

# Light and Dark in International Arbitration: The Virtues, Risks and Limits of Transparency

By  
David D. Caron<sup>1</sup>

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## Introduction

The sharp contrast between ‘light and dark’ reflects the gap between trust and suspicion that exists in relation to international investment arbitration today. A motif of suspicion that arguably began with Bill Moyers referring to secret courts several decades ago,<sup>2</sup> and echoes today in Senator Warren’s recent critique of the proposed Trans Pacific Pact.<sup>3</sup> The tension between light and dark and trust and suspicion operates at a high strategic level but also ultimately leads to a practical and pragmatic point. Namely, the continued vitality of arbitration (whether it be investment arbitration or commercial arbitration) depends fundamentally on public and political belief in the integrity of the process.

The arbitration community has long focused on the views of its users. For example, are the parties concerned with the cost of arbitration or the time required? But a lesson to be taken away from the current controversies surrounding investment arbitration is that the arbitration community must focus not only on its users but in addition be deeply attentive to the beliefs and concerns of those who support the framework within which particular arbitrations place. If trust is in the

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<sup>1</sup> Member, The Iran-United States Claims Tribunal, The Hague, The Netherlands; and Dean and Professor of International Law, The Dickson Poon School of Law, King’s College London.

<sup>2</sup> “Trading Democracy – A Bill Moyers Special,” broadcast 2002, transcript available at [http://www.pbs.org/now/transcript/transcript\\_tdfull.html](http://www.pbs.org/now/transcript/transcript_tdfull.html).

<sup>3</sup> Elizabeth Warren, ‘The Trans-Pacific Partnership Clause Everyone Should Oppose’ *Washington Post* 25 February 2015) <[https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html](https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html)>.

integrity of the process is lost, then the subsequent debate can be deeply emotional and not one easily rebutted by experts in the field.<sup>4</sup>

In recent multilateral initiatives for the promotion and protection of foreign investment, broad criticisms of arbitration as a mechanism for resolution of investment disputes are raised.<sup>5</sup> A recurring image in this criticism is that of arbitration as a secretive process. A major trend in arbitration over the past two decades to address this suspicious image of secrecy has been to make the process of arbitration more transparent.<sup>6</sup> In general, the push for transparency has aimed at opening a process controlled by the parties to the dispute to view (and in some cases to influence or review) by persons and entities who arguably have an interest in the outcome of the dispute but who are not formally parties. The push toward transparency has been particularly directed and relatively successful in regard to investment arbitration where the position of governments as respondents is argued necessarily to involve disputes of broader public interest. The push is both technically narrow and strategically broad; in some respect the calls for reform is aimed at specific procedural aspects of arbitration specifically but in another respect the calls are motivated by more fundamental concerns with globalization generally.

The push for transparency has many aspects. It has involved, among other things, a push to open hearings to the public, allow amicus

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<sup>4</sup> See David D. Caron and Esme Shirlow, “Unpacking the Complexities of Backlash and Identifying its Unintended Consequences,” in *THE JUDICIALIZATION OF INTERNATIONAL LAW – A MIXED BLESSING?* (Oxford University Press, forthcoming 2017)

<sup>5</sup> Such criticisms are present, for example, in ongoing discussions regarding a Transatlantic Trade and Investment Partnership (TTIP) between Europe and the United States. See, e.g., Shawn Donnan and Stefan Wagstyl, “Transatlantic Trade talks hit German snag,” *FINANCIAL TIMES* (14 March 2014).

For an early expression of this concern, see Charles N. Brower, “A Crisis of Legitimacy,” *NAT’L L. J.* B9 (7 Oct 2002). For a discussion of legitimacy concerns within international arbitration generally and the various lens with which this question may be viewed, see Stephan Schill, “The Concept(s) of Legitimacy of International Arbitration” in *PRACTICING VIRTUE: INSIDE INTERNATIONAL ARBITRATION* 106 (David D. Caron, Stephan Schill, Abby Cohen Smutny & Epaminontas Triantafyllou, eds., Oxford University Press, 2015).

<sup>6</sup> For a wide ranging discussion, see *TRANSPARENCY IN INTERNATIONAL LAW* (Andrea Bianchi and Anne Peters, eds., Cambridge University Press, 2013). The promise and the limits of transparency as an approach to managing complex situations has been examined elsewhere; primarily in the domestic context. Archon Fung, Mary Graham & David Weil, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press, 2007). In the international context, where the adoption of transparency is relatively newer, analysis has tended to be more focused on the promise, than on the limits.

submissions and to publish awards. Each move toward transparency has implications. To allow for an amicus submission, for example, the briefings of the parties arguably need to be made public and the filing schedule must be modified to allow appropriate moments for amicus submissions. Viewed as a contest for influence between the parties and other interested parties, transparency itself becomes a contested concept. In general, transparency regulates processes that are opaque by making them open to view.<sup>7</sup> In this sense, transparency should not be seen only as an end in and of itself, but rather as a regulatory tool.

The discussion of the virtue, the risks and the limits of transparency in my remarks proceeds in three parts. First, I examine the response of the Tribunal in *Aguas del Tunari v Bolivia* to a petition for non-party participation that was significant in the emergence of transparency in investment arbitration. I then trace the evolution that followed and the implications for investment arbitration that have accompanied transparency. Second, in exploring the risk of unintended consequences of transparency, I argue that the move to transparency likely will not spill over to private commercial arbitration except possibly for a limited set of cases that are described. Third and in conclusion, I point to the limits to transparency as a tool to address challenges facing arbitration. In particular, I suggest how a loss of trust may arise in the world of private commercial arbitration for reasons independent of those that arose in investment arbitration and how regulatory devices other than simply transparency will be needed to address this challenge.

## 1. The Virtue of Transparency: Recalling *Aguas del Tunari* and the Reforms Since that Time

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<sup>7</sup> This lecture compliments a study recently completed by the author that considered an aspect of transparency where the opposite condition remains quite accepted; namely, the opacity of the deliberations of the arbitral tribunal. David D. Caron, “Regulating Opacity: Shaping How Tribunals Think,” in PRACTICING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 669 (David D. Caron, Stephan Schill, Abby Cohen Smutny & Epaminontas Triantafyllou, eds., Oxford University Press, 2015). That study, published as a chapter in a book celebrating the 80<sup>th</sup> birthday of Charles N. Brower, considered how the institutional structure of arbitration shapes the decision-making process of arbitration tribunals even though that process is as a general matter conducted out of sight of the parties or the public generally. It argues that when a measure of opacity is functionally required, there are regulatory devices other than transparency available to mitigate the possible dangers of such opacity. The Chapter did not question that transparency should be presumed to be a foundational aspect of good governance; rather it reminds us that other regulatory tools are available as well.

Transparency in governance and in courts has a strong presumptive appeal. Conversely, privacy in personal matters has a strong presumptive appeal. Arbitration generally as something created by two parties to resolve disputes between them starts with a presumption of privacy. The primary argument raised for greater transparency in investment arbitration is that such arbitration partakes more of governance in that such disputes are not necessarily and merely between the two parties, but rather given that the respondent is a State the outcome may affect the public interest.

The strong demand for greater transparency in investment arbitration, in contrast to commercial arbitration, arises also because many investments disputes not only potentially impact the public but also are well known to the public. Many scholars focus almost exclusively on the potential public impact of the dispute as the justification for transparency. But that emphasis does not adequately explain the fact many large private disputes potentially have a greater public impact yet they do not meet the same demand for transparency. The added crucial difference in my opinion is that the investment dispute often is known to the public long before the dispute crystallizes and thus remains of public concern or interest. As an example, I start with the “water war” that took place in the province of Chochabamba in Bolivia at the end of the 1990s and crossing in the new century.<sup>8</sup>

Reliable delivery to the public of clean water is major issue in many parts of the world. In the Chochabamba watershed, there was not (and is not) sufficient clean water for the public.<sup>9</sup> Many segments of the public depend on buying water – of unknown quality – at a steep price from water vendors that arrive in tanker trucks daily in villages. A few neighborhoods broke free from such vendors as civil society

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<sup>8</sup> Much has been written concerning the water wars in Bolivia. The water wars are iconic within Bolivia representing not only the dispute within Cochabamba but the political movement that followed within the nation. “For Bolivia, the Water Revolt was the spark that changed everything. Emboldened by their ability to fight and win against guns and conglomerates, Bolivians took to the streets over and over again, winning more victories for economic self-determination.” Jim Schultz, “The Cochabamba Water Revolt, Ten Years Later,” YES! MAGAZINE (2010). See also Juan Forero, “Bolivia Epitomizes Fight for Natural Resources,” THE NEW YORK TIMES (May 23, 2005).

An influential article that focused attention outside of Bolivia on the question of water within Cochabamba and globally is William Finnegan, “Leasing the Rain,” THE NEW YORKER (April 8, 2002). See also Erik J. Woodhouse, the “Guerra del Agua” and the Cochabamba Concession: Social Risk and Foreign Direct Investment in Public Infrastructure, 39 STANFORD J. INT’L L. 295 (2003).

<sup>9</sup> See, e.g., Emma Strother, “On Water Scarcity and the Right to Life: Bolivia”, <http://www.coha.org/on-water-scarcity-and-the-right-to-life-bolivia/>.

organizations from abroad would arrive and drill a well making a local water supply available. But such wells were rare and not a long term answer.

A managerial answer to such shortfalls is for the government to organize a water district, to invest in a water collection and distribution system in the basin that is likely funded at least in part by charging users for the water they consume. But it need be recognized that there are many variations on how such a system may be organized, on how private entities may be involved in such a system, and on how the pricing schedules are structured. Getting such a management scheme correct and acceptable is a difficult task. And this particularly the case where it is water, a necessity of life, that is being managed. There is something very appealing to the idea of water being free, being a right; something to which people are entitled to like the air they breathe, rather than as a commodity like the electricity for which they must pay. And that appeal is strong even though many, particularly the poor, in Cochabamba for example “had to rely on more expensive alternative water sources ... include[ing] water tankers that supplied water at five to ten times the tariffs charged by the local utility.”<sup>10</sup>

In Bolivia, provincial authorities seeking to improve the availability of water entered into a long-term concession agreement for such a water management system in Chochabamba. The agreement was with a joint venture led by Bechtel Corporation, a U.S. company.<sup>11</sup> The public opposed this effort to manage water objecting deeply to notion of treating such a requirement of life as a commodity.<sup>12</sup>

Protests mounted against the idea of the concession and against Bechtel, the concessionaire. At first the government of Bolivia supported the concession as part of the effort to manage water in the basin. It likewise sought to control the protests. But as a protest ended with a student killed with a single shot, the protests grew even stronger. The Government of Bolivia shifted its position and, in time, the concession was terminated.

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<sup>10</sup> MANUEL SCHIFFLER, *POLITICS AND MONEY: A REALITY CHECK ON PRIVATIZATION* 18 (Springer, 2015).

<sup>11</sup> The perspective of Bechtel on the Aguas Del Tunari water concession in Cochabamba, Bolivia can be found at <http://www.bechtel.com/newsroom/releases/2005/03/aguas-del-tunari-water-concession-cochabamba/>.

<sup>12</sup> This visceral reaction was captured not long after in an article in “Leasing the Rain,” *supra* note 8.

This story is recounted because it is at this point that a very important dynamic happens that is not uncommon in investment arbitrations but is quite rare in commercial arbitrations. A dispute that was known widely to the public, that was an item in the local news every week if not every day, that involved a dispute that arguably affected the public interest and certainly was of public interest, suddenly slipped away from view into what one commentator had referred to in the context of NAFTA as “secret courts.”<sup>13</sup> The significant point is that this shift from a dispute being very public to it being pursued in closed tribunals was deeply troubling for not only the public of Chochabamba, but publics elsewhere as well. As Julie Maupin phrases the sentiment: “unknown and unelected people [are disposing]...of the destiny of nations in dark and secret rooms”.<sup>14</sup>

Where had the dispute gone? Shortly after its ouster, Aguas del Tunari,<sup>15</sup> the Concessionaire, initiated in 2002 a claim against the Government of Bolivia within the International Center for the Settlement of Investment Disputes (“ICSID”) under the 1994 Bilateral Investment Treaty between Bolivia and the Netherlands. Shortly thereafter The Tribunal was constituted on July 5, 2002. It consisted of Henri C. Alvarez of Canada (appointed by Aguas del Tunari); José Luis Alberro-Semerena of Mexico (appointed by Bolivia); and myself (appointed as the Tribunal’s President by the Chairman of the ICSID Administrative Council after the parties were unable to agree among themselves on a President).

Although it is true that the need for greater transparency in investment arbitration had been raised perhaps as long as a decade before the *Aguas del Tunari* arbitration,<sup>16</sup> this case was the first to

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<sup>13</sup> *Supra* note 2.

<sup>14</sup> Julie A Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky*, TRANSPARENCY IN INTERNATIONAL LAW (Cambridge University Press 2013).

<sup>15</sup> Aguas del Tunari, the concessionaire, was a legal entity constituted in accordance with the laws of Bolivia. In December of 1999, the ownership of Aguas del Tunari was (1) 20% was held in equal shares by four Bolivia companies, (2) 25% was held ultimately by a Spanish company (Abengoa) and (3) the remaining 55% was held ultimately by an American company (Bechtel). *Aguas del Tunari v The Republic of Bolivia*, paras 60, 61 (ICSID ARB/02/03, Decision on Respondent’s Objections to Jurisdiction, October 21,2005.)

<sup>16</sup> Gus van Harten notes: “The lack of openness in ISDS has been criticized since at least the late 1990s when the foreign investor lawsuits began to explode...” Gus van Harten, “The European Commission’s Push to Consolidate and Expand ISDS: An Assessment of the Proposed Canada-Europe CETA and Europe-Singapore FTA” (2015) Research Paper No. 23, Vol. 11 Osgoode Hall Law School Legal Studies Research Paper Series 5.

Moreover, transparency was a value raised in other settings in the 1990s. For valuable discussions in 1995 of the need for formal participation by NGO and business in the WTO Dispute Resolution Process, *see* G. Richard Shell, Trade Legalism and

address the issue of an ICSID tribunal's authority to allow participation by NGOs. It became a focus for what would become the movement for transparency and the evolution that followed, particularly within ICSID.<sup>17</sup> The case, not heavily discussed in the literature, is an instructive point of departure for understanding transparency in international investment arbitration.

It is correct that ICSID Tribunals are not public in the sense of many domestic courts. However, ICSID proceedings have never been entirely secret either. The ICSID Secretariat at the time on its website maintained a list of all disputes proceeding within the ICSID framework and also indicated the identity of the panel of arbitrators.<sup>18</sup> Thus although the Tribunal was not public like a court, there was some information available. Using this limited information, various non-governmental organizations and some individuals sought to be a part of the *Aguas del Tunari* proceeding. In some instances, individuals sought ascertain what was going on or simply to express their concern. For example, ICSID and the Tribunal received some 20,000 postcards, from France primarily, simply expressing concern. Although the cards were for the most part a standard form, they reflected a strong interest in the case outside of the Tribunal. But in one instance, organizations and individuals together sought also to influence what might happen. It is to that instance I now turn as it influenced significantly the evolution of transparency in investment arbitration.<sup>19</sup>

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International Relations Theory: An Analysis of the World Trade Organization, 44 DUKE L.J. 829 (1995). See also Steve Charnotwitz & John Wickham, Non-Governmental Organizations and the Original International Trade Regime, 29 J. WORLD TRADE 111 (1995)(discussing the long history of opening the trade regime to NGOs).

<sup>17</sup> "The Issue of authority to permit third persons to participate in arbitration proceedings under the CISD Rules arose for the first time in *Aguas del Tunari v. Bolivia*." TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 146 (Dimitrij Euler, Markus Gehring, and Maxi Scherer, eds., Cambridge Univ. Press, 2015).

<sup>18</sup> Discussing such practice as a degree of transparency, the then Secretary General of ICSID wrote in response to outside request: "[W]e ... actively facilitate transparency of the proceedings. Thus, we publish procedural data from each case, the awards (either full texts or extracts) and analyses, including critiques, of the cases (please see in these respects our website and our law journal, a copy of which I am mailing to you)." Letter from Antonio Parra to Nicolas Guihard (April 15, 2003) (copy on file with author).

<sup>19</sup> For a further discussion of the transparency aspect of arbitration, see Toby Landau and Romesh Weeramantry, "A Case for Transparency in Investment Arbitration: *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/0203," in BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST FIFTY YEARS OF ICSID (Meg Kinnear, Geraldine R. Fischer, Jara M. Almeida, Luisa F. Torres & Mairée U. Bidegain, eds, Kluwer, 2016).

At the outset, Bolivia requested of the Tribunal that the proceedings be bifurcated with the jurisdiction of the Tribunal decided upon as a preliminary matter. The Tribunal granted this request.

At this point on August 29, 2002, four organizations and four individuals, none parties to the proceedings, petitioned the Tribunal to grant essentially five requests.<sup>20</sup> First, the petitioners requested that they be joined as parties to the arbitration. Second, they requested that they be allowed access to all filings. Third, they requested that they be allowed to file amicus submissions. Fourth, they requested that any hearings be open to the public. Fifth, they requested that the Tribunal make a site visit to Cochabamba, Bolivia. The Tribunal's handling of this petition is instructive at both the tactical and strategic levels.

It is important at the outset to observe the challenge presented by the form and title given the submission. The request is a twenty-page document. Its coversheet is in the form of a legal document with the ICSID case caption appearing in the upper left of the page and with the title of "Petition of [four entities and four named individuals] to the Arbitral Tribunal" placed in the center of the page. The form is significant because it adopts the form of the relief it seeks. Instead, one can imagine that the requesting organizations and individuals might have written and co-signed a letter to the ICSID Secretary General or to the President of the Tribunal. Rather they submit a petition and adopt the title for themselves of petitioners as though the procedural rules provided for such a petition.

The form of the petition begged the question of the form of the response. If a party to the arbitration makes a request of a tribunal, the tribunal normally provides its reply in the form of a "Procedural Order." But was such a form for the Tribunal's response appropriate in response to a request from individuals outside of the proceeding? Was

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For discussions of the arbitration generally, see Alexandre de Gramont, "After the Water War: The Battle for Jurisdiction in Aguas del Tunari, S.A. v. Republic of Bolivia," TDM (October 2006); and Timothy G. Nelson & Marco E. Schnabl, "Safeguarding Against Expropriation of Assets in Latin America: The Bolivian Water Decision Distilled," 1 WORLD ARB & MEDIATION REV. 557 (2007).

<sup>20</sup> The Petition was made by (1) LA COORDINADORA PARA LA DEFENSA DEL AGUA Y VIDA, (2) LA FEDERACIÓN DEPARTAMENTAL COCHABAMBINA DE ORGANIZACIONES REGANTES, (3) SEMAPA SUR, (4) FRIENDS OF THE EARTH-NETHERLANDS, (5) OSCAR OLIVERA, (6) OMAR FERNANDEZ, (7) FATHER LUIS SÁNCHEZ, AND (8) CONGRESSMAN JORGE ALVARADO. The petition was submitted on their behalf by EarthJustice Legal Defense.

the petition to be a part of the record? Should the Tribunal notify, not to mention involve, the Parties to the arbitration? Given that the Parties funded the arbitration, should the Tribunal consider the expense of addressing the petition?<sup>21</sup> In an international commercial arbitration, the answers to these questions are relatively clear. There is no basis for a non-party to participate unless the parties agree to such participation. It is true that under almost all rules of procedure that a tribunal has a general discretion over the conduct of the proceedings assuming the rules do not explicitly address the situation. But such general discretion exists *within* the basic framework of a proceeding established by the parties. It is not a discretion that extends to altering the basic framework. A tribunal as a matter of courtesy should respond to a request from a non-party, but the question of participation for such a non-party is one for the parties and not within the power of the tribunal.

The First Session, an organizational meeting, for the *Aguas del Tunari* proceeding was held on December 9, 2002. The Tribunal responded to the petition with a two-page letter on January 29, 2003. The form of the response is significant in the same way that the form of the petition was significant; the response taking the form of a letter, not an Order, from the President of the Tribunal to counsel at EarthJustice who submitted the petition.

As far as the substance of the response, EarthJustice in its petition argued that the Tribunal had the authority to grant the requests noting that:

“Nothing in the ICSID Convention or the ICSID Arbitration Rules precludes Petitioners’ participation. Rather, Article 44 of the ICSID rules explicitly allows the Tribunal to decide any question of procedure not covered by those instruments or by a rule agreed by the parties.”

As noted above, the general discretion provided to the Tribunal by Article 44 ordinarily is viewed in the international commercial arbitration context as a discretion within – not beyond - the basic framework established by the Parties. Seeking to distinguish that limited sense to the general discretion of tribunals, the petition pointed to (1) the then recent decision of the Tribunal in *Methanex Corp v. United States of America* in relation to petitions of non-parties and (2) the public

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<sup>21</sup> The Tribunal avoided the question of expense for the parties who did not mutually agree by not placing the expense of responding to the petition on the parties.

nature and facts of the dispute that in petitioners' view made "this claim significantly different from most commercial arbitrations, and weigh[ed] strongly in favor of participation by Petitioners."

The Tribunal's response paralleled the response of the *Methanex* tribunal quire closely. The Tribunal's response to the petition starts:

[T]he Tribunal's unanimous opinion [is] that your core requests are beyond the power or authority of the Tribunal to grant. The interplay of the two treaties involved (i.e., the ICSID Convention and the Netherlands-Bolivia BIT) and the consensual nature of the arbitration places the control of the issues you raise with the parties, not the Tribunal. In particular, it is manifestly clear to the Tribunal that it does not, absent the agreement of the Parties, have the power to join a non-party to the proceedings; to provide access to hearings to non-parties and, *a fortiori*, to the public generally; or to make the documents of the proceedings public.

This paragraph is significant both in terms of substance and form. At to substance, as in *Methanex*,<sup>22</sup> the Tribunal found the general procedural discretion in Article 44 of the ICSID Rules to not authorize the Tribunal (1) to join a non-party, (2) to provide access to hearings to non-parties or (3) to make the record of the proceeding available to non-parties. The Tribunal's view was that ICSID's adoption of arbitration rather than the establishment of a court as the means of dispute resolution meant that the objects of the petition were not matters unaddressed, but rather implicitly decided in the sense that the arbitration is a process between the parties. As to form and in keeping with the petitioners not being parties to the arbitration, the Tribunal

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<sup>22</sup> The *Methanex* arbitration involved a dispute under Chapter 11 of NAFTA in accordance with the UNCITRAL Rules of Arbitral Procedure. The analogue to Article 44 of the ICSID Rules is Article 15(1) of the UNCITRAL Rules. The *Methanex* tribunal in considering the scope of the general discretion provided by Article 15(1) stated:

"The Tribunal is required to decide a substantive dispute between the Claimant and the Respondent. The Tribunal has no mandate to decide any other substantive dispute or any dispute determining the legal rights of third persons. The legal boundaries of the arbitration are set by this essential legal fact. It is thus self-evident that if the Tribunal cannot directly, without consent, add another person as a party to this dispute or treat a third person as a party to the arbitration or NAFTA, it is equally precluded from achieving this result indirectly by exercising a power over the conduct of the arbitration. Accordingly, in the Tribunal's view, the power under Article 15(1) must be confined to procedural matters. Treating non-parties as Disputing Parties ... cannot be matters of mere procedure; and such matters cannot fall within Article 15 (1) of the UNCITRAL Arbitration Rules."

Decision of the Tribunal on Petitions from Third persons as "Amici Curiae," *Methanex Corp. v. United States of America*, para 29, 15 January 2001.

does not state that it “decides that your core requests are ...” but rather states that its “opinion is that your core requests are ...” In other words, it does not act in its judicial capacity as it might in an Order, but rather expresses its view in its response to a non-party.

Having stated that the “absent the agreement of the Parties” the tribunal does not possess the authority under the ICSID Rules, the letter in response goes on to state that “the consent of required of the Parties to grant the requests is not present.

As with the *Methanex* tribunal, the Tribunal in its response observed the request to submit *amicus* submissions presented a different question. The *Methanex* tribunal concluded that it did under Article 15 of the UNCITRAL Rules possess the authority to accept *amicus* submissions but adding that the “next issue is whether, in the particular circumstances of this arbitration, the Tribunal should decide that it is “appropriate” to accept *amicus* submissions from the Petitioners in the exercise of the discretion .... At this early stage, the Tribunal cannot decide definitively that it would be assisted by these submissions on the Disputing Parties' substantive dispute.”<sup>23</sup> The *Aguas del Tunari* Tribunal essentially reversed the order of this reasoning. The Tribunal observing that the proceedings at the point were limited to jurisdiction wrote “the Tribunal is of the view that there is not at present a need to call witnesses or seek supplementary non-party submissions,” but that it held “this view without in anyway prejudging the question of the extent of the Tribunal's authority to call witnesses or receive information from non-parties on its own initiative.”

Most clear in this respect was the request to be joined as a party. The question of joinder is not – and remains not – addressed by the ICSID Rules. There was (and is) no doubt that to join a party was not within the authority of the Tribunal. Rather, joinder, and all of the requests, was matters for the parties.

A year later in 2004, the ICSID Secretariat published a working paper, noting that “concerns have been raised and there have been proposals for change” in the procedures attaching to investment treaty disputes.<sup>24</sup> The aim of the paper was to initiate discussions of how amendments to the ICSID Rules might “complement” the

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<sup>23</sup> Id. at para 48.

<sup>24</sup> ICSID Secretariat, “Possible Improvements the Framework for ICSID Arbitration” (22 October 2004).

contemporaneous reforms to treaty practice considered above.<sup>25</sup> A key focus of the Secretariat's paper was on possible responses to concerns around the lack of (or delays in) publication of information from ICSID proceedings as well as scope for access of third parties to such proceedings, including *amicus curiae* involvement and the holding of open hearings.<sup>26</sup>

In the view of both the ICSID Secretariat and the Tribunal in *Aguas del Tunari*, the preferable route to bring about change in ICSID procedures was better for it occur at the level of the ICSID system rather than for individual tribunals to decide that amicus submissions fell within the Tribunal's general discretion over procedural matters. First, one tribunal's approach would not be binding on future tribunals and one might see a split in practice. Second, the decision to admit amicus submissions creates a host of subsidiary procedural questions, for example the test to be applied as to what constitutes a sufficient interest of a non-party in the dispute, page limits on submissions, timing of submissions, access of non-parties to the filings of parties, etc. The ICSID Secretariat did an excellent job in preparing the 2004 working paper and carrying it through to the 2006 amendments.

The 2004 working paper was submitted for comment to both the Administrative Council and to certain non-governmental organizations, including business and civil society groups.<sup>27</sup> In 2005, the Secretariat published a follow-up paper in which it noted that the reactions to the proposed changes had been "generally favorable".<sup>28</sup> This latter paper made concrete the reforms flagged in the 2004 paper by canvassing the textual changes necessary to implement the suggested amendments. These revisions included detailed provisions on the filing of *amicus curiae* submissions<sup>29</sup> as well as provision for public hearings.<sup>30</sup> These amendments were adopted in 2006, resulting in amendment of the ICSID Rules to provide for the holding of open hearings (with party agreement) and the submission of *amicus curiae* briefs (after consultation with the parties and subject to the submission meeting specified criteria).<sup>31</sup> The transparency movement within ICSID was fully established.

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<sup>25</sup> Id. at 5.

<sup>26</sup> Id. at 7-11.

<sup>27</sup> ICSID Secretariat, "Suggested Changes to the ICSID Rules and Regulations" (12 May 2005) at p. 3.

<sup>28</sup> Id. at p. 4.

<sup>29</sup> Id. at p. 11

<sup>30</sup> Id. at p.10

<sup>31</sup> Rules 32 and 37.

In the context of specific investment treaties and State practice, the trend toward reform began as early as 2001 when the NAFTA Free Trade Commission issued a joint interpretation indicating the NAFTA Parties' view that:

[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties [or]...precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven Tribunal.<sup>32</sup>

Thereafter, in 2002, the President of the United States was given fast track negotiating authority but instructed to ensure that US investment treaties adopted "the fullest measure of transparency in the dispute settlement mechanism".<sup>33</sup> These developments have widely been credited with prompting a broader change to issues of transparency in the treaty practice of other States.

During the years that followed, several States adopted model treaties which incorporated express stipulations on matters of transparency. The Canadian Model BIT of 2004, for example, provided for the mandatory disclosure of arbitral award.<sup>34</sup> Similarly, the Norwegian Model BIT of 2007 provided for mandatory disclosure of all documents submitted to or issued by the Tribunal.<sup>35</sup> The trend towards greater transparency has been solidified in recent treaty practice with States continuing to conclude treaties providing also for mandatory public hearings and greater scope for *amicus curiae* intervention.<sup>36</sup>

Following the example of ICSID and faced with the possibility that some investors would chose UNCITRAL arbitration rather than ICSID in order to maintain confidentiality, the UNCITRAL Rules likewise underwent a process of revision in 2010. Following lengthy consideration by Working Group II, amendments to the transparency

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<sup>32</sup> NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions'.

<sup>33</sup> This included by '(i) ensuring that all requests for dispute settlement are promptly made public; (ii) ensuring that – (I) all proceedings, submissions, findings, and decisions are promptly made public; and (II) all hearings are open to the public; and (iii) establishing a mechanism for acceptance of *amicus curiae* submissions from businesses, unions, and nongovernmental organizations': Trade Act of 2002 section 2102.

<sup>34</sup> Canada, 'Model Investment Treaty' Article 38.

<sup>35</sup> Norway, 'Model Investment Treaty' Article 19.

<sup>36</sup> See, for example: Korea-Australia FTA (2014).

regime applicable to UNCITRAL proceedings were embodied in the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration. These rules came into effect on 1 April 2014, and were incorporated into the 2013 UNCITRAL Arbitration Rules by Article 1(4). The Transparency Rules provide for increased transparency in investor-State proceedings conducted under the UNCITRAL Arbitration Rules. They provide, *inter alia*, for publication by a central repository of basic information about filed cases; public release of key documents, including the tribunal's decisions, and the statements of claim and defense; participation of non-disputing third parties in certain circumstances; and open hearings. Subject to certain exceptions, the Rules apply automatically – but only to UNCITRAL arbitrations which are filed under treaties concluded after 1 April 2014. For UNCITRAL arbitrations instituted under pre-April 2014 investment treaties, the Rules only apply if the parties to the dispute or the treaty parties themselves agree to their application.

The recently concluded UN Convention on Transparency in Treaty-Based Investor-State Arbitration provides one such mechanism by which States can express agreement to the application of the Rules. The Convention was opened for signature on 17 March 2015.<sup>37</sup> The Convention will enter into force six months after the first three instruments of ratification have been deposited by any of the States which have signed the Convention.<sup>38</sup> The Convention is designed to provide additional scope for the application of the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration. Once the Convention enters into force, it will operate to constitute consent by the States party to it for the Transparency Rules to be applied in proceedings (whether or not conducted under the UNCITRAL Rules) brought under pre-April 2014 investment treaties to which they are party. In subscribing to the Convention, States can elect to expressly exclude from coverage any proceedings brought under specified treaties and/or those conducted in accordance with particular arbitral rules (other than the UNCITRAL Rules).

The above reforms illustrate how States and arbitral institutions have successfully learned from developments in tribunal jurisprudence to modify treaty practice and the institutional rules governing transparency in investor-State arbitration to achieve desired policy outcomes. While more recent amendments may take some time to affect

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<sup>37</sup> So far, [nine] countries have signed the treaty (among them, Canada, France, Germany, the United Kingdom and the United States).

<sup>38</sup> Article 9(2).

concrete cases, they are already having early success. For example, details of the first two cases to apply the UNCITRAL Rules on Transparency have recently come to light.<sup>39</sup>

This is the state of the transparency movement. It clearly has served to open up and make less suspicious investment arbitration. It also has had implications. In particular, transparency (meaning the availability of filings, openness of hearing and publications of awards) also creates the possibility of a jurisprudence, increases the number of citations to other awards in briefs, creates if not precedent, then a precedential effect, and makes apparent inconsistency in awards which in turn fuels a call for an appellate mechanism. In other words, transparency creates an environment that leans toward the systemic approach of courts in contrast to the more case specific approach of arbitration.

This tendency can be seen in EU debate over TTIP: does the commitment to transparency require the replacement of arbitration tribunals with a court or has the commitment to transparency gone too far. I quote from the EU consultation paper:

One group of concerns, mostly expressed by NGOs and trade unions, is that some of the exceptions to the transparency provisions to protect business confidential information could be too widely interpreted [by tribunals] and could risk undermining the effectiveness of transparency. There is also concern that the tribunal could have too wide a discretion in deciding under what circumstances public hearings could be closed to the public. Another group of concerns stemming from business organisations and companies is that the provisions in the proposed approach on transparency go further than most national legal systems and that this could entail a risk that genuine confidential information and trade secrets could be disclosed. There is also concern that the access by the public to the hearings could politicise cases brought by companies, with the risk that this could affect the fairness of the proceedings.<sup>40</sup>

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<sup>39</sup> *Iberdrola, S.A. and Iberdrola Energia. S.A.U. v. Bolivia* (PCA Case No. 2015-05), Procedural Order No. 1, 7 August 2015 and *BSG Resources Limited v. Republic of Guinea* (ICSID Case No. ARB/14/22) Procedural Order No. 2 of September 2015 (by party agreement, subject to certain modifications); and as described in Amokura Kawharu, 'Public Participation and Transparency in International Investment Arbitration: *Suez v Argentina*' (2007) 4 *New Zealand Year Book of International Law* 159, 170.

<sup>40</sup> EU Consultation Report, p. 19.

The crucial issue is loss of trust in an institution and that once that trust is lost, as evidenced in the TTIP debate just summarized, it is very difficult to rebut a broad political movement with the reassurances of experts in the field.

That the adoption of a measure of transparency would have implications for investment arbitration is not surprising. Beyond such implications, however, there is the question of the risks of unintended consequences. It is such unintended consequences of transparency that leads to the second part of my remarks, will the transparency movement within investment arbitration spill over into international commercial arbitration.

## II. The Risks of Transparency: Why the Transparency Movement Is Unlikely to Spill over into the Commercial Arbitration World Generally.

In my experience, counsel and arbitrators view the emergence of this multifaceted transparency movement in investment arbitration with a mixture of bewilderment and apprehension. There is bewilderment as to how the investment world could have been allowed this erosion of party autonomy to occur. There is apprehension that the transparency movement will spillover into the commercial arbitration world undermining central features of arbitration that make it both efficient and desirable. It likewise is urged that attention be given to preserving the centrality of party autonomy in commercial arbitration. I agree. But to do so I would suggest to you that one must anticipate where the challenge will come from. In this second part of my remarks, my thesis is a reassuring one, namely that the transparency movement is unlikely to spill over into commercial arbitration with a possible exception. The third part of my remarks, however, point to a different possible reason that a loss of trust may arise in the commercial arbitration world.

Before I outline two reasons do I believe that the transparency movement is unlikely to spillover into the commercial arbitration world, let me emphasize that I do not subscribe to the view that disputes in commercial arbitration themselves are less significant. If one examines the petition in *Aguas del Tunari*, it is asserted several times that the decision of the tribunal would impact the people of Bolivia. Such impact is argued to be a characteristic of investment arbitration generally although it is also recognized that this is not always the case because the amount in dispute may not be particularly large or because

the economy of the State involved is relatively significant and can absorb the award. But equally, it is manifest in my opinion that some international commercial arbitration address disputes that potentially has a significant impact on the economy of a region. If potential public impact were the sole criteria for when transparency is needed, then it is possible that there would be some spillover between the investment and commercial worlds. However, although potential public impact is an important factor in the transparency movement, there are other circumstances as well that distinguish international commercial arbitration. These circumstances can be stated as two reasons why spillover of the transparency movement into the commercial arbitration sphere is unlikely.

The first reason has been touched upon already and I will not dwell on it. Namely, unlike the situation in Chochabamba where a public controversy slid into private arbitration, commercial arbitration overwhelming involves private disputes not known to the public that are resolved in private arbitration. This circumstance, however, only explains why transparency arose first in investment arbitration, it does not indicate that it will not arise eventually in the commercial world as well.

The second reason, however, is the more important in terms of mass movements. As you all know, the criticism of ISDS currently goes far beyond transparency. In TIPP, there is by the EU and several European States an almost complete rejection of ISDS with the call instead for an investment court or a return to use of national courts. It is a controversy where NGOs, some governments and various national publics focus critically on TTIP and TTP and specifically the foreign investment chapters of these FTAs. It is often described as a backlash against investment arbitration generally. But let's tease apart this backlash.

First, there is a critical task of understanding what this backlash is really against. Is it against investment arbitration or is it against something else where investment arbitration is but a focus for some other target of concern? Let me be clear, I am not suggesting that investment arbitration is not deserving of reform, that it should not be held to the highest standard. What I am suggesting is that the investment arbitration mechanism may not in fact be the principal reason for intensity of the backlash. This is crucial because an academic agenda, an institutional agenda, to identify what should be reformed in

a situation of a complex backlash means that reform may not address the foundation of the backlash.

As an example of complex backlash, I would point to what some may recall as the 'Battle of Seattle' in 1999. This large scale protest at a ministerial meeting of the WTO was described as the first wave of criticism that led to the defeat of the MAI. But note, it was a protest against a meeting of the WTO, not the OECD where the MAI was being considered. People in the WTO at the time were stunned at what happened, why was the WTO the object. In the context of such an immense civil society protest, one observer argued that it should not be surprising that the WTO was the object of such protests. Rather, it was observed that — given that the forces of globalization were diffuse and that there is no clear agent of globalization — in such a situation protests often center on particular symbols of the more general phenomenon of concern. The important point is that protest in some specifics against the WTO, or the MAI, was in essence reflected a concern with globalization.

I suggest to that the current backlash against the investment chapters of TTIP and TTP is similarly only partly about investment and I would argue more generally is about globalization. Indications in support of this suggestion can be seen in the breadth of the objections to ISDS in civil society. Whether you agree or not with this suggest, I would urge that the underlying observation remains – one must ask is the apparent backlash against the institution or against something else.

Particularly telling in the case of ISDS is the fact that the investment arbitration regime has responded significantly over the last almost fifteen years to the critique regarding it and yet the critique does not abate. The critique concerns process and substance. What has been the response?

In the first part of my remarks, I described the tremendous reforms that have occurred in regard to transparency, amicus submissions through the amendment of institutional rules, model BITs and most recently the Mauritius Convention. As to substance, the changes are even more startling. Model laws and actual bits have changed radically in that time. Standards to protect regulatory choice in environmental matters have been built into BITs and FTAs. Likewise, there is increased inclusion of self-judging clauses as well as carves out to many obligations in annexes to BITs. Indeed, I would suggest that we would be hard pressed to identify a mechanism that has

reformed more over the same period. This disjunction between reform and opposition reinforces the suggestion that the backlash is not only about ISDS.

I do not argue that the agenda of reform of ISDS is complete, Rather I argue that, whether you agree or not with the suggestion that controversy with ISDS in significant part reflects a discontent concerning globalization, the underlying observation remains – one must ask is the apparent backlash against the institution or against something else.

If it is the case that the real drive behind the intensity and persistence of the critique of ISDS is not so much an in depth evaluation of investment arbitration as much as it is a generalized reaction to the dislocation and uncertainties that accompany globalization, I do not see the transparency movement spilling over with anywhere near the same intensity to commercial arbitration because although international commercial arbitration certainly supports the conduct of international business, it is not as associated with the phenomenon of globalization in the same way.

There is one exception and that is concession agreements. If there is a pool of potential disputes where the risk of such disputes for potential investors is mitigated through investment arbitration, then if that mechanism is seriously weakened in terms of the security provided, it need be asked where such disputes will go instead, what alternatives will be utilized by investors.

One possibility is that investment disputes no longer having in all instances the possibility of being resolved in arbitration instead will be resolved in national courts. The goal of strong national courts able to adjudicate such disputes fairly is a desirable one. A different possibility is that the most powerful investors will return to the use of concession agreements and arbitration under such contracts in the international commercial arbitration framework. A concession agreement potentially can replace the general obligations of BITs to all investors with precise contractual obligations to the specific concessionaire. If in fact there is a substantial rise in the negotiation of concessions, one can imagine the transparency movement attempting to open up such arbitrations arguing that such disputes presenting the same questions of public interest.

### III The Limits of Transparency: How Trust might be lost in International Commercial Arbitration

Transparency by opening the activity of investment arbitration to view, participation and critique provides a device that enhances the integrity of investment arbitration. Viewing this device as a means of regulation, two things become clear. First, transparency can't guarantee integrity and accuracy. In other words, there are limits to what transparency can accomplish. Second, other regulatory devices exist and must be used as appropriate to ensure the integrity of arbitration. Examples include the mechanism for challenge arbitrators for a lack of impartiality and the possibility of set aside of an arbitral award by a national court for corruption of the tribunal.

In this last part of my remarks, I highlight the limits of transparency by pointing to a particular challenge faced by arbitration. I argued in the second part of my remarks that concerns with globalization are a significant factor that energizes the loss of trust in and opposition to international investment arbitration and that it simultaneously is unlikely that this factor will motivate a corresponding loss of trust for international commercial arbitration. However, if not a concern with the implications of globalization, what concern or set of events might lead to a loss of trust in international commercial arbitration? If there is such a circumstance, it is that circumstance that need be anticipated and to which a response may be required.

The challenge I would suggest is the possibility that arbitration may provide an opportunity for the facilitation of other than lawful business activity. By illegal activity, I am not referring to the corruption of the arbitrators.<sup>41</sup> Rather, I am concerned with arbitrators addressing cases where the dealings that gave rise to the dispute are not only contrary to public policy, but rather criminal under interested legal systems. In general, the arbitration community avoids discussion of the possibility that criminal activity somehow takes advantage of the arbitration framework. In significant part, this is because such criminal activity is the rare exception. The extent to which such illegal activity makes use of arbitration is difficult to assess or measure, nor is it clear that any effort at transparency would assist such an assessment. If anything, the evidence of such practice is anecdotal and quite isolated. AS a potential challenge to trust in international commercial

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<sup>41</sup> See, e.g., Paulo Trevisani, Brazil Probes Alleged Corruption Among Tax Officials, WALL STREET JOURNAL (April 7, 2015)(discussing possible corruption of arbitrators as a part of the Petrobas Scandal).

arbitration, I believe it essential that the bar and academy consider the possibility. It should do so even though the practice appears to be rare in order to maintain the public confidence that is so essential to the continued vitality of international commercial arbitration.

The possibility that criminal activity occurs flows from international commercial arbitration's enjoyment of a measure of privacy, if not confidentiality. There are at least four layers to privacy in arbitration

First, there is the fact that the discussion regarding an agreement to arbitrate, like all arrangements between individuals, begins in private. Contracts are negotiated and generally signed in private. And what is arbitration but a complicated form of negotiated settlement of disputes in advance? There are of course exceptions to the tolerance by society of such unexamined privacy and I will come to that. But we start with a broad freedom to discuss matters privately and for two individuals to reach agreements with one another in private.

A second layer is where to privacy is added an expectation of confidentiality. It is not merely that something takes place in private, but rather that there exists an expectation that the matters discussed are not to be discussed elsewhere. We have all gone to lectures where at the outset it is stated that "Chatham House Rules" apply and there is an expectation of confidentiality.

The third level is where confidentiality is not merely something expected but rather something contractually required. For years, a value of arbitration over litigation in courts was the assertion that it was confidential. This expectation of confidentiality matched the wish of business that did not wish to see its business or disputes in the public domain. But like the Chatham House Rules, the truth was that this expectation of confidentiality was not as strong as many assumed. It was the 1994 judgement of the High Court of Australia in *Esso Australia Resources Ltd v. Plowman* that dispelled the illusion that a general expectation of confidentiality went far enough.<sup>42</sup> As Michael Pryles after *Esso Australia* wrote: "Until the current flurry of activity, confidentiality was the subject of assumptions rather than established legal principles and rules. Moreover these assumptions were vague and general in nature and did not adequately address the different facets of

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<sup>42</sup> (1995) 183 CLR 10. The case is also reproduced in (1995) *Arbitration International*, Volume 11, No.3 at p. 235.

confidentiality.”<sup>43</sup> Thus following that judgement, agreements as to confidentiality were quickly added and rules on confidentiality were added to existing rules of arbitral procedure.

The fourth and last layer of privacy is that of confidentiality required by statute. A prominent example of this is the French statutory obligation placed on arbitrators to maintain the secrecy of deliberations.<sup>44</sup>

Thus we have present privacy, an expectation of confidentiality, a contractually enforced confidentiality and finally a confidentiality required by statute. Privacy is widely expected in business and in the commercial arbitrations that spring from those dealings. It is this privacy that may also provide an opportunity for other than lawful business activity. There may be dealings not only contrary to public policy, but indeed may be dealings that involve criminal behavior.

There are no doubt numerous ways in which criminal activity might in some fashion be facilitated by the international commercial arbitration system. I offer one rare public example both of criminal behavior misusing arbitration and of the limits of transparency in addressing this particular challenge.

The example can be found in the Judgement of the U.K. Court of Appeals in the matter of *Soleimany v Soleimany*.<sup>45</sup> The case involved a son (Abner) and father (Sion) who engaged in the shipment and sale of goods. To resolve a dispute as to whether the father had paid the son an appropriate, the two agreed to arbitrate their disputes before the Beth Din (Court of Chief Rabbi).<sup>46</sup> The rabbinical tribunal rendered an award in favor of the son in the amount of £576,574. The father did not pay and the son brought an action in UK Courts against the father to enforce an arbitral award. The father sought to have the award set aside on the ground of illegality; namely that Persian carpets had been smuggled out of Iran to the UK in violation of Iranian law.

The Court’s judgment highlights that the arbitral award clearly indicates that the arbitrator was aware of the illegality of the

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<sup>43</sup> Michael Pryles, “Confidentiality,” in *Leading Arbitrator’s Guide to International Arbitration*.

<sup>44</sup> French Code of Civil Procedure, Art. 1469.

<sup>45</sup> *Soleimany v. Soleimany* [1998] APP.L.R. 02/19.

<sup>46</sup> A leaflet titled “Din Torah; Information for litigants and legal advisers. (Beth Din Leaflet No.4)” states that the system of law to be applied is Jewish Law, although “sometimes other systems of law may also be relevant ... by way of the doctrine of incorporation,…”.

transactions under Iranian law. The Court points out that the award states that “Abner purchased quantities of carpets and exported them, *illegally*, out of Iran”.<sup>47</sup> In assessing what share should be awarded to the son, the Court observes that a factor in the Award was the risk posed by the illegality: the Award stating “Abner’s role was as ... [t]o arrange for transportation out of Iran at considerable risk to himself.”<sup>48</sup> As might be expected, an illegal activity gives rise to other illegal acts, a circumstance also recognized in the award determining the amount to be awarded: “By the very nature of the illicit enterprise, few records were kept ...” but noting that the award did not make allowance for “smugglers’ fees”.<sup>49</sup> The Court finally notes that “the arbitrator did not take the same view as an English court would have taken, but considered the illegality to be of no relevance ‘since he was applying Jewish law, under which, any purported illegality would have no effect on the rights of the parties’”.<sup>50</sup>

For the Court of Appeals, there was little doubt that the award was to be set aside and so ordered. The Court also made clear that they had little doubt because the underlying award made the illegality transparent. The Court emphasized that the fact that the award had started plainly that the transaction in question was illegal made the case a simpler one. But in most cases, it will not be clear for a court. If illegal activity within arbitration is a challenge to society and the institution of arbitration itself, how are the courts to approach this challenge. What if the arbitrators had not perceived the underlying illegality or what if the arbitrators - presented with a defense of illegality - had ruled that the transaction in their view was not illegal? What should the court do in such instance?

The Court of Appeals observes the competing values at play in attempting to supervise arbitration more carefully, it writes:

50. The difficulty arises when arbitrators have entered upon the topic of illegality, and have held that there was none. ... In such a case there is a tension between the public interest that the awards of arbitrators should be respected, so that there be an end to lawsuits, and the public interest that illegal contracts should not be enforced. ...

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<sup>47</sup> *Supra* note 45 at para. 9.

<sup>48</sup> *Id.* at para. 11.

<sup>49</sup> *Id.* at para. 9.

<sup>50</sup> *Id.* at para. 27.

51. It may, however, also be in the public interest that this court should express some view on a point which has been fully argued and which is likely to arise again. In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should enquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an enquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in International trade but in many other circumstances. We do not for one moment suggest that the judge should conduct a full scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid.<sup>51</sup>

The Court concludes its judgment recognizing that the parties and the rabbinical tribunal very well could have disguised the illegality of the claim from review or presented a cause of action, such as title to the rugs, that may not have raised the issue of the illegality of their presence in the UK.<sup>52</sup>

Such is the challenge presented by illegal activity that misuses arbitration in order to further its effort. Among the regulatory tools needed to address this challenge, transparency may play a part. However, not only would it the limits of its efficacy be apparent but its use would, as noted by the Court of Appeals, “create the mischief which the arbitration was designed to avoid.”

## Conclusion

International investment arbitration has over the last decade and a half been the subject of significant procedural and substantive reforms, including the adoption particularly within ICSID of transparency measures. Such transparency measures have been a part of a general trend toward a more systemic approach to investment arbitration while international commercial arbitration has continued as a framework with discrete private arbitrations take place. A virtue of transparency is that its adoption has strengthened the integrity of the

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<sup>51</sup> Id. at paras 50, 51.

<sup>52</sup> Id. at para 68.

investment arbitration system even as such transparency makes greater analysis and critique possible and even though broad criticisms of ISDS strengthen in some regions of the world reflecting deeper concerns by civil society with the implications of globalization writ large. Given the different circumstances of international commercial arbitration, it is unlikely that the demand for transparency will spill over into that arena. But other challenges face international commercial activity and addressing such challenges will require concerted and innovative thinking so as to anticipate and thereby preserve public trust in international commercial arbitration. It is important to recall that the transparency movement is, among other things, a political movement and one should wish to be ahead of, and not in the way of, such movements.