the applicable treaty or the scope of the tribunal's mandate.

B. Moving From The Presumption Of Privacy To The Presumption Of Openness In Investment Arbitration

The characteristic of privacy requires arbitration to be "essentially private proceedings and unlike litigation in public courts do not place anything in the public domain."[62] With this in mind, only the disputants, tribunal, disputants' legal representatives and "invited" third parties are allowed to take part in the arbitration proceedings to avoid unwanted intrusion. Under privacy, in commercial arbitration, tribunals are offered no discretion in allowing the public access to the proceedings. Nevertheless, this is not the case in investment arbitration as examined below.

1. Public Direct and Indirect Access under the UNCITRAL Transparency Rules

The reading of the Transparency Rules indicates that the scope of the application of the Rules covers both privacy *and* confidentiality. Both issues are addressed in different provisions[63]

[61] https://icsid.worldbank.org/en/Pages/process/Confidentiality-and-Transparency.aspx <accessed on 30 Ma 2018>

[62] *Associated Electric & Gas Insurance Services Ltd. v European Reinsurance Company of Zurich* [2003] UKPC 11 [para.20] where the Privity Council carried saying : 'This may mean that the implied restrictions on the use of material obtained in arbitration proceedings may have a greater impact than those applying in litigation.'

[63] Amy Schmitz, 'Untangling the Privacy Paradox in Arbitration' (2006) 54 U.Kan.L.Rev. 1121, 1218.

under the theme of transparency. This is evident where the Rules provide the rights to access hearings of non-parties and, at the same time, rights to the confidential information and the parties' mandatory obligations to submit documentations and communications to the designated repository as examined above. An investment arbitration which is subject to the UNCITRAL Arbitration Rules and the Transparency Rules can see "non-parties" referring to "third parties" or "non-disputing parties" being allowed to have access to the hearing directly or indirectly if the tribunal so decides.

For direct access, non-parties can rely on Article 6(1) of the Transparency Rules as "hearings for the presentation of evidence or for oral argument ("hearings") shall be public."[64] In the case of access to hearings, the tribunal is imposed upon a duty to make logistical arrangements[65] to facilitate the public access to hearings.[66] The only exception to the tribunal's duty is that parties can prove the nature of privileged information stipulated in Article 7. In such a case, the arbitral tribunal shall make arrangements to hold that part of the hearing in private to provide required protection to the privileged information and the disputing parties' right to limited privacy.[67] However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private when arrangement for public access to a hearing becomes infeasible.

In relation to indirect access to arbitration proceedings, non-parties can rely on the submission process to gain access under the Transparency Rules. These rules are to offer the practice of

[64] The Transparency Rules, Article 6(1).
[65] The Transparency Rules, Article 6(1).
[66] The Transparency Rules, Article 6(3).
[67] The Transparency Rules, Article 6(2).

amicus curiae briefs a legal basis in an UNCITRAL Arbitration. At this juncture, it is essential to point out that the wording of "in a concise written statement" in Article 3(2) of the Rules reveals the draftsmen's intention to limit access to written submission. In relation to non-parties, a third person may be allowed to make a submission if the tribunal so decides.[68] In the case of non-disputing parties to the treaty, their indirect access to take part in the proceedings is provided in Article 5(1) of the Rules. Although the access has to be requested and is conditional, the tribunal has discretion to use its own initiatives or after consultation with the disputants to allow submission made by the non-disputing parties on the interpretations of the treaty.[69] Article 5 may potentially open the door for a direct submission to the proceedings through a personal presence, alongside the written submissions. Further evidence can be observed from the compulsory admission under Article 5(1) of the Rules which demands that the tribunal "shall allow" an active submission made from a non-disputing party to the treaty or, the tribunal using its initiative "may invite" a passive submission from a non-disputing party to the treaty after consultation with the disputing parties. Article 5 evidently distinguishes non-disputing parties' access from a third party's conditional access in the practice of *amicus curiae* briefs provided in Article 4. In allowing such a submission, the tribunal is imposed with a duty to ensure efficiency in arbitration proceedings and due process to avoid disruption and unduly burden under Article 5(4) and a reasonable opportunity for the disputing parties to present 'their observations on any submission by a non-disputing party to the treaty'[70] to fulfil the requirement of due process.

2. Public Direct and Indirect Access under the ICSID Investment Arbitration Rules

[68] The Transparency Rules, Article 4(1).
[69] The Transparency Rules, Article 5(1).
[70] The Transparency Rules, Article 5(5).

Currently, in the case of an indirect access to the proceeding in an ICSID arbitration, the legal basis for the practice of *amicus curiae* briefs is provided in Rule 37(2) of the ICSID Arbitration Rules. Accordingly, a person or entity that is not a party to the dispute (non-disputing party in ICSID's terminology)[71] but has a significant interest in the proceedings,[72] and is able to "assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties,"[73] may be invited by the tribunal to make a written submission regarding a matter within the scope of the dispute.[74] However, the wording "may be invited by the tribunal" indicates that filing *amicus curiae* briefs is not an automatic right but a discretion granted by the tribunal. A tribunal has no duty to entertain this submission, furthermore, its discretion in allowing the submission of *amicus curiae* briefs can only be exercised after consulting the disputing parties. Such a submission should not add undue burden to the proceedings and disrupt the due process requirements. This is different from the practice "tribunal shall allow" provided in Article 5(1) of the Transparency Rules. Furthermore, "[a]dditionally, if both parties object the submission, the tribunal may need to find a solid reason to allow non-party submissions. Moreover, the possibility to submit *amicus curiae* briefs does not imply the petitioners' right to access to documents submitted by either party."[75]

The design of open hearings stipulated in Rule 32 of the Arbitration Rules appears to be a

[71] ICSID Arbitration Rules, Rule 37(2).
[72] ICSID Arbitration Rules, Rule 37(2)(c).
[73] ICSID Arbitration Rules, Rule 37(2)(a).
[74] ICSID Arbitration Rules, Rule 37(2)(a).
[75] See a detailed discussion in H Yu and B Guipponi, 'The Pandora Box Effects under the UNCITRAL Transparency Rules' (2016) Journal of Business Law 347-371; *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID (W. Bank), Case No. ARB/03/19, P 16 (2007) and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 5, ICSID Case No. ARB/05/22, 12-14 (2007).

response to the call for transparency and direct access to ICSID hearings. Rule 32 offers the tribunal the discretion to allow other persons to attend or observe all or part of the hearings.[76] However, such a discretion does not allow automatic access to hearings but is subject to three levels of controls. They are: none of the parties to the proceedings object,[77] after consultation with the Secretary-General, and the feasibility of appropriate logistical arrangement made by the tribunal. Although Rule 32 potentially allows third parties "actively attend" or "passively observe" all or part of the hearings, it can only be viewed as an exception to the rule of privacy which is still the format of the current ICSID arbitration proceedings This is a distinct feature differing from Article 5 of the Transparency Rules.

III. PUBLIC INTEREST TO KNOW AND TRANSPARENCY IN BOTH UNCITRAL AND ICSID INVESTMENT ARBITRATION

The increasing procedural transparency in investor-state arbitration proceedings is manifest. Such a consideration arises from people's rights; namely the right to know, the right to information and the right to have a view in the operation of the state and matters affecting them. Procedural transparency has a direct impact on a state's foreign investment policy, sovereignty and eventually accountability. People with a significant interest to the outcome of the dispute rely on the support of public interest / right to know to find out how a State gives away concessions over natural resources, public infrastructure or public utilities to foreign investors in the name of the "public good". Transparency in the State's dispute resolution strategies will allow the people affected to safeguard their own private interest. After all, "the public will

[76] ICSID Arbitration Rules, Rule 32(2).
[77] An earlier version of the amendment to Rule 32 proposed allowing tribunals to open hearings to the public even over the parties' objections. However, it was rejected.

likely pay for any liability imposed on a State as a result of the award through tax revenues."[78] Though varying in degree, both the UNICTRAL and the ICSID arbitration frameworks have taken the concept of public interest on board in the relevant provisions examined above.

Public interest is viewed as the principle underpinning investment arbitration, though ICSID operates a more restricted form of transparency than the Transparency Rules. In the case of ICSID arbitration, the public's right to know is qualified by the wording "subject to parties' consent" which controls the level of transparency.[79] This can be seen in the similar but much more limited duty in publishing excerpts of the legal reasoning of the tribunal and a conditional publication of award subject to parties' consent[80] under the ICSID Arbitration framework. The Transparency Rules prescribe the duty to publish documents[81] and the tribunal's discretion in terms of publication of exhibits[82] used during the proceeding. Such duty addresses the issue of "the public's right to know". With the right to know, the public enjoys a legal entitlement granted through the tribunal's duty and discretion and access information and proceedings through in the Transaprency Rules. Confidentiality related to confidential business information,[83] confidential information defined under the investment treaty,[84] confidential information provided by applicable laws,[85] and the information required to be treated as confidential to maintain law enforcement[86] is no more than an exception.

[78] Cindy Buys, 'The Tension between confidentiality and transparency in international arbitration' (2003) 14 The American Review of International Arbitration, 121, 134.
[79] ICSID Arbitration Rules, Rules 32(2) and 48.
[80] ICSID Arbitration Rules Rule 48.
[81] The Transparency Rules, Article 2 and 3(1).
[82] The Transparency Rules, Article 3(3).
[83] The Transparency Rules, Article 7(2)(a).
[84] The Transparency Rules, Article 7(2)(b).
[85] The Transparency Rules, Article 7(2)(c).
[86] The Transparency Rules, Article 7(2)(d).

Standing firm on public policy, privacy is no longer available under the Transparency Rules as the tribunal has a mandatory duty to make logistical arrangements to facilitate the public's access to the hearings involving their rights or interest.[87] In the case of submission of *amicus curiae* briefs by non-related party to the arbitration, both Rules allow third parties to do so in order to have their views heard by the tribunal during the arbitration proceedings.[88] Both Rules imposed a duty on the tribunal to ensure that due process is observed and the proceeding is not disrupted by the submission or such submission does not create undue burden or unfair prejudice on either party.

Nevertheless, the differences between the ICSID Arbitration Rules and the Transparency Rules lie in "parties' consent" in the ICSID Arbitration Rules and "compulsory transparency" in the Transparency Rules, where the latter took the public's right to know further. Unlike the ICSID Arbitration Rules where the feature of privacy can be waived with parties' agreement,[89] using the word "shall" the UNCITRAL Arbitration imposes an absolute duty on the tribunal to deliver its transparency policy.[90] It also allows a non-dispute party to the treaty to actively participate the hearings or to submit written opinions on the interpretation of treaty provisions under Article 5 of the UNCITRAL Transparency Rules, whereas the similar arrangements are subject to parties' consent under the ICSID Arbitration Rules.

IV. SUGGESTED CHANGES TO ICSID ARBITRATION

[87] UNCITRAL Transparency Rules, art 6.
[88] ICSID Arbitration Rules, Rule 37(2) where 'non-disputing party' is used and Transparency Rules art 34 where a third party is used.
[89] ICSID Arbitration Rules, Rule 32(2).
[90] The Transparency Rules, Article 6.

A. Rule 37 - Submissions by Non-Disputing Parties

As examined above, the current practice of Rule 37 of the ICSID Arbitration Rules provides a legal basis for *amicus curiae* briefs submitted by non-parties who can demonstrate to the tribunal that they have a significant interest in the proceedings. However, this basis is restricted by the wording of "may be invited by the tribunal" in the provision and the tribunal's discretionary power to allow *amicus curiae* briefs is further eroded by the requirements of "after consulting the disputing parties."

Changes to the original texts are suggested to address this issue. The suggestions include the expansion of the scope of non-disputing parties taking part in the proceedings and transparency. Among those responses, one consultee suggested an add-on paragraph to the current Rule 37 for clarification purposes and keeping up with the language employed in the modern investment treaties. The wording of Rules 37 is suggested to be expanded beyond the current definition of "non-disputing party" under Rule 37. The suggested wording "including those from a non-disputing Contracting State" like those provided in the Transparency Rules will see home state being brought into the definition of "non-disputing party"[91] who will be in a good position to provide the tribunal with the benefit of building a clearer view on the treaty interpretation in order to determine the rights and obligations of the disputing parties.

A similar point was also raised by Columbia Centre for Sustainable Investment which is keen to see a correct interpretation of the treaty provisions in future disputes. Modelled on Article 5

[91] *Supra* note 13, Comments to Amendment of ICSID's Rules and Regulations (2016-2018) (Columbia Centre for Sustainable Investment), at 9

of the UNCITRAL Transparency Rules,[92] it highlights the necessity of the home state's input to achieve this aim. In particular, in accordance to their view, such clarification is essential for those investment treaties concluded between the 1960s and the 1990s which contains less clarity. [93] By allowing the submissions made by a non-disputing contract party (home state) or a party to the treaty, the amended ICSID Arbitration Rules would be in line with the modern investment treaties, such as U.S. Model BIT; Canada Model BIT; ASEAN Comprehensive Investment Agreement. [94]

Consequently, the suggested amendment reads:

> (3) In cases where the basis of consent invoked to establish the jurisdiction of the Centre is an International Investment Agreement in force between two or more Contracting States, the Tribunal shall allow or, after consultation with the disputing parties, may invite submissions on issues of treaty interpretation from a non-disputing Contracting State, Party to the treaty. The Tribunal shall not draw any inference from the absence of any submission or response from the non-disputing Contracting State. [95]

The explanation accompanying the proposed provision mentioned the Home State as the "non-disputing Contracting State, Party to the treaty". However, it is not clear to ascertain the meaning of "Party" followed "a non-disputing Contracting State,". Reading in conjunction with the second paragraph of the proposed provision, "a non-disputing party submission, including those from a non- disputing Contracting State" does not seem to suggest an exclusive

[92] *Id*. at 3, Columbia Centre for Sustainable Investment suggests that the Transparency Rules could aid the development of transparency for ICSID amendments.
[93] *Id.* at 9.
[94] *Id.*
[95] *Id.*

list. It raises the question of who the "Party" is. Since this "Party" cannot be the "host state" because it would be viewed as a disputing party to an ICSID arbitration, one wonders whether "Party" is a mistake and should be removed from the proposal. The possibility of this "Party" referring to third parties such as public interest groups or non- governmental organisations (NGOs) should be dismissed because their access is made on the basis of public participation,[96] consequently, they will be in no position to provide clarification on the interpretations on the treaty provisions.

Interestingly, the intention to propose an absolute duty upon the tribunal in the suggested amendment[97] is clear with its use of similar wording "Tribunal shall allow or, after consultation with" as those appear in the Transparency Rules. Replacing "may" in the original texts which suggests the tribunal's discretion "after consultation with the disputing parties," the use of "shall allow" in the suggested text indicates a significant shift from tribunal's discretion to tribunal's duty if a non-disputing Contract State files submissions. Such a change suggests that intervention is to be carried out on the basis of the tribunal's absolute duty and such a duty is a passive but an absolute duty. In the absence of an active submission made by non-disputing Contract State, tribunal's passive/absolute duty will be transformed into a pro-active discretion where the tribunal "after consultation with the disputing parties, may invite submissions on issues of treaty interpretation from a non-disputing Contracting State." The scope of

[96] Nathalie Bernasconi-Osterwalder, *Transparency and Amicus Curiae in ICSID Arbitrations, in* Sustainable Development in World Investment Law 191 (Marie-Claire Segger et al. eds., 2011).

[97] The proposed provision reads: "(3) In cases where the basis of consent invoked to establish the jurisdiction of the Centre is an International Investment Agreement in force between two or more Contracting States, the Tribunal shall allow or, after consultation with the disputing parties, may invite submissions on issues of treaty interpretation from a non-disputing Contracting State, Party to the treaty. The Tribunal shall not draw any inference from the absence of any submission or response from the non-disputing Contracting State."

submission made by a non-dispute Contracting State is limited to the clarification "of treaty interpretation" from its point of view.

The wording of "subject to parties' consent" provided in Rule 37(2) of the ICSID Arbitration Rules should also be removed in order to allow a submission by a non-disputing party to the treaty. There is also a need to allow a full scale of disclosure of material by expanding the scope of documents which are required to be disclosed under Article 48(5) of the ICSID Arbitration Convention and Rule 48(4) of the ICSID Arbitration Rules and Regulations 22(1) and 23 of the ICSID Administrative and Financial Regulations.

B. Third Party Access in ICSID Investment Arbitration

On the issue of non-parties' access to arbitration proceedings, the Columbia Centre for Sustainable Investment argues for an inclusion of interested third parties (including project-affected sectors of host state citizens) and allowing them to have access to the information about disputes to ensure the observation of rule of law, principles of equality, human rights, accountability, fairness, and procedural and legal transparency.[98] This is to provide protection for affected third parties to understand their rights under the treaty based investment framework. The importance of public access to information is also stressed by the Law Council of Australia which proposes ISDS disputes, granting third party access and live streams of

[98] Report of the Secretary-General to the UN Security Council, "The rule of law and transitional justice in conflict and post-conflict societies" (August 23, 2004) UN Doc. S/2004/616; *Supra* note 13 at 3 (Columbia Centre for Sustainable Investment).

hearings.[99]Access by mass class claimants is also suggested to ensure accountability and transparency.[100]

If the ICSID Working Paper proposes to have the issue of third party's access to information modelled on Article 4 and 5 of the Transparency Rules, it must consider (1) definition of third party's "significant interest", (2) the removal of parties' consent from the current provision, (3) observation of procedural efficiency and due process, and, in the public hearing attended by third party, (4) the power of tribunal and the allocations of responsibility for logistical arrangements.

In the case of a written submission made by a third party under Article 4(1) of the Transparency Rules, it is important to point out that despite that its default position is that the tribunal's discretion only arises "after consultation with the disputing parties," the language of the provision does not require the element of parties' consent. This means that, even with the disputing parties' objection, the tribunal has the power to exercise its discretion and allow a third party to file a written submission. Otherwise, the word "consent" should have been used. In the case of submission by a non-disputing party, the tribunal would have the power to allow the submission without consulting the disputing parties or can exercise its discretion to invite the submission after consulting the disputing parties.

[99] http://isdsblog.com/2016/10/14/vattenfall-v-germany-live-stream/, ICSID Case No. ARB/12/12 (*Vattenfall v Germany*).

[100] The accountability and transparency refers to the formulation of the class, the participation of class members in the arbitral process and distribution of the funds to successful mass claimants.

In allowing the tribunal to exercise its power or discretion, the Working Paper would have to retain the wording of "to ensure the efficiency of the proceeding which does not disrupt or unduly burden the arbitral proceedings or unfairly prejudice any disputing parties" but allow "disputing parties' the right to present their observation on third party's submission" in the current provision. On the other hand, the Working Paper may propose to place the emphasis on privacy and maintaining its *status quo* by requiring parties' consent and consultation with the Secretary-General of ICSID before any third party can take part in the arbitration proceedings.

If the ICSID Working Paper proposes to amend the current position on "conditional third parties access" by modelling on the Transparency Rules, the Working Paper must amend Rules 32(1) which prescribes that an oral hearing can only be attended by the people who are directly connected to the arbitration proceedings such as the tribunal, the attendance of the parties, their agents, counsel and advocates, and of witnesses and experts. The wording "unless either party objects" and "after consultation with the Secretary-General" would also have to be removed from the current provision. It would be necessary to replace "may" with "shall" to highlight the nature of public hearings. This is because, under Article 6(1) and 6(3) of the Transparency Rules, it would be the tribunal's task to make the hearings public and ensure logistical arrangements are in place to facilitate the public access to hearings. Furthermore, similar provisions providing protection of the disputing parties' interest in confidential information and privacy,an add-on provision to Rule 32, like Article 6(2) and (3) of the Transparency Rules would be desirable.

C. Potential Third Party Access

The other issue which is currently looked at by both ICSID and the consultees, but overlooked by the Transparency Rules, is third party funding. This issue has been highlighted in point 15 of the listed areas of amendments.[101] Although transparency is on the rise in international investment arbitration, disclosure of third party funding agreement is still currently done on a voluntarily and case-by-case basis as *Oxus Gold plc v Republic of Uzbekistan* highlighted.[102] Currently, disclosure of third party funding is not addressed in the ICSID Convention, the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules or the Transparency Rules.

Various Consultees, such as López at CML Arbitration and Consultant[103] raised concerns over the lack of a regulatory framework on this issue. They are keen to avoid such potential third party funders' access to arbitration proceedings and impacts on the integrity of the tribunal and proceedings. Transparency is called for by the consultees in terms of arrangement third-party funding to avoid "unwilling consequences of belated disclosure or non-disclosure, particularly potential conflicts of interest between the funder and one or more arbitrators."[104] This is due to the inadequacy of guarantees of this issue under the current ICSID arbitration rules.[105] To

[101] *Supra* note 5.
[102] *Oxus Gold plc v Republic of Uzbekistan*, Press Release was issued on 1 March 2012 under the title "Litigation Funding" where Oxus Gold plc announced that on 29 February 2012 it entered into a litigation funding agreement with a subsidiary (the "Funder"), of the Calunius Litigation Risk Fund LLP (1 March 2012) <http://www.lse.co.uk/share-regulatory-news.asp?shareprice=OXS&ArticleCode=0acxo35h&ArticleHeadline=Litigation_Funding> accessed 30 March 2018>
[103] *Supra* note 13, at *2*
[104] *Id*. at *10*
[105] *Id*. at 121*;* Columbia Centre on Sustainable Investment, Chiara Giorgetti, Between Legitimacy and Control: Challenges and Recusals and Arbitrators in International Courts and Tribunals. 49 (2016) *George Washington International Law Review* 205, 208-09.

maintain the critical importance of "preserving the credibility and viability of such mechanisms,"[106] suggestions are proposed against the background of General Standard 7 of the IBA Guidelines on Conflicts of Interest in International Arbitration 2014.[107] The suggested amendment states that funds can be provided in the forms of money or material support to exchange for "a direct economic interest in, or a duty to indemnify the party for, the award to be rendered in the arbitration." [108] Nevertheless, the funded party, either claimant or respondents, should be imposed with a duty to submit the information about the arrangements to the Secretary-General of the ICSID without delay.[109]

On the topic of arbitrator's integrity, consultees also proposes to preclude the practice of "arbitrators wearing "dual hats" – simultaneously practicing both as arbitrators and counsels in investor-state disputes."[110] It calls for revision on challenging procedures and expresses a strong opposition of having challenges heard and resolved by the remaining two co-arbitrators since it "does not fulfil the appearance-of-independence requirement, and thus undermines the normative and sociological legitimacy of arbitral tribunals."[111] Similar views were made known by Investor-State Mediation Task Force[112] and ICCA[113] which places emphasis on both

[106]*Supra* note 13 *at 121;* Columbia Centre on Sustainable Investment, *Id*. (Chiara Giorgetti) at 208-09.
[107] IBA 'Guidelines on Conflicts of Interest in International Arbitration, at 15 https://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx <accessed on 30 March 2018>
[108]*Supra* note 13 at 10
[109] *Id.*
[110]*Id.* at 10 *(*Columbia Centre on Sustainable Investment), *Supra* note 121 at 208-09 (Chiara Giorgetti).
[111]*Id.* at *121*(Columbia Centre on Sustainable Investment).
[112] Investor-State Mediation Task Force, Response to ICSID
on its Invitation to File Suggestions for Rule Amendments 25 September 2017 at 30; *Supra* note 13 at 186.
[113] ICCA Proposals on The Revision of The ICSID Rules, 12 December 2017 *Supra* note 13 at 195.

conflicts of interest and security for costs, whereas one funder expresses a strong nevertheless minority view for non-disclosure of third party funding to be included in the amendment.[114]

In response to the call, the ICSID considers the issue "whether there should be disclosure of third party funding for the purposes of conflict checking and/or for the purposes of security for costs."[115] The main concerns over third party funding are made on the integrity of the arbitration process, such as arbitrator's independence or impartiality.[116] Other concerns over whether the existence of funding agreements and the sums at stake[117] see a funder taking a control over the proceedings should also be considered.[118]

While a level playing field for both disputing parties can be delivered through the disclosure, the key issues ICSID should consider are the scale of disclosure on third parties funding and whether the funding agreement allows a funder to be directly being transformed into a "party" who can be made liable to the compliance of the integrity of proceedings, costs associated with the procedures, or indirectly transfer itself into a "third party" defined in Rules 32 and 37. In the case of the former choice, one would contemplate the possibility of extending the definition of "National of another Contracting State" to a funding party through Article 25(1) and (2) of the ICSID Convention, by adding a paragraph concerning "any funder who directly or

[114] Supra note 13 at 85, Charlie Morris from Woodsford Litigation Funding argues that, in accordance with the response, the funder views funding agreement is a private business matter. Non-regulating is a sensible approach since little problems were reported and call for "if it ain't broke, don't fix it."
[115] *Supra* note 1 at 2, The ICSID Rules Amendment Process.
[116] Eric de Brabandere and Julia Lepeltak, Third Party Funding in International Investment Arbitration (2012) 27(2) ICSID Review 379-398, 394.
[117] Bernardo M Cremades Jr, 'Third Party Litigation Funding: Investing in Arbitration' (2011) 8 Transnational Dispute Management 12–15.
[118] H Yu, Access to Justice through Third Party Funding – Whose Justice Anyway? (2017) 20(1) International Arbitration Law Review 20-34.

indirectly funded the disputing parties. This would address the issue arising from Rules 39 and 40 in relation to provisional measures and ancillary claims as well as Chapter VI on awards and their effects. Although the inherent difficulties related to the issues of jurisdiction and convention amendments would see the complications in the actual delivery, without the extension of jurisdiction to a funder, it would be not possible for all ICSID tribunal to deliver consistent awards on security for costs, legal costs and, most importantly procedural justice.

In the case of the latter choice, ICSID should clarify whether a funder is to be indirectly transformed into "other persons" defined in Rules 32 where a funder can fall into the definition of "other persons to attend or observe all or part of the hearings, subject to appropriate logistical arrangements or "non-disputing party" who has a significant interest in the proceedings. Although the latter choice requires less efforts, it would not resolve the usual concerns over a level playing field, the possibilities of a sudden termination of the funding agreements or control over arbitration process.

V. CONCLUSION - FURTHER AHEAD ON TRANSPARENCY

Compared to the ICISD Arbitration, the UNCITRAL Transparency Rules has expand the scope of transparency than the ICSID Arbitration Rules. After five decades[119] ICSID has announced its intention to have further amendments in October 2016. According to the World Bank

[119] The Convention was adopted in 1967 with Additional Facilities Rules added in 1978, further amendments were carried out in 1984, 2003 and 2006.

document issued in January 2017,[120] a list of sixteen potential amendments on the ICSID Rules are currently being considered at the time writing. In relation to transparency, ICSID intends to explore possible provisions and clarify rules on non-disputing parties' participation. It acknowledges the influence of the Mauritius Convention[121] and the UNCITRAL Rules on Transparency in Treaty–Based Investor-State Arbitration. Suppose, the influence of Article 2 of the Mauritius Convention which incorporate the UNCITRAL Rules on Transparency Rules into its Bilateral or Multilateral Investor-State arbitration frameworks is to be brought into the amended rules, Rules 37, 32(2) and 48 are expected to receive a total revamp to increase the level of transparency. Although the potential widening scope of transparency under the ICSID framework is currently progressing, it remains to be seen in its Working Paper due to be published in 2018. The analysis carried out in this article highlights that the shift of emphasis from parties' entitlement of privacy to public entitlement of right to know will pave the way for the ICSID amendments if the "Transparency Rules Model" is to be adopted. The system and the public demand for further transparency to address the balance between public rights and private rights in the investment arbitration involving states but which impacts on the interest of the general public. Transparency is on the card, nevertheless, it remains to be seen whether the ICSID amendments will assert a compulsory, pro-active and independent right to transparency to support the public's right to know as well as impose the tribunal with a compulsory duty to allow non-parties access to arbitration proceedings.

[120] *Supra* note 5 <accessed on 30 March 2018>

[121] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2015 http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf <accessed on 30 March 2018>