SUSTAINABLE INVESTMENT THROUGH EFFECTIVE RESOLUTION OF INVESTMENT DISPUTES—IS TRANSPARENCY THE ANSWER?

*By Cornel Marian**

ABSTRACT

In investment arbitration, procedural rules that incorporate broad transparency provisions subject both sides of an investment dispute to public scrutiny and, as a consequence, establish an equitable and sustainable framework for investors to seek a remedy against respondent-states. In this day and age, procedural transparency in investment arbitration cannot be ignored. The article draws on the arguments advanced by various non-profit organizations, primarily in North-America, demanding public accountability in investment arbitration. The article deduces three pillars that support investors' needs in resolving investment disputes against respondent-states. First, broad procedural rules facilitate the enforcement of an award since transparent procedural principles are already incorporated in the ICSID Arbitration Rules, which incidentally also offer, pursuant the ICSID Convention, the most favorable framework for enforcement of awards against a state. Second, relying on such transparent procedural rules enhances the level of credibility that is necessary for the enforcement of a foreign award, which leads to the third point—that of justification—inherent in the public relations benefits that mirror the resolve of the investment arbitration proceedings. The article contextualizes these pillars through a review of the dispute resolution mechanisms in the three major model investment agreements, which reveal that the sustainable framework, despite the difficulty of implementing it, is shaped by transparent procedural rules that are no longer an aspiration but a reality.

Keywords: sustainable development, international investment arbitration, transparency, procedural transparency, bilateral-investment treaties, investor-state arbitration.

Introduction

Corporate entities derive a considerable benefit from resolving their investment disputes in arbitration proceedings pursuant to transparent

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procedural rules. Inadvertently, these broadened rules provide a benefit to either an investor or to a respondent-state. At times, they are also likely to increase the costs of arbitration with unpredictable outcomes for the parties. However, even in those instances when high costs may prejudice the parties' interests, opting for procedural rules that provide restrictively for transparent resolution of the investor-state disputes is warranted.

The argument is simple. There is a justifiable interest in recognizing that investor-state arbitration differs considerably from traditional commercial arbitration where the parties choose arbitration to protect their business relationship. In investor-state arbitration, the relationship between the investor and the state, on the one hand, and the public interest, on the other hand, mandate that procedural rules on confidentiality be relaxed so as to permit "some" participation from the public on issues that the parties may not choose to take up but affect long-term interests of the public. When it comes to the interests of the public and long-term costs being often ignored in favor of short-term gains by contractual business parties, environmental concerns are often overlooked without the direct publicity and the open participation by the public. As a result, accounting for environmental concerns, even when the parties have not raised the issue, has been at the forefront of the initiative to broaden transparent provisions of the arbitration rules.

To the same degree, corporate entities—especially small corporations—have much to gain from developing a strategic plan to arbitrate a dispute with a degree of openness. "Failure to consider environmental and sustainable development goals" is the driving interest in third-party participation in investor-state arbitration: ignoring these interests is simply not an option.[2] This paper discusses the elements of transparency provisions in procedural rules (section 1), analyzes the interests in the debate (section 2), delineates the environmental and sustainable goals in the debate, which serve as the starting point as

[2] Methanex Corp. v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, (NAFTA Ch. 11 Arb. Trib. Jan. 15, 2001) para. 6 [hereinafter *Methanex Amici* Decision](where the *amici* argued that in *Metalclad v. Mexico* the tribunal did not consider these important issues and that there was an increased urgency to do so).

delineated in the *Methanex* decision, (section 3), reviews the benefits of transparent provisions from recent investor-state decisions (section 4) and contextualizes the discussion within the parameters of three model investment arbitration agreements (section 5). Better be open—is this paper's message to investors, even when the arbitration system is not all that conducive to transparently resolving an investment dispute.

1. Steps to Resolving a Dispute Arising from an Investment

A corporate party seeking to invest in a state would ordinarily have a myriad of obstacles to overcome before it can effectively operate in a foreign jurisdiction. From regulatory and administrative challenges, turning a profit requires a degree of political stability. There is all too often a discrepancy between promises made by a state and intervening circumstances. When investing in foreign markets, the risk that a dispute would arise from these is very high. Much of this risk may be curbed with risk insurance—political or otherwise.[3] For everything else, there is international arbitration.[4]

When the risk of litigation is too great and impossible to cover with insurance, there is the option of suing the state that has benefitted from the investment but later rescinded on its obligations. Investment arbitration is one such remedy, which although it has been in existence for centuries, it has enjoyed considerable attention since 2001 when bilateral investment arbitration treaties became prevalent and expressly included dispute resolution provisions that disputes between an investor and a state shall be resolved by arbitration.

The exposure of states—developing and developed countries alike—to large claims brought by individual investors prompted an investigation of the confidential restrictions in investor-state arbitrations. Just as the concept of sustainable development focuses on "development that meets

[3] *See e.g.*, Convention Establishing the Multilateral Investment Guarantee Agency (1985, as amended Nov. 14, 2010), 24 I.L.M. 1598

[4] Political-risk insurance only shields the investor from some risks. Note that investor-state arbitration is not "intended as an insurance vehicle for all negative impacts of state actions or business events on a foreign investor." Methanex Corp. v. United States, Amicus Curiae Submission by the International Institute for Sustainable Development, (NAFTA Ch. 11 Arb. Trib. March 9, 2004) para. 3

the needs of the present generation without compromising the ability of future generations to meet their own needs,"[5] procedural transparency in investment arbitration guarantees that decisions reached by arbitral tribunals are sound for the development of legal resources to secure and serve the needs of future generation. In terms of individual provisions, transparent provisions include that: (1) a tribunal's decision/award be made public, (2) public parties enjoy unhindered access to the notice of arbitration—the document that commences arbitration proceedings, (3) public parties have access to oral hearings, and (4) similar access to documents, and (5) interested parties be given an opportunity to comment.[6]

These five sweeping provisions are at the heart of the debate for greater transparency and the recent revision of the UNCITRAL rules have relaxed some of the procedural rules.[7] For example, the new UNCITRAL Arbitration Rules that went into effect in 2010 expanded the confidential nature of the arbitration award from "[t]he award may be made public only with the consent of both parties"[8] to

> *[a]n award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.*[9]

So, how is this debate relevant for companies seeking to invest in a foreign jurisdiction? Or, better yet, what is there to gain for a company from

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[5] World Commission on Environment and Development, *Our Common Future: The Report of the World Commission on Environment and Development* (Oxford: Oxford University Press, 1987) [*Brundtland Report*], at ix. *See also* United Nations General Assembly, "Process of Preparations of the Environment Perspective to the Year 2000 and Beyond," GA Res. 38/161 Para. 8 (1983)(setting the parameters for the scope of the inquiry).

[6] International Institute for Sustainable Development and Center for International Environmental Law, Revising the UNCITRAL Arbitration Rules to Address Investor-state Arbitrations, Revised Version-December 2007, at: http://www.iisd.org/pdf/2008/investment_revising_uncitral_arbitration_dec.pdf (Last access June 20, 2011).

[7] *Compare* Art. 34 of the UNCITRAL Arbitration Rules (2010) *with* Art. 32 of the UNCITRAL Arbitration Rules (1976).

[8] Art. 32 of the UNCITRAL Arbitration Rules (1976).

[9] Art. 34 of the UNCITRAL Arbitration Rules (2010).

understanding this debate that takes place in the legal community and in the diplomatic circles?

2. Why Should Businesses Care How Investment Disputes Are Being Resolved

To put it bluntly: it is all a matter of costs. An investor is obliged to understand the debate on transparency in arbitration proceedings because the issues arising from this debate affect the investor's legal costs, exposure to litigation risk and, most importantly, the potential for continuing business in a foreign jurisdiction. In fact, a company seeking or currently operating abroad has much to benefit from capitalizing on transparent approaches to resolving disputes.

This paper draws on two compelling interests that are seemingly at odds with each other but which are inherent in the definition of "sustainable" for international arbitration procedure.[10] First, these initiatives are necessary to reinforce noble principles that would modify the currently unacceptable *status quo*. Second, these ideals need to respond, fit and account for the "workings of the world."[11] Complex and sophisticated as they are, the "workings of the world" are a primary target of this discussion. The noble principle of "transparency" and "the real world," involving third-parties to bolster one's case because the "interested parties" has an interest in the dispute may certainly sound appealing.[12] One needs to only consider that an opposing party may do the same and submit multiple submissions from other interested more powerful third-parties, or that the tribunal shall review all these submissions at an increased cost to the parties that the advantage of following transparent provisions becomes less than evident.

Yet, before one succumbs to the polemic responses of "opening the floodgates",[13] it is noteworthy that in the few cases that the tribunal ruled

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[10] *See* Thomas Wälde, 'Investment Arbitration and Sustainable Development: Good Intentions – or Effective Results' (2006) *Transnational Dispute Management* v. 3:5, 2.

[11] *Ibid.* at 1-2. *See also* Markus Gehring & Andrew Newcombe, 'An Introduction to Sustainable Development in World Investment Law' in Marie-Claire Cordonier et al. (eds.) *Sustainable Development in World Investment Law* (Kluwer 2011) 3-11, 5.

[12] *See* Eugenia Levine, '*Amicus Curiae* in International Investment Arbitration: the Implications of an Increase in Third-Party Participation' (2011) *Berkley Journal of International Law* 29:1, 102.

[13] *See generally Methanex Amici* Decision, at para. 6.

that third-parties could contribute, these issues were manageable. These issues were effectively handled by tribunals with a due regard to costs and the interests related to the environment and sustainable interests.

3. *Methanex*: Environment and Sustainable Development Shaping Procedural Arbitration Rules

The debate for broad procedural transparency rules, as a whole, commenced in the context of ensuring that the environmental interests and the goals for sustainable development are fully accounted. In fact, the *Methanex* arbitration was the first case where it has become clear that issues pertaining to "environment and sustainable goals" are likely to come within the realm of investment arbitration, even when the parties do not plead these issues.

Reviewing an investor-state dispute under NAFTA and pursuant to the UNCITRAL Rules, the *Methanex* tribunal ruled for the first time that interested parties or *amicus curiae* can participate in arbitration proceedings.[14] The case arose from California's ban of methyl tertiary-butyl ether (MTBE). The Canadian investor, Methanex corporation, was a premier producer of methanol – a key ingredient of MTBE. *Methanex* argued that the California's executive order banning MTBE violated the provisions of NAFTA on expropriation and the fair and equitable treatment of investors and that it was unduly influenced by Methanex's competitor Archer-Daniels-Midland (ADM), the principal producer of ethanol in the United States, through campaign donations to the California Governor.[15]

Chaired by VV Veeder QC, the arbitral tribunal balanced the interests of the parties using Article 15(1) of the UNCITRAL Rules to permit third-

[14] Methanex Corp. v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, (NAFTA Ch. 11 Arb. Trib. Jan. 15, 2001). *See also* Methanex Corp. v. Untied States, Final Award, 44 I.L.M. 1345 (2005)(NAFTA Ch. 11 Arb. Trib. 2005). *See also* Nathalie Bernasconi-Osterwalder, 'Transparency and Amicus Curiae in ICSID Arbitrations', in Marie-Claire Cordonier et al. (eds.) *Sustainable Development in World Investment Law* (Kluwer 2011) 191-207, 195.

[15] Methanex Corp. v. United States, Final Award, (NAFTA Ch. 11 Arb. Trib. Aug. 3, 2005)[hereinafter Methanex Final Award].

parties to submit *amicus* briefs in support of the United States.[16] The tribunal reasoned:

> *These submissions were expanded in the Institute's Final Petitions. It was argued that there was an increased urgency in the need for amicus curiae participation in the light of the award dated 30th August 2000 in Metalclad Corporation v. United Mexican States and an alleged failure to consider environmental and sustainable goals in NAFTA arbitration.*[17]

The submissions, made by IISD and EarthJustice, sought to convince the tribunal that the regulations implemented by California (and by extension the United States) were consistent with the sovereign powers of a state to regulate and did not amount to expropriation.[18] The third-parties overwhelmingly argued in favor of the regulatory regime in California, introducing somewhat new issues that were not submitted by the parties.[19]

IISD, primarily, reasoned that there is an inherent need "to take account of the legal principles of sustainable development."[20] The Institute drew on the inherent principles found in the framework of World Trade Organization (WTO), which although it provides for state-to-state arbitration, it expressly adopts sustainable development and environmental protection as key objectives stated in the Preamble to the Agreement of Establishing the WTO.[21]

At the end, the investor did not prevail against the United States. The tribunal reasoned that claimant invited the Tribunal "to accept a conspirational thesis" and urged the Tribunal "to resort to inference."[22] The Tribunal, however, went further to state that inference is appropriate only

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[16] *Methanex Amici* Decision paras. 12-15 (Claimant argued that the confidentiality provisions of the UNCITRAL Rules prevent participation of *amici curiae* briefs, that the tribunal lacked jurisdiction to add a party to such proceedings and that the public interest is inherently incorporated in NAFTA, not in the procedural rules).

[17] *Methanex Amici* Decision para. 5 (emphasis added).

[18] Methanex Corp. v. United States, Amicus Curiae Submission by the International Institute for Sustainable Development, (NAFTA Ch. 11 Arb. Trib. March 9, 2004) paras. 7-12 & 79-96.

[19] *Methanex Amici* Decision paras. 12-16.

[20] Methanex Corp. v. United States, Petitioner's (IISD'S) Final Submissions Regarding the Petition of the International Institute for Sustainable Development to the Arbitral Tribunal for Amicus Curiae Status, (NAFTA Ch. 11 Arb. Trib. Oct. 16, 2000) para. 6

[21] *Ibid. See also* Marakesh Agreement Establishing the World Trade Organization, Preamble (1994).

[22] *Methanex* Final Award Part III-Chapter B para. 56.

when "firmer evidence is not available."[23] In this case, the objective framework for the legislative process in California made the argument for an inference "untenable."[24] In that respect, the claimant was not successful against the United States and the arbitral tribunal was careful in the reasons on which it relied, in the end, to find the United States not liable.

The lessons from *Methanex* are also appropriate to other cases where environmental and sustainable development issues were not the center of the reasons for third-party intervention. In *AES v. Hungary*, the parties (but primarily the claimants) had to respond to the submissions made by the European Commission that sought to appear as *amicus curiae*. The European Commission argued that the Hungary's original legislation violated EU law, so that the newly-adopted measures brought Hungary's legislation to correspond with EU norms. EC's argument followed that Hungary was not liable for bringing its rules to conform to European competition rules. On this issue alone, the tribunal ruled that EC law "once introduced in the national legal orders … is part of these legal orders."[25] Thereby, a Respondent-state cannot invoke domestic law, which incorporates EU Law "as an excuse for alleged breaches of international obligations."[26]

In following on *Methanex*, third-party submissions in *AES v. Hungary* underline a key risk of which an investor needs to be aware. In both of these cases, the claimants were successful in responding to the party that appeared as amicus curiae, as the tribunal clearly ruled in favor of claimants on these issues. The problem, however, is that in both of these cases claimants did not recover damages as the Respondent-state did not breach any relevant provisions of the Energy Charter Treaty and NAFTA respectively. In all, the claimants may have won the battle of amicus curiae but they certainly did not win the war of recovering damages against the state (Hungary and the United States, respectively, prevailed).

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[23] *Ibid.* para. 57.

[24] *Ibid.*

[25] AES v. Hungary, Final Award, ICSID Case No. ARB/07/22 para. 7.6.6 (commonly referred to as AES II).

[26] *Ibid.*

The two cases discussed above reveal how important it is to account for effective submissions from third-parties, first in the context of environmental and sustainable development issues and later going even beyond those issues. Three elements are deemed to shape the costs of openness: (1) opening investment disputes to be debated and be "politicized" and (2) higher cost on the parties to defend and for the tribunals to adapt to broader provisions.[27] The risks associated with higher costs, increased litigation and defending oneself in the public forum are all palpable factors that an investor needs to evaluate when seeking to arbitrate a dispute and chose upon a forum to commence proceedings.

4. Three Pillars Justifying Transparent Procedural Rules

So what makes transparency in international arbitration a desired or, better yet, a necessary goal for private investors? The answer is that the long-term costs of added procedure are justified due to three factors.

Procedural transparency ensures that three systemic goals are achieved: securing the *enforcement of the award*, obtaining *credibility* for arbitral proceedings and minimizing future risks through *justification* of the arbitral process. As discussed in the previous section, these interests are essential in the context of protecting environmental and sustainable development goals but they extend far beyond these interests.

4.1. Securing Enforcement through Transparent Rules

The purpose for arbitrating an investment dispute is to recover damages for wrongful conduct of the estate: *enforcement* of the final decision is the primary goal for the aggrieved investor. The dual nature of the ICSID regime underlines the structure of the investment regime that offers an investor an avenue against the state. First, the ICSID regime provides the most favorable system for enforcing an award against a state, as the enforcement mechanism recognizes that the award is binding without

[27] *See* Noah Rubins, 'Opening the Investment Arbitration Process: At What Cost, for What Benefit' (2006) *Transnational Dispute Management* 2006:3, 3. Noah Rubins expressly refers to the added costs of revising institutional rules as an additional unexplored cost. *Ibid.* at 4-5. This cost is likely to be incurred more by tax-payers rather than litigating parties. Moreover, as ICSID has already changed the rules in 2006, the cost that Mr. Rubins referred to has already been inherently adopted.

recourse to a national court.[28] The ICSID system also provides the broadest mechanisms for enforcing arbitral awards rendered in favor of private claimants against the states, where the losing party may only apply for interpretation, revision or annulment of the award.[29]

Second, the ICSID Rules have already implemented broad transparent provisions for investor-state proceedings. The ICSID Mechanism was established in 1965 when the goals of environmental protection and sustainable development did not come at the forefront of international development.[30] Instead, the ICSID Rules provide the greatest degree of transparency in procedural mechanisms as they permit submission of *amicus curiae* briefs and publication of awards "excerpts of legal reasoning of the Tribunal."[31] In fact, it has become common practice that ICSID arbitration awards are made available to the public.[32] Moreover, ICSID Rules provide that the tribunal "unless either party objects … [and] after consultation with the Secretary-General … may allow other persons … to attend or observe all or part of the hearings, subject to appropriate logistical arrangements."[33] In all, the ICSID Regime offers the most transparent provisions in arbitration rules.[34]

These double features of the ICSID rules guarantee the investor to have the *greatest degree of enforcement* subject to the greatest degree of procedural transparency. Although both the New York Convention and the ICSID Convention provide guarantees for enforcement, the ICSID Convention provides narrower grounds for recourse against the arbitral

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[28] International Centre for Settlement of Investment Disputes, Disputes, Convention, Regulations & Rules, 17 U.S.T. 1270 , Art. 53(1) (1965)[hereinafter ICSID Convention].

[29] *See* Yas Banifatemi, 'Defending Investment Treaty Awards: Is There an ICSID Advantage?' in Albert Jan Van den Berg (ed.) *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Conference Series, v. 14 318-20)(comparing the ICSID and the New York Convention regimes)

[30] *See* ICSID Convention, Preamble.

[31] ICSID Arbitration Rules, Art. 48(4)(2006).

[32] *See e.g.*, The Investment Treaty Arbitration Project at the University of Victoria, http://ita.law.uvic.edu.

[33] ICSID Arbitration Rules, Art. 32(2)(2006).

[34] *See generally* World Bank-International Centre for Settlement of Investment Disputes, Suggested Changes to the ICSID Rules and Regulations, Working Paper of the Secretariat (May 12, 2005).

award than those found in the New York Convention. Taking advantage of the enforcement mechanisms available under the ICSID Convention would almost certainly benefit the claimants as the mechanisms in place are to guarantee that investors have a remedy against a state. It is rather difficult to assess the track record of claimants when enforcing final awards against states rendered according to the rules of arbitration institutes with strict confidential procedures in safeguarding awards, although with the help of the New York Convention, this track record is still very good.[35]

4.2. Raising Credibility by Avoiding the Traps of Operating in a Non-transparent Medium

The second advantage of adopting broad procedural mechanisms is *credibility*. An arbitral tribunal's decision—whether favorable or not to the claimant—receives *credibility* when it is enforced publicly and it is reasonably open for the public to comment. It is quite understandable that a claimant would be wary that the public at large may be swayed against an award in a public discourse.

With its foundations based in public international law and strong treaties, international arbitration provides the sole solid framework for an investor to seek compensation against the wrongful conduct of a state. *Methanex* underlined the importance of the public to comment on the issues that affect them directly or directly. By opening up the issues to public comment, even if doing so restrictively, the tribunal ensured that those issues were heard. Ironically, in *Methanex*, the third-party participation was directed against the Canadian claimant by a Canadian institute in support of the Californian regulation.

Even in instances where the state loses, publicity of the award ensures that the public is, at least, aware of the issues mandating the payment of damages. Imagine the risk to an investor in the event that the state pays the award in secret and later this information comes to light. *Kardassapolous and Fuchs v. Georgia* illustrates the importance of relying

[35] *Ibid.* at 322.

on *credible*, even if seemingly feeble, transparent norms and the dangers of side-stepping them. [36]

In *Kardassapolous/Fuchs*, a Greek and an Israeli investor brought a claim against Georgia in a dispute arising from the construction of a transit corridor connecting the Caspian oil and gas reserves from Azerbaijan to the Black Sea.[37] In March 2010, the arbitral tribunal found Georgia liable for having violated the Energy Charter Treaty (ECT) provisions of expropriation; thereafter, awarding Ioannis Kardassapolous and Ron Fuchs an award for an estimated USD 98 million.[38] After the award was issued, Georgia changed counsel and requested for the annulment of the award, on the limited grounds permitted by the ICSID Convention.[39] To the investor, the proceedings that commenced in 2005 seemed to have dragged for ages.

But if these proceedings seemed to have lasted an eternity, consider this. Earlier this year, the Israeli investor Ron Fuchs was arrested in Georgia on grounds that it has attempted to bribe Georgian officials in the amount of 7 million to secure enforcement of the award. In a matter of three months, Georgian authorities sentenced Fuchs to serve 7 years in jail.[40] The ICSID annulment proceedings were suspended because Fuchs is currently serving his sentence in Georgia and his legal team has launched numerous charges of entrapment and violations of human rights.

Fuchs' story stands as a cautionary tale. In side-stepping the arbitration regime, as feeble and frustrating as the regime may appear to

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[36] Ioannis Kardassapolous v. Georgia, ICSID Case No. ARB/05/18 and Ron Fuchs v. Georgia, ICSID Case No. ARB/07/15 ran concurrently and the proceeding s were heard by the same tribunal. *See* Kardassapolous and Fuchs v. Georgia, Final Award, ICSID Case No. ARB/05/18 and ARB/07/15 (March 3, 2010) para. 12.

[37] *Ibid.* paras. 69-76.

[38] The amount is estimated at USD 98 million. *See generally* 'Ron Fuchs sentenced to seven years' (2011) *Global Arbitration Review* v. 6(2) at 8. On 3 March 2011, the ICSID tribunal awarded 45 million dollars to each of Mr. Kardassapolous and Mr. Fuchs, plus the costs of arbitration and litigation and interest at LIBOR rate until award is paid. Georgia has not since paid the award and the proceedings are stayed during the incarceration of Mr. Fuchs. *See also* Kardassapolous and Fuchs v. Georgia, Final Award, ICSID Case No. ARB/05/18 and ARB/07/15 (March 3, 2010).

[39] Ioannis Kardassapolous and Ron Fuchs v. Georgia, Decision of the Ad Hoc Committee on the Stay of Enforcement of the Award, ICSID Case Nos. ARB/05/18 and ARB/07/15 paras. 2-4.

[40] 'Ron Fuchs sentenced to seven years' (2011) *Global Arbitration Review* v. 6(2) at 8.

be, Fuchs has undertaken a significant risk that landed him in prison. The relatively transparent ICSID regime provided to the investor the only guarantee of enforcement: in the event that Georgia did not seek to abide by the ICSID award, it would have been subject to sanctions by the World Bank and the international community. The bottom line is that it is easier even if the public roars against the award, to enforce an award against a state when the award is made public and the public is given an opportunity to react to this award than when the award is kept secret. At this point, Fuchs may *only* lay down a strong defense of entrapment and pursue claims against Georgia for violations of human rights by having these issues scrutinized in public.

As Fuchs' case demonstrates, the legal battles in ICSID cases are not for everyone. Costs are a critical factor when selecting the proper arbitration forum but in those instances when litigation costs appear daunting, relying on the seemingly imperfect ICSID framework would be *justified* considering long-term costs.

4.3. *Justification*: Operability in Foreign Jurisdiction and Enforcement of Final Award

Justification relates to medium- and long-term benefits, including operability in the foreign jurisdiction and enforcement of the award. In the context of the procedural debate, legal practitioners often criticize proponents of transparent rules on the grounds that these conflate transparency in procedure with transparency in corporate governance; the latter being "understood to increase predictability and efficiency" and is universally embraced.[41]

It is inherently difficult to think of long-term operations in a country once the country's regulatory regime has contributed or caused expropriation or a violation of a fair and equitable treatment. When enforced, *all* arbitration awards, even if obtained in confidential proceedings, become public unless there is an intervening interest under the court rules of the domestic court provide otherwise. The New York Convention Art. IV requires a duly authenticated original award to be

[41] Rubins (n 14) at 2.

submitted to the appropriate court when seeking the enforcement of the award.[42] In accordance with national legislation that implements the provisions of the New York Convention, these provisions usually become binding and the award often becomes public unless other intervening issues arise.[43]

The key considerations, which would further justify any of the short-term costs for the investor, have to do with publicity: publicity of the cause, publicity of the parties and, of course, publicity for the investor. Investors, as pointed out by arbitrator Mark Kantor, "would resist open proceedings, unless they saw a public relations benefit from that openness."[44] And, the public relations benefit for small and medium-size investors seeking recovery from a state is considerable.[45]

The "public relations" benefit ranges in relation to a business's scope and size and each issue that arises in the dispute. To this point, small investors are more likely to arbitrate as they are more likely than larger investors to be deprived of recourse against a state. "Smaller operations have fewer resources and can't simply shrug off the loss of assets": it is small operations that are obliged "to stand up and fight."[46] In doing so, these "small operations" shall require the mobilization of all resources, including a cost-benefit calculation of revving up the "public relations" factor.

5. Current and Proposed Procedural Mechanisms Found in Model Investment Arbitration Treaties.

As delineated above, there are considerable advantages to opting for a system of resolution that provides for transparent rules. The mechanisms

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[42] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. IV(1)(a), June 10, 1958, 84 Stat. 692, 330 U.N.T.S. 3. *See e.g.*, RosInvestCo UK Ltd. v. the Russian Federation, Final Award, SCC Arbitration V 079/2005, 12 September 2010. The award was made available as soon as the Russian federation challenged the enforcement of the award.

[43] *See e.g.,* Swedish Arbitration Act SFS 1999:116, Sect. 56.

[44] Mark Kantor, *The Transparency Agenda for UNCITRAL Investment Arbitrations*, at 6 (unpublished commentary).

[45] For a case study on how "disclosure of information" can be wielded both as a "positive and negative factor" in international commercial arbitration, *see* Isabel Corona, 'Arbitration Contextualized' (2011) *World Englishes*, vol. 30:1, 129-40.

[46] Ravider Casley Gara, 'International Arbitration: Investment Arbitration – the end of the boom?' (2007) *Chambers Magazine* v. 22 (quoting Kaj Hobér).

currently in place trigger broad and transparent provisions. Bilateral investment agreements commonly provide for ICSID arbitration. Even when a party to the investment (either the investor or the respondent-state) is not a member of the ICSID Convention, an investor may rely on the ICSID Additional Facilities Rules, which incorporate relatively broad transparency provisions.[47] Art. 39(2) of the ICSID Facility Rules provides considerable discretion to the arbitral tribunal, without the delineated grounds envisioned by ICSID Rule 37, which expressly includes the considerations that an ICSID Tribunal shall consider in order to permit third-parties to participate in such proceedings. [48]

Investors ought to be aware of initiatives that seek to offer broad transparency provisions, even beyond the institutional provisions adopted by ICSID. For starters, the United States adopted a model bilateral agreement in 2004, which provides for: (1) open hearings, (2) submissions be made public, (3) pleadings be available to the public, and (4) submission of *amicus curiae*.[49] The US Model BIT includes strict provisions for the definition of protected and confidential information. In fact, the bilateral agreement between the United States and Uruguay, which entered into effect in 2005, expressly adopts the transparency provisions of the 2004 BIT, so that Article 29 of the US-Uruguay BIT provides for these broad transparency provisions for conducting an investor-state arbitration.

The "best practices" for resolving disputes are found in yet another instrument advanced by the IISD, one of the two institutions lobbying the UNCITRAL to revise its arbitration rules to include broad transparency mechanisms. As its primary goal, the IISD Model Investment Agreement

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[47] *See e.g.*, ICSID Additional Facility Rules, Art. 2 (2006)(granting ICSID authority over a case where the investor has the nationality of, or the Respondent-state is, an ICSID Contracting state). *See also Ibid.* Art. 41(3)(offering a non-disputing party an opportunity to participate in arbitral proceedings) and Art. 39(2).

[48] *Compare* ICSID Additional Facility Rules, Art. 39(2) *with* ICSID Arbitration Rules, Rule 37(2)(2006). *See also* Meg Kinnear, 'Transparency and Third Party Participation in Investor-state Dispute Settlement', Making the Most of International Investment Agreements: A Common Agenda Symposium Co-organised by ICSID, OECD and UNCTAD (Dec. 12, 2005) at 3 ("Art. 39(2) of the ICSID Additional Facility Rules is more nuanced, giving the tribunal discretion to determine who will be present at hearings with consent of the parties").

[49] US Department of State, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, [hereinafter 2004 US Model BIT].

provides a "proposal of a more transparent, legitimate, and accountable system of investor-State dispute resolution."[50] Instead of the typical one-article provision for dispute resolution found in ordinary investment agreements, including bilateral treaties, the IISD Model Investment Agreement provides for the establishment of a "dispute settlement body" with a Council of the Parties and a Secretariat which would establish a standing a body of 35 panelists from which "all members shall be drawn."[51] It would also require that the parties exhaust domestic remedies[52] and that all documents, oral hearings be made public with amicus curiae submissions to be made possible under the provisions of Appendix A.[53]

Noteworthy is that Norway sought to implement many of these transparency mechanisms in 2007, which allowed for very broad provisions on transparency, but these efforts fell *understandably* short.[54] In fact, Article 21 of the 2007 Proposed Norway Model BIT went as far as to provide that the tribunal: (1) "*shall* make publicly available" all documents submitted to the tribunal, (2) "*shall* conduct hearings open to the public", (3) "*shall* have the authority to accept and consider amicus curiae submissions."[55] By placing mandatory provisions for arbitral tribunal to conduct transparent proceedings, these provisions of the Proposed Norway BIT went far beyond any proposed remedies found in the US and UK bilateral investment agreements, or even the IISD Model Agreement. Confronted with strong public criticism, Norway has abandoned its draft

[50] Malik Mahnaz, 'The IISD Model International Agreement on Investment for Sustainable Development' in Marie-Claire Cordonier et al. (eds.) *Sustainable Development in World Investment Law* (Kluwer 2011), 565-584, 566.

[51] International Institute for Sustainable Development, IISD Model International Agreement on Investment for Sustainable Development, Art. 40, April 2005.

[52] *Ibid.* Art. 45(B).

[53] *Ibid.* Art. 46.

[54] *See generally* Luke Eric Peterson, 'Norway proposes significant reforms to its investment treaty practices' (2008) *Investment Treaty News*, March 27, 2008.

[55] The Model Agreement between Norway and [country] for the Promotion and Protection of Investments, 2007 (emphasis added)[hereinafter the Norway Proposed Model BIT].

model BIT.[56] It was observed that "the feedback was so polarized that Norway 'decided that achieving a proper balance was too difficult.'"[57]

There are many reasons why Norway has failed to adopt a model BIT, especially in its dealings with countries, which traditionally oppose transparent provisions in the conduct of investment arbitration.[58] The work undertaken by CIEL and IISD, however, is quintessential for serving the instilling long-term solutions for developing states. As pointed out by Iowa professor Alexander Somek, there is a prevalent tendency in the United States, unlike in Europe, "to produce legal scholarship on moral high ground."[59] Non-profit organizations who are but an offspring of the legal theory emerging from law schools in North America attest to the level of initiative and structural reform necessary in the procedural mechanisms available for resolving arbitration disputes. If wielded effectively, these transparent procedures in investment arbitration *shall* serve as a great benefit to individual investors even when these protections are not available in bilateral treaties.

Conclusion

Sustainable development is not only about the important issues of how investment is secured and carried out. Sustainable development relates to the equally important issue of how a dispute arising from an investment shall be subsequently resolved. "Sustainable development" and "transparency" have become buzz-words in investment arbitration, whereas transparency in corporate practices needs to be distinguished from transparency in the conduct of investment arbitration.

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[56] Damon Vis-Dunbar, 'Norway shelves its draft model bilateral investment treaty' (2009) *Investment Treaty News*, June 8, 2009.

[57] *Ibid.*

[58] In 2009, Vis-Dunbar wrote that "Norway will consider agreeing to provisions on investor protection in the context of free trade agreements with India, China, the Ukraine and Russia." *Ibid.* As stated by Mark Kantor in the context of UNCITRAL, China and Russia tend to react negatively to propositions of expanding transparency provisions. Kantor (n 28) at 6 ("Who opposes? Well, there are lots, but Germany, France, Russia, Turkey and China for starters").

[59] Alexander Somek, 'The Spirit of Legal Positivism', (2011) *German Law Journal* 12:2 729-56, 730 & 752 (also characterizing European legal theory "to lack courage to challenge taboos").

Accounting for environmental interests and sustainable development were the driving mechanisms for securing third-party participation and broadening procedural rules in investment arbitration. This paper provides a novel approach in delineating the advantages for *investors* of carrying out arbitration through transparent procedure. These advantages, as delineated out by this paper, are derived from reducing operational costs, increasing public accountability and ensuring that any decision finally reached would adhere to regulatory, most importantly, environmental norms with long-term implications. Besides the "public relations" benefit that transparent rules offer, conducting arbitration by means of transparent rules also enables an investor to obtain a durable award that subjects it to public scrutiny and guarantees that regulatory any long-term interests are fully considered.

At this point, the ICSID system for resolving investment disputes has already incorporated procedural mechanisms that provide for broad provisions on transparency in arbitration procedure. The current system is not perfect. The debate, which started in the context of sustainable development, is now seemingly yielding to considerable interests that inadvertently drive up costs. Certain initiatives for ensuring transparent arbitration proceedings have been successfully advanced by North American NGOs and incorporated in the context of US bilateral relations with relatively stable economies in regions where the United States exerts considerable influence. These provisions are harder to implement universally, especially by other nations which confront different geopolitical objectives than the United States in their dealings with nations such as China and Russia. In light of these considerations, there are considerable advantages for investors to seek resolve of their investment disputes subject to transparent procedural arbitration rules. Investors ought to review these advantages even when the framework for resolving disputes does not expressly offer transparent mechanisms beyond those envisioned by ICSID.