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Transparency Across International Courts and Tribunals

Enhancing Legitimacy or Disrupting the Adjudicative Process?

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Abstract

Transparency in international adjudication is often lauded as the hallmark of an effective judicial process; the goal to which all adjudicative bodies ought to aspire in order to enhance their legitimacy. This paper scrutinizes this perspective: while transparency certainly provides benefits to the international legal order, it needs to be balanced against other objectives in the pursuit of justice. The paper proceeds in two parts. First, it considers the status of transparency in various international courts and tribunals, across five main areas (requests, submissions, hearings, awards and compliance), arguing that most adjudicatory mechanisms have already achieved adequate transparency in the majority of areas. Second, it reviews the drawbacks to transparency, and how unbridled access may disrupt the adjudicative process, which rather ought to facilitate the resolution of a specific dispute and not a 'trial by media'. Overall, achieving a balance between transparency and confidentiality generates the most optimal outcome for international dispute settlement.

Keywords

transparency – confidentiality – international adjudication – international procedural law – legitimacy – access to information – international courts and tribunals – mediatisation

1 Introduction

I first met Geir Ulfstein in March 2007 at the "New International Law Conference" in Oslo. A PhD student at the time, I was highly impressed with the splendid organizational skills of the Norwegian scholars (and the beautiful facilities at the Soria Moria Hotel). As such, I was delighted to return to Oslo in 2015, when Geir and his team organized the 11th annual conference of the European Society of International Law (ESIL) on the topic of "The Judicialisation of International Law – A Mixed Blessing?", and again later that same year, for a symposium on "The Role of Investment Treaty Arbitration in Adjudicating Environmental Disputes". Little did I know then, the very next time I would be in Oslo (in 2016) would be to take up a professorship alongside Geir at the PluriCourts Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order – the magnificent brainchild of Geir and his co-director Andreas Føllesdal, generously funded by the Research Council of Norway.

Together, Geir and Andreas put Norway in general, and Oslo University in particular, on the map of international law, philosophy and political science, bringing together scholars and practitioners from all over the world. Like many others, I am immensely grateful to them, so it is both a pleasure and an honor to contribute to this special issue of the Nordic Journal of International Law, celebrating the professional life and works of Prof. dr. Geir Ulfstein.

Recent multilateral initiatives for the promotion and protection of foreign investment have been framed by a context of broad criticism of arbitration as a mechanism for the resolution of investor-State disputes.[1] One frequently raised complaint is that arbitration – and international dispute settlement more broadly – appears to be a secretive process. Calls for transparency are predominantly directed at investor-State disputes, because these cases often concern issues of public interest, given the public character of the respondents. Over the past two decades, there have been several attempts to overcome this image of 'suspicious secrecy' by making the adjudicatory process more

1 See generally, M. L. Marceddu and P. Ortolani, 'What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments', 31:2 *European Journal of International Law* (2020) pp. 405–428, doi:10.1093/ejil/chaa029; M. Waibel et al (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, London, 2010).

transparent.[2] This push for transparency intends to ensure that the process is controlled by the parties to the dispute, so as to provide access to (and in some cases, influence or review by) all persons and entities who arguably have an interest in the outcome of the dispute but who are not formally parties. The push is both technically narrow and strategically broad; in some respects, it is concerned with arbitration specifically and in other respects, it is motivated by concerns with globalization more generally.

Transparency in international dispute settlement has many forms. It may involve, among other aspects, organising open hearings, allowing amicus submissions, and publishing submissions, judgments and awards. Each step towards transparency, however, carries implications. To allow for amicus submissions, for example, the parties' briefings need to be made public, the filing schedule must be modified and the financial cost of the case increases as both parties and the tribunal have to spend time reviewing arguments put forward in the amicus brief. Viewed as a contest for influence between the parties and other interested entities, transparency itself becomes a contested concept. But what is the inherent value of transparency? It is considered to be a constitutional and public law standard;[3] a procedural guarantee ensuring justice is not only done but also seen to be done.[4] It is regarded as a necessary component of institutional 'input' legitimacy,[5] through its apparent facilitation of

2 These include changes in ICSID and UNCITRAL rules, as well as developments in NAFTA: see E. Shirlow and D. Caron, 'The Multiple Forms of Transparency in International Investment Arbitration: Their Implications, and Their Limits', in T. Schultz and F. Ortino (eds.), *The Oxford Handbook of International Arbitration* (Oxford University Press, Oxford, 2020) pp. 476–482; J. Nakagawa and D. Magraw, 'Introduction', in J. Nakagawa (ed.), *Transparency in International Trade and Investment Dispute Settlement* (Routledge, Abingdon, 2013) pp. 4–5.

3 C. P. Gonzalez, 'On Transparency, Good Governance and the Fight against Corruption: Some Lessons (and Questions) from an International Law Perspective', 19 *Spanish Yearbook of International Law* (2015) pp. 143, 161–162, doi:10.17103/sybil.19.09; C. Harlow, 'Freedom of Information and Transparency as Administrative and Constitutional Rights', 2 *Cambridge Yearbook of European Legal Studies* (1999) pp. 285–302, doi:10.5235/152888712802815860.

4 A. Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law', in A. Bianchi and A. Peters (eds.), *Transparency in International Law* (Cambridge University Press, Cambridge, 2013) p. 1; A. Peters, 'The Transparency Turn of International Law', 1 *Chinese Journal of Global Governance* (2015) p. 8, doi: 10.1163/23525207-00000002.

5 M. A. Pollack, 'The Legitimacy of the European Court of Justice', in N. Grossman et al (eds.), *Legitimacy and International Courts* (Cambridge University Press, Cambridge, 2018) p. 145

democratization,[6] allowing for scrutiny,[7] comprehensibility and the possibility of attributing accountability.[8] It is a necessary precondition for the informed consent by persons affected; furthermore, it leads to greater cooperation, through facilitating trust between participants.[9] Transparency is enthroned as the opposite not of confidentiality, but of secrecy, of dodgy deals behind closed doors.[10] In the context of international adjudication, the term tends to be used interchangeably with the concept of publicity,[11] with the latter preferred in the early twentieth century,[12] and still common in political theory.[13] Alongside accessibility and communication, publicity tends to be conceived

6 N. Grossman, 'Legitimacy and International Adjudicative Bodies', 41:1 *George Washington International Law Review* (2009) p. 115; C.-S. Zoellner, 'Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law', 27 *Michigan Journal of International Law* (2006) p. 585. See however A. Follesdal, 'Constitutionalization, Not Democratization', in N. Grossman et al (eds.), *Legitimacy and International Courts* (Cambridge University Press, Cambridge, 2018) p. 307 who critiques an absolute link between democracy and legitimacy, and argues that transparency – while assisting with democratisation – has other benefits vis-à-vis legitimacy.

7 E. Lieblich, 'Show Us the Films: Transparency, National Security and Disclosure of Information Collected by Advanced Weapon Systems under International Law', 45:3 *Israel Law Review* (2012) p. 463, doi: 10.1017/S0021223712000155; Zoellner, *supra* note 7.

8 A. von Bogdandy, 'The Democratic Legitimacy of International Courts: A Conceptual Framework', 14 *Theoretical Inquiries in Law* (2013) p. 375, doi:10.1515/til-2013–019.

9 *Ibid.*; P. Delimatsis, 'Transparency in the WTO's Decision-Making', 27 *Leiden Journal of International Law* (2014) p. 707, doi:10.1017/S0922156514000272.

10 Bianchi, *supra* note 5, p. 2.

11 See A. Peters, 'Towards Transparency as a Global Norm', in A. Bianchi and A. Peters (eds.), *Transparency in International Law* (Cambridge University Press, Cambridge, 2013) p. 535. While Peters explicitly uses the terms interchangeably, she notes that one potential difference is that transparency refers to accessibility, whereas publicity is the result; that is, whether access is achieved. For a political theory-based comparison of publicity and transparency, see e.g. C. Lindstedt and D. Naurin, 'Transparency is not Enough: Making Transparency Effective in Reducing Corruption', 31:3 *International Political Science Review* (2010) p. 304, doi:10.1177/0192512110377602, which notes that publicity assists in linking transparency with accountability.

12 M. Donaldson, 'The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order', 111:3 *American Journal of International Law* (2017) p. 575 fn. 1, doi:10.1017/ajil.2017.60.

13 Peters, *supra* note 5, p. 4.

of as a core aspect of transparency;[14] however, 'effective' transparency does not always require 'complete' publicity.[15]

Transparency is often hailed as giving voice to an underlying concern that international courts are not protecting the common good but the interests of the privileged few; that they are selling out the masses for the benefit of the elites.[16] Accordingly, its pursual is deemed to be in the public interest.[17] However, at times, it appears that the narrative surrounding these suspicions differs from the reality. This paper investigates this disjunct: how transparent are international courts and tribunals, and how transparent should they be? Transparency is scrutinized in the context of the multitude of factors that affect the legitimacy of the adjudicative process, rather than merely appraising it in a vacuum, as an objective that ought to be pursued at all costs.[18] It adopts a comparative doctrinal approach: as the basis for this paper, the relevant rules and regulations of different international tribunals and arbitral institutions were reviewed in-depth. Additionally, the implementation of these rules in practice was examined. This approach allowed for an in-depth appraisal of differences between international adjudicatory regimes in terms of transparency: the applicable rules, how these are applied, and how these might be improved. This methodology is particularly apt for considerations of transparency: it is not an absolute, quantifiable value; instead, it must be weighed alongside other values with which it conflicts (such as confidentiality), and be evaluated in the context of the goals peculiar to each adjudicative mechanism. 'Optimal'

14 See e.g. G. Bianco 'Article 2. Publication of Information at the Commencement of Arbitral Proceedings', in D. Euler et al (eds.), *Transparency in International Investment Arbitration* (Cambridge University Press, Cambridge, 2015) p. 66; T. Cottier and M. Temmerman, 'Transparency and Intellectual Property Protection in International Law', in A. Bianchi and A. Peters (eds.), *Transparency in International Law* (Cambridge University Press, Cambridge, 2013) p. 198.

15 Cottier and Temmerman, *supra* note 15, p. 207.

16 See generally, N. Grossman, 'The Normative Legitimacy of International Courts', 86:1 *Temple Law Review* (2013) pp. 61–105.

17 A. K. Bjorklund, 'The Emerging Civilization of Investment Arbitration', 113:4 *Penn State Law Review* (2009) p. 1287.

18 For further reading on the links between transparency and legitimacy please see: A. Wiik, *Amicus Curiae before International Courts and Tribunals* (Hart Publishing/Nomos, Baden-Baden, 2018); J. Kalicki and A. Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff, Leiden, 2015); G. Gaja, 'Assessing Expert Evidence in the ICJ', 15 *The Law and Practice of International Courts and Tribunals* (2016) pp. 409–418, doi:10.1163/15718034-12341331; P. Wojcikiwicz Almeida, 'International Procedural Regulation in the Common Interest: The Role of Third-Party Intervention and Amicus Curiae before the ICJ', 18:2 *The Law and Practice of International Courts and Tribunals* (2019) pp. 163–188, doi:10.1163/15718034-12341399.

transparency in the context of international criminal cases, for example, differs from that in interstate trade conflicts. However, it also draws on existing empirical research in the area to assist with this doctrinal analysis.[19]

This analysis led to the central argument of this paper: that – while there is always room for improvement – the international dispute settlement system is already relatively transparent, and accordingly, not in need of major reform. In fact, the level of transparency of international courts and tribunals goes above and beyond what is required by their statutes and other founding documents. Perhaps in contradiction to the criticism that international dispute settlement mechanisms, and particularly arbitration, have received, this paper will conclude by outlining three areas where transparency is – and ought to remain – limited.

2 Current Transparency Rules at International Courts and Tribunals

In the following section, the paper examines how the rules of different courts and arbitral institutions regulate transparency. In particular, it considers five distinct areas in which transparency is managed: the application or request for arbitration, the written submissions, the hearings, the resulting judgments and awards, and compliance. The focus is on the following institutions: first, the International Court of Justice (ICJ); second, the International Criminal Court (ICC); third, the World Trade Organization (WTO); fourth, the European Court of Human Rights (ECtHR), Inter-American Court of Human Rights (IACtHR) and African Court on Human and Peoples' Rights (ACtHPR); and fifth, arbitration under the rules of the International Chamber of Commerce (IChC), the Permanent Court of Arbitration (PCA), the International Centre for the Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL) and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention).[20]

19 See especially J. M. Reis, 'Opening Up International Adjudication: Mapping Procedural Transparency in International Disputes', in E. de Brabandere (ed.), *International Procedure in Interstate Litigation and Arbitration* (Cambridge University Press, Cambridge, 2021) p. 230.

20 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 3208 UNTS I-54749 (Mauritius Convention).

2.1 *Applications*

First, the ICJ's Rules of Court stipulate that the Court may, after ascertaining the views of the parties, make pleadings and annexed documents accessible to the public on or after the opening of the oral proceedings;[21] this follows a change to the prior rule of 1978 that required party consent.[22] However, in practice, applications to the Court are regularly published on its website well in advance of the opening of proceedings. For example, when Ukraine filed an application against the Russian Federation on 26 February 2022, it was made available on the Court's website the very next day.[23] Indeed, since 2010, written pleadings and evidence have been published in *all* contentious cases that have resulted in oral proceedings; since 2015, this material has always been made available on the ICJ website,[24] although it has never published where the parties' wishes differed.[25]

Second, the ICC Registrar is responsible for establishing the ICC's channels of communication.[26] The procedure applicable to the publication of documents focuses on the duty to protect the confidentiality of the proceedings and the security of the victims and witnesses.[27] Thus, the Registrar has to ensure the public dissemination of appropriate, neutral and timely information concerning the activities of the Court as well as "any other material as decided by the Presidency, the Prosecutor or the Registrar" through public information and outreach programmes.[28] In this context, the ICC website includes Reports on Preliminary Examinations, under which the Prosecutor

21 Article 53(2) Rules of Court of the International Court of Justice, 1 July 1978 (ICJ Rules of Court).

22 S. Rosenne, *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice* (Brill, The Hague, 1983) p. 118.

23 See ICJ, Press Release No. 2022/4, 27 February 2022, <www.icj-cij.org/public/files/case-related/182/182-20220227-PRE-01-00-EN.pdf>, visited on 21 September 2022, referring to the application as available on the Court's website.

24 B. Juratowitch, 'Departing from Confidentiality in International Dispute Resolution', 12 *Indian Journal of International Economic Law* (2020) p. 135 fn. 2.

25 T. Neumann and B. Simma, 'Transparency in International Adjudication', in A. Bianchi and A. Peters (eds.), *Transparency in International Law* (Cambridge University Press, Cambridge, 2013) p. 439.

26 Rule 13(1) Finalized draft text of the Rules of Procedure and Evidence (Addendum to the Report of the Preparatory Commission for the International Criminal Court), U.N. Doc. PCNICC/2000/INF/3/Add.1, 12 July 2000 (ICC Rules of Procedure and Evidence).

27 Rule 43 ICC Rules of Procedure and Evidence.

28 Regulation 5*bis* and 8 Regulations of the Registry of the International Criminal Court, ICC-BD/03-03-13 (ICC Regulations of the Registry).

determines whether there is adequate evidence of a crime falling within the ICC's jurisdiction, whether 'genuine' national proceedings have taken place, and whether opening an investigation would serve the interests of justice and of the victims.[29] Arrest warrants for each defendant, with the Court's reasons for issuing the warrant, are also published on its website.[30] Despite this procedural transparency, however, the Court has faced accusations of secretiveness in terms of its decision-making process *prior* to the issuance of arrest warrants; in particular, regarding the selection of persons charged within a situation, which operates entirely within prosecutorial discretion.[31] In turn, this secrecy is seen to potentially threaten the ICC's legitimacy, particularly in the eyes of those states particularly targeted by the Court:[32] without clear discussion of the reasons underlying selection, the Court opens itself to accusations of bias.

Third, the WTO has made efforts to increase the transparency of its dispute settlement mechanism (both internally and public-facing) in contract to the GATT system,[33] which was largely closed, apart from the post-conclusion release of GATT Panel reports.[34] In accordance with the Procedures for the Circulation and Derestriction of WTO Documents, all official WTO documents shall be accessible to the public – subject only to restrictions on Member or WTO body-submitted documents where requested[35] – and made available via the WTO website once they have been translated in all three official WTO languages.[36] Certain documents, where the information is publicly available or where it is required to be published under any agreement in Annex 1, 2 or 3 of the WTO Agreement, must be uploaded immediately on the WTO website.[37]

29 Article 53 Statute of the ICC, 2187 UNTS 38544 (Statue of the ICC).

30 Article 58 Statute of the ICC. Note, however, that some scholars consider the provision of elements on the website – including transcripts of proceedings – serve to create a 'staged' transparency that obfuscates: S. D'Hondt, 'Why Being There Mattered: Staged Transparency at the International Criminal Court', 183 *Journal of Pragmatics* (2021) pp. 168–178, doi:10.1016/j.pragma.2021.07.014.

31 See A. Branch, 'Uganda's Civil War and the Politics of ICC Intervention', 21:2 *Ethics and International Affairs* (2011) pp. 188–189, doi:10.1111/j.1747-7093.2007.00069.x.

32 See A. M. Danner, 'Enhancing Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', 97 *American Journal of International Law* (2003) p. 515, doi:10.2307/3109838.

33 F. Weiss and S. Steiner, 'Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison', 30:5 *Fordham International Law Journal* (2007) p. 1572.

34 G. Marceau and M. Hurley, 'Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms', 4 *Trade, Law and Development* (2012) p. 22.

35 Procedures for the Circulation and Derestriction of WTO Documents, WT/L/452, 14 May 2002, para. 2 (Procedures for the Circulation and Derestriction of WTO Documents).

36 *Ibid.*, para. 3.

37 *Ibid.*, fn. 4.

The first stage in the process of dispute settlement at the WTO is a request for consultation.[38] Such requests as well as requests for the establishment of a panel are also published on the WTO website, usually within three to four days,[39] although under the DSU, the deliberations of the panel and the documents submitted to it are to be kept confidential.[40] Notices of appeal are also made public.[41] In fact, many supposedly restricted documents become available on "various websites hours after their first circulation in a WTO meeting",[42] resulting in the publication of almost all case documents in recent years.[43]

Fourth, in the case of the ECtHR, with a few exceptions, all documents deposited with the Registry by any party or by any third party in connection with an application are made accessible to the public,[44] rendering it in theory one of the most open international institutions.[45] An applicant may submit a motivated request seeking that their identity not be disclosed to the public; otherwise, the application is published *in toto* on the website.[46] The practice direction requires that such a request be made upon submission of the application form or as soon as possible thereafter, providing reasons and specifying the impact of a refusal, with anonymity the exception, provided in narrow circumstances.[47] However, in practice, while many documents are published, the notice of complaint tends not to be.[48]

The ACtHPR similarly publishes all cases on its website, with the Registrar responsible for the printing and publication of all judgments, orders, pleadings and minutes of public sittings, as well as of such other documents as the Court may direct to be published.[49] However, as requests fall within the latter

38 Article 4 Dispute Settlement Rules, Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Agreement, Annex 2, 1869 UNTS 401 (DSU).

39 C. Ahlborn and J. H. Pfitzer, 'Transparency and Public Participation in WTO Dispute Settlement', *Center for International Environmental Law* (2009) p. 14, <www.ciel.org/Publications/Transparency_WTO_Dec09.pdf>, visited on 21 September 2022.

40 Appendix 3 para. 3 DSU.

41 P. Delimatsis, 'Institutional Transparency in the WTO', in A. Bianchi and A. Peters (eds.), *Transparency in International Law* (Cambridge University Press, Cambridge, 2013) p. 123.

42 Delimatsis, *supra* note 10, p. 725.

43 Reis, *supra* note 20, p. 251.

44 Rule 33 Rules of Court of the European Court of Human Rights, 3 June 2022 (ECtHR Rules of Court).

45 Neumann and Simma, *supra* note 26, p. 440; Reis, *supra* note 20, p. 245.

46 Rules 33 and 47(4) ECtHR Rules of Court.

47 ECtHR, *Practice Directions: Requests for Anonymity,* 14 January 2010, <echr.coe.int/Documents/PD_anonymity_ENG.pdf>, visited on 21 September 2022.

48 Reis, *supra* note 20, p. 251.

49 Rule 25(2)(i) Rules of Court of the African Court on Human and Peoples' Rights, 2 June 2010 (ACtHPR Rules of Court).

category, unlike the ECtHR, not all documents *must* be published, and this remains in the Court's discretion. In practice, originating documents tend not to be published.[50] Where an applicant requests anonymity, documents available to the public refer to the applicant under a pseudonym.[51]

The inter-American human rights system differs from the European and African systems in that cases may only be brought before the IACtHR by States or by the Inter-American Commission on Human Rights.[52] Individuals cannot bring a case directly before the Court, which significantly lowers the number of submitted applications. Applications to the Court are to be made public "except those considered unsuitable for publication";[53] while these are made available on the IACtHR website, it seems that there is a publication backlog, meaning that applications tend only to be published once a judgment has been rendered in the case.[54] However, on the webpage of the Inter-American Commission on Human Rights, one may find a database of all the petitions brought before the Court as well as the Final Report of the Commission (with some minor delays).[55]

Fifth, requests for arbitration are generally made public where this is required by the treaty on which the tribunal's jurisdiction is based, regardless of the institution under whose auspices the proceedings are initiated. For example, under NAFTA Annex 1137.4 and the Note of Interpretation of the NAFTA Free Trade Commission of 31 July 2001, States party to NAFTA agree to "make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal",[56] regardless of whether the dispute was administered by the PCA or ICSID, or was *ad hoc*. The Canada-United States-Mexico Agreement (CUSMA) similarly requires parties participating in dispute settlement under the agreement to publicly release requests.[57] Individual BITs also

50 Reis, *supra* note 20, p. 251.

51 Rule 41(8) ACtHPR Rules of Court.

52 Article 61 Inter-American Convention on Human Rights, 1144 UNTS 17955 (Inter-American Convention on Human Rights).

53 Article 32(1b) Rules of Procedure of the Inter-American Court of Human Rights, 28 November 2009 (IACtHR Rules of Procedure).

54 The most recent judgment with the written submissions published online is a decision from June 2021: see <www.corteidh.or.cr/casos_sentencias.cfm>, visited on 21 September 2022.

55 See <www.oas.org/es/cidh/decisiones/demandas.asp?Year=2020#>, visited on 21 September 2022.

56 NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions,* 31 July 2001, <www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp>, visited on 21 September 2022 (FTC Notes of Interpretation).

57 Article 19, Annex III (Rules of Procedure) Agreement between the United States of America, the United Mexican States and Canada, 1 July 2020 (CUSMA).

can include broad transparency provisions: the 2012 Model BIT of the Southern African Development Community, for example, requires the State party to promptly make available to the public all documents in the arbitration.[58]

Most rules do not preclude either party from unilaterally disclosing information concerning the dispute, such as the notice of arbitration.[59] For example, the Comprehensive Economic and Trade Agreement allows Canada and the EU to make documents publicly available prior to the constitution of the tribunal.[60] Moreover, arbitration documents may be made public by agreement of the parties to the dispute, either voluntarily, or through submissions to local courts. They may also be 'leaked' to databases such as italaw.com, investmentclaims.com, iareporter.com, globalarbitrationreview.com, investorstatelawguide.com or the PluriCourts Investment Treaty Arbitration Database (PITAD) (though some of these are paid databases and therefore not generally accessible).

In recent years, a number of institutions have revised the rules governing arbitrations as to increase transparency. In 2014, UNCITRAL promulgated the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.[61] They apply to all UNCITRAL-based proceedings commenced under treaties that came into effect on or after 1 April 2014,[62] as extended by the Mauritius Convention, to any investor-State arbitration in which either party is signatory to the Convention.[63] As of 2020, 61 treaties provided for their application.[64] Under these rules, the notice of arbitration must be made available to the public,[65] subject to certain limitations:[66] the notice must be immediately communicated to the established repository, with the repository required to "promptly" make available to the public certain information regarding the dispute, including the name of the disputing parties, the economic sector and the

58 L. Boisson de Chazournes and R. Baruti, 'Transparency in Investor-State Arbitration: An Incremental Approach', 2:1 *BCDR International Arbitration Review* (2015) p. 64.

59 This includes the SCC, ICC, ICSID and UNCITRAL arbitration rules: L. Johnson, 'New UNCITRAL Rules on Transparency: Application, Content and Next Steps', 8 *Columbia Center on Sustainable Investment* (2013) p. 7, <scholarship.law.columbia.edu/sustainable_investment_staffpubs/27>, visited on 21 September 2022.

60 Article 8.36 Comprehensive Economic and Trade Agreement, OJ L 11, 14 January 2017, pp. 23–1079.

61 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 1 April 2014 (UNCITRAL Rules on Transparency).

62 Article 1 *ibid*.

63 Article 2 Mauritius Convention.

64 Juratowitch, *supra* note 25, p. 137.

65 Article 3 UNCITRAL Rules on Transparency.

66 Article 7 *ibid*.

treaty under which the claim is being made.[67] The disclosure of the request is fundamental for legitimacy purposes, as it ensures stakeholders are aware of the dispute, in turn allowing their intervention as amici curiae,[68] with its publication in a central, identifiable repository assisting with this transparency.[69] While the rules may be adopted by disputing parties more broadly, the Mauritius Convention itself has found only limited acceptance by States. Though it has been signed by 23 States, only nine had ratified it at the time of writing: Australia, Benin, Bolivia, Cameroon, Canada, Gambia, Iraq, Mauritius and Switzerland.

Similarly, the new ICSID Arbitration Rules, which went into effect on 1 July 2022, provide for the publication of all written submissions or supporting documents filed by a party in the proceeding with the consent of the parties, subject to any redactions they may have.[70] Indeed, for all cases registered at the Centre, Regulations 25 and 26 of the 2022 ICSID Administrative and Financial Regulations require the Centre to publish documents generated in proceedings "in accordance with the rules applicable to the individual proceeding", and maintain and publish a register for each case "containing all significant data concerning the institution, conduct and disposition of the proceeding", respectively. This differs from the 2006 version, which required the Secretary-General to "appropriately" publish information concerning the Centre's operation, "including the registration of all requests for conciliation or arbitration";[71] while this 2006 revision was explicitly aimed at improving transparency, it did not provide for the prompt, central provision of documents at the commencement of arbitration.[72]

2.2 *Written Submissions*

The ICJ and the ICC regularly make the parties' written submissions easily accessible on their websites in accordance with their respective rules. In the case of the ICJ, Article 53 of the Rules of Court provides that "[t]he Court may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the

67 Article 2 *ibid*.
68 Bianco, *supra* note 15, p. 65.
69 *Ibid*.
70 Rule 64 ICSID Arbitration Rules, 1 July 2022 (ICSID Arbitration Rules).
71 Regulation 22 ICSID Administrative and Financial Regulations, 10 April 2006.
72 Bianco, *supra* note 15, p. 66.

opening of the oral proceedings".[73] Evidence to be adduced in the pleading is to be attached to the document.[74] While these rules provide full discretion to the Court, which suggests against transparency, in practice, all pleadings, memorials, counter-memorials, replies and rejoinders are published and easily accessible on the Court's website.

At the ICC, submissions related to ongoing cases, including by victims' representations, amici curiae, the prosecutor and the defence, may be published online. These are generally redacted to protect victims and witnesses.[75] Some submissions are entirely confidential: these often are submitted as a confidential annex to the submitted written observations, provided to victims representatives and the defence, such that the public is made aware of their filing, without gaining access to their contents.[76] Statements made by witnesses or victims are not generally available, due to their sensitive nature.[77] Most evidence is not uploaded online,[78] and certain documents such as complaints remain confidential.[79]

Prior to the 2002 revised procedures for the circulation and derestriction of documents,[80] the GATT practice regarding the accessibility of general WTO documents was restrictive. The General Council's decision recognized that the system for the circulation of documents at the time was in need of improvement, and specifically noted that greater transparency was of importance to the WTO.[81] Specifically, the revised procedures stipulate that "[a]ll official WTO documents shall be unrestricted".[82] Documents that are submitted by a Member as 'restricted' may be automatically derestricted after a maximum of 60 days, unless the Member requests otherwise; if this occurs, the Member must renew its request every 30 days.[83] Minutes of meetings (including records, reports and notes) are to be made available as well,[84] and translations of documents

73 Article 53 ICJ Rules of Court.
74 Article 50 *ibid*.
75 Rule 15 ICC Rules of Procedure and Evidence.
76 See e.g. Submission of Prosecution's Final Written Observations with Confidential Annex A, *Bahr Idriss Abu Garda*, (ICC -02/05-02/09), Pre-Trial Chamber I, 16 November 2009.
77 Rule 43 ICC Rules of Procedure and Evidence.
78 Rule 81 *ibid*. Note, however, that in *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, the Court has uploaded certain evidence, including the analysis of satellite imagery: <www.icc-cpi.int/case-evidence/al-hassan>, visited on 21 September 2022.
79 Rule 26 ICC Rules of Procedure and Evidence.
80 Procedures for the Circulation and Derestriction of WTO Documents.
81 *Ibid*., preambular para. 3.
82 *Ibid*., para. 1.
83 *Ibid*., para. 2(a).
84 *Ibid*., fn. 3.

in the three WTO languages are to "be completed expeditiously",[85] and these translations are to be published on the website "to facilitate their dissemination at large".[86] However, the transparency of the adjudicatory process remains relatively limited. Pursuant to DSU Article 18.2, "the deliberations of the panel and the documents submitted to it shall be kept confidential", with only the disclosure of parties' own positions to the public allowed. The disclosure of 'positions' permits the full publication of written submissions, and the other party cannot prevent this publication.[87] Some panels also attach summaries or full text versions of submissions to their reports once published,[88] and often quote directly from party submissions.[89] However, relatively few submissions are published of themselves.[90] One possible avenue allowing WTO members to gain access to these documents is through acting as third party observers, which does not require participation through written or oral submissions;[91] this, however, provides access only to those submissions up until the first panel meeting.[92]

At the ECtHR, all documents deposited "shall be accessible to the public".[93] While parties may seek to oppose disclosure, and the President of the Chamber similarly can choose to restrict documents, the circumstances where this may occur is limited to where restriction is:

> in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties or of any person concerned so require, or to the extent strictly necessary in the opinion of the President of the Chamber in special circumstances where publicity would prejudice the interests of justice.[94]

85 *Ibid*., para. 3.
86 *Ibid*.
87 WTO Panel Report, Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil, 22 April 2003, WT/DS241/R, para. 7.14, <docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/241R-00.pdf&Open=True>, visited on 21 September 2022.
88 Ahlborn and Pfitzer, *supra* note 40, p. 7.
89 G. Cook, 'Confidentiality and Transparency in the WTO's Party-Centric Dispute Settlement System', in M. T. Molina Tejeda (ed.), *Practical Aspects of WTO Litigation* (Kluwer, Alphen aan den Rijn, 2020) p. 359.
90 See Reis, *supra* note 20, p. 252.
91 Delimatsis, *supra* note 42, p. 123.
92 *Ibid*., p. 125.
93 Rule 33(1) ECtHR Rules of Court.
94 Rule 33(2) ECtHR Rules of Court.

Access to case files (that is, documents deposited with the Registrar pursuant to Article 40(2) of the European Convention on Human Rights)[95] can be gained by filling out and submitting an online form.[96] This form requires that a full name and email address be provided, together with the reason for the request and details of the document(s) to be consulted. The information on the website regarding access to case files adds:

> You must give the exact references of each case you wish to consult (application number, date, etc.). To avoid unnecessary travel and expense, it should be noted that the internal documents of the Court are not accessible. The parties are reminded that "documents deposited with the Registrar" by the Government are forwarded for information or comments to the applicant and vice versa. If the request is accepted the documents may be consulted at the European Court of Human Rights by appointment only, made at least 15 working days in advance.

Thus, access to written submissions in practice seems to be limited and only available where there is a justification for access to the submission.

The ACtHPR may publish written submissions if the Court wishes to do so, a decision fully within its discretion.[97] Although the website does not publish such submissions,[98] presently, the Court is digitizing all case files, with this process 52 per cent complete.[99] While the decisions, once digitized, will be uploaded to African Union Common Repository, it is unclear whether there will be restrictions on access to the case files themselves.[100]

The IACtHR makes public all "documents from the case file, except those considered unsuitable for publication" and "any other document that the Court considers suitable for publication".[101] However, as noted above, publication generally only occurs once a judgment has been rendered in the case and even then, there is a backlog of approximately one year. The Court also does not appear to publish exhibits or other evidence submitted in the cases.

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95 European Convention on Human Rights, 213 UNTS 221 (ECHR).

96 The form is available at <app.echr.coe.int/Contact/EchrContactForm/English/1>, visited on 21 September 2022.

97 Rule 25(2)(i) ACtHPR Rules of Court.

98 Reis, *supra* note 20, p. 251.

99 ACtHPR, *African Court on Human and Peoples' Rights Strategic Plan 2021–2025* (2021) p. 8 <www.african-court.org/wpafc/wp-content/uploads/2021/06/ACtHPR-Strategic-Plan-2021-2025-Deepening-Trust-in-The-African-Court.pdf>, visited on 21 September 2022.

100 *Ibid.*, p. 26.

101 Article 32 IACtHR Rules of Procedure.

Arbitration generally does not provide access to written submissions. The 2010 UNCITRAL Arbitration Rules, prior to their amendment, provide no comment on access to submissions, and institutions such as the IChC and the Singapore International Arbitration Centre do not provide for transparency, unless the parties themselves decide on such rules.[102] Indeed, under the IChC's rules, access to any document is only provided in very limited circumstances, and submissions are excluded from this: the President or the Secretary General may authorize academic researchers to "acquaint themselves with awards and other documents of general interest, with the exception of memoranda, notes, statements and documents".[103] Similarly, depending on the parties' agreements and the applicable treaty, the written submissions of the parties to PCA cases are only sometimes freely available. ICSID provides slightly more scope for publication. The amended ICSID Administrative and Financial Regulations establish that "[w]ith a view to furthering the development of international law in relation to investment, the Centre shall publish: … (d) documents generated in proceedings, in accordance with the rules applicable to the individual proceedings".[104] The Arbitration Rules also provide that "[w]ith the consent of the parties, the Centre shall publish any written submission or supporting document filed by a party in the proceeding, with any redactions agreed to by the parties and jointly notified to the Secretary-General".[105] The Rules also note that "absent consent of the parties … a party may refer to the Tribunal a dispute regarding the redaction of a written submission … the Tribunal shall decide and disputed redactions and the Centre shall publish the document in accordance with [its] decision".[106] This is very similar to the requirements of the ICSID Additional Facility proceedings.[107] In addition, where the UNCITRAL Rules on Transparency apply, such as for parties to the Mauritius Convention, greater transparency of written submissions is facilitated. Though its application is still limited, these rules require documents to be made available to the public, including written submissions, expert reports and witness statements.[108] The list of exhibits (if prepared for the arbitration) must be published, although this does not extend to the exhibits themselves: these may

102 Y. Kryvoi, 'Private or Public Adjudication? Procedure, Substance and Legitimacy', 34 *Leiden Journal of International Law* (2021) pp. 691–692, doi:10.1017/S0922156521000224.
103 Appendix II Article 1(5) International Chamber of Commerce, Rules of Arbitration, 1 January 2021.
104 Regulation 25 ICSID Administrative and Financial Regulations, 2022.
105 Rule 64 ICSID Arbitration Rules.
106 *Ibid.*
107 Rule 74 ICSID Additional Facility Arbitration Rules, 1 July 2022.
108 Article 3(1)–(2) Mauritius Convention.

be made available if the tribunal so decides, in the manner which it sees fit.[109] These documents may be subject to proceedings in relation to confidentiality or protected information.[110]

NAFTA and CUSMA similarly provide for greater levels of transparency. In 2001, the Free Trade Commission (constituted by Canada, Mexico and the United States) issued a Note of Interpretation providing that there was no duty of confidentiality upon the parties that prevented public availability of documents relevant to the arbitration.[111] This note in effect rendered transparency the default in disputes under the treaty.[112] Accordingly, each of the three NAFTA parties publish information online about investment disputes to which they are parties.[113] This information includes parties' written submissions, courts orders, decisions and awards, albeit with confidential material redacted.[114] The NAFTA Secretariat itself also publishes decisions and reports of disputes under NAFTA.[115] Further, various online resources also provide access to arbitral awards.[116] CUSMA takes this further, with the treaty itself explicitly requiring parties to publicly release their submissions.[117]

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109 Article 3(3) *ibid.*

110 Article 3(4) *ibid.*

111 Article A FTC Notes of Interpretation.

112 J. A. Maupin, 'Transparency in International Investment Law: The Good, the Bad, and the Murky', in A. Bianchi and A. Peters (eds.), *Transparency in International Law* (Cambridge University Press, Cambridge, 2013) pp. 153–154.

113 The United States' website is <www.state.gov/nafta-investor-state-arbitrations/>, visited on 21 September 2022; the Canadian website is <www.international.gc.ca/trade-commerce/trade_topics-domaines_commerce/trade_dispute_settlement-reglement_differends_commerciaux.aspx?lang=eng>, visited on 21 September 2022; the Mexican website is <www.gob.mx/se/acciones-y-programas/comercio-exterior-solucion-de-controversias?state=published>, visited on 21 September 2022.

114 Maupin, *supra* note 113, p. 154.

115 The archived version of this page is available at <web.archive.org/web/20181106132142/www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports>, visited on 21 September 2022.

116 A. K. Bjorklund, 'The Legitimacy of the International Centre for Settlement of Investment Disputes', in N. Grossman et al (eds.), *Legitimacy and International Courts* (Cambridge University Press, Cambridge, 2018) p. 247. The online resources that Bjorklund cites are *Investment Treaty Arbitration*, <www.italaw.com>, visited on 21 September 2022; *Investment Claims*, <oxia.ouplaw.com/home/ic>, visited on 21 September 2022; *Investor-State Law Guide*, <www.investorstatelawguide.com>, visited on 21 September 2022; *UNCTAD Investment Policy Hub*, <investmentpolicyhub.unctad.org>, visited on 21 September 2022; *ICSID*, <icsid.worldbank.org/en/Pages/cases/searchcases.aspx>, visited on 21 September 2022.

117 Article 19, Annex III (Rules of Procedure) CUSMA.

2.3 *Hearings*

Hearings are generally public at the ICJ and ICC, as well as the ECtHR, the ACtHPR and the IACtHR, though there are some limitations.

The ICJ Statute provides that "minutes shall be made at each hearing and signed by the Registrar and the President".[118] The Statute sets out that a transcript of the hearings (signed by the President and the Registrar) "shall constitute the authentic minutes of the sitting for the purpose of Article 47 of the Statute. The minutes of public hearings shall be printed and published by the Court".[119] Further, the hearing in Court "shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted".[120] This not only allows for the Court to completely close hearings if it chooses, without reason, but also to partially close elements, or to alter the hearing from open to closed.[121] While this may appear to hinder full transparency, as there is no unilateral ability for parties to require closed hearings, this has not become an issue:[122] there has never been a fully closed hearing, but there have been some cases in which witnesses were heard behind closed doors, for example in the *Genocide* case.[123] Indeed, the intention behind the original Article was to provide for full public access – this ensuring "the confidence of the public" – with exclusion the exception.[124] Though hearings are public, seating is limited at the ICJ, and frequently the seats are reserved for diplomats. Since 2009, hearings have also been live-streamed over the internet, making them generally accessible, although the Court has indicated it will only do so where in the public interest.[125] In 2020, with the COVID-19 pandemic, the relevant Article was amended to include the possibility that "the Court may decide, for health, security or other compelling reasons, to hold a hearing entirely or in part by video link".[126]

At the ICC, hearings are presumed to be public,[127] subject to some exceptions, which must be expressly invoked if a hearing is closed: for example,

118 Article 47(1) ICJ Statute.
119 Article 71(6) ICJ Rules of Court.
120 Article 59(1) *ibid.*
121 S. von Schorlemer, 'Article 46', in A. Zimmermann et al (eds.), *Statute of the International Court of Justice: A Commentary* (2nd ed., Oxford University Press, Oxford, 2012) p. 1199.
122 Neumann and Simma, *supra* note 26, p. 449.
123 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia*), Judgment, ICJ Reports 2015, p. 3, at para. 31.
124 von Schorlemer, *supra* note 122, p. 1198.
125 Neumann and Simma, *supra* note 26, p. 454.
126 Article 59(2) ICJ Rules of Court.
127 Prosecutor's Application under Article 58(7), *Situation in Darfur, Sudan*, (ICC -02/05), Pre-Trial Chamber I, 27 February 2007, para. 17.

the Court can hold closed sessions to protect confidential or sensitive information.[128] These exceptions were intended to be limited in scope, as to protect against witness intimidation.[129] Hearings are regularly broadcast with a 30-minute delay.[130] All documentary and other evidence introduced by a participant during a public hearing is available for broadcast, unless otherwise ordered by the Chamber.[131] Moreover, "[a]t the request of a participant or the Registry, or proprio motu, and when possible within the time set out [...], the Chamber may, in the interests of justice, order that any information likely to present a risk to the security or safety of victims, witnesses or other persons, or likely to be prejudicial to national security interests, shall not be published in any broadcast, audio- or video-recording or transcript of a public hearing".[132] In practice, temporary *in camera* hearings occur fairly frequently to protect witnesses.[133] Finally, the audio- and video-record of hearings is made available to the participants and the public, unless otherwise ordered by the Chamber.[134] The ICC's records and transcripts are available on its website.[135]

At the WTO, traditionally, hearings before a Panel or the Appellate Body are not open to the public. However, an increasing number of panel hearings are now publicly accessible subject to the parties' consent and the Panel's authorization.[136] Members of the public can register for access to these hearings through the WTO website.[137] The proceedings of the Appellate Body are in principle still confidential, but exceptions have been made.[138] For example, Mr Shahid Bashir (former chairperson of the Dispute Settlement Body) stated:

> Traditionally, WTO dispute settlement proceedings have been confidential until the panel or Appellate Body report is circulated. However, on several occasions in recent years, panels, the Appellate Body, and Arbitrators have opened for public viewing their hearings (called "meetings"

128 Article 64(7) Statute of the ICC; Regulation 20 ICC Regulations of the Court, ICC-BD/01-05-16, 15 November 2018 (ICC Regulations of the Court).
129 W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., Oxford University Press, Oxford, 2016) p. 986.
130 Regulation 21 ICC Regulations of the Court.
131 Regulation 21(7) *ibid.*
132 Regulation 21(8) *ibid.*
133 Schabas, *supra* note 130, p. 986.
134 Regulation 21(9) ICC Regulations of the Court.
135 See <www.icc-cpi.int/documents>, visited on 21 September 2022.
136 Appendix 3, para. 2 DSU.
137 See, for example, WTO, 'Registration opens to access audio statements in "US – Supercalendered Paper" arbitration', 14 February 2022, <www.wto.org/english/news_e/news22_e/hear_ds_14feb22_e.htm>, visited on 21 September 2022.
138 Article 17(10) DSU.

> in WTO dispute settlement) with disputing parties… For two panel hearings, members of the public were permitted to view the panel via closed circuit television in a WTO meeting room. Similarly, the Appellate Body opened one of its oral hearings to public viewing. The disputing parties in these cases, namely Canada, the EU, Japan, Mexico, and the United States, had agreed to this procedure.[139]

The WTO's goal is to move to a situation where "openness [to] be the rule, with the exception of confidentiality as broad as required": this approach can be rooted in "an interpretation of the DSU based on its text, context, and object and purpose".[140] The Appellate Body decision in *US – Continued Suspension*, for example, supports the view that "there is no express provision in the DSU establishing that Members have a procedural rights to confidentiality regarding all their statements during WTO appeal proceedings".[141] Similarly, the benefits of public access to hearings include the opportunity for public scrutiny, thereby demonstrating that the proceedings are unbiased and properly conducted, satisfying the requirements of fairness and integrity, and facilitating greater legitimacy and credibility.[142] Indeed, WTO members themselves have indicated their support for transparency in dispute settlement.[143] While there is a greater push for public hearings in the WTO, hearing records are as of yet not provided.[144]

Hearings at the ECtHR and documents deposited with the Registrar are public, unless the Court or the President respectively, in exceptional circumstances, decides otherwise;[145] this practice occurred even prior to the introduction of the rule requiring open hearings in the Convention.[146] The Court considers

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139 S. Bashir, 'WTO Dispute Settlement Body Developments in 2012', <www.wto.org/english/tratop_e/dispu_e/bashir_13_e.htm>, visited on 21 September 2022.

140 A. Álvarez-Jiménez, 'Public Hearings at the WTO Appellate Body: The Next Step', 59:4 *International & Comparative Law Quarterly* (2010) p. 1097, doi:10.1017/S002058931000045X.

141 *Ibid.*, pp. 1090–1092.

142 See L. Ehring, 'Public Access to Dispute Settlement Hearings in the World Trade Organization', 11:4 *Journal of International Economic Law* (2008) pp. 1021–1034, doi:10.1093/jiel/jgn034 (though his article was published when Panel and Appellate Body hearings were open to the public physically, but not live-streamed).

143 P. Ala'i, 'From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance', 11:4 *Journal of International Economic Law* (2008) p. 780, doi:10.1093/jiel/jgn027.

144 Reis, *supra* note 20, p. 253.

145 Article 40 ECHR.

146 W. A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, Oxford, 2015) p. 826.

public hearings as "one of the means whereby confidence in the courts, superior and inferior, can be maintained".[147] Refusal occurs on the basis of certain clearly identified public or private interests, or to the extent "strictly necessary in the opinion of the President of the Chamber in special circumstances where publicity would prejudice the interests of justice".[148] Such a decision can be made by the Chamber, either of its own motion or at the request of a party or any other person concerned. In such cases:

> [t]he press and the public may be excluded from all or part of a hearing in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Chamber in special circumstances where publicity would prejudice the interests of justice.[149]

Any request for a hearing to be held in private must be motivated and specify whether it concerns all or only part of the hearing. While restrictions have previously been permitted in cases concerning child custody and adoption, most cases involving children, or other sensitive issues, remain public.[150] All public hearings are broadcast on the ECtHR website, with interpretation in French and English,[151] although this is not required under the rules.

Similarly, the ACtHPR requires that cases are heard in "open court".[152] However, the Court is permitted to hold proceedings *in camera* – either of its own decision or at party request – if, in its opinion, it is in the interest of public morality, safety or public order.[153] Judgments are streamed on YouTube.[154] In practice, the majority of hearings are held in public.[155] Further, at the IACtHR, the 2009 iteration of the rules states that "hearings shall be public, unless the Tribunal deems it appropriate that they be in private" (unlike the 2002 iteration

147 *Axen* v. *Germany* [1984] 6 EHRR 195, para. 25.
148 Rule 33 ECtHR Rules of Court.
149 Rule 63 *ibid*.
150 Schabas, *supra* note 147, pp. 826–827.
151 See <www.echr.coe.int/Pages/home.aspx?p=hearings&c>, visited on 21 September 2022. The website states "[t]hanks to the support provided by Ireland, all the Court's public hearings since 2007 have been filmed and can be viewed in their entirety, with interpretation in French and English".
152 Rule 43(1) ACtHPR Rules of Court.
153 Rule 43(2) *ibid*.
154 Available at <www.youtube.com/user/africancourt/live>, visited on 21 September 2022.
155 Reis, *supra* note 20, p. 253.

of the Article, which required hearings to be public except in "exceptional circumstances").[156] This would seem to expand the ability for the Court to close hearings. The Court makes public "the conduct of the hearing by means of the corresponding technological means",[157] which has been implemented through the live-streaming of hearings on YouTube, where they remain available to be viewed afterwards;[158] records are available for the majority of cases.[159] All three courts have increased the availability of hearing records across time, given the provision of recorded streams of public hearings.[160]

As indicated above, in international arbitration, the rules on transparency usually depend on the treaty relied upon to generate the jurisdiction of the tribunal, and in particular, any institutional rules governing procedure adopted by the parties.[161] This is also the case with regard to the transparency of hearings, which are traditionally closed. The PCA Arbitration Rules do not contain any rules specifically pertaining to transparency. The only provision that deals with confidentiality is Article 28(3) of the PCA Rules, which provides that "[h]earings shall be held *in camera* unless the parties agree otherwise".[162] The 2006 ICSID Arbitration Rules provide for hearings to be closed, with the possibility of the Tribunal permitting other persons to attend, after consultation with the Secretary General, unless either party objects.[163] Rule 65 of the amended ICSID Arbitration Rules, which entered into force on 1 July 2022, does not require consultation with the Secretary General: "the Tribunal shall allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal, to observe hearings, unless either party objects".[164] Although discussions in ICSID working papers on the revision of the rules have resulted in greater transparency, they also granted the tribunal more discretion in this regard.[165] As (particularly State) parties to a dispute frequently oppose complete transparency, such discretion is likely to result in greater public access. Additionally, "upon the request of a party, the Centre shall publish recordings or transcripts of hearings, unless

156 Article 24(1) Statute of the Inter-American Court of Human Rights, 1 January 1980 (IACtHR Statute); Article 15(1) IACtHR Rules of Procedure.
157 Article 32 IACtHR Rules of Procedure.
158 Available at <www.youtube.com/user/CorteIdh>, visited on 21 September 2022.
159 See Reis, *supra* note 20, pp. 253–254.
160 *Ibid.*
161 For example, NAFTA hearings have traditionally been public.
162 Article 28(3) PCA Arbitration Rules, 17 December 2012.
163 Rule 35 ICSID Arbitration Rules, 10 April 2006.
164 Rule 65(1) ICSID Arbitration Rules.
165 Juratowitch, *supra* note 25, p. 139.

the other party objects".[166] Both the PCA and ICSID publish transcripts of the hearings where the Parties to the dispute request such publication. The IChC has strict confidentiality requirements: it specifies that the Court's sessions are open only to its members and its secretariat; however, "in exceptional circumstances, the President of the Court may invite other persons to attend".[167]

On the other hand, NAFTA and CUSMA both provide for greater transparency generally, as noted above. Under NAFTA, Canada and Mexico agreed to public access to hearings by 2004, a binding interpretation that facilitated transparency in this area.[168] CUSMA establishes open hearings (with the ability for tribunals to make arrangements to protect confidential information),[169] and requires that minutes or transcripts of hearings must be made available to the public where available.[170] NAFTA hearings have historically been streamed by closed-circuit television feed, with the feed cut where confidential information is provided.[171]

Similarly, while the prior UNCITRAL Arbitration Rules set *in camera* hearings as the default unless the parties agreed otherwise[172] – to the extent that tribunals decided that even amici curiae were not permitted to attend under the rules[173] – the UNCITRAL Rules on Transparency reverse this default: they stipulate that hearings shall be public, subject to the need to protect confidential information or the integrity of the arbitral process.[174] They also provide for the logistics of such publicity, stating that

> The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the

166 Rule 65(3) ICSID Arbitration Rules.
167 Article 1 Internal Rules of the International Court of Arbitration, Annex III, IChC Arbitration Rules, 2021.
168 Boisson de Chazournes and Baruti, *supra* note 59, p. 62.
169 Article 14.D.8(2) CUSMA.
170 Article 14.D.8(1)(d) *ibid*.
171 M. Zhao, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach', 59 *Virginia Journal of International Law* (2019) p. 204.
172 Article 28 UNCITRAL Rules, 15 August 2010.
173 *See Methanex Corporation* v. *United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001, paras. 41–42.
174 Articles 6(1)–(2) UNCITRAL Rules on Transparency.

> circumstances render any original arrangement for public access to a hearing infeasible.[175]

The COVID-19 pandemic brought about a technical revolution in this sense. While hearings were held remotely, public hearings were streamed (either live or with a delay) on different institutional platforms. Most institutions required that people register to 'attend' the hearing, though there were some exceptions. Some hearing recordings remained accessible online, while others were only available for a limited period of time.

2.4 *Adjudicatory Decisions*

Judgments, awards or other adjudicatory decisions are generally publicly available and published on the websites of the adjudicatory institutions. While institutions allow redactions on the basis of confidential information, only arbitration limits the publication of decisions themselves.

In the ICJ, judgments must be read in open court:[176] this has the purpose of allowing the public to assess the judgment, assisting with legitimacy, through permitting public scrutiny and providing a safeguard against inconsistent standards in decision-making;[177] demonstrating the seriousness of international legal obligations, through the "unrestricted release into the public domain of judicial findings on quite sensitive issues"; and alerting the States party to the proceedings of the result.[178] The ICJ's judgments are also published on its website, in accordance with its language rules: where the parties agree that the case shall be conducted in French or English, the judgment is delivered in that language, if there is no agreement, it is delivered in both languages.[179]

Decisions by the ICC on admissibility, jurisdiction, criminal responsibility and reparations are pronounced in public,[180] as well as sentences.[181] All judgments, as well as other decisions resolving fundamental issues (such as decisions on admissibility, sentencing, reparations and appeals decisions),[182] are

175 Article 6(3) *ibid.*
176 Article 58 ICJ Statute.
177 Bogdandy, *supra* note 9, p. 376.
178 D.-E. Khan, 'Article 58', in A. Zimmermann et al (eds.), *Statute of the International Court of Justice: A Commentary* (2nd ed, Oxford University Press, Oxford, 2012) pp. 1401, 1401–1402, 1408.
179 Article 39 ICJ Statute.
180 Rule 144 ICC Rules of Procedure and Evidence.
181 Article 76(4) Statute of the ICC; Rule 144 ICC Rules of Procedure and Evidence.
182 Rule 40 ICC Rules of Procedure and Evidence.

published on its website in its official languages;[183] currently, these are the six official languages of the United Nations.[184]

At the WTO, the reports of Panels and Appellate Body Reports are deemed public documents and so are circulated to all WTO members,[185] and made available on the WTO website. While confidential information may be redacted, in doing so, the panel "should bear in mind the rights of third parties and other WTO Members" as to ensure that the public version of the report is understandable.[186] However, reports are not delivered in a public hearing.[187] The WTO also provides for interim review, at which it provides (initial) privileged access to parties, allowing them to comment on an interim report.[188]

Similarly, the ECtHR specifies that "[a]ll judgments, all decisions and all advisory opinions shall be published, under the responsibility of the Registrar, on the Court's case-law database, HUDOC".[189] This database is usually kept well up-to-date. Periodically, the Court also publishes general information about its decisions and the Registrar draws attention "to those judgments, decisions and advisory opinions that have been selected by the Bureau as key cases".[190] Structuring information, particularly according to its potential relevance, clarifies the development of the Court's jurisprudence and assists with transparency.[191] Decisions and judgments are issued in either official language (English and French),[192] with the exception of cases in which the Court decides to render its judgment in both languages, and Grand Chamber decisions, judgments and advisory opinions that are always given in both languages.[193] Judgments may be read out at public hearings;[194] however, this is not required: rather, the judgment must be transmitted to the Committee of Members and placed in the Court archives.[195]

183 Article 50 Statute of the ICC. See also Rule 40 ICC Rules of Procedure and Evidence; Regulation 8 ICC Regulations of the Court.
184 Article 50 Statute of the ICC.
185 Article 16 DSU.
186 WTO Appellate Body Report, Japan – Countervailing Duties on Dynamic Random Access Memories from Korea, 28 November 2007, WT/DS336/AB/R, para. 279, <docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/336ABR.pdf&Open=True>, visited on 21 September 2022.
187 Neumann and Simma, *supra* note 26, p. 463.
188 Article 15(1) DSU.
189 Article 44(3) ECHR; Rule 104 ECtHR Rules of Court,
190 Rules 104A–104B ECtHR Rules of Court.
191 Neumann and Simma, *supra* note 26, p. 464.
192 Rule 34 ECtHR Rules of Court.
193 Rules 57, 76 and 88 *ibid*.
194 Rule 77(2) *ibid*.
195 Rule 77(3) *ibid*.

The ACtHPR publishes its judgments, advisory opinions and orders, the pleadings and statements, and minutes of public sittings in each case.[196] All judgments are presently being digitized and translated in the Court's working languages; presently, only 40 per cent have been translated.[197]

The IACtHR delivers its decisions, judgments and opinions in public session, with these additionally required to be published.[198] The Court then issues its judgments, orders, opinions, and other decisions on its up-to-date website.[199] The official languages are Spanish, English, Portuguese and French;[200] however, decisions are published in the working language used in each case:[201] this accounts for the dominance of Spanish-language documents.[202] The Inter-American Commission on Human Rights has its own website, which includes reports on cases, decisions on requests for precautionary measures, applications to the Inter-American court, annual reports and webcasts and audio recordings.[203]

In international arbitration, the publication of awards or decisions depends on the parties to the arbitration and the treaty invoked as the basis of jurisdiction of the tribunal.[204] Many parties in cases registered at the PCA have permitted the PCA to publish the award, although the number of cases published has decreased over time.[205] At ICSID, most awards are also made public, although this requires party consent, with the Convention specifying that "the Centre shall not publish the award without the consent of the parties".[206] The new ICSID Arbitration Rules provide for the publication of all awards, supplementary decisions, rectification, interpretations and revisions of awards and decisions on annulment, with the consent of the parties;[207] these are published "with any redactions agreed to by the parties and jointly notified to

196 Rule 25 ACtHPR Rules of Court.
197 ACtHPR, *supra* note 100, p. 12.
198 Article 24(3) IACtHR Statute.
199 Article 32 IACtHR Rules of Procedure.
200 Article 22 *ibid*.
201 Article 32(2) *ibid*.
202 See <www.corteidh.or.cr/cf/Jurisprudencia2/index.cfm?lang=es>, visited on 21 September 2022.
203 Available at <www.oas.org/en/iachr/decisions/cases.asp>, visited on 21 September 2022.
204 See generally, F. Ortino, 'Transparency of Investment Awards', in J. Nakagawa (ed.), *Transparency in International Trade and Investment Dispute Settlement* (Routledge, Abingdon, 2013) pp. 119–158.
205 See Reis, *supra* note 20, p. 255.
206 Article 48(5) Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes (ICSID)), 575 UNTS 159 (ICSID Convention).
207 Rule 62(1) and 62(3) ICSID Arbitration Rules.

the Secretary-General within 60 days after the order or decision is issued".[208] Consent is presumed where no party objects in writing to such publication within 60 days of the dispatch of the document. Where the parties do not consent, the rules set out a procedure for the publication of excerpts of the document.[209] Virtually all ICSID awards of the last decade have been made public. Similarly, decisions, orders and awards issued under the Additional Facility are published by the Centre, with the only restriction of redactions agreed by the parties.[210]

The 2010 UNCITRAL Arbitration Rules similarly provide for the publication of awards if the parties consent.[211] However, the UNCITRAL Transparency Rules *require* that orders, decisions and awards of the arbitral tribunal be made available to the public,[212] subject to confidentiality exceptions.[213] This provision was explicitly intended to provide a broad right of transparency vis-à-vis awards, while providing safeguards through "necessary" exceptions such as for confidential business and governmental information.[214]

An example of a treaty guiding the publication of awards and decisions is NAFTA, as well as its new iteration, CUSMA. Dispute settlement under both give investors the option to seek arbitration for disputes under ICSID, ICSID's Additional Facility Rules or UNCITRAL.[215] In each forum, the applicable rules govern the arbitration. In addition, NAFTA stipulates that where Canada is the disputing party, either Canada or a disputing investor that is a party to the arbitration may make an award public; where Mexico is the disputing party, the applicable arbitration rules apply to the publication of an award; where the United States is the disputing party, either the United States or a disputing investor that is a part to the arbitration may make an award public.[216] Under CUSMA, within 15 days of the final report, the parties must make the report available to the public (although are permitted to redact confidential information).[217]

208 Rule 63 *ibid.*

209 Rule 62(4) *ibid.*

210 Rule 73(1) ICSID Additional Facility Arbitration Rules. The Tribunal shall resolve any disputes in relation to the redactions.

211 Article 34(5) UNCITRAL Arbitration Rules, 15 August 2010.

212 Article 3(1) UNCITRAL Rules on Transparency.

213 Article 7 *ibid.*

214 UNCITRAL, *Report of Working Group II* (*Arbitration and Conciliation*) *on the work of its fifty-fourth session*, U.N. Doc. A/CN.9/717, 7–11 February 2011, paras. 84, 93–100.

215 Article 1120 North American Free Trade Agreement, 32 ILM 289 (NAFTA); Article 14.D.3 CUSMA.

216 Annex 1137(2) NAFTA.

217 Article 19(9), Annex III (Rules of Procedure) CUSMA.

2.5 *Compliance*

Information about parties' compliance with decisions is notoriously difficult to find. At the ICJ, information about the parties' compliance with the Court's decisions is not systematically made available, but it has been the subject of academic attention.[218]

The ICC website publishes information about the status of each case and each defendant, including information on withdrawn proceedings and the effectiveness of the Court's judgments, including persons at large, in custody, convicted and acquitted.[219]

The WTO provides a formal process for the consideration of compliance, noting in the DSU that prompt compliance is "essential".[220] Following the adoption of a report by a Panel or the Appellate Body, a DSB meeting is held within 30 days, in which "the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so".[221] The relevant Article then defines "a reasonable period of time". Evidence of compliance with Panel and Appellate Body reports may be found in the minutes of DSB meetings.

ECtHR monitoring documents on the execution of its judgments can be found online at the HUDOC-EXEC database.[222] The ACtHPR also monitors its own compliance, and releases statistics on the issue.[223] For the IACtHR, enforcement of judgments is regarded as a fundamental part of access to international justice so it periodically supervises compliance with its judgments.

218 C. Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press, Oxford, 2004); A. P. Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice', 18:5 *European Journal of International Law* (2007) pp. 815–852, doi.org/10.1093/ejil/chm047; A. V. Huneeus, 'Compliance with International Court Judgments and Decisions', in K. J. Alter, C. Romano and Y. Shany (eds.), *Oxford Handbook of International Adjudication* (Oxford University Press, Oxford, 2013); C. Paulson, 'Compliance with Final Judgments of the International Court of Justice since 1987', 98:3 *American Journal of International Law* (2004) pp. 434–461, doi:10.2307/3181640; A.-K. A. San and S. Abila, 'A Critical Examination of the Enforcement of ICJ Decisions through the Organs of the United Nations', 6:1 *Journal of Law and Criminal Justice* (2018) pp. 21–46, doi:10.15640/jlcj.v6n1a3.

219 See <www.icc-cpi.int/Pages/defendants-wip.aspx>, visited on 21 September 2022.

220 Article 21(1) DSU.

221 Article 21(3) *ibid.*

222 See <hudoc.exec.coe.int/ENG#{%22EXECDocumentTypeCollection%22:[%22CEC%22]}>, visited on 21 September 2022.

223 ACtHPR, *supra* note 100, p. v.

The resolutions referring to compliance by the States parties to disputes are published online, usually in Spanish.[224]

Regarding international arbitration, there is no centralized database regarding compliance with awards in international investment arbitration. However, there has been some academic interest in the matter.[225] At ICSID, the basic position is that if a party informs ICSID of the other party's failure to comply with the award, ICSID generally contacts the non-complying party to request information on compliance.[226] UNCITRAL, on the other hand, do not participate in recognition or enforcement of awards.[227] For CUSMA, failure to comply with an award results in the establishment of a panel, with a view to seeking a determination of breach of CUSMA or a recommendation that the party comply; further, the party can rely upon the enforcement mechanisms

224 See <www.corteidh.or.cr/casos_aplicacion_articulo_65_convencion.cfm>, visited on 21 September 2022.

225 E. Gaillard and I. Mitrev Penushliski, 'State Compliance with Investment Awards', 35:3 *ICSID Review* (2020) pp. 540–594, doi:10.1093/icsidreview/siaa034; J. H. Suh and M. M. Mbengue, 'Compliance with Arbitral Awards', *Jus Mundi*, 3 March 2022, <jusmundi.com/en/document/wiki/en-compliance-with-arbitral-awards>, visited on 21 September 2022; C. Annacker, L. Achtouk-Spivak and Z. Bouraoui, 'ICSID Awards', *Global Arbitration Review*, 4 January 2019, <globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/1st-edition/article/icsid-awards>, visited on 21 September 2022; J. M. Cardosi, 'Precluding the Treasure Hunt: How the World Bank Group Can Help Investors Circumnavigate Sovereign Immunity Obstacles to ICSID Award Execution', 41:1 *Pepperdine Law Review* (2013) pp. 117–156; J. Gill and M. Hodgson, 'Costs Awards – Who Pays?', *Global Arbitration Review*, 15 September 2015, <globalarbitrationreview.com/article/costs-awards-who-pays>, visited on 21 September 2022; A. Ben Mansour, 'Domestic Procedures for the Payment of Damages by States in Investment Arbitration', *Investment Treaty News*, 20 June 2020, <www.iisd.org/itn/en/2020/06/20/domestic-procedures-for-the-payment-of-damages-by-states-in-investment-arbitration-affef-ben-mansour/>, visited on 21 September 2022; L. E. Peterson, 'How Many States Are Not Paying Awards under Investment Treaties?', *Investment Arbitration Reporter*, 7 May 2010, <www.iareporter.com/articles/how-many-states-are-not-paying-awards-under-investment-treaties/>, visited on 21 September 2022; B. Sepúlveda-Amor and M. Lawry-White, 'State Responsibility and the Enforcement of Arbitral Awards', 33:1 *Arbitration International* (2017) pp. 35–61, doi:10.1093/arbint/aiw006; E. Gaillard and D. Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, London, 2008).

226 See ICSID, 'Recognition and Enforcement – ICSID Convention', <icsid.worldbank.org/en/Pages/process/Recognition-and-Enforcement-Convention-Arbitration.aspx>, visited on 21 September 2022.

227 See ICSID, 'Recognition and Enforcement – UNCITRAL Arbitration', <icsid.worldbank.org/procedures/arbitration/uncitral/recognition-enforcement>, visited on 21 September 2022.

under the ICSID Convention, the New York Convention, or the Inter-American Convention.[228]

2.6 *Preliminary Conclusions on Transparency*

Table 1 summarizes the above discussion. Considering each area of transparency for each type of institution or dispute settlement mechanism, it categorizes the level of transparency in practice (rather than according to the level required by the institutional rules), with a view to facilitating comparison between the various institutions and areas. It adopts the following schema. Where all – or all, with few exceptions – relevant documents or hearings are publicly accessible in practice, the institution is given a 'high' rating for that area. Where the institution renders only some documents or hearings publicly accessible, or where these documents or hearings are only temporarily available, with no permanent record available online, the institution is given a 'mid' rating for that area. Where documents are not provided publicly, or only on an exceptional basis, a 'low' rating is given. The 'mid-high' rating refers to a general tendency towards full transparency of all documents; however, this is hindered by the institution's processes (such as requiring confidentiality of substantial elements of the document/hearing), or by the provision of documents in multiple, or hard-to-find, locations. Finally, 'varied' refers to where the level of transparency differs dependent on the particular adjudicative body in the institutional category.

TABLE 1 Summary of conclusions on transparency

	ICJ	ICC	WTO	HR courts	Arbitration
Applications	High	High	Mid-high	Varied	Varied
Written submissions	High	Mid-high	Low	Low	Varied
Hearings	High	High	Mid	Mid-high	Varied
Adjudicatory decisions	High	High	High	High	Mid-high
Compliance	Low	High	Mid-high	Varied	Low

This study demonstrates that international dispute settlement is already relatively transparent – although no adjudicatory system is beyond improvement. Such improvements, in particular, should include increasing transparency with regard to compliance. However, particularly the adjudicatory decisions of

228 Article 14.D.13(11)–(12) CUSMA.

international courts and tribunals are highly transparent: this arguably is the most beneficial form of transparency, as decisions not only reveal the case's outcome and reasoning, but also shed light on the content of other (non-disclosed) elements, such as the initial application, written submissions and oral statements. When appraising transparency in terms of its contributions to adjudicative legitimacy, publication of decisions is often the aspect considered most necessary. Transparency allows the public to observe the decision-maker in action, and thus, permits to confirm the presence (or absence) of those aspects that generate public acceptance of the process, such as fairness, rationality, neutrality, accountability and understanding of the wider context.[229] The relatively high level of transparency in international adjudication becomes particularly obvious when compared with the transparency (or lack thereof) of domestic courts, whose legitimacy is far less frequently questioned. For example, written submissions before and even judgments of most local courts are usually difficult to find online. Most national courts also have no online agenda which impedes the public's ability to attend hearings, even if these are in theory open to the public. Some instances of incomplete transparency at the domestic level are attributable to considerations such as confidentiality– but more often would seem to result from a lack of technical expertise and/or willingness.

International courts and tribunals, in contrast, go above and beyond what their statutes or other founding agreements require: this is most clear in the frequent provision of live web-streaming of hearings (albeit without the option for the public to comment in the chat function). Further, both international law – through the right to information and procedural rules – and domestic law – through freedom of information requests – can assist with access to international documents in adjudication.[230] However, the question remains whether this is a sufficient contribution to safeguard the legitimacy of the international adjudicatory process. Domestic judicial decision-makers usually obtain their legitimacy through their selection process, or the process of appeal that is applicable to their decisions. Higher court justices are often appointed by one branch of government but require confirmation from a second branch or committee (such as Germany), or from a commission that chooses or has disciplinary powers over magistrates (such as France's Conseil Supérieur de la Magistrature and Indonesia's Judicial Commission). In addition, decisions in domestic proceedings are usually subject to an appellate process, which is not

229 D. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115:7 *Yale Law Journal* (2006) p. 1530, doi:10.2307/20455663; N. Grossman, *supra* note 7.

230 Neumann and Simma, *supra* note 26, p. 436.

always the case in international dispute settlement (although bodies such as the WTO and ICC provide this avenue). Thus, the push for more transparency in international proceedings may be a useful tool to enhance the legitimacy of international courts and tribunals in order to compensate for the (perceived) lack of citizen oversight over adjudicators' selection process or the absence of a review option for their decisions. While these aspects are not subject to democratic processes, transparency allows the public evaluation of adjudicative processes, and thus allows the public to assess whether it will 'buy into' – i.e., continue to view as legitimate – the system.[231] It can improve both the decision-making process and the outcomes themselves, by ensuring adjudicative bodies are responsive and aware of broad interests, and have access to all relevant information.[232]

In particular the ICC displays high levels of transparency. This reflects its character as a criminal court, focused on fighting against impunity and seeking transitional justice:[233] justice must be seen to be done. To that end, the Court is notable for enabling particular, targeted access to affected communities, rather than exclusively focusing on 'worldwide' access through its website. In the *Ongwen* trial, for example, it facilitated screening in case locations, and domestic non-governmental organizations arranged the trial's stream over radio.[234] Further, the ECtHR's high levels of transparency may reflect the context of its cases: as domestic remedies must be exhausted for claims to proceed in the Court, most case details will have been disclosed in the prior domestic proceedings.[235] Accordingly, the Court has no need to prevent the publication of case details. While arbitrations vary vis-à-vis transparency, both the UNCITRAL Rules on Transparency and NAFTA / CUSMA indicate an increasing adoption of high transparency rules that sit alongside historic confidentiality requirements. For example, NAFTA / CUSMA jurisprudence demonstrates a trend of issuing confidentiality orders that carefully delimit protected information alongside a general push for transparency.[236]

231 N. Grossman, *supra* note 7, p. 153.
232 Shirlow and Caron, *supra* note 3, p. 486.
233 Preamble Statute of the ICC.
234 L. Owor Ogora 'Over 10,000 Community Members in Northern Uganda Follow Ongwen's Trial', *International Justice Monitor*, 16 December 2019, <www.ijmonitor.org/2019/12/over-10000-community-members-in-northern-uganda-follow-ongwens-trial/>, visited on 21 September 2022.
235 Neumann and Simma, *supra* note 26, p. 444.
236 Zhao, *supra* note 172, p. 196.

3 Limits of Transparency

Perhaps contradictory to the general trend of public opinion in the context of transparency, there are at least two areas where transparency should not be expanded: in the process of internal judicial decision-making and with regard to the protection of classified, private or confidential business information. Furthermore, a 'trial by media' risks jeopardising the fairness of the international justice system in its entirety.

3.1 *Internal Judicial Decision-Making*

Once the parties' positions have been submitted in writing and defended in oral hearings (or even earlier), the international court or tribunal starts its internal decision-making process. Here a measure of opacity is functionally required and there are regulatory devices other than transparency available to mitigate possible dangers. In other words, transparency should be seen not only as an end in and of itself, but also as merely one of many regulatory options to legitimize opaque processes by exposing them to public scrutiny. This paper does not question that transparency is a foundational aspect of good governance; rather, it argues that transparency serves as a reminder that other regulatory tools are available as well. In the adjudicatory decision-making process, there is often a near-complete lack of transparency in relation to deliberations. Rather than clamoring for more transparency in this particular context, it is submitted that maintaining the secrecy of the deliberations is fundamental for judges and arbitrators in order to enable them to freely arrive at a decision: indeed, the ICJ expressly provides for this in its statute.[237] It should never be divulged who of the adjudicators took which position during the internal discussions, and who may have changed their mind over the course of the deliberations.

Some aspects of the adjudicatory decision-making process may become public post-factum depending on the fora where they are decided. Most international courts and tribunals will record in their decisions' *dispositif* which judge or arbitrator voted in favor or against a particular claim, and allow for separate or dissenting opinions or declarations. For example, ICJ judgments indicate the particular vote in relation to each question asked, with dissenting judges frequently appending an explanation of the reasons underlying their contrary vote. Judges can also attach separate opinions that provide their reasoning for supporting the majority view, where this differs from the main judgment's. The ICC and the human rights courts similarly allow for dissenting

237 Article 54 ICJ Statute; Article 21 ICJ Rules of Court.

and separate opinions: the European Convention on Human Rights, for example, provides that where "a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion";[238] this is complemented by the ECtHR's Rules of Court.[239] ICSID also permits tribunal members to attach individual opinions to the award.[240] Such opinions may at times reveal some of the debate that took place during the deliberations. This approach reflects a common law approach to decision-making; civil systems, on the other hand, often require a single 'consensus' judgment, and supranational courts that follow this system – such as the European Court of Justice – tend not to allow separate opinions.[241] Also some international adjudicatory mechanisms, such as the WTO DSB, prescribe that some decisions – such as the refusal to adopt a panel report – are to be made by consensus. In such cases, separate or dissenting opinions may not be allowed, such that nothing of the underlying debate will be revealed to the parties. While dissents in courts tend not to follow predictable lines, by nationality or otherwise,[242] in arbitrations – a system whereby each party appoints one tribunal member – dissents tend to be written by the arbitrator appointed by the losing party.[243] These dissents may then rather reflect a response to specific party arguments, as opposed to the panel's discussions.[244]

Unlike some domestic courts – particularly those in common law systems, where a judgment even in a collegiate court indicates who drafted the decision[245] – international adjudicatory bodies' practice varies on whether decisions list judges' names, or whether the primary author of the draft is identified. The ICJ includes the judges' votes for each question, whereas the ECtHR merely mentions the number of judges constituting the majority, and the WTO anonymizes separate opinions.[246] It is presumed that the primary drafter is the chairperson

238 Article 45 ECHR.
239 Rule 74(2) ECtHR Rules of Court
240 Article 48(4) ICSID Convention.
241 See R. C. A. White and I. Boussiakou, 'Separate Opinions in the European Court of Human Rights', 9:1 *Human Rights Law Review* (2009) p. 39, doi:eres.qnl.qa/10.1093/hrlr/ngn033.
242 *Ibid*., 54.
243 S. Gáspár-Szilágyi and L. Létourneau-Tremblay, 'A Question of Impartiality', in F. Baetens (ed.), *Identity and Diversity on the International Bench: Who is the Judge?* (Oxford University Press, Oxford, 2020) p. 281.
244 See A. J. van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators', in M. H. Arsanjanu et al (eds.), *Looking at the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill, Leiden, 2011) p. 842.
245 For example, the United States Supreme Court, the United Kingdom House of Lords.
246 J. L. Dunoff and M. A. Pollack, 'The Judicial Trilemma', 111:2 *American Journal of International Law* (2017) p. 236, doi:10.1017/ajil.2017.23.

of the tribunal or court, who may be assisted by a drafting committee of two other judges, as is the case in the ICJ.[247] However, the drafters' names are not disclosed. This would seem to be an advisable choice, as drafts are subsequently discussed in the plenary and adjusted to the opinions and preferences of other judges, so that the final result is "owned" by the entire bench or, at least by the majority voting in favor of the decision. Further, this practice assists in ensuring judges do not become agents of their country of nationality, as it is impossible for their home State to monitor their contributions to the deliberations.[248] As such, this necessary lack of transparency grants adjudicators more flexibility, independence and impartiality in the positions they adopt and facilitates a greater chance of reaching consensus: 'procedural secrecy' thus functions as a tool to enhance the legitimacy of final decisions.[249]

3.2 *Classified, Private and Confidential Business Information*

On the one hand, the right to access to information in general, and transparency in international dispute settlement in particular, entails the right to obtain information of public interest that is held by public authorities, the right to participate in law- and policy-making and the right to challenge public decisions that have been made without respecting the two aforementioned rights ("access to justice"). Such rights are often deemed to be human rights,[250] and have been codified in various international instruments, such as Article 19 of the International Covenant on Civil and Political Rights, Articles 10 and 13 of the UN Convention Against Corruption, the Inter-American Declaration of Principles on Freedom of Expression, the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998),[251] and the Council of Europe Convention on Access to Official Documents (2009).[252] Access to information rights have also been incorporated in regional and national instruments, such as Article 15 of the Treaty on the Functioning of the European Union, Council of Europe Recommendation No R (81) 19 of the Committee of Ministers to Member States on the access to information held by public authorities (1981), Article

247 ICJ, Resolution Concerning the Internal Judicial Practice of the Court, 12 April 1976.
248 Neumann and Simma, *supra* note 26, p. 457.
249 *Ibid.*, p. 458.
250 See J. Klaaren, 'The Human Right to Information and Transparency', in A. Bianchi and A. Peters (eds.), *Transparency in International Law* (Cambridge University Press, Cambridge, 2013) pp. 223–238.
251 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447.
252 Council of Europe Convention on Access to Official Documents, CETS No 205.

13 of the American Convention on Human Rights, the European Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH),[253] the Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (2008)[254] and the US Freedom of Information Act (1996)[255]. Through copious case law, courts and compliance committees have elaborated on the interpretation and application of these rights.

On the other hand, there are countervailing interests that warn against transparency in all circumstances, and the two competing objectives ought to be adequately balanced.[256] National security concerns of States, for example, should be taken seriously and may limit the transparency towards non-State actors. To a large extent, the level of transparency in this context lies within the margin of sovereign discretion and can differ from State to State. Not all States are as transparent as Sweden which, in 2018, sent out a brochure with its action plan in case of a Russian invasion.[257] International courts and tribunals will generally defer to States in this respect,[258] although at times require the confidential information be disclosed to the court itself.[259] In addition, at the non-State actor side, private parties to an international dispute may have well-founded reasons to ask for the non-disclosure of (certain elements of) a dispute. In the context of international criminal and human rights law, for example, an individual (be it a victim, a witness or an accused person) has a right to privacy. The ICC contains strict guidelines on confidentiality, for example: its rules on procedure aim to ensure confidentiality and protect witnesses, including through training.[260] The ICC has adopted protocols on

253 *European Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals* (*REACH*), 18 December 2006, EC 1907/2006.

254 *Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents*, 20 April 2008, COM(2008) 0229.

255 Freedom of Information Act, 5 U.S.C. § 552 (2016).

256 Peters, *supra* note 5, p. 9. Peters, however, notes the 'powerful argument' in favour of disclosure according to principles of necessity, proportionality and specificity, as outlined in Lieblich, *supra* note 8.

257 E. Jozuka, 'Sweden to Send War Pamphlet to 4.8 Million Households', *CNN*, 22 May 2018, <www.cnn.com/2018/05/22/europe/sweden-security-war-brochure-russia-intl/index.html>, visited on 21 September 2022.

258 See e.g. WTO Panel Report, Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia, 28 October 2005, WT/DS312/R, para. 7.17; Articles 14 and 18 DSU.

259 See WTO Panel Report, Turkey – Measures Affecting the Importation of Rice, 21 September 2007, WT/DS334/R, para. 7.100.

260 See e.g. Rules 16, 17, 18, 20 and 43 ICC Rules of Procedure and Evidence.

handling confidential information and contacting witnesses;[261] this protocol is frequently updated according to current case needs.[262] On the other hand, the need to balance confidentiality with providing defense counsel with access is sometimes difficult to manage, and the Court has been critiqued for not compelling disclosure of documents relevant to the defense.[263]

Moreover, trade secrets or Confidential Business Information (CBI) often represent a substantial portion of a company's value and performance, and are essential to its growth, competitive advantage and even its survival. Thus, trade secrets concerning a particularly innovative process, possibly protected by intellectual property rights, or a combination of incremental advances, are valuable business assets which can confer a significant competitive advantage over competitors. CBI is protected through various legal instruments such as the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS),[264] CUSMA,[265] the US Uniform Trade Secrets Act (UTSA)[266] and the above-mentioned REACH Regulation, stipulating exceptions to the right to access to information. The risk exists, namely, that access to information is sought, not because of public interest motives, but in order to undermine companies' market position – for example when such companies are operating within the EU and have to comply with EU transparency rules, while their competitors outside the EU market are under no such obligation to divulge information.

As a result, it would seem only logical that the application of transparency rules in such cases is balanced against the valid interests of the parties (be it States or non-State actors) and existing treaties and adjudicatory bodies actively attempt to find such balance. For example, Article 22 of the IChC Arbitration Rules provides an explicit power to tribunals to "make orders concerning the

261 See ICC, 'Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant', 22 March 2019, ICC-01/14-01/18-156-AnxA, <www.icc-cpi.int/sites/default/files/RelatedRecords/CR2019_01767.PDF>, visited on 21 September 2022.

262 See e.g. Decision Adopting an Updated Protocol on the Handling of Confidential Information and Contact with Witnesses, *Ali Muhammad Ali Abd-Al-Rahman*, (ICC-02/05-01/20), Trial Chamber I, 18 May 2022.

263 See R. Katzman, 'The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial', 8:1 *Northwestern Journal of International Human Rights* (2009) pp. 77–101.

264 General Agreement on Trade-Related Aspects of Intellectual Property, 1869 UNTS 299.

265 Article 14.D.8 CUSMA, on transparency in arbitral proceedings, for example notes that "[t]he tribunal shall make appropriate arrangements to protect such information from disclosure".

266 Uniform Trade Secrets Act, 14 U.L.A. 539 (1980).

confidentiality of the arbitration proceedings… and may take measures for protecting trade secrets and confidential information". Similarly, Article 7 of the UNCITRAL Rules on Transparency provide an exception for confidential information, and explicitly lists CBI as a protected category. In mediation especially, confidentiality is required so as to ensure the process works effectively: the parties and mediator must be able to discuss the dispute, and their willingness to alter their positions, without this information then being used against them in the future.[267] Erring too far on the side of transparency in institutional rules may also be ineffective or counterproductive: in arbitration, for example, an empirical study has found that both claimants and respondents in ICSID proceedings started pursuing confidentiality *more actively* after this institution reformed its rules to increase transparency.[268]

3.3 *'Trial by Media'*

Anecdotal evidence indicates that parties in high-profile mediatized proceedings are less likely to search for an amicable settlement, as they may be compelled by a need to 'save face' and demonstrate their effort to the public 'back home' (either voters or shareholders) – thereby spending far more time and financial resources on the dispute, and possibly achieving a less palatable result. In addition, witnesses are increasingly unwilling to participate in totally transparent procedures for fear of retaliation or reputational concerns.[269] Such unwillingness may be overcome through specific witness protection mechanisms, as applied in *South American Silver v Bolivia*[270] or in the ICC Protocol in *The Prosecutor v Bosco Ntaganda*,[271] but these mechanisms do not suffice in each case. Indeed, the ICC has been criticized for failing to organise closed hearings in cases where this is in the best interest of the victims.[272] As

267 C. Brown and P. Winch, 'The Confidentiality and Transparency Debate in Commercial and Investment Mediation', in C. Titi and K. Fach Gómez (eds.), *Mediation in International Commercial and Investment Disputes* (Oxford University Press, Oxford, 2019) p. 329.

268 E. M. Hafner-Burton, Z. C. Steinert-Threlkeld and D. G. Victor, 'Predictability versus Flexibility: Secrecy in International Investment Arbitration', 68 *World Politics* (2016) p. 436, doi:10.1017/S004388711600006X; Shirlow and Caron, *supra* note 3, p. 479.

269 *South American Silver Limited* (*Bermuda*) v. *Bolivia*, Procedural Order No 14, 1 April 2016, PCA Case No. 2013–15, para. 2.

270 *Ibid*., annex A.

271 For example, see Protocol on the Vulnerability Assessment and Support Procedure used to Facilitate the Testimony of Vulnerable Witnesses, *Bosco Ntaganda*, (ICC-01/04-02/06-445-Anx1), Trial Chamber VI, 5 February 2015.

272 R. Pulvirenti, 'Protecting Victims Who Testify Before the ICC', in J. Nicholson and J. P. Perez-Leon-Acevedo (eds.), *Defendants and Victims in International Criminal Justice* (Routledge, London, 2020) p. 280.

a result, an insistence on total transparency of all aspects of a case may hinder the truth-seeking exercise lying at the heart of each dispute settlement procedure.[273] International courts and tribunals have limited to no powers to compel witnesses to testify,[274] and if key witnesses refuse to appear out of fear of repercussions, it harms the rights of both claimants and respondents as well as the adjudicatory process itself. Finally – and this topic remains rather taboo – a 'trial by media' also puts added pressure on adjudicators to arrive at the 'right' result in the eyes of the broader public, which may not always coincide with the correct application and interpretation of the law. For example, the ability for the ICJ to close hearings may allow parties to "eschew putative public compromising and an appearance of political subordination in a given case".[275]

One compromise could be that, in order to avoid a 'trial by media', transparency obligations ought to be mainly activated in the post-litigation/arbitration stage. Final judgments and awards should be published, as well as data on whether they have been complied with. But the divulgence of information (aside from the existence of the case) while the proceedings are ongoing could remain limited so as not to influence the witnesses, the parties or the members of the bench. It would also be feasible to work with a three-tier system of information distribution, dependent on role: parties to the dispute, who would obtain access to all documents; non-parties with a particular legal interest (for example, the home State of the private party in a human rights or investment case), who would get access to all except the most confidential documents; and third parties, who would only get limited information on pending cases, but more extensive information (most importantly the adjudicatory decision itself) after the case has concluded. Any request for closed hearings or the redaction of documents would have to be well-motivated and only granted after review by the international court or tribunal.

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273 See Peters, *supra* note 5, pp. 9–10; Neumann and Simma, *supra* note 26, p. 474.

274 The ICC has limited power under Article 64(6)(b) Rome Statute, which, combined with the obligation for States to assist the Court under Article 93, may permit the Court to rely on domestic means of compelling witnesses: Judgment on the Appeals of William Samoei Ruto and Mr Joshua Arap Sang Against the Decision of Trial Chamber V (A) of 17 April 2014 Entitled "Decision on Prosecutor's Application for Witness Summonses and Resulting Request for State Party Cooperation", *William Samoei Ruto and Joshua Arap Sang*, (ICC-01/09-01/11–1598), Appeals Chamber, 9 October 2014.

275 Neumann and Simma, *supra* note 26, p. 449.

4 Conclusion

The current rules and practices of international dispute settlement institutions ensure significant transparency. There is room for minor reforms to address some outstanding issues, for example with regard to compliance data, but overall, international courts and tribunals would seem to perform better than their domestic counterparts in this area. While applications and decisions are most frequently released to the public, written submissions and the hearings themselves are often less accessible. However, this differs between fora: both the ICC and the ICJ release most documents in a timely manner; the WTO and human rights courts are less forthcoming but still often release information, while arbitral institutions – likely due to the characterization of arbitration as a 'confidential' means of dispute resolution – tend to only publish decisions and awards (although rules and practices in this regard have been undergoing substantial reform in recent years).

It is not necessary or desirable that everyone should be enabled to obtain information about all aspects of a case, let alone intervene in a dispute proceeding. Confidentiality of certain elements such as judicial determinations ultimately assists in facilitating the legitimacy of decisions, as adjudicators are able to consider arguments and develop these with their colleagues more freely, independently and impartially in the privacy of the deliberation room, which assists the creation of well-reasoned, consistent results. Such confidentiality also ensures that classified, private and confidential business information is released to judicial decision-makers, and that witnesses are willing to provide information, as this remains protected beyond the trial process.

In addition to the risk of 'trial by media', unlimited participation by third parties may cause significant time delays and may increase the costs exponentially as both the parties and the adjudicators must review and consider these submissions. The participation of third parties also puts pressure (based on emotional reasons or political games) on governments not to settle. In particular, a government may be forced by its constituents to not accept a favorable agreement because one particular aspect may affect a small but influential part of the population. In addition, the general public is generally not familiar with all international obligations that a State has undertaken. One example is the opposition by part of the British public to any decision of the ECtHR on the ground that after Brexit, no "European court" should have any competence to review the conduct of the British government.[276] Examples of

276 See Z. Jay, 'A Tale of Two Europes: How Conflating the European Court of Human Rights with the European Union Exacerbates Euroscepticism', *The British Journal of Politics and International Relations* (2021) pp. 1–19, doi:10.1177/13691481211048501.

this sort of behavior can also be found in the public's reaction to deals such as NAFTA,[277] the Paris Agreement with regard to climate change[278] and the agreement regarding the development of the Iranian nuclear programme.[279] In other words, unlimited participation of the public may undermine an agreement in line with a State's international obligations on the basis of legal misunderstandings.

In sum, transparency promotes legitimacy of dispute resolution institutions – but it is not the only factor doing so. In fact, it may impede respect for other rights such as a State's right to classify information or an individual's right to privacy, and even undermine trust in the legal system as such. A strict *de jure* rule forcing transparency would be too blunt an instrument. Rather, dispute resolution institutions ought to carry out a balancing exercise considering why is it important for the general public to know about a certain element of a case, versus the benefit for the parties involved in the dispute or for the judicial decision-making process of the court, that such element should *not* be made public. The proper exercise of this balance – between the right to information and privacy, between legitimacy created by transparency and that fostered by confidentiality – ultimately safeguards the international adjudicative process.

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277 C. English, 'Opinion Briefing: North American Free Trade Agreement', *Gallup*, 12 December 2008, <news.gallup.com/poll/113200/opinion-briefing-north-american-free-trade-agreement.aspx>, visited on 21 September 2022.

278 D. Smith, 'Despite Rejoining the Paris Agreement, Polling Shows US Experts Divide on Climate Issues', *The Chicago Council on Global Affairs*, 22 April 2021, <www.thechicagocouncil.org/commentary-and-analysis/blogs/despite-rejoining-paris-agreement-polling-shows-us-experts-divide>, visited on 21 September 2022.

279 'Iran Nuclear Agreement: Public Opinion', *Ballotpedia*, <ballotpedia.org/Iran_nuclear_agreement: Public_opinion>, visited on 21 September 2022.

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