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# THE NEXUS OF ACCESS TO INFORMATION, GOOD GOVERNANCE, AND INVESTMENT NEGOTIATION

Mahmoud Elsaman<sup>†</sup>

*Abstract:* One advantage of alternative dispute resolution mechanisms is the confidentiality that they provide. Negotiations preceding and during dispute resolution proceedings are no exception to the rule of privacy. However, when governments are involved in negotiations, confidentiality may contradict the free access to information as a fundamental human right that plays a significant role in sustaining good governance by promoting transparency and government accountability. While there are escalating efforts to enhance the right to access information related to investment arbitration proceedings, not all investment disputes are settled through investment arbitration. A significant number of investment disputes are settled directly through investment negotiation between host states and foreign investors before the issuance of an award, or even afterwards. Investment negotiations may save the parties time and the costs usually associated with arbitration; however, they may also threaten the right to access information and, accordingly, the principles of good governance, including transparency and accountability. This article argues that investment negotiation impairs the right to access information because of confidentiality that surrounds the negotiation process and the negotiated settlement agreement. As such, the non-disclosure of negotiated settlement agreements adversely impacts the principles of good governance and the protection of public interest as two interrelated principles with the right to access information. In addition, this article underlines that the negative repercussions of investment negotiation are not peculiar to both developed and developing countries. In supporting this argument, two examples from Germany and Egypt are presented.

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## I. INTRODUCTION

The right to access information is a recognized human right that confers on individuals the right to request information held by governmental agencies.

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Based on this right, government bodies are required to respond and offer access to information unless there is a legally justifiable reason not to do so.<sup>1</sup>

Recently, enhancing the right to access information has become an international trend.<sup>2</sup> In 2009, the Council of Europe adopted the Convention on Access to Official Documents, which is the first binding legal instrument providing for the protection of the right to access public information and public documents.<sup>3</sup> In addition, many countries have included the right to access information in their constitutions and enacted national laws to regulate this right.<sup>4</sup> The rationale behind protecting the right to access information as a human right is its importance to achieving democracy. The right to access information creates an informed citizenry capable of participating in decision-making.<sup>5</sup> As a result, governments are held accountable, reflecting good governance and better protecting the public interest.<sup>6</sup>

Nevertheless, the right to access information is not an absolute right. It is subject to many limitations that are usually based on the protection of the public interest and the privacy of third parties.<sup>7</sup> However, there are some instances when governments withhold public information that does not fit under any category of the exemptions to the right to access information. One common case is when government authorities withhold public information related to Investor-State Dispute Settlements (“ISDS”). ISDS usually entails public policy-related questions.<sup>8</sup> Investors usually challenge measures taken by host states that are deemed necessary for public interest to preserve the environment, impose taxes, or regulate business.<sup>9</sup> For example, in *Phillip Morris v. Australia*, an investor sued the Australian government because of

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<sup>1</sup> David Banisar, *The Right to Information and Privacy: Balancing Rights and Managing Conflicts*, 5 (World Bank Inst., Governance Working Paper No. 80740, 2011), <http://hdl.handle.net/10986/23022> (last visited Nov. 11, 2019).

<sup>2</sup> Maeve McDonagh, *The Right to Information in International Human Rights Law*, 13 HUM. RIGHTS L. REV. 1, 25–26 (2013), <https://academic.oup.com/hrlr/article-lookup/doi/10.1093/hrlr/ngs045>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Anshu Jain, *Good Governance and Right to Information: A Perspective*, 54 J. INDIAN LAW INST. 506, 515 (2012).

<sup>6</sup> *Id.* at 506.

<sup>7</sup> CHERYL ANN BISHOP, ACCESS TO INFORMATION AS A HUMAN RIGHT 78–79 (2011).

<sup>8</sup> Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT. LAW J. 138, 140 (2007).

<sup>9</sup> *Id.* at 140–41.

the Tobacco Plain Packaging Act.<sup>10</sup> The Act aimed at improving public health by requiring manufacturers to include graphic health warnings while prohibiting the use of logos and images, among other means of identification, on tobacco products.<sup>11</sup> As such, since ISDS involves matters that relate to the public interest, the public should have the right to access ISDS-related information. In fact, there are increasing efforts to enhance transparency in investment arbitration-related procedures.<sup>12</sup> However, not all investment disputes are settled through investment arbitration. A significant number of investment disputes are amicably settled between host states and foreign investors before an arbitration award is issued, or even after the issuance of an award when the parties disregard the award and agree on a different settlement.<sup>13</sup> These settlement agreements are reached through negotiation as one type of alternative dispute resolution (“ADR”) mechanisms.

In fact, one of the main advantages of ADR mechanisms is confidentiality.<sup>14</sup> Negotiation is no exception to this rule—parties are usually free to negotiate their settlement agreements in private.<sup>15</sup> However, when governments are a party to negotiation, confidentiality concerns may conflict with the right to access information as a fundamental human right. In particular, if governments do not adhere to the disclosure requirements set by their national laws, the public will be deprived of its right to challenge such settlement agreements if they are in conflict with the public interest. In other words, non-disclosure of investment negotiation-related settlement agreements may adversely impact the principles of good governance and the protection of the public interest.

This article aims to shed light on the negative impact of investment negotiations on the right to access information and, accordingly, good

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<sup>10</sup> See Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012–12 (June 22, 2011).

<sup>11</sup> *Id.*

<sup>12</sup> Antonio R. Parra, *Enhancing Transparency at ICSID*, OUP BLOG (2014), <https://blog.oup.com/2014/02/enhancing-transparency-at-icsid/> (last visited Mar 10, 2019).

<sup>13</sup> Lise Johnson & Brooke Skartvedt Guven, *The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest – Investment Treaty News*, <https://www.iisd.org/itn/2017/03/13/the-settlement-of-investment-disputes-a-discussion-of-democratic-accountability-and-the-public-interest-lise-johnson-and-brooke-skartvedt-guven/> (last visited Feb 16, 2019).

<sup>14</sup> BISHOP, *supra* note 7, at 78–79.

<sup>15</sup> See, e.g., Department of Justice Government of Canada, *Department of Justice – Dispute Prevention and Resolution Services* (2007), <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/03.html> (last visited Mar 13, 2019).

governance. Egypt and Germany are chosen as examples that show how infringing the right to access information may impair the principle of good governance. Practices of the executive, judicial, and legislative branches in Egypt will be presented to highlight the inconsistency in applying the right to access information and its impact on good governance.

Part II of this paper focuses on the emergence of the right to access information as a human right and its scope of application. In addition, Part II explains the significance of the right to access information for the public interest and good governance. Part III narrows down the discussion to investment negotiation and shows the concerns arising as a consequence of the confidentiality of investment negotiation through examples from developed and developing countries. Part IV evaluates the legitimacy of governments' withholding of information by considering positions taken by Germany and Egypt.

## II. THE RIGHT TO ACCESS INFORMATION AS AN EMERGING HUMAN RIGHT

### A. *Setting the Scene: The Emergence and the Scope of the Right to Access Information*

The right to access information first emerged in Sweden in 1766 but is now widely acknowledged. The right is found explicitly in the constitutions of many countries, in addition to several international instruments. Despite its prevalence, the right to access information is not absolute; governments are free to restrict the right. Nevertheless, there are limitations imposed on governments in restricting the right to access information.

#### 1. *Background: The Emergence of the Right to Access Information*

The right to access information can be traced back to 1766 when the parliament of Sweden enacted the "Freedom of Press Act."<sup>16</sup> Based on this act, any document relating by any means to any administrative agency was considered a public document accessible to any person upon request.<sup>17</sup> Until now, a main distinguishing feature of the Swedish public administration was its openness and accountability.<sup>18</sup> However, the right to access information is

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<sup>16</sup> Jain, *supra* note 5, at 510.

<sup>17</sup> *Id.*

<sup>18</sup> Paul T. Levin, *The Swedish Model of Public Administration: Separation of Powers – The Swedish Style*, 4 J. ADM. GOV. 38, 39 (2009).

no longer the sole preserve of Sweden. There is a recent global trend to enhance the right to access information that is widely acknowledged on national and international levels.<sup>19</sup>

On a national level, various countries' constitutions expressly provide for the right to access information as a human right; in addition, many states have enacted laws to regulate the right to access information.<sup>20</sup> The United States enacted its Freedom of Information Act in 1967, followed by Australia, New Zealand, and Canada in 1982. By 2012, around ninety countries had their own national laws regulating the right to access information.<sup>21</sup> On the international level, the Council of Europe in 2009 adopted the Convention on Access to Official Documents. This convention is the first binding legal document dedicated to the protection of the right to access information.<sup>22</sup> Based on this Convention, signatory states shall guarantee to their citizens, upon request and without any discrimination, the right to access official documents held by public authorities.<sup>23</sup> In addition, many regional and global human rights enforcement bodies have construed existing human rights treaties in ways that extend their scope of protection to include the right to access information.<sup>24</sup>

The right to access information is a human right that finds its foundation in the well-established right of freedom of expression. More precisely, the right to access information is considered to be the main instrument for the full enjoyment of the right to freedom of expression,<sup>25</sup> considered one of the main cornerstones of democracy.<sup>26</sup> The essence of democracy is the right of citizens to participate in decision-making.<sup>27</sup> Accordingly, for people to fully exercise their right to freedom of expression, they should have access to information as a precondition.<sup>28</sup> Within this context, access to information includes access to any information regardless of the desire of its holder (the government) to reveal it or not. Accordingly, citizens should have the right to access

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<sup>19</sup> McDonagh, *supra* note 2, at 25.

<sup>20</sup> *Id.*

<sup>21</sup> Jain, *supra* note 5, at 510–12.

<sup>22</sup> McDonagh, *supra* note 2, at 26.

<sup>23</sup> Convention on Access to Official Documents art. 3, June 18, 1951, C.E.T.S. No. 205.

<sup>24</sup> McDonagh, *supra* note 2, at 26.

<sup>25</sup> *Id.* at 29.

<sup>26</sup> W.J. Van Vollenhoven, *The Right to Freedom of Expression: The Mother of Our Democracy*, 18 POTCHEFSTROOM ELECTRONIC L.J. 2299, 2299 (2015).

<sup>27</sup> *Id.*

<sup>28</sup> McDonagh, *supra* note 2, at 29.

information even if their government prefers not to disclose such information.<sup>29</sup> However, the right to access information is not absolute. Governments can impose limitations that usually relate to the protection of the public interest.<sup>30</sup> The next section outlines the limitations of the right to access information and the conditions that need to be observed by governments before imposing such limitations.

## 2. *The Scope of the Right to Access Information*

As a rule, the right to access information is granted to every single citizen.<sup>31</sup> The rationale behind this rule is that governments are delegated the authority to rule by their citizens. Therefore, any information or documents owned by governments shall be considered public property owned by their citizens.<sup>32</sup> Relevant to this rule is the fact that individuals do not have to prove their direct interest to justify their need to obtain information. This meaning has been repeatedly confirmed by many non-governmental organizations (“NGOs”),<sup>33</sup> courts,<sup>34</sup> and intergovernmental organizations.<sup>35</sup> Accordingly, individuals are presumed to have the right to access and the legitimate interest in accessing any information.

However, the right is not absolute; governments can impose limitations. Generally, limitations relate to the protection of national security – like public order, public health, public morals, or the privacy of other individuals.<sup>36</sup> Nevertheless, governments are subject to limitations that narrow the scope of the right to access information. First, governments should bear the burden to prove that the limitations they impose serve legitimate interests that outweigh

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<sup>29</sup> *Id.*

<sup>30</sup> BISHOP, *supra* note 7, at 78.

<sup>31</sup> *Id.* at 64.

<sup>32</sup> *Id.*

<sup>33</sup> The NGO Commonwealth Human Rights Initiative’s 2003 report provides that “[i]nformation is a public good like clean air and drinking water. It belongs not to the state, the government of the day or civil servants, but to the public. Officials do not create information for their own benefit alone, but for the benefit of the public they serve, as part of the legitimate and routine discharge of the government’s duties. Information is generated with public money by public servant paid out of public funds. As such, it cannot be unreasonably kept from citizens.” See Commonwealth Human Rights Initiative, *Open Sesame: Looking for the Right to Information in the Commonwealth 10* (2003) [https://www.humanrightsinitiative.org/publications/chogm/chogm\\_2003/chri\\_exec\\_summary\\_2003.pdf](https://www.humanrightsinitiative.org/publications/chogm/chogm_2003/chri_exec_summary_2003.pdf).

<sup>34</sup> *Claude Reyes et al. v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 77* (Sept. 19, 2006).

<sup>35</sup> *Ambeyi Ligabo, Rapporteur on Civil and Political Rights, Including the Question of Freedom of Expression, ¶ 41, U.N. Doc. E/CN.4/2005/64* (Dec. 17, 2004).

<sup>36</sup> BISHOP, *supra* note 7, at 78–79.

the public's right to know. Second, governments are under obligation to justify their decision to withhold specific information. Third, any limitations imposed on the right to access information should be clearly established within the national law that regulates the right to access information.<sup>37</sup>

In fact, limiting governments' discretion to reveal public information is rational. If governments are left with broad discretion in deciding whether to reveal public information, public authorities may object to revealing information of great public interest for illegitimate reasons. Accordingly, there must be clear guidance for public authorities setting the categories of and conditions on which information that may be kept confidential.<sup>38</sup> Otherwise, restricting the right to access information without a great cause may negatively impact democratic processes. This is particularly relevant considering that the right to access information has strong ties with the principles of good governance, public interest, and public interest litigation, as highlighted in the following section.

## *B. Access to Information and Democracy*

As explained above, the right to access information is a fundamental human right because of its role in promoting democracy.<sup>39</sup> The right to access information makes governments accountable to their acts, which in turn enhances the public interest. This section highlights the relationship between access to information on the one hand and good governance, public interest, and public interest litigation on the other hand.

### *1. Access to Information and Public Interest*

Legally speaking, many terms are used to refer to the public interest—state interest, collective interest, and general interest.<sup>40</sup> However, there is no concrete definition of what constitutes the public interest. Notwithstanding the absence of a clear definition of the public interest, some scholars attempted to verify this vague term.<sup>41</sup> For example, some define the public interest as a “collective good, having priority against private interests;” in other words, it

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 80.

<sup>39</sup> Jain, *supra* note 5, at 506.

<sup>40</sup> Gintare Makauskaitė, *Public Interest in the Context of the Right to Access Official Information*, 11 *BALT. Y.B. INT'L L.* 281, 282 (2011).

<sup>41</sup> *Id.*



is a fundamental interest “of which the state takes the responsibility to promote, respect, and realize.”<sup>42</sup> Others define the public interest—which concerns the interest of indefinite number of people—by contrasting it with the private interest, which has clear subjects.<sup>43</sup> Finally, some define the public interest by its source of realization; while public interests are realized through the public sector, private interests are realized through individuals.<sup>44</sup>

Regardless, public interest is a vague term that is hard to define.<sup>45</sup> However, precisely defining public interest is insignificant. Public interest is a common concept that has been historically used in common and civil law countries without thinking about its meaning.<sup>46</sup> Public interest is a fundamental principle that acts as a mechanism for making decisions with regard to competing considerations that relate to issues of public concern.<sup>47</sup> Therefore, to utilize this mechanism, courts developed public interest tests.<sup>48</sup> One major example of courts utilizing the public interest mechanism is when assessing claims of secrecy with regard to public information against the right to access information.<sup>49</sup>

Within the context of the right to access information, the notion of public interest plays a significant role. Basically, the right to access information is mainly founded on the concept of public interest. Official information to be disclosed should be of public interest and public interest may also be the source of the imposed restrictions on the right to access information.<sup>50</sup> In other words, public interest acts within the field of the right to access information as a tool to balance the competing interests that may be affected by disclosing or withholding specific information.<sup>51</sup> In addition, public interest plays an important role in assessing the relevance of imposing restrictions on the right to access information.<sup>52</sup>

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<sup>42</sup> *Id.* at 283.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Moira Paterson & Maeve McDonagh, *Freedom of Information and the Public Interest: The Commonwealth Experience*, 17 OXF. UNIV. COMMONW. L. J. 189, 191 (2017).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 192.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Makauskatie, *supra* note 40, at 283.

<sup>51</sup> Paterson & McDonagh, *supra* note 45, at 192.

<sup>52</sup> *Id.* at 193.

To guarantee that the restrictions imposed on the right to access information are necessary and proportionate, there are usually two tests, namely: the *harm test* and the *public interest test*.<sup>53</sup> Based on the *harm test*, the public authority must justify withholding information by demonstrating that disclosure would cause substantial harm to other protected legitimate interests.<sup>54</sup> According to the *public interest test*, even if the probability of causing harm exists, it must be weighed against the public interest.<sup>55</sup> Thus, the *public interest test* mandates disclosure of information that would otherwise be withheld based on an exception where there is a public interest.<sup>56</sup>

Furthermore, including the *public interest test* in national freedom of information laws can be considered the most important feature that guarantees that such laws would meet their objective of transparency.<sup>57</sup> The *harm test* is said to be incapable of delivering sufficient level of transparency. As such, the *public interest test* would supplement the inadequacies of the *harm test* to guarantee access to information.<sup>58</sup> For example, if only the *harm test* is to be applied, the withholding authority would only focus on the potential harm that would be caused in case of disclosure. With the adoption of the *public interest test*, weighing the public interest that would be protected with the harm that might be caused would guarantee better levels of transparency.

Thus, in brief, the right to access information and the notion of public interest are interrelated. Linked to the concept of public interest is the principle of public interest litigation. The subsequent section demonstrates the strong bond between the right to access information and public interest litigation as a mechanism for maintaining the public interest.

## 2. *Access to Information and Public Interest Litigation*

Public Interest Litigation (“PIL”) is a legal tool that allows citizens to challenge the decisions and the acts of their governments before their national

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<sup>53</sup> *Harm and Public Interest Test*, RIGHT2INFO.ORG, <https://www.right2info.org/exceptions-to-access/harm-and-public-interest-test> (last visited Mar. 25, 2019).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Paterson & McDonagh, *supra* note 45, at 193.

<sup>57</sup> *Id.* at 194.

<sup>58</sup> *Id.*

courts to maintain public interest.<sup>59</sup> Without PIL, citizens would not have *locus standi* to raise cases challenging acts to which they are not a party.<sup>60</sup> As such, PIL allows every citizen to protect the public interest on behalf of the whole nation.<sup>61</sup> Accordingly, PIL may serve as protection of the rights of disadvantaged marginalized groups in society who are unable to reach courts to seek relief, allow the public to bring issues of public concern that result from the inefficient operation of their government, hold the government accountable for its failure to meet its constitutional or statutory obligations, and allow the public to participate in decision-making.<sup>62</sup> To achieve these results, PIL liberalizes the scope of application of the rule of *locus standi* by allowing the public or NGOs to bring cases when they aim to achieve public interest, even if they do not otherwise have a directly affected interest supporting standing.<sup>63</sup>

In this regard, the right to access information plays a vital role in facilitating PIL. Petitioners in PIL proceedings usually face many challenges in proving the alleged violations of the government. As highlighted above, petitioners in PIL cases are usually third parties who happened to consider the public interest of a specific community or all of society. Accordingly, they are usually unable to reach information that is frequently withheld by the government or the other parties who are challenged. Accordingly, the right to access information guarantees petitioners their right to reach public information that would facilitate their mission to prove their public interest claims.<sup>64</sup> Consequently, PIL ensures good governance from the side of state authorities. The following section elaborates on the meaning of the principle of good governance and how it relates to the right to access information.

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<sup>59</sup> Dan Ngabirano, *The Right to Information as a Tool for/in Public Interest Litigation: An East African Perspective*, GREENWATCH UGANDA, 3 (June 18, 2014), <https://greenwatch.or.ug/right-information-tool-for-in-public-interest-litigation-east-african-perspective>.

<sup>60</sup> *Id.* at 4.

<sup>61</sup> Hari Bansh Tripathi, *Public Interest Litigation in Comparative Perspective*, 1 NAT'L JUD. ACAD. L.J. 49, 50 (2007).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Ngabirano, *supra* note 59, at 4–5.

### 3. *Access to Information and Good Governance*

Good governance is not an easy term to define.<sup>65</sup> The doctrine of good governance was developed by many international organizations, specifically various international financial agencies that played an essential role in defending the public interest.<sup>66</sup> According to the World Bank's definition, good governance refers to transparency, openness, predictability, accountability, and participation of the public and civil society in public affairs and applying the rule of law to all.<sup>67</sup> Following the World Bank's adoption of the doctrine of good governance, many other financial institutions followed a similar path.<sup>68</sup> For example, the International Monetary Fund utilized its stature to require member states to bring their policies in accordance with the principles that constitute good governance.<sup>69</sup> Another example is the African Development Bank, which adopted a similar policy on good governance entailing similar elements of transparency, combating corruption, accountability, public participation, and judicial and legal reform.<sup>70</sup> Finally, the principle of good governance was reflected by the United Nations Millennium Declaration as one of the main requirements towards the realization of the Millennium Development Goals ("MDGs").<sup>71</sup> More recently, there is ongoing debate about whether to include governance as a "stand-alone" goal in the United Nations Sustainable Development Goals ("SDGs"), as a means to achieve not only good but effective and equitable governance.<sup>72</sup>

As indicated by the good governance definitions of the World Bank and the African Bank for Development, a consensus seems to exist on considering accountability, transparency, public's participation in governance, combating corruption, and applying the rule of law as the main elements constituting good governance. To achieve any of these elements, the right to access information plays a significant role. First, the right to access information

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<sup>65</sup> *Good Governance and Human Rights*, OHCHR, <https://www.ohchr.org/en/issues/development/goodgovernance/pages/goodgovernanceindex.aspx> (last visited Mar 14, 2019).

<sup>66</sup> CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 62 (2d ed. 2008).

<sup>67</sup> WORLD BANK, *GOVERNANCE: THE WORLD BANK'S EXPERIENCE* vii (1994).

<sup>68</sup> TOMUSCHAT, *supra* note 66, at 62–63.

<sup>69</sup> *Id.* at 62–63.

<sup>70</sup> *Id.* at 63.

<sup>71</sup> *GOVERNANCE FOR THE MILLENNIUM DEVELOPMENT GOALS: CORE ISSUES AND GOOD PRACTICES* 90 (2007).

<sup>72</sup> FRANK BIERMANN ET AL., *INTEGRATING GOVERNANCE INTO THE SUSTAINABLE DEVELOPMENT GOALS* 3 (Reed Evans ed., 2014).

promotes transparency by allowing the public to know how their government functions. As such, the processes of government decision-making become more open to the participation of the public.<sup>73</sup> Second, the right to access information is a master key to government accountability. Accountability ensures that public officials are responsible for their actions and the use of public resources. Accordingly, the right to access information is an effective instrument to combat corruption.<sup>74</sup>

In summary, a government that makes access to information a rule and secrecy the exception will achieve better democracy.<sup>75</sup> The right to access information is a cornerstone of enabling informed citizens who are considered to be the foundation of democracy.<sup>76</sup> In addition, the right to access information is inseparable from transparency, which is a pre-requisite for accountability.<sup>77</sup> As such, the right to access information is a non-detachable part of good governance that requires transparency, accountability mechanisms for public authorities, and the participation of citizens in decision-making.<sup>78</sup>

### III. THE DILEMMA OF THE RIGHT TO ACCESS INFORMATION AND THE CONFIDENTIAL NATURE OF INVESTMENT NEGOTIATION

Generally, disputes are usually solved through negotiations, mediation (conciliation),<sup>79</sup> arbitration, or litigation. Negotiation occurs when the parties themselves directly discuss to reach a settlement and may agree to renegotiate their relationship or the transaction concerned. Mediation (conciliation) includes the intervention of a neutral third party who assists the disputants with resolving their conflict but without providing them a particular solution. However, when the parties agree to the mediator's proposal, it becomes

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<sup>73</sup> Rouf Ahmad Bhat, *Right to Information Act: A Tool for Good Governance*, 5 IISTE 185, 186 (2015).

<sup>74</sup> *Id.* at 185.

<sup>75</sup> Jain, *supra* note 5, at 506.

<sup>76</sup> *Id.*

<sup>77</sup> Bhat, *supra* note 73, at 186.

<sup>78</sup> Jain, *supra* note 5, at 507.

<sup>79</sup> While some jurisdictions use the terms "mediation" and "conciliation" simultaneously to refer to the same process, other jurisdictions distinguish between them and provide different regulation for each. For instance, while in Brazil there are no difference between mediation and conciliation, India treats both concepts as two different systems even though the two terms are sometimes used interchangeably. Within the context of this paper, both terms are used to refer to the same process.

binding on them.<sup>80</sup> Arbitration is when the parties submit their dispute to a neutral third party and agree to abide by his or her decision. Finally, litigation is when the parties bring their dispute to national courts of the state.<sup>81</sup>

These four mechanisms of settling disputes gradually rank based on the parties' control of the process of settling their dispute. In negotiation, the parties retain full control of their dispute. In mediation, the parties keep on dominating their dispute but the involvement of the neutral third party may influence their decision. In arbitration, the parties agree to refer their dispute to a third party, but once referred, arbitrators take full control of settling the dispute. Finally, in litigation, parties have no control – the law of the state determines the jurisdiction and the procedure of the courts.<sup>82</sup>

Nevertheless, not all dispute settlement mechanisms are suitable for settling investment disputes due to their special nature, which distinguishes them from commercial disputes. Many features distinguish investment disputes: their duration, subject, higher costs, and inclusion of international law—represented in international investment treaties—as their governing law.<sup>83</sup> However, the most important feature that relates to this discussion is investment disputes' involvement of public policy issues. Most investment disputes arise out of legislative or administrative measures taken by states to preserve their public interests that adversely affects the interests of investors. Accordingly, when arbitrators find such measures to be illegal, the effect of the decision is not only limited to the compensation that is to be paid to the claimant investor; it may also lead the host state to repeal such measures to avoid similar investment arbitration claims in the future.<sup>84</sup> In addition, the intimate relation between investment disputes and public policy issues makes investment disputes issues of political nature. As such, NGOs, political groups, the media, and the general public oversee their settlement. Accordingly, this political nature may influence how investors and states settle their disputes.<sup>85</sup>

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<sup>80</sup> Mediation, INT'L CHAMBER OF COMMERCE, <https://iccwbo.org/dispute-resolution-services/mediation/> (last visited May 27, 2019).

<sup>81</sup> Salacuse, *supra* note 8, at 154.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 141.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

Because of the distinct nature of investment disputes, litigation through a host state's court is usually not an appealing option for foreign investors. National courts may lack independence, neutrality, experience, expedition, and foreign investors may wish to avoid the host state's national laws.<sup>86</sup> Accordingly, foreign investors usually resort to ADR mechanisms, such as negotiation, mediation, or arbitration.

In theory, nothing prevents the parties from resorting to mediation.<sup>87</sup> This is particularly relevant given that ICSID is working on a new set of rules to regulate investor-state mediation.<sup>88</sup> However, investor-state negotiation (investment negotiation) and investor-state arbitration (investment arbitration) are the basic means for settling investment disputes.<sup>89</sup> Nevertheless, because of the confidentiality that surrounds investor-state arbitration and investor-state negotiation, the right to access information plays a vital role. As such, the relevance of the right to access information within the context of settling investment disputes through arbitration and negotiation is to be discussed with a focus on the dilemma of the right to access information and the confidential nature of investment negotiation and the negotiated settlement agreements that result thereof, which is the main subject of this article.

#### A. *Access to Information and ISDS*

For the purpose of this discussion, ISDS is used comprehensively to refer to both investment arbitration and investment negotiation. Investment arbitration is the most frequent mechanism for settling investor-state disputes. The number of registered investment arbitration cases before the ICSID, under the ICSID convention and its Additional Facility rules, has only reached 706 cases as of December 31, 2018.<sup>90</sup> However, investment negotiation is not uncommon. In fact, many investor-state disputes are settled through investment negotiation.<sup>91</sup> In addition, many investment treaties require parties to resort to investment negotiation before seeking other more binding dispute

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<sup>86</sup> *Id.* at 163.

<sup>87</sup> *Id.* at 169.

<sup>88</sup> *Investor-State Mediation*, ICSID, <https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx> (last visited Nov. 12, 2019).

<sup>89</sup> Salacuse, *supra* note 8, at 178.

<sup>90</sup> *The ICSID Caseload Statistics*, ICSID, 7 (2019), [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf).

<sup>91</sup> Salacuse, *supra* note 8, at 165.

settlement mechanisms—e.g., investment arbitration.<sup>92</sup> Yet, because of the confidentiality surrounding investment negotiation, there are no accurate statistics on the number of disputes settled through this mechanism.<sup>93</sup> Still, an estimate of thirty percent of cases filed before ICSID are settled through investment negotiation rather than by binding arbitration award. Furthermore, roughly two-thirds of all arbitration cases filed before the International Chamber of Commerce Court of Arbitration are settled by investment negotiation before the issuance of any binding arbitration award.<sup>94</sup>

Within the context of settling investment disputes through ISDS, the right to access to information plays a vital role. As indicated above, investment disputes usually entail matters of public interest. The challenged acts of the government may pertain to the protection of public health, environment, or human rights. Even in cases where these elements are left unwound, the money that a government uses to pay any compensation specified in an investment arbitration award is considered public money. Accordingly, the public should be entitled to access investment dispute-related information.<sup>95</sup>

While there are increasing efforts to enhance transparency of investment arbitration proceedings, investment negotiation lacks any efforts that aim at enhancing its transparency. The section below will briefly preview the issue of transparency in investment disputes. Afterwards, it will highlight the delinquent efforts to improve transparency in investment negotiation. Furthermore, the second section of Part III will give examples from Germany and Egypt to demonstrate the negative impact of investment negotiation on the right to access information.

### 1. *Access to Information and Investment Arbitration*

There are escalating efforts to enhance the transparency of arbitration proceedings. For instance, for the ICSID to publish its awards or any relevant documents, the consent of the disputants is required.<sup>96</sup> Nowadays, the ICSID

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<sup>92</sup> Salacuse, *supra* note 8, at 166.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Filip Balcerzak & Jarrod Hepburn, *Publication of Investment Treaty Awards: The Qualified Potential of Domestic Access to Information Laws*, 3 GRONINGEN J. INT'L LAW 147, 168 (2015), <https://ugp.rug.nl/GROJIL/article/view/31117/28424> (last visited Feb 16, 2019).

<sup>96</sup> Antonio R. Parra, *supra* note 12.



is very keen on seeking the consent of the relevant parties to publish its final awards and decisions, in addition to obtaining the consent of former disputants to publish past awards.<sup>97</sup> Furthermore, there is now strong pressure on the ICSID to amend its general rules on confidentiality to allow for more transparency.<sup>98</sup> Thus, despite the efforts to enhance transparency in investor-state arbitration, much is still to be done to guarantee fully transparent arbitration proceedings and secure the public's right to access investor-state arbitration proceedings-related information. The following case against Germany validates this argument.

In *Vattenfall II*,<sup>99</sup> Germany adopted a policy to end nuclear power by 2022 through the closure of all of its nuclear plants. To speed up the process, Germany amended its Atomic Energy Act ("AEA"). The amendment included that some old reactors be shut down. The claimant, a Swedish Company, owned two of these reactors. The claimant argued that the shutdown of its two reactors would result in the loss of expected revenues.<sup>100</sup> As such, the claimant brought his claim before the ICSID alleging that Germany's acts amounted to indirect expropriation, and that it breached its obligation to afford fair and equitable treatment. However, since the request of arbitration is not publicly accessible, neither the exact standards of protection alleged, nor the amount of compensation requested is known. The only available sources of information are just estimates—the exact claims of *Vattenfall* remain secret.<sup>101</sup>

In fact, *Vattenfall II* is a clear example that transparency is still an issue in investor-state arbitration. It is evidenced from the ICSID's website that there are four confidentiality orders issued by the tribunal, based on requests from both of the parties.<sup>102</sup> However, since all orders are not published, it is impossible to know which party argued for confidentiality, the parties' substantive arguments, or the decision of the tribunal on the matter.<sup>103</sup> In addition, the relevant documents to the dispute are kept confidential and are

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Vattenfall AB et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 [hereinafter *Vattenfall II*].

<sup>100</sup> See Francesca Romanin Jacur, *The Vattenfall v. Germany Disputes: Finding a Balance Between Energy Investments and Public Concerns*, in 4 BRIDGING THE GAP BETWEEN INT'L INVESTMENT L. & THE ENV'T 338, 338 (Y. Levashova et al. eds., 2015).

<sup>101</sup> *Id.*

<sup>102</sup> Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, *The State of Play in Vattenfall v. Germany II: Leaving the German Public in the Dark*, 8 IISD BRIEFING NOTE 3 (2014).

<sup>103</sup> *Id.* at 5.

not revealed to the public, media, or even parliamentarians. For instance, before the initiation of *Vattenfall II*, when parliamentarian Ralph Lenkert asked the federal government about the mechanism by which it may reveal ISDS-related information to the public and to the parliament, the State Secretary Anna Ruth's reply was that "ICSID arbitrations are confidential."<sup>104</sup> Therefore, it is clear that the German government intended to hurdle the public's right to access investor-state arbitration-related information.<sup>105</sup>

Based on the above, the right to access information in investment arbitration is necessary to keep the public informed and balance public and private interests.<sup>106</sup> Given the example of the *Vattenfall II* case, prioritizing the general interest of transparency over the private interests of confidentiality becomes reasonable. This is not merely because of the enormous amount of money that is paid from taxpayers' coffers, but also because the challenged decision of the German Parliament to end the use of nuclear power is firmly within the realm of public policy.<sup>107</sup>

However, since transparency of investment disputes is an issue that is especially topical, it is important to focus only on the right to access investment negotiation-related information, a topic that is rarely addressed.<sup>108</sup>

## 2. *Access to Information and Investment Negotiation*

Not all investment disputes are settled through investment arbitration, litigation, or other binding mechanisms of dispute settlement. A significant number of investment disputes are settled directly between host states and foreign investors before an award is issued,<sup>109</sup> or even after the issuance of award<sup>110</sup> where the parties disregard the arbitration proceedings or the arbitration award and negotiate another settlement. These negotiated

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 5.

<sup>106</sup> *Id.* at 6.

<sup>107</sup> *Id.* at 5.

<sup>108</sup> Johnson & Guven, *supra* note 13.

<sup>109</sup> *Id.*

<sup>110</sup> Based on the United Nations Conference on Trade and Development's report "Investor-State Dispute Settlement: Review of Developments in 2017," twenty-five percent of the 548 ISDS proceedings that were brought before arbitral tribunals in 2017 were settled. In addition, ten percent of these cases were discontinued. *Investor-State Dispute Settlement: Review of Developments in 2017*, UNCTAD (June 2018), <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2155>.

settlement agreements are reached through direct negotiations between investors and host states.

While investment negotiation may save the parties time and costs usually associated with investment arbitration, it may form a threat to the principles of good governance, including transparency and accountability.<sup>111</sup> As highlighted above, investment disputes usually entail matters of public interest. Thus, the information and documents exchanged during investment negotiations may be subject to disclosure requirements under national laws.<sup>112</sup> When the government abstains from disclosing information relevant to investment negotiation, it infringes the right to access information, which in turn restricts the ability of citizens to protect their public interest.

In investment negotiation proceedings, there is usually a governmental agency responsible for handling investment disputes. This agency, for example, may authorize foreign investors to construct projects despite objections by local communities, provide exemptions from legal requirements, or offer foreign investors other incentives contrary to the public interest.<sup>113</sup> In these scenarios and many others, the public is deprived of its right to know and, in turn, its right to challenge the validity of these settlement agreements through PIL. The below example of Egypt demonstrates the importance of access to information for effective practice of PIL. But before addressing Egypt as an example of a developing country, it is important to underline that hindering the right to access information of investment negotiations is not peculiar to developed countries. The *Vattenfall I*<sup>114</sup> case against Germany, a developed country, supports this argument.

*B. The Negative Impact of Investment Negotiation Within Local Contexts: Examples from Germany and Egypt*

*1. The Example of Germany as a Developed Country*

Two years before *Vattenfall II*, Vattenfall brought a case against Germany (*Vattenfall I*). Despite having the Freedom of Information Act and

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<sup>111</sup> Johnson & Guven, *supra* note 13.

<sup>112</sup> Diana A. Silva, *Settlement Negotiations and Public Disclosure Laws*, LEGAL INTELLIGENCER 4 (Jul. 25, 2016).

<sup>113</sup> Johnson & Guven, *supra* note 13.

<sup>114</sup> *Vattenfall AB, et al. v. Federal Republic of Germany*, ICSID Case No. ARB/09/6 [hereinafter *Vattenfall I*].

notwithstanding the adoption of the Convention on Access to Official Documents by the Council of Europe in 2009, Germany could not hold itself to its obligation to respect the right to access information. In other words, Germany did not reveal the content of the settlement agreement concluded with Vattenfall as a response to the arbitration claim that Vattenfall brought against Germany before the ICSID in 2009. Specifically, Germany did not reveal the monetary aspect of the settlement agreement paid with the money of German taxpayers.<sup>115</sup> Vattenfall, a Swedish energy company, started negotiations with the German authorities to construct a coal-fired power plant near Hamburg, in 2004. After receiving provisional approval of the project in 2007, Vattenfall witnessed delays in the issuance of permits required for the construction and operation of the project.<sup>116</sup> The permits were repeatedly delayed due to opposition from the civil society<sup>117</sup> and public<sup>118</sup> because of environmental concerns. Later, these concerns were embraced by the recently elected Authority for Urban Development and Environment of Hamburg, which included in its composition the Green Party – which strongly objected to the construction of the new plant due to its negative environmental impact.<sup>119</sup>

After long deliberations, Vattenfall successfully obtained the required permits; however, the issued permits included unexpected restrictions that, according to Vattenfall's allegations, would hurt plant operations and decrease profitability. Accordingly, Vattenfall brought a case before the ICSID against Germany under the Energy Charter Treaty ("ECT") claiming that, by including new requirements in its permits, Germany violated two standards of protection contained under the ECT: fair and equitable treatment and indirect expropriation.<sup>120</sup>

In 2010, Vattenfall and Germany negotiated a settlement agreement to discontinue the proceedings before the ICSID. Based on the parties' request, the ICSID tribunal, in accordance with Article 43(2) of the ICSID rules, endorsed the parties' negotiated agreement in a final award. The negotiated

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<sup>115</sup> Michelle C. Perez, *Trading Goods for Bad: Is Public Policy Undermined by Investor State Dispute Mechanisms?*, 49 U. MIAMI INTER-AMERICAN L. REV. 132, 157 (2018).

<sup>116</sup> Jacur, *supra* note 100, at 2.

<sup>117</sup> *Id.* at 2–3.

<sup>118</sup> *Case Study: Vattenfall v. Germany I*, ISDS PLATFORM, <https://isds.bilaterals.org/?case-study-vattenfall-v-germany-i> (last visited May 20, 2019).

<sup>119</sup> Jacur, *supra* note 100, at 3.

<sup>120</sup> *Id.* at 2–3.

agreement of the parties, endorsed in the ICSID award, obliges the German government to exempt Vattenfall from its additional environmental requests and to provide it with all necessary permits.<sup>121</sup> However, the agreement has not disclosed any information on the monetary payment to be made by the German government.<sup>122</sup> In any case, the proceedings are confidential and therefore unavailable for review or further analysis.<sup>123</sup>

## 2. *The Example of Egypt as a Developing Country*

In Egypt, the right to access information was not expressly acknowledged as a human right until the country's 2012 constitution was replaced by the current Egyptian constitution of 2014.<sup>124</sup> Both constitutions provide citizens the right to reach official documents, statistics, data, and information freely and oblige the state to make them available to citizens with transparency. In addition, both constitutions urge the legislature to pass laws that establish the means of exercising the right to access information, its scope, and the penalties that should be imposed upon those withholding or providing false information.<sup>125</sup>

Notwithstanding the explicit provision of the Egyptian constitution of 2014, the Egyptian Parliament has failed to enact access to information laws in the subsequent five years. This raises the question of whether Egypt is granting its citizens the right to access information in accordance with the constitution, despite the absence of clear guidance of how to grant such access.<sup>126</sup> With respect to the right to access investment negotiation-related information, the attitudes of the executive, legislative, and judicial (represented in the State Council of Egypt) branches are highly inconsistent. While judicial practice demonstrates strong preferences for shielding the right of citizens to access information, both the government and parliament have not acted accordingly. Three examples, in chronological order, illustrate the

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<sup>121</sup> *Case Study*, *supra* note 118.

<sup>122</sup> Perez, *supra* note 115.

<sup>123</sup> *Id.* at 158–159.

<sup>124</sup> Ahmad Hossam, *The Constitutional Right to Reach Information - Is it a Right Conditioned on Enacting Access to Information Act?* [الحق الدستوري في الوصول إلى المعلومات - هل هو حق معلق النفاذ إليه على إصدار؟ [تشریح بنظمه؟], LEGAL PUBLICATIONS (2017) [منشورات قانونية], <https://manshurat.org/node/22096> (last visited Mar 10, 2019).

<sup>125</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT art. 236, 18 Jan. 2014; *see also* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT art. 47, 26 Dec. 2012.

<sup>126</sup> Hossam, *supra* note 124.

attitude of each of the three branches toward the protection of the right to access information.

a. *Example One: The Judicial Branch's Position on the Right to Access Information*

In 2013, two NGOs brought PIL claims against Egypt's cabinet before the State Council (an administrative court). The claimants challenged the cabinet's decision to not enact regulations setting out the scope of the right to access information relevant to investment negotiated settlement agreements.<sup>127</sup> The respondent argued that the claimants had no *locus standi* to bring their claim. In reply, the court decided that the claimants, as Egyptian citizens, had standing because the law aims to protect the public ownership of all Egyptians.<sup>128</sup>

On the merits, the court held that the state is mandated to create appropriate mechanisms to guarantee the right of individuals to access information in a way that facilitates monitoring of the government's acts.<sup>129</sup> In reaching this conclusion, the court highlighted the importance of the right to access information of investment negotiated settlement agreements to maintain transparency, combat corruption, and engage the public in the decision-making processes that reflect on their own living conditions.<sup>130</sup> As such, this example demonstrates the position of the Egyptian judiciary towards enhancing the right to access information. In contrast, the next two examples reflect the opposite position taken by the executive and the legislative branches to impose arbitrary restrictions on the right to access information relevant to investment negotiated settlement agreements.

b. *Example Two: The Executive Branch's Position on the Right to Access Information*

In 2005, the Egyptian government concluded the Gas Supply Contract ("GSPA") with EMG, an Egyptian company owned by American corporations (Ampal-American Israel Corporation and others).<sup>131</sup> The subject of the GSPA

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<sup>127</sup> The Administrative Court, Case No. 59439, Judicial Year No. 67 [2015], (Egypt).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Puneeth Ganapathy, *Case Report: Ampal-American Israel Corp. et al. v. Arab Republic of Egypt*, SCH. OF INT'L ARB. 1, 1 (2017).

contract was the supply of gas to EMG to be exported to Israel. Between 2008 and 2011, EMG alleged that Egypt took certain measures that amounted to a breach of the U.S.-Egypt bilateral investment treaty (“BIT”). EMG claimed that Egypt revoked a tax-free zone license; failed to protect the gas pipelines against terrorist attacks following Egypt’s January revolution; and delayed the supply of gas to EMG after the revolution, thus breaching the GSPA contract and, accordingly, an umbrella clause under the U.S.-Egypt BIT.<sup>132</sup>

In 2017, the ICSID tribunal found Egypt in breach of the relevant BIT and, therefore, liable to compensate the claimant.<sup>133</sup> Furthermore, in parallel proceedings<sup>134</sup> on distinct claims before the International Chamber of Commerce (“ICC”), Egypt was also held liable to compensate EMG.<sup>135</sup>

In 2018, news spread about settlement agreement negotiations between Egypt and Israel to reduce Egypt’s compensation to Israel. The news included a concluding settlement agreement that reduced the arbitration award to \$470 million to be paid over fifteen years, instead of the original amount of \$1.76 billion to be paid immediately.<sup>136</sup> In return, some news sources stated that Egypt will import \$15 billion-worth of gas from Israel over the following ten years.<sup>137</sup> Furthermore, Egypt, through its well-developed liquefaction stations and pipeline networks, would help Israel to liquefy and to export its gas on the international market.<sup>138</sup> However, there was no accurate information on the exact terms of the settlement agreement as the agreement was, and has not been, disclosed.

Egypt successfully reached a settlement agreement with EMG after the arbitration awards were rendered. In many other scenarios, Egypt has reached similar settlement agreements with foreign investors before the issuance of the arbitration awards, resulting in discontinuation of arbitration proceedings.

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> East Mediterranean GAS S.A.E. v. Egyptian General Petroleum Corp. et al, Case No. 18215/GZ/MHM, Int’l Ct of Arb. (2018).

<sup>135</sup> Ganapathy, *supra* note 131.

<sup>136</sup> *Egypt Finalizes Settlement with Israel on USD 1.76 Billion International Arbitration Ruling*, ENTERPRISE (Nov. 22, 2018) <https://enterprise.press/stories/2018/11/22/egypt-finalizes-settlement-with-israel-on-usd-1-76-bn-intl-arbitration-ruling/>.

<sup>137</sup> Makram Muhammad Ahmad, *Why the Gas Deal with Israel?! (لماذا صفقة الغاز مع إسرائيل)*, DAILY AHAM (الأهرام اليومي), <http://www.ahram.org.eg/News/202567/4/639057/-لماذا-صفقة-الغاز-مع-قضايا-واراء-لماذا-صفقة-الغاز-مع-إسرائيل.aspx> (last visited Mar 9, 2019).

<sup>138</sup> *Id.*

For example, in *ArcelorMittal S.A. v. Arab Republic of Egypt*, Egypt settled the dispute with the claimant before the ICSID tribunal could decide the case. The settlement agreement refers to amicable payment of compensation by Egypt to the claimant. In return, the claimant would discontinue arbitration proceedings against Egypt. However, no information was available from the side of the government concerning the amount of compensation to be paid under or the general terms of the settlement agreement.<sup>139</sup>

As established from the facts surrounding both cases, it seems that the Egyptian government was very keen on maintaining the confidentiality of its negotiated settlement agreements. However, it is unclear whether the government's intention was to protect any legitimate public interests or to generally respect the confidentiality requirement of such agreements. Nevertheless, as will be seen in the next example of the legislative branch, it seems that the general trend is to protect investment deals and related information for the benefit of foreign investors.

*c. Example Three: The Legislative Branch's Position on the Right to Access Information*

The State Council of Egypt ("SC") has nullified many public investment agreements based on public interest grounds.<sup>140</sup> As a result, many foreign investors have brought arbitration claims against Egypt seeking compensation as a result of the annulment of their agreements. To avoid similar claims and their associated costs, Egypt's parliament imposed limitations on the competence of the State Council in order to offer investors more protection. In 2014, Egypt's parliament issued law 32/2014, banning litigation on the basis of public interest (the "PIL Ban Law").<sup>141</sup>

The PIL Ban Law abolished litigation for the public interest for government contracts and limited the right to litigate to the relevant contracting parties and third parties who have direct interests in challenging these contracts as lenders and creditors. The PIL Ban Law does not allow third parties to challenge administrative contracts merely on the grounds of public

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<sup>139</sup> Islam Salah, *Steel giant ArcelorMittal Reaches Settlement Agreement with Egypt*, ZAWYA (Nov. 14, 2016), [https://www.zawya.com/uae/en/legal/story/Steel\\_giant\\_ArcelorMittal\\_reaches\\_settlement\\_agreement\\_with\\_Egypt-ZAWYA20161114051540](https://www.zawya.com/uae/en/legal/story/Steel_giant_ArcelorMittal_reaches_settlement_agreement_with_Egypt-ZAWYA20161114051540).

<sup>140</sup> Heba Hazzaa & Silke Noa Kumpf, *Egypt's Ban on Public Interest Litigation in Government Contracts: A Case Study of "Judicial Chill,"* 51 STAN. J. INT'L L. 147, 149 (2015).

<sup>141</sup> *Id.* at 151.



interest. This places investment contracts on a different playing field to other government actions in Egypt. Thus, the PIL Ban Law contradicts the well-established judicial concept of protecting the public interest recognized by the Egyptian legal system.<sup>142</sup>

On May 3, 2014, the Egyptian Center for Economic Social Rights (“ECESR”) brought a claim before the SC challenging the constitutionality of the PIL Ban Law.<sup>143</sup> Although no final award was issued by the Supreme Constitutional Court of Egypt, the Court Commissioner’s Office issued a preliminary advisory report urging the Court to decide the constitutionality of the PIL Ban Law.

Therefore, even the legislative branch has acted against guaranteeing the right to access information. The PIL Ban Law restricts the rights of citizens to challenge administrative contracts based on the grounds of public interest.<sup>144</sup> However, as discussed above, public interest law is clearly associated with the right to access information;<sup>145</sup> the right to access information is a means rather than an end. In other words, the right to access information has an objective—to protect the public interest. So, assuming that the public has full access to investment negotiation-related information, without the ability to challenge the validity of any of these acts, the right to access information is rendered meaningless.

#### IV. EVALUATING THE POSITION OF GERMANY AND EGYPT

As shown by examples in Germany and Egypt, governments of both developed and developing countries tend to keep investment negotiation-related information confidential. Thus, the question is whether governments’ tendency to withhold investment negotiation-related information can be legally justified.

As highlighted above, good governance requires the application of the principle of the rule of law. The rule of law refers to the supremacy of law over all persons and private and public institutions, including the state itself. Related to the principle of the rule of law is the principle of administrative

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<sup>142</sup> See generally *id.*

<sup>143</sup> The Supreme Administrative Court, Case No. 55546/6103/55/2010, (Egypt).

<sup>144</sup> Hazzaa & Kumpf, *supra* note 140, at 169.

<sup>145</sup> Ngabirano, *supra* note 59, at 4–5.

legality.<sup>146</sup> While the rule of law applies broadly to all institutions, individuals, and entities,<sup>147</sup> administrative legality applies only to states' main authorities—the legislative, executive, and judicial authorities.<sup>148</sup>

Based on the principle of administrative legality, for a government's acts to be legal, they must fall within the scope of law. If the government acts without adhering to applicable law, its acts cannot be considered legal.<sup>149</sup> However, the principle of administrative legality is not absolute; it is subject to many exceptions. Most notably, a government's acts may contravene with the principle of administrative legality if it serves the public interest.<sup>150</sup> Thus, a government may take some measures that are not per se legal but may be considered legitimate if they serve the public interest. In addition, a government's acts may be considered illegitimate if the acts do not serve the public interest, even if they are taken in accordance with applicable laws.<sup>151</sup> The rationale behind this public interest exception is to give the government, which is entrusted with enforcing the law, some discretion to meet extraordinary or newly emerging circumstances, which may not be addressable by its legislative authority when enacting laws.<sup>152</sup>

Thus, by limiting the discussion to withholding investment negotiation-related information, it is clear that governments may have the right to withhold investment negotiation-related information. However, as highlighted, governments need to prove that withholding such information serves the public interest. Section 3 of the German Freedom of Information Act<sup>153</sup> and Article 3 of the Council of Europe Convention on Access to Official Documents support this argument.<sup>154</sup> Section 3 of the German Freedom of Information Act provides for limiting access to information based on the

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<sup>146</sup> Massimo Tommasoli, *Rule of Law and Democracy: Addressing the Gap Between Policies and Practices*, UN CHRONICLE (Dec. 2012), <https://unchronicle.un.org/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices>.

<sup>147</sup> Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SINGAPORE J. OF LEGAL STUD. (2012) 232, 233

<sup>148</sup> Raafat Fouda, *The Sources of Administrative Legality and its Exceptions* (مصادر المشروعية الإدارية) (Dar Al-Nahda Al-Arabeya 1994) 34.

<sup>149</sup> *Id.* at 38.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 156–57.

<sup>152</sup> *Id.* at 149–50.

<sup>153</sup> The German Freedom of Information Act (Informationsfreiheitsgesetz) Jan. 1. 2006, art. 3, [http://www.gesetze-im-internet.de/englisch\\_ifg/englisch\\_ifg.pdf](http://www.gesetze-im-internet.de/englisch_ifg/englisch_ifg.pdf).

<sup>154</sup> Council of Europe Convention on Access to Official Documents 2009, art. 3, June 18, 2009, C.E.T.S No. 205, <https://rm.coe.int/1680084826>.

protection of the public interest.<sup>155</sup> In doing so, the act provides examples of information that may have a detrimental effect on the public interest if disclosed. For example, information related to international relations, the Federal Armed Forces, and public safety may be withheld by the government.<sup>156</sup> Within the same context, Article 3(1) of the Council of Europe Convention on Access to Official Documents provides examples of several limitations on the right to access information. Article 3(1) allows governments to withhold information that may relate to economic and commercial interests and deliberations among public authorities, among many other examples.<sup>157</sup> However, Article 3(2) provides that the limitations included in Article 3(1) may be suspended if there is an overriding public interest in disclosure.<sup>158</sup> As such, the notion of public interest is the deciding tool utilized to either justify withholding or disclosing public information.

Based on the preceding analysis, access to investment negotiation related information may be restricted if the public interest so necessitates. But the question remains whether a government has the absolute authority to determine the interests of the public and accordingly impede its access to such public information. In other words, who supervises the government's decision to disclose or withhold information to protect the public interest?

An answer to this question is illustrated by Article 8 of the Council of Europe Convention on Access to Official Documents, which provides that there be a review procedure either before a court or another independent body.<sup>159</sup> Similarly, Section 9(4) provides that the decision of the government to withhold official information may be challenged either by filing an administrative appeal (in accordance with the Code of Administrative Court Procedure) or bringing an action to compel the government to disclose the requested information.<sup>160</sup> Finally, even in Egypt, a country that has failed to enact law regulating access to public information, the decision of the government to withhold public information is considered an administrative decision that can be challenged before the courts of the SC (the administrative

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<sup>155</sup> The German Freedom of Information Act, *supra* note 153, at art. 3.

<sup>156</sup> *Id.*

<sup>157</sup> Convention on Access to Official Documents, *supra* note 154.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Freedom of Information Act, *supra* note 153.

courts).<sup>161</sup> Therefore, the decision of the government to withhold public information is reviewed by the judiciary. In this review process, courts must apply the *public interest test*, highlighted above, to weigh the harm that may be caused by disclosure against the protected public interest.

But if courts are left with the discretion to determine what constitutes the public interest, does this mean that confidentiality of investment negotiations cannot be guaranteed when public actors are party to it? The answer to this question seems to be “yes.” While confidentiality may be guaranteed in arbitration proceedings between private parties, identical confidentiality rules may not be applicable when states are involved.<sup>162</sup> This is mainly because, unlike arbitration, negotiations are still governed by the national laws of host states.

## V. CONCLUSION

The right to access information is essential to good governance. Access to information mandates governments to reveal public information and data that allows citizens to monitor governments’ acts and hold them accountable. No doubt Egypt is triggered to enact a new law setting the scope, guarantees, and limitations of its citizens’ right to access information, in accordance with the accompanying provision of the Egyptian Constitution of 2014. However, as seen in *Vattenfall I*, Germany has failed to guarantee access to investment negotiated settlement-related information despite having enacted law regulating the right to access information and being subject to the Convention on Access to Official Documents.

Accordingly, laws regulating the right to access information are not sufficient if they are not backed by appropriate judicial mechanisms for challenging governments’ acts. Citizens should have both the right to access information and the right to take action based on this information. Otherwise, the right to access information is of no value.

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<sup>161</sup> This is considered negative administrative decision. Negative administrative decisions, under Egyptian law, takes place when administrative entities abstain from issuing decisions they ought to take under the prevailing laws and regulations. See Raafat Fouda, *The Origins and the Philosophy of the Judiciary’s Role in Annuling Administrative Decisions* (أصول وفلسفة دعوى الإلغاء) (Dar Al-Nahda Al-Arabeya 2011) 25.

<sup>162</sup> Monique Pongracic-Speier, *Confidentiality and the Public Interest Exception: Considerations for Mixed International Arbitration*, 3 J. WORLD INVEST. TRADE 232, 232 (2002).

