Transparency in Investment Treaty Arbitration & Asia's Mixed reception

Mahdev Mohan[*], *Siraj Shaik Aziz*[**], *Kartik Singh*[***]

I. Introduction

1. The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention" or the "Convention") has been lauded by scholars such as Stephan Schill as underscoring "investment law's public law nature and breaking with the so far still dominant conceptualization of investor-State dispute settlement ("ISDS") as a form of commercial arbitration and private justice".[1] Other scholars point to the multilateral Convention as an innovative example of how treaty-based ISA

* This article arises from a research project titled "Investment Arbitration & Sustainable Development in Asia: The Regulatory Turn towards the State". The lead author is the Principal Investigator for this project, which is kindly funded by the Singapore Management University (SMU) through a Ministry of Education of Singapore Tier 1 (Category B) Academic Research Fund.

** Student, School of Law, Singapore Management University.
*** Student, School of Law, Singapore Management University.

could utilise an "opt-in" approach. They posit that while the "opt-in" mechanism "would be primarily aimed at the existing [international investment agreement] network, it would be without prejudice to the possibility that future investment treaties may refer to new dispute resolution options, as States may deem appropriate".[2] For example, it has been characterised by Gabrielle Kauffman-Kohler and Michael Potesta as an exemplar for how further reform to the ISDS regime, such as the creation of a multilateral Investment Court System ("ICS"), can be implemented.[3]

2. However, one could also argue that any call for a Mauritius Convention-type approach to broader ISDS reform may be premature since the Convention has only been ratified by 3 States; none of whom are Asian States. This limited reception hints at a dark side of transparency that might trouble States. The present authors do not view States' reticence as a categorical rejection of transparency. Rather, several Asian States accept the importance of transparency in ISDS, although they are mindful of competing concerns, as we will show. Further, while the Convention is the first of its kind to mandate automatic transparency in proceedings, the work done by North America Free Trade Agreement ("NAFTA") and International Centre for the Settlement of Investment Disputes ("ICSID") tribunals have paved the way for the Convention. It has been noted by some that not all the disclosure provisions in the Convention are novel given the jurisprudence on the matter.[4]

3. Part II of this paper will examine the significance of the Mauritius Convention in the development of transparency in ISA. Part III will examine the concerns that might account for the tepid reception of the Convention by Asian States, whereas Part IV will analyse the textured reception towards transparency across three Asian States, namely China, India, and Singapore. All three States have recognised the need for transparency notwithstanding their status as non-signatories to the Convention but have adopted different approaches. Part V of this paper will consider the viability of a Mauritius

---

1 Stephan W. Schill, "The Mauritius Convention on Transparency", 16 Journal of World Investment & Trade 201, 203 (2015)

2 Gabrielle Kaufmann-Kohler & Michele Potesta, "Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?" CIDS – Geneva Center for International Dispute Settlement, 4 (2016).

3 *Ibid*. at 6.

4 Dr. Hong-Lin Yu & Dr. Belen Olmos Giupponi, "The Pandora's Box Effects under the UNCITRAL Transparency Rules", 5 Journal of Business Law 347, 350 (2016); See also: Laurence Boisson de Chazournes & Rukia Baruti, "Transparency in Investor-State Arbitration – An Incremental Approach", 2 Bahrain Chamber for Dispute Resolution International Arbitration Review, vol. 59, 74 (2015).

Convention approach towards other ISDS reforms, including the establishment of an ICS.

II. THE SIGNIFICANCE OF THE MAURITIUS CONVENTION

4. The Mauritius Convention came into force on 18 October 2017.[5] The Convention aims to provide States and regional economic integration organizations with an efficient mechanism that extends the scope of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency" or the "Rules")[6] to investment treaties concluded before the Rules on Transparency came into force on 1 April 2014. The Rules comprise a set of procedural rules dealing with, *inter alia*, the disclosure of case-related documents, public access to hearings, and submissions by *amici curiae* and non-disputing State parties in ISA. Much like the Rules on Transparency, the Mauritius Convention seeks to take into account both the public interest in such arbitrations and the interest of the parties to resolve disputes in a fair and efficient manner; though the temporal and procedural/institutional scope of the Rules and Mauritius Convention differ.

5. The Rules on Transparency apply automatically to all ISAs conducted under the UNCITRAL Arbitration Rules pursuant to treaties concluded on or after 1 April 2014 (i.e., the effective date of the Rules).[7] On the other hand, the Mauritius Convention applies to ISAs under State parties' investment treaties in general, whether or not initiated under the UNCITRAL Arbitration Rules. More specifically, the Convention can apply to treaty-based arbitrations in which the respondent is a party to the Convention and the claimant investor is "of a" State that is a party to the Convention.[8]

---

[5] Currently, 22 countries are signatories to the Convention but only three have ratified it. The signatory States are Australia, Belgium, Benin, Cameroon, Canada, Congo, Finland, France, Gabon, Gambia, Germany, Iraq, Italy, Luxembourg, Madagascar, Mauritius, Netherlands, Sweden, Switzerland, Syrian Arab Republic, United Kingdom, and United States of America. The three countries that have ratified it are Canada, Mauritius, and Switzerland. Consequently, as of today, the Convention only applies to one of the thousands of investment treaties pre-dating 1 April 2014: the Mauritius-Switzerland BIT (1998), which can be found at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1994> accessed 20 March 2018.

[6] UNCITRAL Press Releases, "UNCITRAL Adopts Transparency Rules for Treaty-Based Investor-State Arbitration and Amends the UNCITRAL Arbitration Rules", UN Information Service, (accessed 19 December 2017) http://www.unis.unvienna.org/unis/pressrels/2013/unisl186.html.

[7] The Rules, Art. 1(1).

[8] The Convention, Art. 2(1).

When these conditions are satisfied, the Convention provides for the mandatory application of the Rules on Transparency, unless either the respondent party or the claimant's home State has made a "relevant reservation".[9] Significantly, by making such a reservation, a party can exclude the application of the Convention to arbitrations under a specific treaty, or to those conducted using a specific set of arbitration rules (other than the UNCITRAL Arbitration Rules).[10]

6. The Mauritius Convention's drafters claim it is "a powerful instrument to enhance transparency in investor-State dispute settlement"[11] and have expressed hope that it would allow States to apply the Rules on Transparency to arbitrations arising under some 3,000 treaties concluded before 1 April 2014. Several reasons have been cited in support of transparency. Some of the key reasons supporting transparency in ISA are as follows:

(i) This signals that neither party has anything to hide,[12] thereby enhancing the confidence of foreign investors;

(ii) There is general public interest in the issues put forth for ISA;[13]

(iii) Legitimate interest of the public in knowing what has transpired in an arbitration;[14]

(iv) Public access to the arbitral mechanism helps to build and maintain the legitimacy of the arbitral process;[15] and

(v) Transparency of decisions leads to more predictability for both States and investors.[16]

7. Although the Convention reflects the existing practice in relation to *amici* and third-party submissions, it does mandate higher disclosure requirements in relation to access to documents and public hearings. The Rules and Convention push for a high standard of transparency in requiring mandatory and automatic disclosure of certain documents, including the

---

[9] *Ibid*.

[10] The Convention, Art. 3.

[11] United Nations, "Draft Transparency Convention 'A Powerful Instrument' in Treaty-Based Arbitration United Nations Trade Law Body Tells Sixth Committee", (accessed 20 March 2018) https://www.un.org/press/en/2014/gal3479.doc.htm.

[12] Jack J. Coe Jr, "Transparency in the Resolution of Investor-State Disputes: Adoption, Adaptation and NAFTA Leadership", 54 University of Kansas Law Review 1339, 1361 (2006).

[13] E.g. Environmental legislation, labour standards, or other social and economic rights; Eric de Brabandere, *Investment Treaty Arbitration as Public International Law* 151 (Cambridge University Press, 2014).

[14] *Esso Australia Resources Ltd*. v. *Plowman*, 1995 HCA 19, para 38.

[15] Brabandere, (n 13), at 152.

[16] *Ibid*.

award given by the tribunal.[17] This is a stricter standard than the ones found today in institutional arbitration rules. For instance, Rule 48(4) of ICSID Arbitration Rules only requires ICSID to publish certain excerpts of legal reasoning of every award, leaving any other documentary disclosure subject to consent of the parties. Similar consensual disclosure of documents is also allowed in regional treaties[18] and in Model BITs.[19]

8. Articles 4 and 5 of the Rules allow the tribunal to accept non-party submissions.[20] These provisions build upon the work of NAFTA and ICSID, with these *fora* accepting *amici* submissions for over a decade.[21] Due to the public interest in investment arbitration proceedings, there has been a growing trend of allowing non-parties to the dispute to make submissions in the proceedings.[22]

9. Involving non-parties, including NGOs, as *amici* in ISAs has been said by the ICSID tribunal in *Vivendi* v. *Argentina* to enhance the "legitimacy of international arbitration processes":

> "*the acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor-State arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve States and*

---

17 The Rules, Art. 3.

18 NAFTA Free Trade Commission Note of Interpretation pursuant to Article 1131(2) (31 July 2001); Lisbon Treaty 2009; Arts. X33(2)-(5) and Art. X35(2) Negotiations with Canada on the Comprehensive Economic and Trade Agreement, Chapter 10; Art. 29.17 Model BIT of the Southern African Development Community May 2012; Art. 39(6) ASEAN Comprehensive Investment Agreement.

19 2012 US Model Bilateral Investment Treaty, Art. 29 (accessed 20 March 2018) at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf; 2015 Norwegian Model BIT (2015), Art. 19(1) (accessed 20 March 2018), http://investmentpolicyhub.unctad.org/Download/TreatyFile/2873; Canada Model BIT (2007) Art. 39.

20 Arts. 4 and 5 of the Rules on Transparency.

21 See NAFTA's jurisprudence in *United Parcel Service of America Inc.* v. *Govt. of Canada*, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001; *Methanex Corpn.* v. *United States*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001. See ICSID's jurisprudence in ICSID's in Suez, *Sociedad General de Aguas de Barcelona SA* v. *Argentine Republic*, ICSID Case No. ARB/3/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission, 12 February 2007; *Aguas Provinciales de Santa Fe SA* v. *Argentina*, Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 11-16 (2006); *Biwater Gauff (Tanzania) Ltd.* v. *Tanzania*, ICSID Case No. ARB/05/22, 48-55, 2 February 2007.

22 Alexis Mourre, "Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?", 5 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 257, 258-260 (2006).

> *matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function.*"[23]

10. In relation to open hearings, Article 6 of the Rules requires all substantive hearings to be open to the public. This is a remarkable departure from extant practice where certain tribunals have resolved the tension between public interest in hearings and parties' right to maintain confidentiality in favour of the latter.[24] UNCITRAL's Working Group II has, through the Rules and Convention, attempted to move ISA away from commercial arbitration principles of privacy and confidentiality[25] and towards requiring greater transparency. Some argue that this shift towards presumptive public access reflects the public interest in ISA cases, and ensures greater accountability for both investors and States.[26]

III. The limited reception of the Mauritius Convention

11. However, despite this ground-breaking move towards transparency, the Rules and Convention have only enjoyed limited success. The Mauritius Convention entered recently into force on 18 October 2017 after Canada, Mauritius, and Switzerland ratified the treaty. 19 States have signed the Convention but only 3 have ratified it.[27] Further, it bears mention that none of these signatory or ratifying States are from the Asian or Latin American regions.[28] The UNCITRAL website lists 13 treaties that have concluded with their transparency provisions being modelled after the Rules.[29]

---

[23] *Suez, Sociedad General de Aguas de Barcelona, SA* v. *Argentina*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006, para 21.

[24] Rules 32(2) of the Investment Arbitration Rule of the ICSID. See, for example of old approach, *Biwater Gauff (Ranzania) Ltd*. v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 26 September 2006, [135]-[42] where the ICSID tribunal observed that a uniform rule in favour of disclosure when a matter of public interest is implicated by a dispute could exacerbate the dispute, or even affect the integrity of the arbitral procedure

[25] Brabandere, (n 13), at 148.

[26] Charzournes & Baruti, (n 4), at 62 and 75; Schill, (n 1), at 202; Claudia Reith, "Enhancing Greater Transparency in the UNCITRAL Arbitration Rules – A Futile Attempt?" 2 Yearbook on International Arbitration 297, 300 (2012).

[27] To see all the States that are signatories to the Convention, see (n 5).

[28] UNCITRAL, "Status: United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration" (New York, 2014) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html> accessed 20 March 2018.

[29] *Ibid*.; Esmé Shirlow, "Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration" [2016] 31 ICSID Review 622,

12. Before the Convention and the Rules on transparency came into force, transparency was neither the norm nor an expectation in ISA proceedings beyond North America and Europe. It is to be noted that while NAFTA became the propelling force for transparency, NAFTA only has 3 parties to the agreement. Further, these parties, especially USA and Canada, already had extensive freedom of information legislative regimes that complimented such transparency provisions. Outside these countries, there was little to no pressing need for transparency provisions. Prior to the Rules and Convention, most States preferred to have issues of transparency settled on an ad-hoc basis.[30] About 88% of BITs[31] and about 50% FTAs[32] in force addressed issues of procedural transparency, with most of these BITs and FTAs having North American countries as a party.[33] However, this does not preclude the possibility of States eventually calibrating and adopting a form of transparency in ISA that best accords with their interests.

13. Another major reason why the Convention has enjoyed little reception is due to its retrospective application to treaties concluded before 1 April 2014, pursuant to Article 2(1) of the Convention. During the discussions of the Working Group, States had objected to the far-reaching effects of this retrospective application. After all, there exists over 3000 investment treaties in force before 1 April 2014[34] and States were not ready for the Convention to subject these already concluded treaties to transparency requirements introduced *ex post facto*.

14. The crux of the objection is articulately expressed in Singapore's 2013 Statement to the 68th Session of the United Nations General Assembly:

> "*Applying the Transparency Rules to existing treaties raises grave issues. Investments made pursuant to those treaties are premised on the legal environment established by these treaties. Unilaterally changing this environment after the investments have been made demolishes the certainty of the rules applicable to these investments. This cannot be said to be compliant with the Rule of Law.*"[35]

629.

30 Shirlow, (n 29), at 625.

31 *Ibid*.; Cristoffer Nyegaard Mollestad, "See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement", PluriCourts Research Paper No. 14-20, 38 (2014).

32 Shirlow, (n 29), at 625; Mollestad, (n 31), at 58.

33 Shirlow, (n 29), at 625; Mollestad, (n 31); N. Jansen Calamita, "Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy: Adopting the UNCITRAL Transparency Rules Approach", The Journal of World Investment and Trade 645 (2014).

34 Schill, (n 1), at 202.

35 Ministry of Foreign Affairs, Statement by Mrs Rena Lee, Delegate to the 68th Session of the United Nations General Assembly on Agenda Item 79, on Report of the United Nations

A. States' Reservations in Allowing Amici and third-party submissions in ISA Proceedings

15. Many States have also maintained their reservations to the Mauritius Convention in relation to *amici* submissions. Not only does such participation lead to the inevitable increase in cost and delay in proceedings,[36] it also "re-politicize[s]" the dispute settlement process in what is intended to be an apolitical environment.[37] There is an important issue of legitimacy in relation to *amici* and third parties.[38] Organizations and/or individuals that petition to be considered as *amici* purport to represent interests of all or part of the civil society, which may not be true. They often introduce themselves as advocates for "environment, public health, workers' rights, etc.",[39] as was done by the *amici* in *Methanex Corpn.* v. *United States of America*,[40] while in cases like *United Parcel Service of America Inc.* v. *Govt. of Canada*[41] where *amicus* was a trade union representing several members, other petitioners may not have represented such broad interests. Indeed, there is nothing preventing an opposition party, lobbyist, or NGOs from being third parties in proceedings.[42] Hence, there arises a real fear of third parties lobbying for their own agendas and seeking to influence the outcome of the arbitration.[43] In *Bernhard von Pezold* v. *Republic of Zimbabwe*, the *amicus curiae* submissions were rejected for a lack of independence on the part of the *amicus curiae*.[44] Additionally, developing countries fear that *ami-*

Commission on International Trade Law on the Work of its Forty-Sixth Session, Sixth Committee, 14 October 2013, (Ministry of Foreign Affairs 2013) (accessed 20 March 2018) https://www.mfa.gov.sg/content/mfa/overseasmission/newyork/nyemb_statements/sixth_committee/2013/201310/press_20131014.html.

36 A. Newcombe and A. Lemaire, "Should Amici Curiae Participate in Investment Treaty Arbitrations?", 5 VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND ARBITRATION 22, 33 (2001); K. Tienhaara, "Third-Party Participation in Investment-Environment Disputes: Recent Developments", 16 REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW 230, 240 (2007); P. Friedland, "The Amicus Role in International Arbitration", Conference Paper at the School of International Arbitration, London, at 10 (2005).

37 Newcombe and Lemaire, (n 36), at 34.

38 Mourre, (n 22), at 266

39 *Ibid*, at 267.

40 *Methanex Corpn.* v. *United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001.

41 *United Parcel Service of America Inc.* v. *Govt. of Canada*, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001.

42 *Ibid*.

43 Lucas Bastin, "The Amicus Curiae in Investor-State Arbitration", 1(3) CAMBRIDGE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 208, 22 (2012).

44 *Bernhard von Pezold* v. *Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural No. 2, 26 June 2012, para 49; *Border Timbers Ltd.* v. *Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No. 2, 26 June 2012, para 49.

cus curiae applications could exacerbate the imbalances they face, as they may now have to defend their positions against NGOs and multinational companies, in addition to resource-rich and powerful countries.[45]

16. Fundamentally, the admissibility of *amicus curiae* submissions is at the discretion of the tribunal and not based on the agreement of the parties. Therefore, it is for the tribunal to ensure only legitimate *amici* can make submissions. However, one might argue that this undermines parties' consent, which is the bedrock of arbitration.[46] Where mutual consent of the parties was required in the past for the admission of *amicus curiae* submissions,[47] the Rules now prescribe specific guidelines[48] which arbitral tribunals could consider when deciding on the admissibility of *amici* briefs.

17. One factor that perhaps holds countries back from signing or ratifying the Convention is that even if they are not parties to it, they can still choose to apply the UNCITRAL transparency rules on an *ad hoc* basis. This would allow States the flexibility to disregard the rules in the event of a sensitive or reputation damaging dispute they do not want publicized. It is easy to see the appeal of such flexibility. A case in point is the procedural order in *BSG Resources Ltd.* v. *Republic of Guinea*[49] which was published on ICSID's website, revealing that the parties had also agreed on the application of the Rules on Transparency. In this case, the parties decided to modify some of the provisions of the Rules on Transparency to align them with their interests concerning the conduct of the arbitration.[50] The decision in *BSG*

---

[45] Gregory Shaffer and Victor Mosoti, "The EC-Sardines Case: How North-South NGO-Government Links Benefited Peru", 6(7) Bridges, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=847264 (2002).

[46] In *Glamis Gold Ltd.* v. *United States of America*, UNCITRAL, Award, 8 June 2009, at para 286: the NAFTA-UNCITRAL Tribunal invoked the FTC Statement and observed that "leave to file and acceptance of submissions should be granted liberally", hence granting the requests of the amici curiae.

[47] *Aguas del Tunari SA* v. *Republic of Bolivia*, ICSID Case No. ARB/02/3, Letter from the President of the Tribunal, 29 January 2003, at 1: the tribunal recognised that it did not have the power or authority to grant requests for amicus curiae submissions without the agreement of the parties.

[48] UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, Art. 4(3).

[49] *BSG Resources Ltd.* v. *Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 2 on Transparency, 17 September 2015.

[50] The parties agreed that: (i) all parties written submissions, including the request for arbitration, memorials, exhibits, legal authorities, witness Statements, expert reports, transcripts of hearings, orders, decisions and award of the Tribunal would be made available to the public; (ii) hearings would be publicly accessible by video link on the ICSID website and physical attendance by third persons at hearings should be subject to the Tribunal's approval; (iii) each party should give notice within 21 days from the filing of any document that it wishes that document to remain confidential and protected; (iv) the ICSID Secretariat would act as Repository. Finally, in order to protect confidential information during hearings, the parties agreed that the broadcast would be delayed by thirty minutes

Resources is a good example of how parties can take advantage of flexibility afforded to them by international arbitration. On the one hand, ICSID's legal framework allows parties to agree on a greater degree of transparency than the one provided by the ICSID Convention and Rules of Arbitration. On the other hand, the Rules on Transparency allow parties to agree on their application even if the arbitration is not initiated under the UNCITRAL Arbitration Rules, such as ICSID or ad hoc arbitrations. Thus, it has been observed that parties in international arbitration can benefit from the choice of procedural rules that are narrowly tailored to its specific needs.[51]

18. Though Australia was the first signatory of the Mauritius Convention in the Asia-Pacific region, it too has circumscribed transparency in the aftermath of *Philip Morris Asia Ltd*. v. *Commonwealth of Australia*.[52] This is evident in the 2017 Amendments to the Singapore-Australia Free Trade Agreement ("SAFTA") which stipulate that ISA hearings will be open to the public by default, but may be closed when "protected information" is being discussed. Article 22 of Investment Chapter in the SAFTA Amendment Agreement States that "no claim may be brought under this Section in respect of a tobacco control measure."

B. Confidentiality as a competing value

19. Confidentiality has been a quintessential aspect of international commercial arbitration with some commentators even characterizing this feature to be in the "very nature of arbitration" at large.[53] As with commercial entities, host States continue to see a value in the confidentiality of ISA proceedings but may be wary of the political consequences accompanying public disclosure in sensitive cases.

20. Such regard for the competing value of confidentiality can be observed even in the US/NAFTA context where transparency provisions have been most progressive. For instance, Article 19 of the U.S. Department of State's 2012 Model BIT provides that disclosure of confidential information is not

---

[51] Christian Leathley & Daniela Paez, "UNCITRAL Transparency Rules Applies for the First Time in Investor-State Arbitration", Herbert Smith Freehills (2015), (accessed 20 March 2018) https://hsfnotes.com/publicinternationallaw/2015/10/26/uncitral-transparency-rules-applied-for-the-first-time-in-investor-state-arbitration.

[52] *Philip Morris Asia Ltd*. v. *Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015.

[53] UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Third Session" (Vienna, 4-8 October 2010), UN Doc A/CN.9/712 para 57 (2006); UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Fourth Session" (New York, 7-11 February 2011), UN Doc A/CN.9/717 para 101 (2011); Shirlow, (n 29), at 623.

required if it would impede law enforcement, be contrary to public interest, or "prejudice the legitimate commercial interests" of public or private companies. Article 2102 of NAFTA also absolves a party from providing access to information that concerns its "essential security interests".[54] China noted that such an instrument should not come into force given the confidential nature of arbitral proceedings.[55] In stark contrast to the Rules on Transparency, which provide for transparency save in exceptional circumstances (i.e. commercially sensitive information or national security interests), the Singapore International Arbitration Centre Investment Rules 2017 treat confidentiality as the default position.

21. Apart from States, practitioners too have argued for the continued relevance of confidentiality in ISA. For instance, Gary Born challenges the notion that the treaty-based authority of the State leads to an inherent requirement for transparency. He argued that the difference between the contractual underpinning of international commercial arbitration and the source of ISDS in international treaty is a red herring.[56] While the investor may not be a party to the underlying treaty, the treaty acts as an open invitation to arbitrate accepted by the investor thereby forming the required contractual base where implied rights of confidentiality may arise. He also queried how the publication of pleadings, other written submissions, transcripts and evidentiary submissions would materially assist a State in asserting (or defending) "*its interests [or] in explaining its policies to the public*" any more than would a redacted sanitized version similar to mandated corporate disclosures.[57]

22. This continued desire for confidentiality from both State and non-State actors could also slow down receptivity towards the Mauritius Convention.

C. Domestic environment in Asian countries

23. The domestic environment within Asian States may also account for why they have been less forthcoming in their adoption of transparency. First, most Asians States do not have the same robust access to information legislation for citizens as their American counterparts. Even though countries

[54] North American Free Trade Agreement, 1 January, 1994, available at http://www.sice.oas.org/Trade/NAFTA/chap-21.asp#A2101.

[55] United Nations Commission on International Trade Law, Working Group II, "Settlement of Commercial Disputes: Transparency in Treaty-Based Investor-State Arbitration – Compilation of Comments by Governments", 53rd session (4-8 October 2010) UN Doc A/CN.9/WG.II/WP.159/Add.1', 12 (2010).

[56] Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2014) 2828.

[57] *Ibid*., at 2829.

like India, China, Indonesia, Pakistan etc. have started to pass Freedom of Information legislation,[58] there have been several challenges in relation to enforcement due to bureaucratic resistance, shortcomings in the capacity of public officials, insufficient public awareness, etc.[59] Therefore, the culture of holding government accountable by having heightened access to information as a right on part of the citizenry is very much in its nascent stages.

24. Second, the citizenry in such States have a more sceptical relationship with their respective governments. The governments in several Asian States have been accused of corruption and misusing their power to achieve certain outcomes.[60] The bureaucratic control and extensive red tape in these countries have also been a point of grave consternation for investors. While the use of investment arbitration to settle investment disputes, as opposed to using national courts, has helped develop greater stability and certainty for investors in developing countries,[61] excessive disclosure of information on the part of the government can risk more claims being brought by either investors or citizenry against acts of the government. For instance, after India lost its first investment arbitration case,[62] 21 new claims sprang up against the State.[63] While these claims related to a wide variety of issues such

---

[58] Roger Vleugels, "Overview of all FOI Laws", Fringe Special, (accessed 20 March 2018), http://right2info.org/resources/publications/Fringe%20Special%20-%20Overview%20FOIA%20-%20sep%2020%202010.pdf (2011).

[59] UNESCO, "Freedom of Information in Asia-Pacific", (accessed 20 March 2018) http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/foi-in-asia-pacific/; see also: Toby Mendel, "Freedom of Information: A Comparative Legal Survey" (UNESCO, 2003).

[60] See Survey conducted by Transparency International in 2017 at <https://www.transparency.org/news/feature/corruption_in_asia_pacific_what_20000_people_told_us> accessed 20 March 2018.

[61] Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decision", 73 Fordham Law Review 1521, 1525 (2005); See also: Christoph H. Schreuer, "Do We Need Investment Arbitration?" in *Reshaping the Investor-State Dispute Settlement System* 879 [Jean E. Kalicki and Anna Joubin-Bret (eds.) 2015].

[62] Prabhash Ranjan, "The White Industries Arbitration: Implications for India's Investment Treaty Program" (International Institute for Sustainable Development 2012) (accessed 20 March 2018) https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/.

[63] Vodafone issued an arbitral notice under the India-Netherlands BIT for a retrospective taxation measure – see, *Vodafone* v. *India*, UNCITRAL, Notice of Arbitration (not public), 17 April 2014; Cairn Energy also initiated arbitration under the India-UK BIT for a retrospective taxation issue – see, *Cairn Energy Plc* v. *Govt. of India*, UNCITRAL, http://investmentpolicyhub.unctad.org/ISDS/Details/691 (accessed 20 March 2018); see also, Prabhash Ranjan and Pushkar Anand, "The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction", 38 Northwestern Journal of International Law and Business (draft copy available at https://ssrn.com/abstract=2946041), 10 (2018).

as imposition of retrospective taxes,[64] cancellation of spectrum licenses,[65] and withdrawal of approval given for telecom licenses,[66] this reaction shows the tight-rope walking that a government undertakes. Therefore, there exists a strong interwoven connection between politics and commerce in such countries and by exposing themselves too much, the government risks losing the confidence of both investors and citizens.

IV. ASIAN POSITIONS ON TRANSPARENCY: A TEXTURED LANDSCAPE

25. While Asian States have not signed the Mauritius Convention, we argue that they nonetheless affirm the value of transparency. There is a growing recognition of the need for transparency – though there is no general consensus as to what that concept entails. This textured landscape shall be analysed by examining the developments in India, Singapore, and China.

A. India

26. Traditionally, India had not taken any pro-transparency stance in their BITs.[67] Transparency and disclosure of information was governed very much by party agreement and not through any institutional or treaty-based requirement. However, with Mr. Narendra Modi's pushing for greater FDI in India through various policies such as the *Make in India* campaign,[68] there is a growing need than ever before to ensure investor certainty to sustain such investments. Currently, India has one of the fastest growing economies in the world[69] with the FDI flows in India at US$ 55,457 million in 2015-16 as compared to US$ 4,029 million in 2000-01.[70] These policies,

---

64 Ranjan and Anand, (n 63), at 10.

65 Detusche Telekom initiated arbitration under the India-Germany BIT over a cancellation of a satellite venture – see *Deutsche Telekom* v. *India*, ICSID Additional Facility, Notice of Arbitration (not public), 2 September 2013; Ranjan and Anand, (n 63), at 10.

66 Tenoch Holdings issued an arbitration notice against India under the India-Russia and India-Cyprus BIT for withdrawal of approval to grant telecom licences, see *Tenoch Holdings Ltd*. v. *Republic of India*, PCA Case No 2013-13; Ranjan and Anand, (n 63), at 11.

67 Prabhash Ranjan, "As India's New Bilateral Investment Strategy Sputters Out, the Secrecy and Opaqueness Must Go", The Wire (2017), https://thewire.in/130524/bits-investment-strategy-failure/ (accessed 20 March 2018).

68 Read more about India's Make in India Policy and the Foreign Direct Investments at http://www.makeinindia.com/policy/foreign-direct-investment (accessed 20 March 2018).

69 Ranjan and Anand, (n 63), at 11.

70 Quarterly Fact Sheet, Fact Sheet on Foreign Direct Investment from April 2000 to December 2016, Department of Industrial Policy and Promotion, Ministry of Commerce

coupled with India's recent loss in the investment arbitration case of *White Industries Australia Ltd*. v. *Republic of India*[71] have started to coalesce into a strong case for transparency.

1. Aftermath of White Industries

27. In *White Industries*, India, for the first time, lost a case in investment arbitration.[72] The tribunal found India to be in breach of its BIT with Australia because of unreasonable delays suffered by the Australian investor in having their arbitral award enforced.[73] For over 9 years, the award granted to White Industries could not be enforced as it was pending review by the Supreme Court.[74] Further, after the decision in *White Industries*, 21 new claims were brought against India despite the decision not being public.[75] Unsurprisingly, the Indian Parliament criticized the award, calling it "an attack on the sovereignty of the Indian Judiciary".[76]

28. After being subject to the judgment in *White Industries* and the subsequent claims brought thereafter, India took a drastic change in position by allowing its 57 BITs to lapse.[77] On 29 December 2016, the government constituted a Committee, under the Chairmanship of Mr. Justice B.N. Srikrishna, to review the existing arbitration framework and to recommend an effective way to resolve investment disputes. The Committee proposed, in its 143-page report,[78] doing away with ISA and resolving disputes through State-to-State arbitration and mediation, amongst other things.[79]

---

and Industry, Government of India http://dipp.nic.in/publications/fdi-statistics/archives (accessed 20 March 2018); Ranjan and Anand, (n 63), at 7-8.

71 *White Industries Australia Ltd*. v. *Republic of India*, UNCITRAL, Final Award, 30 November 2011, and can be found at <http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf> accessed 20 March 2018.

72 Ranjan, (n 62).

73 *Ibid*.

74 *Ibid*.

75 Rohit Bhat, "Will India Do Away with Investor State Arbitration", Kluwer Arbitration Blog (2017) http://arbitrationblog.kluwerarbitration.com/2017/08/23/will-india-away-investor-state-arbitration/ (accessed 20 March 2018).

76 Statement by P. Rajeeve, Member of Parliament (India), Transcript of the Proceedings of the Rajya Sabha (22 May 2012) 52-54, http://164.100.47.5/newdebate/225/22052012/Fullday.pdf accessed 20 March 2018; Ranjan and Anand, (n 63), at 12.

77 Ranjan and Anand, (n 63), at 6; Pramit Pal Chaudhuri, "India's Bilateral Investment Treaties: Once BITten 57 Times More Shy", *Hindustan Times* (2016), http://www.hindustantimes.com/analysis/india-s-bilateral-investment-treaties-once-bitten-57-times-more-shy/story-2d0VyByBuCC55TYz0zDzNK.html (accessed 20 March 2018).

78 See the High Level Committee to Review the Institutionalization of Arbitration Mechanism in India's Report, http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf (accessed 20 March 2018).

79 Bhat, (n 75).

The government eventually did not adopt this recommendation in their new Model BIT showing that not all faith had been lost in investment arbitration.

2. 2016 Model BIT

29. Interestingly, the new 2016 Model BIT allows for greater transparency requirements. Even though India is not a signatory to the Convention, it does seem like the work done through the Convention and Rules, coupled with the domestic pressures within the country, has pushed India to afford greater transparency in their proceedings. The government hopes to provide "*appropriate protection to foreign investors in India… while maintaining a balance between investor's rights and the government's obligations*" through the 2016 Model BIT.[80]

30. There are some key provisions in the Model BIT that ensure greater transparency for the purposes of public interest and investor protection. Article 10.1 of the Model BIT provides greater certainty to investors by requiring both the States to the BIT to publish any laws, procedures, regulations or rulings of general administrative application that relate to the scope of the BIT. Further, this provision also requires parties to publish and give the counter-party reasonable time to respond and comment on such laws. This ensures that both the States are transparent in their laws and their application with each other. Ultimately, this allows a State to negotiate for better protection for their investors as the State is kept aware of any changes of laws that can ultimately affect the investor. Article 22.1 of the Model BIT requires the disclosure of several key documents such as the transcripts of the hearings, awards, and notices of arbitration. This ultimately achieves the aims of Working Group II even though India is not explicitly a signatory to it.

31. Notwithstanding the key transparency provisions, investment arbitration is not the first recourse available to investors to settle their dispute under the new Model BIT. The Model BIT only allows for arbitration after the local remedies available have been exhausted for at least a period of 5 years before commencing international arbitration.[81] These 5 years are counted from the date the foreign investor has acquired "*knowledge of the*

---

[80] Department of Economic Affairs, Ministry of Finance, Government of India, "Transforming the International Investment Agreement Regime: The Indian Experience" (2016), http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/India_side-event-Wednesday_Model-agreements.pdf (accessed 20 March 2018).

[81] Arts. 15.1 & 15.2, 2016 India Model BIT.

measure in question and the resulting loss or damage to investment" or when the investor should have acquired such knowledge.[82]

32. From purely a transparency point of view, using national courts to resolve disputes offers maximum transparency as the hearings, judgment, and award, are available to the public in the vast majority of the cases. However, this move comes as an antithesis to the investment arbitration movement, where arbitration allowed investors greater confidence in a neutral body making the determination on the award.[83] Hence, while transparency has been achieved in the new Model BIT, a potential trade-off has been made with investor confidence. This situation is further exacerbated by the lack of publicly available information on (a) the processes followed in drafting the Model BIT i.e. whether there was public consultation or a purely internal process, (b) the status on the termination of India's 58 BITs and (c) the two BIT awards that have been issued against India – *White Industries* v. *India* and *Devas Multimedia* v. *India*.[84] All this hints at India's growing discontent with investment arbitration being the appropriate method for dispute resolution.

B. China

33. In 2008, China reported to the UNCITRAL Secretariat its view that "*[g]iven the confidentiality of arbitration, we do not consider it appropriate to impose provisions of publicity and transparency on treaty-based settlement of investor-State investment disputes*".[85] In August 2010, the UNCITRAL Secretariat circulated a questionnaire to States on their current practices with respect to treaty-based investor-State arbitration. China consistently gave negative answers; reaffirming its 2008 views on ISDS transparency in the process.[86]

34. A remarkable *volte face* occurred when the UN General Assembly discussed the work of UNCITRAL and its Rules on Transparency in October 2013. The Chinese representative, Mr Shang Zhen, stated the following in no uncertain terms:

> "*The Chinese Delegation believes that the implementation of the Rules on Transparency will be conducive to enhancing the transparency of international investment arbitration procedures. In so doing,*

---

[82] Art. 15.2, 2016 India Model BIT; Ranjan and Anand, (n 63), at 41.
[83] Kaufmann-Kohler and Potesta, (n 2), at 8.
[84] Ranjan, (n 62).
[85] United Nations Commission on International Trade Law, (n 55), at 12.
[86] *Ibid*., at 11.

> *it will help dispel people's apprehension that international arbitration tribunals tend to protect investors at the expense of the public interest, and will reinforce social monitoring of the implementation of host countries' legislations related to foreign investment management, thus building the overall trust of the international community in investment arbitration mechanisms. The Chinese Delegation appreciates and supports the formulation and adoption of the Rules on Transparency.*"[87]

35. This shift is also reflected in treaty practice. Under the China-Canada BIT, the ISDS arbitration award must be publicly available.[88] Under Article 27, the non-disputing party is entitled to make submissions "*on a question of interpretation*" and a non-disputing party also has the right to attend hearings. This was a landmark agreement as there has been no treaty clause on transparency of arbitral proceedings in the past BITs that China has entered into, nor in the three versions of Chinese model BITs.[89]

36. The China-Australia FTA ("ChAFTA") requires the publicity of the consultation request, the notice of arbitration, as well as the orders, awards, and decisions of the ISDS tribunal.[90] Further, three categories of documents may be made publicly available under the ChAFTA if certain conditions are met: (i) the disputing parties' pleadings, memorials, and briefs submitted to the tribunal, as well as written submissions presented in the consolidation of arbitration, (ii) minutes or transcripts of tribunal hearings, and (iii) written submissions by the non-disputing party.[91] Both parties agree to, within one year of the entry into force of the FTA, consult on the application of the UNCITRAL Rules on Transparency.[92]

37. This shift is even affirmed in the context of mega-regional agreements such as the Regional Comprehensive Economic Partnership ("RCEP"),

---

87 Statement by Mr. Shang Zhen, Chinese Delegate at the 68th Session of the UN General Assembly on Agenda Item 79 Report of UNCITRAL on the Work of Its 46th Session.

88 China-Canada BIT (2012) Art. 28.1, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3476. (accessed 20 March 2018).

89 Fu Chenyuan, "China's Prospective Strategy in Employing Investor-State Dispute Resolution Mechanism for the Best Interest of Its Outward Oil Investment", 2(1) PEKING UNIVERSITY SCHOOL OF TRANSNATIONAL LAW REVIEW 266, 308 (2014).

90 ChAFTA Art. 9.17.2(a), http://booksandjournals.brillonline.com/content/journals/10.1163/23525207-12340026;jsessionid=0V70Rli2aC30aNjL59bsw9dR.x-brill-live-03#FN85 (accessed 20 March 2018); Heng Wang, "The RCEP and Its Investment Rules: Learning from Past Chinese FTAs", 3 THE CHINESE JOURNAL OF GLOBAL GOVERNANCE 160 (2016) (copy available at SSRN: https://ssrn.com/abstract=2902926).

91 ChAFTA, (n 90), at Arts. 9.17.2(b) and 9.17.2(c).

92 *Ibid*.; Side Letter on Transparency Rules Applicable to Investor-State Dispute Settlement.

whose general principles and objectives include the facilitation of investment and the enhancement of transparency in investment relations.[93] The upcoming negotiations on Investment agreements with the EU and US are likely to keep China on this trajectory in light of the regard given for transparency in the US Model BIT and the EU Agreements with Canada, Vietnam and Singapore.[94]

C. Singapore

38. Singapore, like China, has changed its stance on transparency over time. In the past 20 FTAs Singapore has had with its 31 trading partners,[95] there has been no mention of extensive transparency clauses. Some FTAs of Singapore that do have provisions akin to transparency provisions can be found in Peru-Singapore FTA,[96] Singapore-Costa Rica FTA,[97] and ASEAN-Korea FTA.[98] The transparency provisions in these FTA provide narrow disclosure obligations and are generally limited to disclosure of laws, regulations, judicial decisions, and administrative rulings so that traders and investors can be familiar with the relevant laws and principles.[99] There is no mention of disclosure of documents, public hearings, or *amici* submissions.

39. Singapore had been more reserved and hesitant in 2013 in relation to the Rules and Convention. Ms. Rena Lee, the Singapore Delegate at the UN General Assembly's Sixth Committee, while being generally supportive of transparency, raised two specific concerns:

(i) apprehension in relation to non-governmental organisations' interventions under Art. 4 of the Rules;[100] and

---

[93] Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership, http://dfat.gov.au/trade/agreements/rcep/Documents/guidingprinciples-rcep.pdf.

[94] Mahdev Mohan, "Singapore and Its Free Trade Agreement with the European Union: Rationality 'Unbound'?" [2017] Journal of World Investment & Trade 858.

[95] International Enterprise Singapore, Singapore Free Trade Agreements <http://www.iesingapore.gov.sg/Trade-From-Singapore/International-Agreements/free-trade-agreements/Singapore-FTA> accessed 20 March 2018.

[96] See Peru-Singapore FTA (signed 29 May 2008, entered into force 1 August 2009) at <https://www.iesingapore.gov.sg/Trade-From-Singapore/International-Agreements/free-trade-agreements/PeSFTA> accessed 20 March 2018.

[97] See Singapore – Costa Rica FTA (entered into force 1 July 2013) at <https://www.iesingapore.gov.sg/Trade-From-Singapore/International-Agreements/free-trade-agreements/SCRFTA> accessed 20 March 2018.

[98] See ASEAN – Korea Free Trade Area (entered into force 1 June 2007) at <https://www.iesingapore.gov.sg/Trade-From-Singapore/International-Agreements/free-trade-agreements/AKFTA> accessed 20 March 2018.

[99] *Ibid*, at Art. 4.

[100] Ministry of Foreign Affairs, Statement by Mrs Rena Lee, Delegate to the 68th Session of the United Nations General Assembly on Agenda Item 79, on Report of the United

(ii) increased legal uncertainty caused due to the application of the Rules to existing treaties.[101]

40. Eventually, in 2014, Singapore became more receptive of the transparency movement. The Statement given by Mrs. Natalie Morris-Sharma, the then Singapore Delegate of the same Committee, reiterated Singapore's support for transparency and further commended the repository for providing access to arbitral jurisprudence.[102] However, Singapore raised new queries regarding the redaction of confidential information and the costs of disclosure.[103] Nevertheless, Singapore remained supportive of transparency as it was certain that practice of transparency would aid in clarifying these issues.[104]

41. In 2015, Singapore signed the EUSFTA,[105] which contains extensive transparency provisions.[106] Under the EUSFTA, transparency obligations include disclosure of all documents, including party submissions, decision of tribunals, expert, and *amici* reports.[107] EUSFTA also requires hearings to be conducted in public.[108] More recently, Article 29 in Chapter 8 of the Agreement to Amend the Singapore-Australia Free Trade Agreement[109] now likewise requires that the above-mentioned documents are made available to the public. It goes further than the EUSFTA in further requiring, at Article 29(2), that ISDS hearings to be open to the public. Article 28(4) of the same also commits parties to strive to ensure that any appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29.

Nations Commission on International Trade Law on the Work of its Forty-Sixth Session, Sixth Committee, 14 October 2013 (Ministry of Foreign Affairs 2013) <https://www.mfa.gov.sg/content/mfa/overseasmission/newyork/nyemb_statements/sixth_committee/2013/201310/press_20131014.html> accessed 20 March 2018.

[101] *Ibid*.

[102] Ministry of Foreign Affairs, Statement by Mrs Natalie Y. Morris-Sharma, Counsellor, Permanent Mission of Singapore to the United Nations, on Agenda Item 76, on the Report of the United Nations Commission on International Trade Law on the Work of its Forty-Seventh Session, Sixth Committee, 13 October 2014 (Ministry of Foreign Affairs 2014), http://www.mfa.gov.sg/content/mfa/overseasmission/newyork/nyemb_statements/sixth_committee/2014/201410/press_20140913.html (accessed 20 March 2018).

[103] *Ibid*.

[104] *Ibid*.

[105] The EUSFTA was concluded on 17 October 2014 with its investment protection chapter initialled on 22 May 2015, see: European Union-Singapore Free Trade Agreement (2015) (EUSFTA) http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 (accessed 20 March 2018).

[106] *Ibid*, at Art. 9.25, Annex 9-C.

[107] *Ibid*.

[108] *Ibid*.

[109] Agreement to Amend the Singapore-Australia Free Trade Agreement ATNIF 9 (2017).

42. Article 29 of the Investment Chapter in the 2017 SAFTA Amendment Agreement now likewise requires that the above-mentioned documents are made available to the public. It goes further than the EUSFTA in requiring, at Article 29(2), ISDS hearings to be open to the public. Article 28(4) also commits parties to strive to ensure that any appellate mechanism they consider adopting provides for transparency of proceedings, similar to the transparency provisions established in Article 29.

43. These developments represent a marked change of position on part of Singapore. This comes as a surprise especially when one is to compare these developments in light of Singapore's comments to the Working Group II in relation to the Rules and the Convention.

44. While at first glance it may seem that Singapore remains unequivocally supportive of transparency, especially in light of this recent FTA, a closer examination reveals more to the story. Ultimately, the higher degree of transparency afforded under the EU-Singapore FTA, is balanced by the extensive scope of what may be redacted[110] that provide stronger protection to confidential information. This balance allows Singapore to retain its general position in support of transparency while still allowing the Republic certain degree of flexibility in what it determines to be confidential information that ought not to be disclosed.

45. Nevertheless, Singapore remains quite distinct from other Asian countries in its general support for transparency. This can be attributed to the fact that several problems that plague other Asian countries, contributing to their hesitation in supporting transparency, do not plague Singapore to the same extent. In terms of governance, Singapore's government has continually been ranked as the least corrupt government in Asia.[111] This crystallises the investor confidence which other developing countries still struggle with.

V. A 'MAURITIUS CONVENTION APPROACH' FOR ISDS REFORM – DESIGNING AN INVESTMENT COURT SYSTEM

46. In July 2016, the UNCITRAL Commission approved a proposal for a mandate that was vigorously pushed by the European Commission, EU

[110] In particular, Arts. 4(5) to (6) of the Annex 9-C of the Free Trade Agreement between the European Union and the Republic of Singapore (not entered in forced) are *in addition* to Art. 7 Exceptions provided under the UNCITRAL Transparency Rules.

[111] See survey conducted by Transparency International in 2017, https://www.transparency.org/news/feature/corruption_perceptions_index_2016 (accessed 20 March 2018).

member States, Canada, and Mauritius. The approved mandate for the UNCITRAL working group is very broad, asking it to:

(i) identify and consider concerns regarding investor-State dispute settlement;

(ii) consider whether reforms are desirable in light of the identified concerns; and

(iii) to develop and recommend any relevant solutions, if the working group were to conclude that reform is desirable.

47. While the mandate does not explicitly mention an ICS, this court is, at present, the European Commission's preferred solution, given that the ICS is now being pursued by the EU in all its trade agreements and that "*anything less ambitious, including coming back to the old Investor-to-State Dispute Settlement, is not acceptable*".[112] It is no coincidence that UNCITRAL was selected as the forum for negotiating an ICS. This is due to the positive experience the Commission had with the drafting of the UNCITRAL Transparency Rules for ISDS proceedings. After all, the proponents of an ICS would also have to address the same difficulty faced by the drafters of the Mauritius Convention, i.e. how to remove the jurisdiction of the arbitral tribunals which would be set up on the basis of the existing 3,000 over BITs without having to re-negotiate each of them. The operationalisation of this approach is discussed in a detailed report by Gabrielle Kaufman-Kohler and Michele Potestà from the Center for International Dispute Settlement, Geneva.[113]

48. The appeal of applying this "Mauritius Convention approach" to a push for ICS is understandable. As observed by Professor Nikos Lavranos, Secretary-General of European Federation of Investment Law and Arbitration:

> *"The Mauritius Convention allowed for an extraordinarily fast negotiation process and contains a flexible opt-in menu for the contracting parties. Accordingly, States are free to select whether or not the UNCITRAL Transparency Rules will also apply for disputes initiated under pre-existing BITs or only for BITs which entered into force after the Transparency Rules become applicable. In addition, the unusual low requirement of only 3 ratifications for the entering*

---

[112] European Commission, "A New EU Trade Agreement with Japan", (European Commission 1 July 2017) http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.PDF (accessed 20 March 2018).

[113] Kaufmann-Kohler and Potesta, (n 2).

> *into force of the Mauritius Convention is another feature, which allows for turning a negotiated text into a formally applicable legal instrument*."[114]

49. However, enthusiasm for applying such an approach to the notion of an investment court must be tempered. A 'flexible opt-in menu' for Contracting States allows them to make reservations. In addition, the Convention only has a retroactive scope of application, leaving open what States will do in future treaties.[115] Further, realities on the ground must be taken into account, namely, the tepid reception to an Investment Court System by the world at large, including Asian States.

50. The recent European Court of Justice ruling on 15 February 2017 in relation to the European Commission's competence regarding the EUSFTA has created further complications. Judges found that the competence for dispute settlement provisions in EU FTAs is mixed, which means that all member States also must sign and ratify such provisions. This would also apply to any new Mauritius Convention-type agreement establishing the Investment Court System to make it applicable for all EU trade deals. More recently, Belgium requested an opinion from the court on whether – and if so, to what extent – the proposed bilateral investment court system that is to be included in CETA is compatible with EU law. If the court were to find it is not compatible, the European Commission might have to give up the Investment Court System altogether.

51. It is notable that after "*18 intense and constructive negotiating rounds and several meetings at technical and political levels*",[116] the EU has been unable to persuade Japan to adopt an Investment Court System in their forthcoming treaty as Japan would prefer to continue with the traditional ISA regime.[117] China prefers to "*carefully examine the pro and cons of any proposal in a pragmatic but cautious manner in order to find the most appropriate solution to address such problems without bringing any new*

---

[114] Nikos Lavranos, "The First Steps Towards A Multilateral Investment Court (MIC)", EFILA Blog (2017), https://efilablog.org/2017/07/19/the-first-steps-towards-a-multilateral-investment-court-mic/ (accessed 20 March 2018).

[115] Stephan Schill, "The Maritius Convention on Transparency: A Model for Investment Law Reform", EJIL: Talk (2015), https://www.ejiltalk.org/the-mauritius-convention-on-transparency-a-model-for-investment-law-reform/ (accessed 20 March 2018).

[116] European Commission, "Key Elements of the EU-Japan Economic Partnership Agreement", (European Commission 6 July 2017), http://europa.eu/rapid/press-release_MEMO-17-1903_en.htm, (accessed 20 March 2018).

[117] Irina Angelescu, "EU-Japan Agreement: Good News on the Long Road to a Deal", European Council on Foreign Relations, (2017) http://www.ecfr.eu/article/commentary_eu_japan_agreement_good_news_on_the_long_road_to_a_deal_7214. (accessed 20 March 2018).

systemic challenges".[118] The EUSFTA eschews an Investment Court, preferring for roster of arbitrators in contrast to other EU regional agreements such as CETA and EUVFTA – a position that could be partly motivated by a desire to give deference to the Singapore International Commercial Court (an internationalised domestic court that has been observed to be close to meeting all the pre-conditions of a permanent investment court of appeal that can address the criticisms against ISA).[119] UNCTAD reports that thirty-seven international investment agreements were concluded in 2016, almost all of which contain traditional ISA provisions. These facts, coupled with a solitary instance of support for the Investment Court System in the form of CETA seem indicative of a broader global preference for the traditional ISDS system in the status quo.[120]

52. It should be noted, parenthetically, that India stands out as an exception in this regard. This is evidenced both in the language of its Model BIT and its recent remarks to the UNCITRAL Secretariat in July 2017. India's model BIT text does envisage the creation in the future of (a) a bilateral or multilateral appellate mechanism for ISA awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court. Article 29, as quoted in above, includes reference to a mechanism in future under a multilateral agreement. In its remarks to the UNCITRAL Secretariat in July 2017, India stated, in relation to the investment court system, that it "*welcomes the move to have discussions and deliberations on the proposal*".

53. In light of the above, it would be prudent for international efforts to be focused first on maximising the number of State signatories to the Mauritius Convention to give the transparency rules widespread effect in investor-State arbitration.

VI. CONCLUSION

54. The UNCITRAL's work on the Rules on Transparency and the Mauritius Convention has ultimately shaped a global acknowledgement of

---

[118] United Nations Commission on International Trade Law, Settlement of Commercial Disputes, 50th session, (3-21 July 2017) UN Doc A/CN.9/918/Add.1' (2017).

[119] Sundaresh Menon, "The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions", 5(2) ASIAN JOURNAL OF INTERNATIONAL LAW 219, 232-236 (2015).

[120] Anthea Roberts, "The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds", EJIL: Talk (2017), https://www.ejiltalk.org/the-shifting-landscape-of-investor-State-arbitration-loyalists-reformists-revolutionaries-and-undecideds/ (accessed 20 March 2018).

the need for transparency in investment arbitration – even if not all States move towards it in a uniform pace, let alone towards a universal standard. The normative pull the UNCITRAL's work has generated has clearly influenced the shift in attitudes amongst Asian States, which merely less than a decade ago had been firmly rooted against transparency. These three States recognise the value of transparency in ISDS, though given the breadth of what it might entail, are cautious with their implementation into State practice. The transparency provisions in their investment treaties seek to ensure a balance exists between transparency and other competing considerations. This change, brought about by instruments negotiated over a short span of time is definitely a step in the right direction.

55. Even so, the work is in progress and care must be taken to ensure that the Rules on Transparency and the Mauritius Convention are not adopted in a piecemeal fashion such as to lead to an increasingly pronounced two-track system: a transparent track and a non-transparent one. That, too, would be a change in the investment treaty landscape, although not the kind of systemic change that those who seek greater transparency are aiming for.[121] Eventually, some parity must also be sought with International Commercial Arbitration. For instance, Gary Born notes, there is an inconsistency in enforcing transparency for small ISDS cases with limited public interest while large, commercial arbitrations between public companies and government bodies, which may affect a much broader sector of the community, are permitted to remain confidential.[122]

---

[121] N. Jansen Calamita and Ewa Zelazna, "Transparency in Investor-State Arbitration: Understanding Asia's Ambivalence", in *The Asian Turn in Foreign Investment*, [Chester Brown and Mahdev Mohan (eds.) 2018] (Cambridge University Press).

[122] Born, (n 56), at 2829.