

## **The Confidentiality and Transparency Debate Under Investor-State Mediation**

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### **Abstract**

As an important part of alternative dispute resolution, investor–state mediation is attracting increasing interest from the creators of investment treaties and institutional rules. Traditional mediation mechanisms are inherently confidential. Keeping mediation proceedings and related documents strictly confidential is crucial to successful mediation. However, investor–state disputes, which involve public interests, often do not allow for the strict confidentiality of traditional mediation. Rather, those involved in investor–state mediation face pressure to be transparent. To increase public acceptance and the perceived legitimacy of the investor–state mediation system, it is necessary to establish the right balance between confidentiality and transparency. The degrees of transparency in arbitration and mediation are not the same; there are many institutional differences in their transparency rules, such as those regarding public hearings, access to documents, and non-disputing party submissions. The degree of transparency of investor–state mediation should generally fall between the strict confidentiality of commercial mediation and the transparency of investor–state arbitration. Distinct from investor–state arbitration and its exceptions to transparency and confidentiality requirements, investor–state mediation applies confidentiality in principle, with appropriately expanded transparency exceptions to respond to the need for transparency. When constructing investor–state mediation transparency rules, it is necessary to consider many other factors, as there is no universally applicable optimal degree of transparency.

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## I. Introduction

In the context of investor–state dispute settlement (ISDS), mediation<sup>1</sup> is not new. Some institutions provide mediation rules for investment disputes, some of which have existed for years. Conciliation is provided for by the International Centre for the Settlement of Investment Disputes (ICSID) Convention and Conciliation (Additional Facility) Rules as a method parallel to arbitration.<sup>2</sup> As a mechanism complementing ISDS, mediation has rarely been used;<sup>3</sup> instead, investor–state arbitration (ISA) has been foregrounded. In the last decade, however, the use of investor–state mediation (ISM) has increased in the ISDS field, attracting growing attention from the creators of investment treaties and institutional rules. In terms of international investment agreements (IIAs), the Comprehensive Economic and Trade Agreement Between Canada and the European Union (CETA), the

<sup>1</sup> This article makes no distinction between conciliation and mediation. There is some controversy in the academic world concerning whether mediation and conciliation are identical. Some scholars believe that the differences between the two terms reflect conceptual differences. See Gabriele Ruscala, 'Latest Developments in Conciliation and Mediation in Investor-State Disputes' (2019) 16(63) *Revista Brasileira de Arbitragem* 98. Others believe that there is no clear boundary between conciliation and mediation and thus that they are interchangeable. See Michael E Schneider, 'Investment Disputes: Moving Beyond Arbitration' in Laurence Boisson de Chazournes, Marcelo G Kohen and Jorge E Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Brill 2012) 119. Recent treaties, such as the United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted on 20 December 2018, entered into force 12 September 2020) CN.154.2019.TREATIES-XXII.4 <[https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements)> accessed April 30 2020 and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (adopted in 2018, amending the Model Law on International Commercial Conciliation 2002) <[https://uncitral.un.org/en/texts/mediation/modellaw/commercial\\_conciliation](https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation)> accessed 30 April 2020), use the term 'mediation' with the understanding that the terms 'conciliation' and 'mediation' are interchangeable. Given these recent trends in international mediation rules, this article uses the term 'mediation' to refer to both mediation and conciliation and holds the view that the two terms can be used interchangeably, except in specific contexts where they denote two different procedures, such as under the International Centre for Settlement of Investment Disputes (ICSID). The Key 7 differences between ICSID conciliation and ICSID mediation can be found in ICSID, 'Background Paper on Investment Mediation' (July 2021) <[https://icsid.worldbank.org/sites/default/files/publications/Background\\_Paper\\_on\\_Investment\\_Mediation\\_Oct.2021.pdf](https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation_Oct.2021.pdf)> accessed 28 January 2022.

<sup>2</sup> The Conciliation Rules under the ICSID took effect on 1 January 1968. Article 33 of the ICSID Convention provides that conciliations be conducted and considered in effect on the date on which the parties consented to conciliation, except as the parties otherwise agree. The current rules came into effect on 10 April 10 2006. See ICSID Convention Conciliation Rules (adopted 25 September 1967, entered into force 1 January 1968, amended 10 April 2006) ICSID/15 <<https://icsid.worldbank.org/en/Pages/process/ICSID-Convention-Conciliation.aspx#%23%23>> accessed 30 April 2020.

<sup>3</sup> According to the ICSID, of the 728 cases registered since 1982, only 12 were conciliation cases, 10 (1.4%) of which were under the ICSID Convention, Regulations and Rules (entered into force 14 October 1966) and 2 (0.3%) were under the ICSID Conciliation (Additional Facility) Rules. See ICSID, 'Caseload: Statistics' (2019) 2019 (2) <<https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSI D%20Caseload%20Statistics%20%282019-2%20Edition%29%20ENG.pdf>> accessed 30 April 2020.

EU–Vietnam Investment Protection Agreement (EVIPA),<sup>4</sup> and the EU–Singapore Free Trade Agreement (EUSFTA)<sup>5</sup> are all examples of treaties providing incentives for investors to opt for mediation to resolve disputes.<sup>6</sup> At the institutional level, some new mediation (conciliation) rules reflect modern conceptions of mediation and its dynamics. In 2012, the International Bar Association (IBA) adopted the IBA Investor–State Mediation Rules.<sup>7</sup> The 2014 International Chamber of Commerce (ICC) Mediation Rules replaced the 2001 ICC Amicable Dispute Resolution (ADR) Rules (ICC: Legal Texts).<sup>8</sup> In July 2016, the Energy Charter Conference adopted the Guide on Investment Mediation of Energy Charter Treaty (ECT),<sup>9</sup> a document prepared to encourage investors and governments to consider voluntary mediation at any stage of a dispute. Later that year, the International Mediation Institute (IMI) Competency Criteria for Investor–State Mediators<sup>10</sup> came into effect. In 2018, the ICSID announced its fourth set of dispute resolution rules, incorporating the most extensive changes to date as well as proposing a new set of mediation rules.<sup>11</sup> The Convention on International Settlement Agreements Resulting from Mediation (Singapore Mediation Convention) provides a framework for the enforcement of mediated settlements.<sup>12</sup> These and many other incremental changes and developments have allowed investor–state mediation and conciliation to gain momentum, but none of them have had a significant impact on practice. Among the

<sup>4</sup> European Commission, ‘EU-Vietnam Investment Protection Agreement, Annex 9: Mediation Mechanism’ (*European Commission*, 18 June 2020) <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>> accessed 26 March 2022.

<sup>5</sup> Free Trade Agreement Between the European Union and The Republic of Singapore [2018] OJ L294/3 (EU-Singapore Agreement).

<sup>6</sup> Maria Beatrice Deli, ‘Transparency in the Arbitral Procedure’ in Andrea Gattini, Attila Tanzi, and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018) 54.

<sup>7</sup> International Bar Association Council, IBA Rules for Investor-State Mediation (adopted 4 October 2012) <[https://icsid.worldbank.org/sites/default/files/IBA%20Rules%20for%20Investor-State%20Mediation%20\(Approved%20by%20IBA%20Council%204%20Oct%202012\)\\_0.pdf](https://icsid.worldbank.org/sites/default/files/IBA%20Rules%20for%20Investor-State%20Mediation%20(Approved%20by%20IBA%20Council%204%20Oct%202012)_0.pdf)> accessed 30 April 2020.

<sup>8</sup> International Chamber of Commerce, ICC Mediation Rules (entered into force 1 January 2014) <<https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/>> accessed 30 April 2020.

<sup>9</sup> Energy Charter Secretar, Decision of the Energy Charter Conference: the Guide on Investment Mediation (19 July 2016) CCDEC 12 INV <<https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>> accessed 30 April 2020.

<sup>10</sup> International Mediation Institute, ‘IMI Competency Criteria for Investor-State Mediators,’ (19 September 2017) <<https://www.imimediation.org/wp-content/uploads/2017/07/IMI-IS-Med-Competency-Criteria625483FINAL-19-September-2016.pdf>> accessed 30 April 2020.

<sup>11</sup> The latest draft of the Mediation Rules can be found in International Centre for Settlement of Investment Disputes (ICSID), ‘Proposals for Amendment of the ICSID Rules’ (2020) ICSID World Bank Group Working Paper 4 (hereinafter ICSID Working Paper 4) <[https://icsid.worldbank.org/en/Documents/WP\\_4\\_Vol\\_1\\_En.pdf](https://icsid.worldbank.org/en/Documents/WP_4_Vol_1_En.pdf)> accessed 30 April 2020. This is the first set of institutional rules for ISM, released by the world’s leading arbitral institution for investment disputes.

<sup>12</sup> UN Convention on International Settlement Agreements Resulting from Mediation (n 1).

commonly perceived problems and key obstacles to facilitating access to mediation<sup>13</sup> is the tension that remains between transparency and confidentiality under ISM.

Many scholars argue that the confidentiality associated with mediation could pose a threat to transparency, which is crucial to ISDS.<sup>14</sup> Strict confidentiality is one of the most important attractions and strengths of mediation.<sup>15</sup> However, when the government is named as the respondent, public interest calls for more transparency in the dispute resolution process.<sup>16</sup> The call for transparency applies not only to ISA but also to ISM. To address the criticism of 'secrecy' ISA authorities have begun drafting related reforms, including those allowing for public hearings, amicus participation, and the publication of awards and other informative documents. However, ISM lags behind ISA in terms of transparency.<sup>17</sup> A significant argument against the mediation of investor–state disputes is that it may be used to keep cases confidential and remove them from public scrutiny.<sup>18</sup> To maintain mediation as a valuable alternative, there is no choice but to respond to the increasing call for transparency and make adaptations to address these concerns. Striking a balance between confidentiality and transparency is necessary to integrate mediation into the ISDS mechanism.

However, to what extent would increased transparency in ISDS impact the generally confidential mediation process?<sup>19</sup> This article focuses mainly on the transparency issue as regards the ISM mechanism. The article proceeds as follows. Section 2 explains why ISM requires transparency from the perspective of theoretical analysis and practical reform. Section 3 discusses the role of confidentiality in the investment mediation world. Section 4 provides a structural analysis of unique transparency in ISM by outlining consistencies and inconsistencies in transparency issues between ISA and ISM. Section 5 discusses how to redesign guidelines to achieve the right balance between transparency and confidentiality under ISM. Section 6 concludes the paper.

## II. Importance of transparency in ISM

The drive for greater transparency in investment mediation stems from two main factors. The first is the public interest involved in investor–state disputes. The second is the transparency reforms undertaken for arbitration. In light of these reforms, it seems inappropriate for ISM to remain highly confidential, as the high level of confidentiality

<sup>13</sup> Seraphina Chew, Lucy Reed, and J Christopher Thomas, 'Report: Survey on Obstacles to Settlement of Investor-State Disputes' (2018) NUS Centre for International Law Research Paper 18/01, NUS Law Working Paper 2018/022.

<sup>14</sup> Shahla F Ali and Odysseas G Repousis, 'Investor–State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat' (2016) 45(2) *Denv J Int'l L & Pol'y* 225.

<sup>15</sup> Jack J Coe Jr, 'Should Mediation of Investment Disputes Be Encouraged, and, If So, by Whom and How?' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (Brill 2010) 349.

<sup>16</sup> Deli (n 6) 56.

<sup>17</sup> Coe (n 15) 349.

<sup>18</sup> Ana Ubilava and Luke R Nottage, 'ICSID's New Mediation Rules: A Small but Positive Step Forward' (2018) ICSID World Bank, Submission to ICSID on ICSID Rules and Regulations Amendment Process 3 <[https://icsid.worldbank.org/sites/default/files/amendments/public-input/Ubilava\\_Nottage\\_10.17.2018.pdf](https://icsid.worldbank.org/sites/default/files/amendments/public-input/Ubilava_Nottage_10.17.2018.pdf)> accessed 26 March 2022.

<sup>19</sup> Catharine Titi, 'Mediation and the Settlement of International Investment Disputes: Between Utopia and Realism' in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (OUP 2019) 35.

may be used by parties as a tool to circumvent the ever-increasing standards of transparency in investment arbitration.

### **A. Theoretical analysis of the characteristics of disputes to be resolved**

Investor–state disputes inherently involve public interests.<sup>20</sup> As no public interests are involved in commercial arbitration and mediation, those disputes do not generate the same pressure for transparency.<sup>21</sup> In investor–state disputes, however, public interest is involved in many ways, as discussed below.

#### **i. Public interests involved in investor–state disputes: the micro view**

Investor–state disputes invariably involve a government as the respondent. As one of the parties to such disputes, a democratic state must be accountable to its constituencies for its decisions and actions<sup>22</sup> and subject itself to public scrutiny.<sup>23</sup> In some states, influenced by internal legal conditions, political situations, and domestic perceptions of democracy, representatives of the state government are obliged to publish certain information.<sup>24</sup> For some governments, there is a legal duty to comply with domestic disclosure laws, such as the Freedom of Information Act in the United States.<sup>25</sup> Investor–state disputes also involve the exercise of regulatory autonomy over foreign investors by sovereign states and their agencies, and every investor–state arbitration alleges wrongful behaviour by a state.<sup>26</sup> ‘Transparency of arbitral proceedings would allow parliament and the public [...] to scrutinize better whether their government has honoured its international commitments and whether it does not compromise essential public interests in bargaining with the investor in the course of the arbitration proceedings.’<sup>27</sup> In this way, transparency and participation contribute to good governance.<sup>28</sup>

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<sup>20</sup> Susan D Franck and Anna Joubin-Bret (eds), ‘Investor-State Disputes: Prevention and Alternatives to Arbitration II: Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution, held on 29 March 2010 in Lexington, Virginia, United States of America’ (UNCTAD 2010) 11.

<sup>21</sup> José E Alvarez, ‘Is Investor-State Arbitration “Public”?’ (2016) 7(3) JIDS 541.

<sup>22</sup> Daniel Barstow Magraw and Niranjali Manel Amerasinghe, ‘Transparency and Public Participation in Investor–State Arbitration’ (2009) 15 ILSA J Int’l & Comp L 337, 351.

<sup>23</sup> Ximena Bustamante, ‘Investor–State Mediation: Reflections on its Feasibility from a Process Perspective’ in Todd Weiler and Freya Baetens (eds), *New Directions in International Economic Law* (Brill 2011) 275, 297.

<sup>24</sup> Steffen Hindelang, ‘Study on Investor–State Dispute Settlement (ISDS) and Alternatives to Dispute Resolution in International Investment Law’ (2016) 13(1) TDM 1, 98.

<sup>25</sup> The 1967 Freedom of Information Act 5 USC § 552 (FOIA) imposes a statutory obligation on US federal government agencies to comply with requests for information contained in government records, subject to specific, enumerated exceptions.

<sup>26</sup> Barstow Magraw and Amerasinghe (n 22) 339.

<sup>27</sup> Hindelang (n 24) 88.

<sup>28</sup> Daniel Barstow Magraw, Sofia Plagakis and Jessica Schifano, ‘Ways and Means of Citizens’ Participation in Trade and Investment Dispute Settlement Procedures’ (Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper, Geneva, 15 July 2008) 101 <<http://dx.doi.org/10.2139/ssrn.1159770>> accessed 26 March 2022..

Political issues, sensitive industries, or non-economic interests of states usually feature in investor–state claims.<sup>29</sup> Topics such as the state’s public order, national security interests, environmental concerns, cross-border resource exploitation,<sup>30</sup> major infrastructure,<sup>31</sup> human rights, financial stability, environmental protection, public health, and other topics<sup>32</sup> related to the national interests of the host country are hot issues in investor–state disputes. As for investors, they often provide essential services, such as drinking water, sanitation, or electricity,<sup>33</sup> that also implicate public interest. For this reason, tribunals are required to treat the balance of investors’ private law rights and the state’s public interest with ‘more caution.’<sup>34</sup> From this perspective, an investor–state dispute always implicates the host country’s public policies and public interests.

Access to information and public participation are human rights in democratic systems worldwide, as is recognized on both the national and international levels.<sup>35</sup> ‘When allowing international tribunals to review administrative, judicial, and legislative acts of host states, the public in these states has a vital interest in securing the integrity of the proceedings.’<sup>36</sup> To protect their interests, citizens of the host state have the right to know of and participate in the process of dispute settlement regarding government actions that directly affect them. After all, the losing party to a lawsuit must pay considerable arbitration costs and awarded damages, which fees are ultimately borne by the taxpayers of the host state.<sup>37</sup>

## ii. Hybrid nature of the ISDS regime: the macro-view

ISDS has been described as both public and private.<sup>38</sup> However, to correct the commercial positioning of ISDS in the past, scholars are increasingly inclined to emphasize its ‘public’ side. Professor José E. Alvarez lists 10 reasons why ISDS is a system of ‘public law,’<sup>39</sup> including the following: ISDS is based on a regulatory relationship between states as governors and foreign investors as the governed;<sup>40</sup> ISDS is well suited to disputes by

<sup>29</sup> Chester Brown and Phoebe Winch, ‘The Confidentiality and Transparency Debate in Commercial and Investment’ in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (OUP 2019) 324.

<sup>30</sup> Resources include important natural resources such as oil and gas, hard rock minerals, forests, freshwater resources, and fisheries.

<sup>31</sup> Major forms of built infrastructure include facilities involving water, sanitation, roads and other transport, power generation, and dams.

<sup>32</sup> Hindelang (n 24) 4.

<sup>33</sup> Barstow Magraw and Amerasinghe (n 22) 339.

<sup>34</sup> Hindelang (n 24) 12.

<sup>35</sup> Barstow Magraw and Amerasinghe (n 22) 349.

<sup>36</sup> Hindelang (n 24) 98.

<sup>37</sup> Sarah J K Rauber, ‘Investor–State Mediation in International Investment Dispute Settlement – a Critical, Integral Multi- and Transdisciplinary Analysis: Analysis & Development of Policy Implications and Practical Guidelines, with a Particular Focus on De-Biasing the Mediation Process’ (22 August 2016) <<http://dx.doi.org/10.2139/ssrn.3115955>> accessed 26 March 2022.

<sup>38</sup> Anthea Roberts, ‘State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority’ (2014) 55 Harv Int’l LJ 55; Anthea Roberts, ‘Triangular Treaties: The Extent and Limits of Investment Treaty Rights’ (2015) 56(2) Harv Int’l LJ 353.

<sup>39</sup> Alvarez (n 21) 535.

<sup>40</sup> Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107(1) Am J Int’l L 45.

individual claimants directed against state action;<sup>41</sup> governmental decisions usually involve the public interest;<sup>42</sup> ISDS is a creature of public international law;<sup>43</sup> arbitral tribunals may review a host country's public national law or administrative or judicial activities, which is different from the settlement of commercial disputes between purely private parties;<sup>44</sup> ISDS generates a form of 'global governance'<sup>45</sup> and ISDS arbitrators must find a balance between private investors' rights and states' public interests.<sup>46</sup>

In line with the increased emphasis on the public nature of ISDS,<sup>47</sup> the public law agenda for reform to improve transparency came into being. It has received considerable attention and become an essential part of the reform to rid the traditional ISDS system of its 'confidential' label.

Most international dispute settlement mechanisms addressing matters of public interest follow the principles of transparency and due process. Typical representatives, such as the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the European Court of Justice (ECJ), and the European Court of Human Rights (ECtHR), all have rules for public hearing procedures and public access to documents.<sup>48</sup> Publication and transparency are inherent requirements of due process, which depends on the general understanding of society at a particular stage. As Professor Andrea Bianchi says,

Transparency epitomizes the prevailing mores in our society and becomes a standard of (political, moral, and, occasionally, legal) judgment of people's conduct. A narrative of transparency permeates our daily life. It is a deeply rooted belief that transparency is all around us. In contrast, the opposites of transparency, such as secrecy and confidentiality, have negative connotations. Although they remain paradigmatic narratives in some areas, overall, they are largely considered as manifestations of power and, often, of its abuse.<sup>49</sup>

## **B. Transparency reform of ISA in practice**

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<sup>41</sup> Roberts (n 40).

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

<sup>44</sup> Hindelang (n 24) 44.

<sup>45</sup> Roberts (n 40) 65–66.

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.*

<sup>48</sup> Article 46 of the Statute of the International Court of Justice (entered into force 24 October 1945) USTS 993 (hereinafter ICJ Statute) provides: 'The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.' Similarly, Article 26(2) of the Statute of the International Tribunal for the Law of the Sea, Annex VI of the United Nations Convention on the Law of the Sea (UNCLOS) (entered into force 10 December 1982) 1833 UNTS 397 (ITLOS Statute), Article 31 of the Consolidated version of the Treaty on the Functioning of the European Union – Protocol No 3 on the Statute of the Court of Justice of the European Union [2016] OJ C202/210 (CJEU Statute) and Article 40(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) make provisions regarding public hearings. In terms of access to information, Article 40(2) ECHR provides that 'Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.'

<sup>49</sup> Andrea Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 2.

ISA, the most popular instrument of ISDS, has been used to resolve all types of investment disputes on six continents for more than 30 years. ISA is rooted in commercial arbitration, which is characterized by secrecy.<sup>50</sup> Traditional instruments, such as the ICSID Convention and most bilateral investment treaties (BITs), say little or nothing about the confidentiality of proceedings and awards.<sup>51</sup> This means that there is no general obligation to publish decisions and information related to the process without the mutual consent of the investor and state parties to the dispute.<sup>52</sup> For a long time, ‘meetings of a small group of tribunals [have been] secret; their members [have been] generally unknown; the decisions they reach need not [have been] fully disclosed.’<sup>53</sup> Many scholars seriously question and criticize the confidentiality feature of the ISA system.<sup>54</sup>

### **i. Potential benefits of more transparent ISA**

The call for ISDS transparency and its motivation to cast off the unwelcome tag of ‘private’ have led to related reforms of ISA. The main potential benefits of increased transparency cited by reformists to demonstrate the importance of transparency reform are discussed below.

First, increasing transparency promotes the public’s trust in and acceptance of the ISA system, thereby increasing the legitimacy of ISA. Reducing the secretiveness of the process through the publication of arbitration awards, decisions, and other documents renders the public more familiar with and less suspicious of this system. Through public participation, the public is granted the opportunity to voice their perspectives, raise legal arguments, and protect their interests. Members of the public are more likely to approve of a decision or decision-making process in which they have participated or had the right to participate.<sup>55</sup> In this way, the credibility and reputation of ISDS can gain a certain degree of protection. Increasing the transparency of ISM is thus a useful way to enhance the political and social legitimacy of the ISDS system, particularly in response to criticisms of illegitimacy. It is also a meaningful way to make the international investment legal system more attuned to constitutional values, such as the rule of law and democracy.

Second, increased transparency is an effective means to increase the consistency of ISA. The most common criticisms leveled at ISDS in recent years involve the lack of transparency in ISDS proceedings, the lack of consistency in arbitral decision making, and the lack of appellate authority to correct substantive errors and ensure consistency of outcomes.<sup>56</sup> ISDS tribunals have proven to be highly inconsistent in the relationship between investment treaty norms and contractual terms expressly chosen by the parties.<sup>57</sup> Greater transparency of process and decisions allows arbitrators to look to previously

<sup>50</sup> Hindelang (n 24) 98.

<sup>51</sup> Karl-Heinz Böckstiegel, ‘Commercial and Investment Arbitration: How Different Are They Today? The Lalive Lecture 2012’ (2012) 28(4) *Arbitr Int* 586.

<sup>52</sup> Hindelang (n 24) 97.

<sup>53</sup> Anthony Depalma, ‘NAFTA’s Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say’ *New York Times* (New York City, (11 March 2001).

<sup>54</sup> Hindelang (n 24) 97.

<sup>55</sup> Barstow Magraw and Amerasinghe (n 22) 352.

<sup>56</sup> Mark Baker and Cara Dowling, ‘Interest in Investor-State Mediation is Growing’ (2017) 8 Norton Rose Fulbright International Arbitration Report 22 <<https://www.nortonrosefulbright.com/en-nl/knowledge/publications/b33662dc/interest-in-investor-state-mediation-is-growing>> accessed 30 April 2020.

<sup>57</sup> Julian Arato, ‘The Private Law Critique of International Investment Law’ (2019) 113(1) *Am J Int’l L* 29.



published cases for both guidance and procedural and analytical support for their actions. The tribunal in *El Paso v Argentina* articulated the position as follows: 'It is nonetheless a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals.'<sup>58</sup> 'It is precisely through the publication of such excerpts and awards that tribunals can follow in the footsteps of their predecessors and foster greater consistency in investment treaty cases.'<sup>59</sup> However, increasing the consistency of investment arbitration cannot be achieved by increasing transparency alone. It may also require the creation of an appeal mechanism, improved interpretation of investment treaties, and other such measures. Nevertheless, increasing transparency is a necessary step. Making ISA documents open to the public, especially the interpretations of investment treaties contained in their decisions and awards, is a crucial part of shaping the international investment legal system to reflect consistent values and unify international standards.

Third, greater transparency can increase the predictability of ISA for both the host country and its investors. Countries can learn lessons from published case rulings and awards, helping them draft bilateral, regional, and multilateral investment treaties to better meet future challenges. It can also improve a host country's ability to foresee the legitimacy of its investment management behavior in international law. For investors, the public disclosure of ISA documents, particularly the interpretations of investment treaties contained in tribunal decisions and rulings, can help to improve predictability. Investors can foresee whether and how rights and obligations will be protected under investment treaties. Increasing transparency enhances consistency, which in turn solidifies the predictability necessary in an investment treaty.

## ii. Transparency reform in ISA

Due to the substantial benefits described above, the topic of transparency has continued to gain momentum in the field of investor-state arbitration, leading to some reform efforts. Many sets of institutional rules have made efforts to promote transparency in ISA, as have some tribunals in practice, leading to a steady improvement in ISA transparency over the last few years.<sup>60</sup> Scholars have analyzed this transparency reform movement to determine whether it is an unfinished effort or has already gone too far, with mixed results.<sup>61</sup> However, a trend toward improving transparency in the investment arbitration context is clearly confirmed in two aspects, namely in the norms of institution rules and in practice in arbitration cases.

Three institutions are responsible for most of the recent transparency reforms in institution rules: the United-States-Mexico-Canada Agreement (USMCA),<sup>62</sup> the United

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<sup>58</sup> *El Paso Energy International Company v The Argentine Republic*, ICSID Case ARB/03/15 Award (31 October 2011) para 39.

<sup>59</sup> Baker and Dowling (n 56) 11.

<sup>60</sup> Julia Maupin, 'Transparency in International Investment Law: The Good, the Bad, and the Murky' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 142.

<sup>61</sup> Jeffrey Chieh Lo, 'An Unfinished Effort or a Push Goes Too Far: An Assessment of ICSID's Proposed Transparency Amendment' (2019) 12 *Contemp Asia Arb J* 231.

<sup>62</sup> On 1 July 2020, the United States-Mexico-Canada Agreement (USMCA) came into force, replacing North America Free Trade Agreement (NAFTA).

Nations Commission on International Trade Law (UNCITRAL), and the International Center for Settlement of Investment Disputes (ICSID). The earliest proposal to include procedural transparency clauses was NAFTA. As early as 2001, the NAFTA Trade Commission issued a statement calling for greater transparency in NAFTA dispute resolution procedures.<sup>63</sup> Since then, increasing the transparency of ISA has gained importance both in and outside North America. UNCITRAL Working Group II has focused on improving the transparency of its arbitration procedures since 2007<sup>64</sup> and planned to make it a 'priority' in 2009.<sup>65</sup> The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration<sup>66</sup> represent another significant development on the transparency front, establishing transparency as a general principle of international investment law. The United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration<sup>67</sup> extended the application of the UNCITRAL Rules on Transparency, which so far have a minimal scope of application.<sup>68</sup> In 2006, the ICSID made amendments to increase transparency in the ICSID Arbitration Rules and the ICSID Additional Facility Arbitration Rules.<sup>69</sup> On February 28, 2020, the ICSID Secretariat published its fourth working paper on proposals for rule amendments, including a more significant reform of transparency.<sup>70</sup> (This is discussed further below.) All the changes made by these three institutions have increased transparency mainly by calling for the disclosure of case information and awards, allowing amicus curie briefs from non-disputing parties, and permitting the participation of non-parties to the arbitration.

Clear improvements in terms of transparency can also be witnessed in the practice of investment arbitration, exemplified in the following cases: *Methanex v. United States*,<sup>71</sup>

<sup>63</sup> Amokura Kawharu, 'Public Participation and Transparency in International Investment Arbitration: Suez v Argentina' (2007) 4 New Zealand Yearbook of International Law 159.

<sup>64</sup> UNGA 'Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-Sixth Session' UNCITRAL 40<sup>th</sup> Session (20 March 2007) UN Doc A/CN.9/619 para 61.

<sup>65</sup> *ibid* para 121.

<sup>66</sup> UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (entered into force 1 April 2014) <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf>> accessed 30 April 2020 (Mauritius Convention on Transparency). These Rules comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration.

<sup>67</sup> The Mauritius Convention on Transparency is an instrument by which parties to investment treaties concluded before 1 April 2014 express their consent to apply the UNCITRAL Rules on Transparency.

<sup>68</sup> Stephan Schill, 'The Mauritius Convention on Transparency' (2015) 16(2) JWIT 201.

<sup>69</sup> Following the amendments to the ICSID Convention: Arbitration Rules of April 2006, the issue of participation of non-disputing parties as amicus curiae is no longer problematic, according to Antonietti. See Aurélie Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21(2) ICSID Rev/FILJ 434-442. The amended ICSID Arbitration Rule 37(2) 'Visits and Enquiries, Submissions of Non-Disputing Parties' rules that the publication of excerpts of the 'legal reasoning of the tribunal' no longer applies to excerpts of the 'legal conclusions'. See ICSID Arbitration Rules, Rule 37(2) <<https://academic.oup.com/icsidreview/article/21/2/427/628910>> accessed 30 April 2020.

<sup>70</sup> The ICSID Working Paper 4 is potentially the last in the series of working papers produced by the ICSID Secretariat to guide the rules amendment process. The ICSID Secretariat noted that its goal was to put the amended rules to a vote in the second half of 2020 for implementation in early 2021. Working Paper 4 builds on the previous working papers published in August 2018 (Working Paper 1), March 2019 (Working Paper 2) and August 2019 (Working Paper 3). See ICSID Working Paper 4 (n 11).

<sup>71</sup> *Methanex Corporation v The United States of America*, NAFTA/UNCITRAL Arbitration Rules Proceedings, Award (3 August 2005).

*The Glamis Gold Ltd v. United States*,<sup>72</sup> *Aguas Argentinas et al. v. Argentina Republic*,<sup>73</sup> *Biwater v. Tanzania*,<sup>74</sup> and *Metalclad v. Mexico*.<sup>75</sup> These cases all involved a third party attempting to voice their perspective on the matter at hand either by submitting amicus curiae briefs or by obtaining documents related to arbitration. However, due to the lack of a binding code of transparency in the applicable rules, in the absence of agreement between the parties, each arbitral tribunal had virtually complete discretion and judged the matter according to the specific circumstances of the case. The lack of a uniform approach to the confidentiality or disclosure of information has been criticized. Although the UNCITRAL Transparency Rules, the Transparency Convention, and the revision of the ICSID Arbitration Rules have paved the way for transparency reform in investment arbitration, with new transparency rules reflecting an acknowledgment of public interest and enabling dispute participants to increase the legitimacy of ISA, it remains to be seen whether mandatory and high-level transparency standards will be implemented.<sup>76</sup>

### III. Role of confidentiality in ISM

Most BITs are silent on the issue of confidentiality in ISM, and such matters are generally regulated by the applicable procedural rules. The importance of confidentiality is reflected in many ISM procedural rules. The rules require that mediation sessions be conducted in private and that related information be kept confidential. Documents from mediation are not to be used for any other purpose in any other proceedings. The high level of confidentiality is due to several factors. In terms of traditional practice, mediation thrives on the candor encouraged by strict confidentiality. Furthermore, confidentiality can address concerns about future repercussions, as documents from mediation cannot be used for other purposes. Confidentiality is one of the key institutional attractions of mediation, as opposed to the transparency of arbitration. As mediation is now facing calls for greater transparency, there is a tension between the values of confidentiality and transparency in ISM.

#### A. Confidentiality status quo in ISM under institutional rules and IIAs

Regardless of whether mediation takes place in a commercial or an investment setting, one of its essential features is confidentiality, as reflected in mediation regulations under investment treaties and institutional rules. The 2018 UNCITRAL Model Law on International Commercial Mediation indicates that confidentiality is an essential value of commercial mediation. Articles 9, 10, and 11 of the 2018 UNCITRAL Model Law text prescribe the disclosure of information, confidentiality, and admissibility of evidence in

<sup>72</sup> *Glamis Gold Ltd v The United States of America*, NAFTA/UNCITRAL Arbitration Rules Proceedings, Award (8 June 2009).

<sup>73</sup> *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v the Argentine Republic*, ICSID Case ARB/03/19 Award (9 April 2015).

<sup>74</sup> *Biwater GAUFF (Tanzania) Ltd v the United Republic of Tanzania*, ICSID Case ARB/05/22, Award (24 July 2018).

<sup>75</sup> *Metalclad Corp v Mexico*, ICSID Case ARB(AF)/97/1, Award (August 30, 2000).

<sup>76</sup> Hong-Lin Yu, 'Who Is In - Who Is Out - How the UNCITRAL Transparency Rules Can Influence the Upcoming Amendments of the ICSID Arbitration Rules' (2018) 11 *Contemp Asia Arb J* 45.

other proceedings, respectively. As this article focuses on investor–state mediation, the confidentiality of commercial mediation is not discussed in detail here.

As foreshadowed, many new institutional rules (including IBA, ICSID, ECT, ICC, IMI, and ARMO) and international investment agreements (IIAs, such as CETA, EVIPA, and EUSFTA) suggest that ISM has entered a new phase in its development. These rules and agreements have set confidentiality as a fundamental principle throughout the mediation process. The characteristics of confidentiality observed in the current ISM mechanism are discussed below.

### **i. Confidentiality of the process**

Almost all mediation rules provide that all stages of the mediation proceeding are to be confidential.<sup>77</sup> This means that mediation sessions are conducted in private. Moreover, no persons other than the mediator, the parties, and their representatives are permitted to attend, hear, or view any part of the mediation, unless with the consent of the parties and with the mediator's permission.<sup>78</sup> It is up to the parties to decide whether the process is to be public. They can make their confidentiality and privacy arrangements in the mediation management conference.<sup>79</sup> Except as otherwise provided, parties may mutually decide whether, to whom, to what extent, and which part of the dispute, proceeding, or information can be disclosed at the conference. To ensure privacy, no audio or video recording of any part of the mediation proceedings is permitted.<sup>80</sup>

### **ii. Confidentiality of the information**

The range of confidential information and documents is vast, and affected parties are subject to the obligation of confidentiality for a very long period. For example, the new ICSID Mediation Rules state that 'All information relating to the mediation, and all documents generated in or obtained during the mediation shall be confidential.'<sup>81</sup> 'Confidential information and documents' include any information regarding the process (including pre-process exchanges and agreements), contents (including written and oral information), settlement terms, or outcome of the proceedings.<sup>82</sup> This obligation of confidentiality requires the compliance of both the parties and the mediators. Nevertheless, specific exceptions to these rules, if set out, would save them from this kind of obligation. These exceptions are discussed below. To ensure that the confidentiality of information and documents is maintained past the mediation process, some rules stipulate a long obligation performance period. For example, the IBA rules stipulate that confidentiality

<sup>77</sup> See IBA Rules for Investor-State Mediation (n 7) art 10(1); EU-Canada Comprehensive Economic and Trade Agreement (CETA) 'Annex 29-C: Rules of Procedure for Mediation' (signed 30 October 2016, not entered into force) art 6(1); Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) 10.C; Chang-fa Lo and others, 'Draft "Agreement on the Establishment of the Asia-Pacific Regional Mediation Organization' (2018) 13(1) *Asian Journal of WTO & International Health Law and Policy* 5, art 15.

<sup>78</sup> IBA Rules for Investor-State Mediation (n 7) art 10(1).

<sup>79</sup> *ibid* art 9(1)(c).

<sup>80</sup> See Lo and others (n 77) art 15.

<sup>81</sup> See ICSID Working Paper 4 (n 11) Rule 10(1). Similar regulations can be found in the following documents: CETA 'Annex 29-C - Rules of Procedure for Mediation' (n 77) art 6(1); IBA Rules for Investor-State Mediation (n 7) art 10(2); Lo and others (n 77) art 15.

<sup>82</sup> See Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) 10.

continues to be valid after the termination of mediation unless otherwise specified in the agreement signed between the parties and the mediator.<sup>83</sup>

### **iii. 'Without prejudice' principle**

Generally, no information or documents related to a mediation are to be used for any other purpose in any other proceedings, particularly legal proceedings. CETA 'Annex 29-c: Rules of Procedure for Mediation,' Article 6.4 provides:

A Party shall not rely on or introduce as evidence in other dispute settlement proceedings under this Agreement or any other agreement, nor shall an arbitration panel take into consideration: (a) positions taken by the other Party in the course of the mediation proceeding or information gathered under Article 4.2; (b) the fact that the other Party has indicated its willingness to accept a solution to the measure subject to mediation; or (c) advice given or proposals made by the mediator.

The 'without prejudice' principle is also reflected in other ISM rules.<sup>84</sup> An essential part of the system design, the principle not only helps to maintain the confidentiality of mediation but also eliminates parties' concerns about the risk of leaking evidence in the ISM process.

## **B. Why confidentiality is a vital component of ISM**

### **i. Mediation thrives on the candour encouraged by strict confidentiality<sup>85</sup>**

Investment disputes involve socially sensitive information, critical political concerns, major issues of public policy, international finance, states' international obligations, and national sovereignty,<sup>86</sup> issues that may not be effectively discussed in the public eye.<sup>87</sup> Only when the involved parties and mediators can frankly discuss the core issues of the dispute, the actual positions of the parties, their interests and concerns, and potential solutions, is it possible to successfully settle disputes and reach a settlement agreement through the mediation process.<sup>88</sup> Such extensive and frank communication depends on a confidential environment and a low risk of disclosure.<sup>89</sup> If confidentiality, a cornerstone of ISM, were removed from the mediation system, this would destroy not only the working environment of mediation but also the possibility of a successful result. As Sussman states, 'Speaking in a confidential setting encourages an openness not otherwise achieved and often enables the parties to find innovative solutions.'<sup>90</sup>

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<sup>83</sup> See IBA Rules for Investor-State Mediation (n 7) art 10.

<sup>84</sup> See CETA 'Annex 29-C - Rules of Procedure for Mediation' (n 77) art 6(4); Lo and others (n 77) art 15(3); ICSID Working Paper 4 (n 11) Rule 11.

<sup>85</sup> Lawrence R Freedman and Michael L Prigoff, 'Confidentiality in Mediation: The Need for Protection' (1986) 2 Ohio St J on Disp Resol 37.

<sup>86</sup> Peter D Cameron and Abba Kolo, 'Mediating International Energy Disputes' in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (OUP 2019) 237.

<sup>87</sup> Titi (n 19) 35.

<sup>88</sup> Freedman and Prigoff (n 85) 37.

<sup>89</sup> UNCITRAL, 'Model Law on International Commercial Conciliation with Guide to Enactment and Use' (adopted in 2002) para 58 <[https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953_ebook.pdf)> accessed 30 April 2020.

<sup>90</sup> Edna Sussman, 'The Advantages of Mediation and the Special Challenges to its Utilization in Investor-State Disputes' (2010) 7 *Revista Brasileira de Arbitragem* 6.

**ii. Confidentiality can reduce concerns about future repercussions**

Confidentiality can prevent the parties to mediation from being disadvantaged by their candour in follow-up procedures and consequently eliminate their worries concerning the future. To resolve disputes efficiently, parties may make some admissions of facts and promises, and the mediators may give some advice in the mediation. If a party were to be allowed to use the other party's admissions, offers of settlement, or expressed views or those of the mediator made during mediation as evidence in subsequent procedures, this would reduce the stability of the mediation procedure and hinder the fairness of the subsequent procedures.<sup>91</sup> Therefore, most of the new mediation rules stipulate that the 'without prejudice' principle prohibits the subsequent use of information generated in ISM. This is deemed necessary based on the difference between mediation and arbitration. Given the final, binding, and more enforceable awards and sufficient procedural safeguards of arbitration, the parties to an arbitration feel safe enough to disclose information. However, the safeguards, qualified counsel, and specific rules of evidence and procedure present in legal proceedings such as arbitration are absent in mediation.<sup>92</sup> Mediation is voluntary and non-binding; it is difficult to make a party comply with its outcome.<sup>93</sup> Although the Convention on International Settlement Agreements Resulting from Mediation (Singapore Mediation Convention) is poised to change the landscape in this respect,<sup>94</sup> a mediation agreement is not enforceable in the way that an arbitral award is. If the mediation process were required to be public, the parties to the dispute would risk not only the embarrassment of having wasted time and resources<sup>95</sup> without a successful settlement but also disadvantaging themselves in subsequent arbitration or litigation proceedings. Without the 'without prejudice' principle, if the mediation communications were not inadmissible in subsequent judicial actions, mediation could be used as a discovery device against legally naive persons.<sup>96</sup>

**iii. Confidentiality is one of the essential institutional attractions of mediation**

Confidentiality offers a significant incentive for parties to investor–state disputes to choose mediation.<sup>97</sup> Mediation has many oft-cited advantages over arbitration: it is cheaper and faster,<sup>98</sup> less formal, more flexible, and voluntary. The parties to mediation have control over both the process and outcome;<sup>99</sup> they can build trust and preserve their business relationship going forward.<sup>100</sup> The parties can consult with each other on economic matters

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<sup>91</sup> Freedman and Prigoff (n 85) 37.

<sup>92</sup> *ibid.*

<sup>93</sup> Jack J Coe, 'Towards a Complementary Use of Conciliation in Investor–state Disputes – A Preliminary Sketch' (2005) 12 UC Davis Journal of International Law 7, 17.

<sup>94</sup> Harold I Abramson, 'New Singapore Convention on Cross-Border Mediated Settlements: Key Choices' in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (OUP 2019).

<sup>95</sup> Coe (n 93) 17.

<sup>96</sup> Freedman and Prigoff (n 85) 37.

<sup>97</sup> *ibid.*

<sup>98</sup> Thomas W Walde, 'Proactive Mediation of International Business and Investment Disputes Involving Long-Term Contracts: From Zeo-Sum Litigation to Efficient Dispute Management' (2004) 5 Bus Law Int 99-101.

<sup>99</sup> Coe (n 93) 17.

<sup>100</sup> Nancy A Welsh and Andrea K Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration' (2013) 18 Harvard Negotiation Law Review 71, 77.

beyond legal interests during the mediation process and fully express their respective claims. All of these advantages and others, which are crucial to the successful application of mediation, are supported by confidentiality.<sup>101</sup> It is precisely because the mediation process is not open to the public that it can resolve disputes relatively in a quick and cheap manner, and provide its users with tailor-made solutions. In contrast, transparency entails excessive interference from media and public opinion, which may affect the parties' free will in ISM and run contrary to the objectives of flexibility and efficiency (including cost efficiency).

### **C. Tension between transparency and confidentiality in ISM**

As previously stated, the many advantages of mediation are inseparable from the principle of confidentiality. A series of academic articles introducing ISM support the notion that confidentiality is essential to the survival of mediation.<sup>102</sup> The inclusion of confidentiality as part of the mediation process in the mediation rules mentioned above also demonstrates this. As Catharine Titi state, 'It is difficult to envisage mediation that would work without the guarantee of confidentiality.'<sup>103</sup> However, confidentiality has also generated doubt and drawn criticism.

Professor Jack J. Coe, Jr. states that:

some would find a shift to mediation to be retrogressive in terms of transparency. After all, mediation thrives on candour encouraged by strict confidentiality—a markedly different value than that fuelling the recent trend in investor–state arbitration in which hearings have sometimes been opened to the public, amicus participation has been allowed, and awards and other informative documents have been widely published.<sup>104</sup>

Himalaya Saha comments that mediation 'fails to solve the problem of transparency as the ADR processes are also confidential.'<sup>105</sup> Chester Brown and Phoebe Winch state that 'in light of its confidential nature, however, mediation use by parties to resolve their differences suffers from the same criticisms that can be levelled at arbitration: that it favours secrecy at the expense of transparency.'<sup>106</sup> Hafner-Burton, Puig, and Victor agree, stating, 'The major argument against settlement in ISDS is that it will be used to keep cases confidential and remove them from public scrutiny.'<sup>107</sup> 'If States and investors are allowed to channel certain disputes to mediation,' claims Coe, 'particularly irresponsible or culpable behaviour by one or both parties may escape detection—at least so goes the argument.'<sup>108</sup> Professor Catharine Titi comments that 'the confidentiality of the

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<sup>101</sup> Brown and Winch (n 29) 324.

<sup>102</sup> Titi (n 19) 36; Sussman (n 90) 6.

<sup>103</sup> Titi (n 19) 36.

<sup>104</sup> Coe (n 15) 349.

<sup>105</sup> Himalaya Saha, 'A Critical Analysis of the Commonly Recommended Reforms of the Investor–state Dispute Settlement (ISDS)' (2016) 4 *Legal Issues J* 4 47.

<sup>106</sup> Brown and Winch (n 29) 322.

<sup>107</sup> Ubilava and Nottage (n 18) 3.

<sup>108</sup> Coe (n 15) 349.

mediation process (sometimes discussed as an advantage of mediation,<sup>109</sup> at least in part because arbitration can have a negative reputational impact on both investor and host state)<sup>110</sup> jars with the new tendency for transparency in ISDS.<sup>111</sup> ‘Consequently,’ states Sudborough, ‘should sovereign debt disputes now be redirected from ISDS arbitration proceedings with enhanced transparency standards to less transparent mediation proceedings, there is a risk that this would detract from the legitimacy of any settlement agreement stemming therefrom and thus render the process less attractive.’<sup>112</sup> Ana Ubilava and Luke Nottage comment, ‘Due to this characteristic it has commonly been believed that mediation was not suitable for ISDS because public awareness and transparency constitute a crucial component of a dispute settlement regime where one of the parties is a State. Stakeholders in ISDS have expressed growing concerns that mediation will be used to bypass transparency<sup>113</sup> and also have access to universal enforceability through the 2018 UN Convention on International Settlement Agreements.’<sup>114</sup>

This conversation raises the question of whether there should be a presumption of transparency in ISM.<sup>115</sup> Confidentiality is indeed one of the most attractive advantages of the mediation procedure, but when mediation is applied to investor–state disputes, confidentiality may not be entirely inherent to the process.<sup>116</sup> The hybrid nature of investment disputes calls for transparency, which results in the transparency requirements applicable to both ISA and ISM.<sup>117</sup> In other words, the use of mediation to resolve disputes between private investors and sovereign host states cannot avoid the public interest issues involved in such cases. There is a natural conflict between the confidentiality characteristics of the mediation mechanism and the need for transparency in investment disputes. This tension makes many scholars worry about two potential consequences of applying the mediation mechanism to ISDS. First, excessive violations of confidentiality may destroy the nature of mediation. Second, the excessive maintenance of confidentiality may leave public interest in the lurch, just as ISA has indeed experienced.<sup>118</sup> Furthermore, heightened expectations of confidentiality in mediation limit states’ ability to disclose and explain mediated settlements publicly, which may provoke allegations of corruption over mediated settlement agreements.<sup>119</sup>

<sup>109</sup> (ICSID), ‘Proposals for Amendment of the ICSID Rules’ (2019) ICSID World Bank Group Working Paper 3 (hereinafter ICSID Working Paper 3) 205–19 <[https://icsid.worldbank.org/sites/default/files/amendments/WP\\_3\\_VOLUME\\_1\\_ENGLISH.pdf](https://icsid.worldbank.org/sites/default/files/amendments/WP_3_VOLUME_1_ENGLISH.pdf)> accessed 26 March 2022.

<sup>110</sup> Susan D Franck, ‘Using Investor–state Mediation Rules to Promote Conflict Management: An Introductory Guide’ (2014) 29(1) ICSID Review–Foreign Investment Law Journal 66, 78.

<sup>111</sup> Titi (n 19) 35.

<sup>112</sup> Calliope M Sudborough, ‘Mediating Sovereign Debt Disputes’ in Catharine Titi and Katia Fach Gómez (eds), *Mediation in International Commercial and Investment Disputes* (OUP 2019) 233.

<sup>113</sup> Emilie M Hafner-Burton, Sergio Puig and David G Victor, ‘Against Secrecy: The Social Cost of International Dispute Settlement’ (2017) 45 Yale Journal of International Law 2.

<sup>114</sup> Timothy Schnabel, ‘The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements’ (2019) 19 Pepp Disp Resol LJ 1.

<sup>115</sup> Sussman (n 90) 6.

<sup>116</sup> Saha (n 105) 47.

<sup>117</sup> Sudborough states: ‘Therefore, it is important that similar increased transparency standards also apply to sovereign debt mediation proceedings.’ See Sudborough (n 112) 233.

<sup>118</sup> Ubilava and Nottage (n 18) 3.

<sup>119</sup> See Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) 10.C.



Balancing the competing interests of transparency and confidentiality is essential for the mediation of investor–state disputes to flourish. Although it is challenging to reconcile the confidentiality of mediation with the public attributes of the state subject and the public interests of the disputed object in the investment dispute, only in this way can the feasibility and legitimacy of the investment mediation mechanism be improved and the public’s acceptance of and trust in the mediation operating system be secured.

#### **IV. Consistencies and inconsistencies in transparency issues between ISA and ISM**

There can be no identification without contrast. The role that transparency currently plays in ISM is best understood by comparing ISM with ISA. Thus, the consistencies and inconsistencies in transparency issues between ISA and ISM are identified and explained briefly below.

##### **A. Consistencies in transparency issues between ISA and ISM**

ISA and ISM are used to resolve the same type of disputes, those involving international investment. Transparency is one of the values of international investment dispute resolution. As discussed in Section 2, the public interest involved in ISDS and the hybrid nature of investor–state disputes are the leading causes of increasing transparency. All instruments of ISDS, whether arbitration, mediation, or local remedy, must acknowledge the need for transparency to resolve disputes. At this level, ISA and ISM face the same pressure to ensure transparency, producing a consistent requirement for transparency.

Both ISA and ISM seek a balance between transparency and confidentiality. Although public interest matters, securing a balance between private and public interests is the proper response to the hybrid nature of investment disputes. In other words, both ISA and ISM must seek a balance between transparency and confidentiality. Analysis of the specific rules of ISA and ISM reveals that they both follow a ‘principle and exceptions’ model. In terms of investor–state arbitration, ISA adopts a transparency principle with confidentiality exceptions. Article 7 of the UNCITRAL Transparency Rules details eight kinds of ‘confidential or protected information’ as exceptions to transparency.<sup>120</sup> Even the UNCITRAL Transparency Rules, which have the highest transparency requirements for ISA, take confidentiality into account. Similarly, ICSID details 10 kinds of ‘confidential or protected information’ as transparency exceptions in its most recently revised set of arbitration rules, dated February 2020.<sup>121</sup> As for ISM, the current rules outline many confidential exception clauses while maintaining an overarching emphasis on confidentiality. The new ICSID Mediation Rules provide three exceptions to confidentiality: ‘unless (a) the parties agree otherwise; (b) the information or document is independently available; or (c) disclosure is required by law.’<sup>122</sup> Compared with these, the confidentiality exception provisions in the IBA Mediation Rules are more detailed and illustrative.<sup>123</sup> In both ISA and ISM, the relationship between transparency and

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<sup>120</sup> See UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (n 66) art 7.

<sup>121</sup> See ICSID Working Paper 4 (n 11) Rule 66.

<sup>122</sup> *ibid* Rule 10 (1). Similar regulations can be found in CETA ‘Annex 29-C - Rules of Procedure for Mediation’ (n 77) art 6(1); IBA Rules for Investor-State Mediation (n 7) art 10(3).

<sup>123</sup> See IBA Rules for Investor-State Mediation (n 7) art 10(3).

confidentiality is carefully handled in the design of rules to achieve the right balance.

## **B. Different degrees of transparency between ISA and ISM**

This section addresses whether arbitration and mediation, as different dispute resolution instruments, are entirely consistent in the degree of transparency in their dispute resolution procedures and results. In terms of procedural transparency, ISA and ISM display at least the following differences.

### **i. Public hearing or secrecy session**

Under ISA rules, whether the UNCITRAL Transparency Rules or the ICSID Arbitration Rules, public hearings are provided for. Article 6 of the UNCITRAL Transparency Rules stipulates that ‘hearings for the presentation of evidence or oral argument shall be public.’ In the ICSID system, a ‘tribunal shall allow persons in addition to the parties [...] to observe hearings, unless either party objects.’<sup>124</sup>

However, ISM is just the opposite, basically establishing the principle of ‘private mediation sessions.’ As the IBA Mediation Rules provide, ‘unless the parties and the mediators otherwise agree, no person [...] shall be permitted to attend, hear or view any part of the mediation or any communications relating to the mediation.’<sup>125</sup>

### **ii. Disclosure or concealment of related documents**

Since the recent transparency reform of ISA, the documents and information related to arbitration have gradually become public. Today, little confidentiality is left in investment arbitration.<sup>126</sup> The 2006 version of the ICSID Arbitration Rules requires that the publication of documents be based on the agreement of both parties, and the published documents are mainly procedural documents.<sup>127</sup> Nevertheless, the ICSID Secretariat has the right to quickly publish excerpts of the legal reasoning for the ruling.<sup>128</sup> The latest round of reformed arbitration rules promotes document disclosure more thoroughly. First, the new ICSID Arbitration Rules have added the notion of ‘deemed consent,’ meaning that consent to publish the documents is deemed to have been given if no party objects in writing to such publication within 60 days of the ruling.<sup>129</sup> Second, the publication of ‘excerpts of the award’ (broadening the previous wording ‘excerpts of the legal reasoning

<sup>124</sup> ICSID Working Paper 4 (n 11) 334, Rule 65. States take different positions on whether hearings should be public. Some think that hearings should not be open to the public without the consent of both parties. Many other states agree that the tribunal should make this decision after consulting with the parties. ICSID Working Paper 3 (n 109) Arbitration Rule 64 provided that ‘the Tribunal shall determine whether to allow persons [...] to observe hearings, after consulting with the parties.’ Nevertheless, this was changed in Working Paper 4 to add ‘unless either party objects.’ Proposed Arbitration Rule 65(2) reflects this concern and ties it to the definition of confidential and protected information in Rule 66.

<sup>125</sup> See IBA Rules for Investor-State Mediation (n 7) art 10.1. Similar rules can be found in Lo and others (n 77) art 15(4).

<sup>126</sup> Böckstiegel (n 51) 586.

<sup>127</sup> See ICSID Arbitration Rules (n 69) art 48(4).

<sup>128</sup> See ICSID Arbitration Rules (n 69).

<sup>129</sup> See ICSID Working Paper 4 (n 11) Arbitration Rule 62(3).

in the award<sup>130</sup>) is now permitted if the parties do not have consent to publish the award.<sup>131</sup> The UNCITRAL Transparency rules provide that a comprehensive list of documents shall be made available to the public.<sup>132</sup> Furthermore, it establishes an institution called the 'repository of published information' to make all documents available promptly in the form and language in which it receives them.<sup>133</sup>

ISM rules, in contrast, generally stipulate that all information and documents generated during mediation should be kept confidential unless a confidentiality exception applies.<sup>134</sup> This duty of confidentiality stays in effect after the termination of the mediation unless otherwise specified in the agreement signed by the parties and the mediator. To prevent one party's compromise and confession made under mediation from being used by the opposing party in subsequent procedures, most ISM rules stipulate the 'without prejudice' principle.<sup>135</sup> If there were no such principle, then mediation could be reduced to a tool for obtaining compromising information.<sup>136</sup> The investor or the host state could initiate mediation without any actual intention to resolve the dispute, thereby obtaining evidence for use in subsequent arbitration or litigation proceedings.

### **iii. Amicus curiae participation**

The current ISA rules generally allow a third party and a non-disputing party to a treaty to apply to file a written submission regarding matters within the scope of the dispute. When submitting materials, a third party must meet a series of substantive and procedural requirements, including language, description of themselves, duty to disclose any connection with any disputing party, third-party funding, the nature of the interest, and specific issues of fact or law.<sup>137</sup> The arbitral tribunal has the right to determine whether to allow such a submission after considering the listed factors.<sup>138</sup> The participation of third parties by amicus briefs can promote the disclosure of the arbitration process and results to a greater extent while also making disputes more likely to be resolved completely.<sup>139</sup>

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<sup>130</sup> Article 48(4) of the ICSID Arbitration Rules (2006) provides that 'The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.' See ICSID Arbitration Rules (n 69) art 48(4).

<sup>131</sup> See ICSID Working Paper 4 (n 11) Arbitration Rule 62(4). Although the 2006 rules propose publicizing excerpts of the legal reasoning in the award, the 2020 version changed the rules to require publicizing 'excerpts of the Award.' This reflects current practice, wherein parties are provided with a draft of a fully extracted award for comment rather than merely the award's legal reasoning. See ICSID Working Paper 3 (n 109) 348.

<sup>132</sup> UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (n 66) art 3.1.

<sup>133</sup> UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (n 66) art 8.

<sup>134</sup> See ICSID Working Paper 4 (n 11) Mediation Rules, Rule 10; CETA 'Annex 29-C - Rules of Procedure for Mediation' (n 77) art 6(1); IBA Rules for Investor-State Mediation (n 7) art 10.1; Lo and others (n 77) art 15(1).

<sup>135</sup> See ICSID Working Paper 4 (n 11) Mediation Rules Rule 11; CETA 'Annex 29-C - Rules of Procedure for Mediation' (n 77) art 6(4); IBA Rules for Investor-State Mediation (n 7) art 10.2; Lo and others (n 77) art 15(3).

<sup>136</sup> Freedman and Prigoff (n 85) '37.

<sup>137</sup> See UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (n 66) art 4.2; ICSID Working Paper 4 (n 11) Arbitration Rules Rule 67, 68.

<sup>138</sup> See UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (n 66) art 4.3; ICSID Working Paper 4 (n 11) Arbitration Rules 67, 68.

<sup>139</sup> Barstow Magraw and Amerasinghe (n 22) 346.

Observing the current series of ISM rules, it is impossible to find regulations addressing the submission of amicus briefs by a third party. This is not difficult to understand. Due to the private nature of mediation meetings and the confidentiality of the information involved, a third-party lacks the opportunity to learn the substance of the dispute, let alone put forward a third-party submission on the substance of the dispute. As explained in other articles, ‘maintaining strict confidentiality concerning amicus petitioners leads to lower quality contributions and may not serve to protect the public interest.’<sup>140</sup>

### C. Summary

In the above analysis, both consistencies and differences are apparent in ISA and ISM treatment of transparency issues. The similarities in transparency between the two processes (as means to resolve the same kind of investment disputes) is reflected in many aspects, such as the need to maintain the public interest involved in the dispute, to respond to due process requirements, and to seek the best balance between confidentiality and transparency. Of course, as alternative methods of dispute resolution, there are also many differences between them, such as in the system and design of the procedures, including public hearings, disclosure of documents, and participation of third parties. Although both ISA and ISM must balance transparency and confidentiality, the specific content of their balancing models differs. ISA has adopted the model of a transparency principle with confidentiality exceptions. In contrast, the principle of the ISM is confidentiality, with transparency being exceptional.

The reasons for the difference in the pursuit of transparency between arbitration and mediation are mainly in the following two aspects. First, as mentioned, confidentiality can ensure the success of ISM, while transparency is a vital way to increase the legitimacy of ISA. Second, the nature of mediation is different from that of arbitration. That is, mediation is non-binding, non-adversarial, and non-enforceable. If the mediation procedure is required to be made public, parties may fail to settle their disputes and leak information in their own favour. However, due to its ‘harder’ characteristics of final arbitration, reliable arbitral awards, and enforcement, arbitration parties have no fear of disclosing information. Furthermore, even if there is disclosure, procedures are in place to safeguard their legitimate rights and interests.

## V. Balance of confidentiality and transparency under ISM

### A. Essential positioning: confidentiality as a principle

To improve the public’s acceptance, or the perceived legitimacy, of the ISM system, it is necessary to establish the right balance between confidentiality and transparency. The principle of confidentiality should be adhered to, reserving disclosure as the exception. The ISM mechanism should be more confidential than investment arbitration, but it does not and should not reach the same level of transparency as commercial mediation.

As arbitration transparency standards gradually rise, maintaining the gap between mediation and arbitration transparency standards is necessary to maintain the advantages of the ISM system, including its greater likelihood of reaching settlements and its

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<sup>140</sup> Barstow Magraw and Amerasinghe (n 22) 350.

attractiveness to disputing parties. ISM has a number of advantages over ISA. First, mediation is more time- and cost-effective. To avoid lengthy mediation procedures and facilitate the speedy resolution of disputes, many mediation rules specify shorter time limits for the designation, resignation, and replacement of mediators and for reaching mutually agreed-upon solutions.<sup>141</sup> Mediation also has significant advantages in terms of costs. For example, because of the limited role of lawyers in the mediation process, the parties often seek minimal to no legal consultation at all, saving can save significantly on attorney fees. by Second, mediation facilitates a more complete resolution of disputes. Mediation focuses not on legal rights and obligations or determining a moral right and wrong instead emphasizing its economic benefits. It allows parties to negotiate their extra-legal interests and fully express their respective claims during the mediation process. The parties themselves control the process and outcome of the dispute during the mediation, which also promotes the complete resolution of the dispute. Third, mediation is conducive to maintaining friendly relations between investors and the state. Investor- State disputes are characterised by lengthy time frames, large investment amounts, and slow output. In such disputes, maintaining friendly and cooperative relations between the two sides is as important as resolving the disputes. The ‘no-harm’ nature of the mediation mechanism is of great significance to both the state and the investor. For a foreign investor, it is important to reduce the risk of being forced to terminate business relationships due to a failure to resolve disputes; for the State, a ‘softer’ dispute resolution is less threatening to its sovereignty and helps to maintain its image in the international community as a friendly investment host. Compared to the traditional ‘win-lose confrontation’ model of ISA, ISM is an interest-oriented ‘win-win’ model that is genuinely required by both parties. This set of advantages is considered to be predicated on confidentiality. Costs and duration have become more prominent concerns in ISA.<sup>142</sup> Given the more substantial award amounts and proceedings costs that states (especially developing countries) must bear in ISAs, states may instead consider the confidentiality of ISM as an acceptable price to pay for the relative advantages of ISM.

The current state of their respective rules and practice indicates an underlying trend of ISM’s being less transparent than ISA. In terms of rules, ISM is less transparent than ISA, as discussed above in Section 4. At the practical level, as there is insufficient publicly available data on ISM cases, we must compare the transparency of cases that were settled in the arbitration process with the transparency of final awards. According to an empirical study (conducted by Ana Ubilava) of all known and concluded treaty-based investor-state claims during 1990–2017, the confidentiality levels of (ICSID and other) arbitration cases that had been settled during the arbitral process but before the final arbitral award was higher than the levels of disclosure of final awards. In 43% of publicly available cases, the fact of the settlement, identity of the parties, and the settlement amounts that had been amicably agreed upon by the parties were made available. In 98% of completed, investor-

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<sup>141</sup> See CETA ‘Annex 29-C - Rules of Procedure for Mediation’ (n 77) art 5(5); IBA Rules for Investor-State Mediation (n 7) arts 2(a), 4.

<sup>142</sup> For respondent states, the mean cost incurred in an ISDS proceeding is approximately US\$4.7 million. For investors, the mean cost exceeds US\$6.4 million. The mean length of ISA proceedings is 4.4 years. See Matthew Hodgson, Yarik Kryvoi and Daniel Hrecka, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration* (BIICL and Allen & Overy 2021).

won cases where the awarded amounts were made known, the confidentiality levels were much lower than in settled arbitration cases.<sup>143</sup>

Although confidentiality is important to an extent, due to the public interests involved in and the hybrid nature of investor–state disputes, the transparency of investment mediation should be greater than that of general commercial mediation. With the inclusion of broader confidentiality exceptions, ISM can effectively respond to the current transparency reform trend by maintaining a level of transparency somewhere between that of commercial mediation and that of investment arbitration.

## **B. Transparency in ISM**

Recently, some IIAs and institution rules have made attempts to better optimize mediation transparency while still balancing transparency and confidentiality. Rules designed to maintain the essential characteristics of mediation confidentiality while allowing for some disclosure of information generally address private sessions<sup>144</sup> and confidential documents.<sup>145</sup>

### **i. Disclosing the fact of mediation**

It seems permissible for parties to disclose the fact of mediation. The ECT mediation guidelines point out:

Governments increasingly face the request for more transparency and it may be politically difficult for governments to keep confidential the fact that mediation is taking place and even the terms of the settlement agreement. Some modern domestic legislation on transparency requires states to publish any agreement reached with foreign investors. Therefore, parties could agree to disclose the fact that the mediation is taking place and the main aspects of the settlement.<sup>146</sup>

Other institutional rules and international agreements applicable to mediation also appear to acknowledge that a strict confidentiality obligation should not extend to the fact that the parties have agreed to mediate, unless the parties agree otherwise in writing. Such rules include the IBA Rules for Investor–State Mediation, the ICSID’s Working Paper 3, CETA’s Mediation Rules, and the ECT’s Guide on Investment Mediation.<sup>147</sup>

There are several advantages to disclosing the facts of the mediation in the ISM system. Disclosure would certainly alleviate some of the concerns about investment mediation’s being used as a covert means of dispute resolution to bypass transparency reforms. Furthermore, disclosure is a prerequisite of greater transparency and public participation. If civil society stakeholders or affected third parties are not aware of the on-going mediation, they cannot participate in the dispute settlement, and remain unable to submit relevant materials and information, for example. Moreover, disclosing the fact of

<sup>143</sup> Ubilava (n 107) 528–557.

<sup>144</sup> See Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) 10.C; IBA Rules for Investor-State Mediation (n 7) art 10; Lo and others (n 77) art 15(4).

<sup>145</sup> See ICSID Working Paper 3, ‘Mediation Rules,’ Rule 9(1); CETA ‘Annex 29-C - Rules of Procedure for Mediation’ (n 77) art 6(1); IBA Rules for Investor-State Mediation (n 7) art 10(2); Lo and others (n 77) art 15(3).

<sup>146</sup> Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) art 10.C.

<sup>147</sup> See IBA Rules for Investor-State Mediation (n 7) art 10.3(a); ICSID Working Paper 3 (n 109) Mediation Rule 9(2); CETA ‘Annex 29-C - Rules of Procedure for Mediation’ (n 77) art 6(1); EU-Vietnam Agreement (n 4) Annex 9: Mediation Mechanism art 7; Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) 10.C.

mediation helps to raise the profile of ISM among potential users (including investors) and promotes the likelihood that they will choose mediation to settle their own disputes.

However, the rules regarding whether mediation facts should be made public vary between versions of the ICSID working paper. Working Paper 3 of Proposals for Amendment of the ICSID Rules, Mediation Rules 9(2) states, 'The fact that the parties are mediating or have mediated shall not be confidential.' However, Working Paper 4, Mediation Rules 10(2) states, 'Unless the parties agree otherwise, the fact that they are mediating or have mediated shall be confidential.' This rule change is a result of comments by certain states that confidentiality could be a key consideration for parties in deciding whether to mediate. The disclosure of the fact of mediation was thus made subject to party agreement. This change is also consistent with the Administrative and Financial Regulations for Mediation, Regulation 3, which states that the publication of mediation registers by the ICSID requires the parties' consent.<sup>148</sup> The provision on confidentiality of mediation facts in Working Paper 4 has been carried over to the newly published Working Paper 6. The ICSID mediation rules appear to be more conservative than other rules (such as the ECT mediation guidelines and the IBA mediation rules) in terms of whether the facts of the mediation should be made public, and they show greater adherence to the principle of confidentiality.

Such a provision maintaining the confidentiality of mediation is not a sign of progress but the result of compromise. On the one hand, in the absence of the parties' agreement to disclose the facts of the mediation, it leaves non-disputing parties uninformed about the mediation and deprives them of any opportunity to participate in it, bringing investment mediation back into shadows.

On the other hand, it is better to establish general procedural rules and make them available through ICSID than to not. There are probably many instances of investors and states' involvement in conflict resolution processes with neutral third parties behind closed doors. There is no established registration system for such conflict resolution processes. Therefore, the information exchanged and agreements reached in such negotiations remain unknown, which amounts to complete confidentiality. In contrast, the mediation rules offered by the ICSID allow the international community to be informed of the fact of such disputes, even if the terms of the eventual mediation agreements are not automatically made public.

## **ii. Disclosing the settlement agreement resulting from mediation**

It also seems permissible under some rules to disclose the settlement agreement resulting from mediation. For example, the IBA's rules state, 'The settlement agreement or part of its terms can be disclosed unless the two parties have agreed otherwise in writing.'<sup>149</sup> CETA's mediation rules similarly provide that 'any mutually agreed solutions shall be

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<sup>148</sup> 'The Secretary-General shall maintain a Register for each mediation containing all significant data concerning the institution, conduct and disposition of the mediation proceeding. The information in the Register shall not be published, unless the parties agree otherwise.' ICSID Working Paper 4 (n 11) Administrative and Financial Regulations for Mediation, Regulation 3.

<sup>149</sup> IBA Rules for Investor-State Mediation (n 7) art 10.3(b); Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) 10.C.

made publicly available.<sup>150</sup> Disclosing the settlement agreement resulting from mediation strengthens the legitimacy of the mediation in the eyes of the general public and shields public officials from potential criticism regarding the appropriateness of concessions or payments to the other party. It also facilitates the rebuttal of potential allegations of the involvement of corruption in the settlement agreement.

Compared with these rules, the ICSID mediation rules are relatively cautious in terms of the disclosure of settlement agreements. Under ICSID's Rule 10, 'all documents generated in or obtained during the mediation shall be confidential' and 'the fact that they have mediated shall be confidential.'<sup>151</sup> This appears to be a compromise; the ICSID grants parties control over the disclosure of settlement agreements without restricting them by institutional rules. It is worth noting that if parties seek to enforce and invoke settlement agreements across borders through the Singapore Convention on Mediation, the settlement agreements may eventually become public regardless of an agreement as to disclosure.

### **iii. Establish limited exceptions to confidentiality**

Institutional rules allow for an explicit listing of exceptions to the general principle of confidentiality. The ISM models offer insight into what these exceptions are, and these are discussed below. However, it is helpful to look at the exceptions to transparency offered in ISA guidelines and compare their rigor to those in ISM rules.

ISA provides exceptions to transparency, laid out in the UNCITRAL Transparency Convention<sup>152</sup> as well as the ICSID's newly crafted Arbitration Rules.<sup>153</sup> These transparency exceptions can be broadly divided into the following four categories.

(1) Information that is protected against being made available to the public under binding documents, including the applicable treaty, the law of the respondent state, orders and decisions of the tribunal, agreement of the parties, the applicable law or applicable rules, and orders and decisions of the tribunal agreement of the parties;

(2) confidential business information;

(3) information that is confidential for the sake of procedural benefits, including public disclosure would impede law enforcement, aggravate the dispute between the parties, or undermine the integrity of the arbitral process; and

(4) any public disclosure that would be contrary to a state party's vital security interests.

In terms of mediation, potential exceptions to confidentiality can be found in the existing ISM rules. For example, the ICSID's newly released ICSID Mediation Rules stipulate three confidentiality exceptions: '(a) the parties agree otherwise; (b) the information or document is independently available, or (c) disclosure is required by law.'<sup>154</sup> Affirmative disclosure requirements may be found, for example, in domestic legislation applicable to public and private partnerships (the World Bank's PPP Disclosure

<sup>150</sup> See CETA 'Annex 29-C - Rules of Procedure for Mediation' (n 77) art 7(3).

<sup>151</sup> See ICSID, Proposed Regulations and Rules for ICSID Mediation Proceedings, available at <[https://icsid.worldbank.org/sites/default/files/publications/rule\\_amendment\\_proposals\\_mediation.pdf](https://icsid.worldbank.org/sites/default/files/publications/rule_amendment_proposals_mediation.pdf)> accessed on January 29, 2022.

<sup>152</sup> See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration art 7.

<sup>153</sup> See ICSID Working Paper 4 (n 11) Arbitration Rule 66.

<sup>154</sup> *ibid* Mediation Rule 10(1).



Framework illustrative of the objectives and scope of such disclosure regimes),<sup>155</sup> public financial management regulations, budget transparency legislation, or freedom of information legislation. Compared with their ICSID counterparts, the confidentiality exception provisions in the IBA Mediation Rules are more detailed and illustrative.<sup>156</sup> The IBA also requires that any disclosure made shall be in a manner that protects the confidentiality of information to the greatest extent feasible and permissible.

### **C. Additional considerations**

When balancing the two value orientations of confidentiality and transparency in ISM, some additional considerations are needed, as there is no universal ideal form of transparency for ISM.<sup>157</sup> Rather, the proper balance depends on certain specific factors such as the circumstances surrounding the mediation, the internal legal conditions and political situations of state parties, the specific subject of the dispute, and the stages of the mediation. As is evident from the published compilations of comments to date in ICSID working papers, states and other commentators continue to hold varying positions on transparency in ISDS.<sup>158</sup> For example, the states that have joined the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) are likely to pursue a low level of transparency in mediation to prevent evidence of bribery issues in ISDS procedures and awards. The release of this information could cause parties to be sanctioned by the OECD Anti-Bribery Convention and face severe legal risks. Further, some host states are inclined to resolve disputes in secrecy out of concern for their reputation. When a host country is publicly accused of breaking the law or losing a lawsuit, it damages the credibility of the host states' investment environment and states' reputation, particularly in the eyes of potential investors.<sup>159</sup> However, parties in a case with long-lived investments tend to have a greater need for confidentiality than parties in a case with short-lived investments.<sup>160</sup> In long-term investment projects (such as power, mining, or transportation infrastructure construction), parties tend to try to avoid destroying their continuous cooperative relationship and instead strive to make compromises and concessions to achieve the expected benefits of sustainable operation of the asset. If such compromises and concessions were carried out through open procedures, achieving satisfactory results would be difficult. Moreover, the cost of transparency is often substantial. Running a high-transparency system may result in increased costs, unnecessary delay, and interference with proceedings and may expose uncertain information.<sup>161</sup> Thus, the transparency of ISM may need to be determined on a case-by-case basis; as cases differ, so do their disclosure requirements.

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<sup>155</sup> See World Bank Group, 'A Framework for Disclosure in Public-Private Partnerships (2016) <<https://thedocs.worldbank.org/en/doc/773541448296707678-0100022015/original/DisclosureinPPPsFramework.pdf>> accessed on 29 January 2022.

<sup>156</sup> See IBA Rules for Investor-State Mediation (n 7) art 10.3.

<sup>157</sup> Moffitt Michael, 'Casting Light on the Black Box of Mediation: Should Mediators Make their Conduct More Transparent?' (1997) 13 OHSDJR 49.

<sup>158</sup> See ICSID Working Paper 3 (n 109) 347.

<sup>159</sup> Titi (n 19) 35.

<sup>160</sup> Cases involving longer investments have a 12% greater probability of having a fully public award than cases involving short-lived investments do.

<sup>161</sup> Barstow Magraw and Amerasinghe (n 22) 353-56.

Although it is not possible to determine a uniform ideal level of transparency, the level of transparency is not unpredictable in all respects. Specific tasks, individual mediators' characteristics, and the degree of public supervision in a given case all affect transparency in ISM. Taking these elements into consideration, states can adjust their efforts accordingly and cooperate in their own interests. Host states can adjust their responsibility for transparency in the ISDS mechanism in the following ways.

(1) Reaching an agreement regarding the disclosure of information including the ISM settlement;

(2) stipulating 'transparency clauses' in bilateral investment treaties and multilateral investment agreements signed by the state;

(3) defining an internal monitoring mechanism that requires the state's representative in the mediation regularly to report to a group of officials with full access to the file about the progress of the discussions and any proposals made by the mediator;<sup>162</sup>

(4) making provisions for disclosure obligations in domestic legislation, such as the freedom of information legislation, public financial management regulations, and budget transparency legislation of some democratic states; and

(5) while emphasizing confidentiality, stipulating exceptions to it (as in the models mentioned above), leaving space to protect transparency.

In addition to the individual efforts of each state, parties can make transparency responsibilities more predictable by working together to promote the establishment of the amicus curiae system in the ISM mechanism. In ISA, the purpose of the amicus curiae system is to provide factual information of various types to the tribunal to help the tribunal better understand the case before it and reach the correct decision.<sup>163</sup> The submission of amicus curiae briefs also encourages public participation, which is closely related to transparency.<sup>164</sup> If amicus curiae can be adopted by the ISM mechanism, the participation of third parties may also provide new ways of thinking about and creative solutions to settlement negotiations, thereby promoting better decision-making.<sup>165</sup> Furthermore, the establishment of amicus participation can increase the transparency of ISM by allowing the stakeholders in the dispute to express their perspectives, thereby enhancing the credibility of the ISM.<sup>166</sup> An amicus curiae system integrated into ISM would grant opportunities to the public in voicing their perspectives on legal matters, raise legal arguments or facts in light of the public interest, and make amicus petitions without having to rise to the level of an intervener to the case.<sup>167</sup> Strict confidentiality would not enable amicus petitioners to make such quality contributions. Disclosing the fact of the dispute itself, as discussed above, may allow for the timely participation of amicus curiae, thus promoting the public interest.

Of course, the value of amicus participation depends on the individual case.<sup>168</sup> Such participation may have some disadvantages, including increased costs, unnecessary delays,

<sup>162</sup> See Decision of the Energy Charter Conference: the Guide on Investment Mediation (n 9) art 10.C.

<sup>163</sup> Joseph D Kearney and Thomas W Merrill, 'The Influence of Amicus Curiae Briefs on the Supreme Court' (2000) 148(3) *Univ PA Law Rev* 830.

<sup>164</sup> Joachim Delaney and Daniel Barstow Magraw, 'Procedural Transparency' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 778.

<sup>165</sup> Christoph H Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009).

<sup>166</sup> Rauber (n 37).

<sup>167</sup> Barstow Magraw and Amerasinghe (n 22) 350.

<sup>168</sup> Rauber (n 37).

the politicization of conflicts, and the disclosure of highly confidential information.<sup>169</sup> The experience of the use of *amicus curiae* in ISA can be used for reference. The regulations of *amicus curiae* in ISA address these drawbacks by setting strict procedural safeguards and restrictions, such as tight deadlines, specific page limits, subject matter limits, a duty to explain the background and existence, and funding parties, to ensure that there is no interference with or unnecessary burden on the mediation process.

## **VI. Conclusion**

The above analysis shows that due to the hybrid nature of investor–state disputes, it is necessary to maintain public interest and improve transparency for both ISA and ISM. However, due to their institutional differences, the two dispute settlement systems allow for different degrees of transparency. Through transparency reform efforts, ISA has adopted transparency as its principle and confidentiality as the exception, whereas the basic principle of ISM is still confidentiality, with reasonable exceptions of transparency. Although mediation is unworkable in some cases and therefore cannot replace arbitration, to offer an attractive complementary mechanism, ISM must successfully balance the requirements of transparency and confidentiality.

In light of public interest concerns, the ISM mechanism must be expanded to include more reasonable transparency exceptions while maintaining an appropriate level of confidentiality. Otherwise, it will lose its institutional advantages and value. Some international treaties and rule practices have made progress in this direction, but further optimisation will require countries to make choices based on their respective positions. The degree of transparency of mediation in a specific case should depend on the specific circumstances of the dispute, any transparency rules implicated in the dispute settlement clauses involved, and the level of public interest and other calls for transparency involved.

The ISM mechanism is quite flexible in terms of transparency, allowing for a balance of confidentiality and transparency to be struck by the parties involved. Transparency is an increasingly important determinant of the development of the investment mediation mechanism. It will also affect the trends of both diversified investment dispute resolution and investment governance modernisation.

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<sup>169</sup> Rauber (n 37).