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The Evolution of Transparency in Investment Treaty: Is Confidentiality Death?
An ICSID Perspective

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Abstract

The International Centre for Settlement of Investment Disputes (ICSID), has seen an increased transparency in the past couple of decades. The participation of third parties in the proceedings and the disclosure of documents or information regarding the arbitrations are some of the most important and controversial issues regarding transparency nowadays.

The purpose of this thesis is to analyze the evolution of transparency in ICSID, as well as specific cases that dealt with issues of third party participation and the disclosure of documents or information in investment treaty arbitration, and analyze the decisions taken by the tribunals.

The evolution of transparency within the history of ICSID allows us to see the principal amendments made, and how transparency has been evolving in favor of investment treaty arbitration, providing more confidence, openness and legitimacy on this system of dispute resolution. Nevertheless, transparency is not a panacea. Excessive transparency might bring more challenges than benefits, depending on the circumstances on a case-by-case basis, therefore, it is necessary to consider the effects that transparency may produce in investment treaty arbitration, and find a right balance with elements such as confidentiality, the power of the tribunals and the will of the disputing parties in the arbitration, among others.

This thesis proposed that even if there is always space for improvements, the evolution of transparency has reach a limit where further changes would be futile and prejudicial for the system of investment treaty arbitration. This would bring a serie of challenges, such as, an extra burden to the disputing parties, a delay on the proceedings, and in certain cases leaving the result of the arbitration in hands of the public scrutiny, the media or turning the dispute in a political matter.

Key words: Transparency, evolution, investment treaty arbitration, ICSID.
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<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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The Evolution of Transparency in Investment Treaty: Is Confidentiality Death?

1. Introduction

It is well known that confidentiality traditionally was considered one of the major advantages of international commercial arbitration.¹ This means among others aspects that in arbitration unlike court proceedings, the parties can be sure that the press, the public opinion, and the third parties in the proceedings can not push forward their agendas and their own interests when a dispute arise between two parties. Arbitration was perceived as a modern, quick, private way of dispute resolution where private parties could resolve their commercial disputes. Confidentiality is an essential part of any business person or entity,² which means that it has no obligation to open their activities to the public opinion and scrutiny. In most times it is linked to privacy. Confidentiality and privacy are interrelated but are not the same. These instruments are designed to protect private parties from third parties involvement in their proceedings, or disclosing information to the public.

In investment treaty arbitration,³ the parties are different from commercial arbitration, here countries and private parties enter into relations based in most of the times on bilateral investment treaties (BITs), and thus the interests differ compared to a disputes between private parties.

In investment arbitration there are new factors that need to be taken in consideration, mainly because of the public interest that exist; the relations that States and private parties enter in this kind of investment involves

³ Investment treaty arbitration, refers to claims against the States, governed by public international law.
public issues and therefore affects an entire state, their people, their environment, their economy, and so on. This is the reason why nowadays there is a especial emphasis on transparency, public opinion, and non-governmental organizations (NGOs), and even politicians are pushing forward for more openness, particularly towards the development of third-party participation in investment treaty arbitration.

Transparency is not a new concept. It has long been recognized in different legal systems; the reason is its connection with other legal concepts such as certainty, predictability, good governance even with the duty to give reasons, among others.

Transparency can also evoke a range of different meanings depending on the context and the circumstances it is used. In international commercial relations, transparency is generally understood to involve (1) effective communication between the parties with regards to local laws, regulations and practices that may affect the investments, (2) notification and consultation of regulatory changes and (3) due process and procedural fairness with the formalities to carry on with the business.

According to some commentators transparency can have three connotations:

“... (1) transparency as a public value embraced by society to counter corruption, (2) transparency synonymous with open decision-making by
governments and nonprofits and, (3)transparency as a complex tool of good governance in programs, policies, organizations and nations.”

This definition is all-encompassing, because in the first connotation it is seen the relation between transparency and accountability, transparency is not an end, but a mean to achieve better governance. In the second connotation, transparency seeks too have more openness with regards the decision making of governments and private parties. Lastly in the third connotation transparency represents a tool to avoid arbitrary and discriminatory conducts. Although this is just one of many interpretations that transparency has, the importance with this definition is to indicate the value transparency has in international commercial relations, and thus in investment treaty arbitration nowadays.

There is no doubt that transparency seeks to create a better practice between the investors and the host States, and to create better governance. Nevertheless, when it comes to investment treaty arbitration, transparency and confidentiality must be must be weighed regarding the object and finality of this mechanism of dispute resolution and the circumstances of each particular case. Thus, it is fundamental to find a balance when these elements come into play.

The importance of transparency in investment treaty arbitration relies on the legitimacy of arbitration, and in certain way the impact that it might have in the future of investor-state relations as we know it. Nevertheless, more transparency equals less confidentiality. If there is no confidentiality in investment treaty arbitration then we should better rename this kind of dispute resolution mechanism and call it public opinion arbitration or media arbitration.

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1.1 Purpose of the Thesis

The purpose of this thesis is to analyze the evolution of transparency in investment treaty arbitration, and find out pros and cons of the increased transparency in today’s practice, especially regarding the participation of third parties and the disclosure of information and documents. Further, it is important to analyze the consequences and the impact that transparency has on the confidentiality aspect, which is one of the most appealing characteristics and key benefit to private parties and States, in investment treaty arbitration. The aim of this thesis is not to criticize transparency, but merely to look at the contemporary development of an increased transparency in investment treaty practice and the impact that it might have in the future of investment treaty arbitration.

1.2 Methodology

The methodology used in this thesis is the traditional legal dogmatic approach, in other words the appropriate rules and laws as well as their sources will be presented in an analysis in *de lege lata*. First this thesis will devise how transparency is established in the International Centre for Settlement of Investment Disputes (ICSID) practice (*de lege lata*). Second, an attempt to identify and explain pros and cons of transparency (*de lege ferenda*) in investment arbitration, will be done by reviewing specific cases. Finally in the concluding remarks of this thesis, its submitted how is the role of transparency affecting the investment treaty arbitration system.

Since investment treaty arbitration is established by treaties and their interpretation establishing the scope of investment, the present work is based on one of the most important arbitration institution and its rules: ICSID.
The thesis is structured as follows. In section 2, we will look at the evolution of transparency in investment treaty arbitration. This chapter will focus on the historical development of transparency in ICSID history.

In section 3 the focus will be on case law in investment treaty arbitration, followed by an analysis on how transparency was used with regards non-disputing parties and the disclosure of information and documents in ICSID cases.

Finally, the last section, contains a conclusion together with some final words and concluding remarks on transparency in today’s investment treaty arbitration.

1.3 Limitations

The amount of transparency is increasing nowadays in investment treaty arbitration, and it can be implemented in a wide range of contexts within this field. This thesis, however, will limit the discussion on the concept of transparency associated with two concepts: (1) the disclosure of documents and information and (2) the participation of third parties in investment treaty arbitration. International commercial arbitration will be discussed shortly when needed to develop the concept of confidentiality essentially to understand the consequences of transparency in investment treaty arbitration.
2. Evolution of Transparency: ICSID

The purpose of this section is to look at the evolution that transparency has had in investment treaty arbitration, in specific within:

ICSID

We will look at the development that transparency has had from the beginning of this institution, its rules, and articles, until present amendments and how transparency had evolve within ICSID and the role that it had played in international investment treaty arbitration.

2.1 ICSID

ICSID,⁹ is an independent forum to conciliate and arbitrate international investment disputes. This Centre was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention).¹⁰ On March 18, 1965, the text of the Convention was “submitted to members governments for consideration with a view to signature and ratification.”¹¹ ICSID, entered into force in 1966, and since then there has been a series of amendments and changes. This thesis focuses on the alterations concerning transparency. Since the approval of the ICSID Convention by the World Bank, more than 153 States¹² have signed and ratified it, Mexico was the

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⁹ The creator of ICSID was the International Bank for Reconstruction and Development (the IBRD). Already then it was called “World Bank”, and with the time the name was adopted officially. ICSID is counted as one of the “affiliated institutions” of the World Bank.

¹⁰ ICSID has two sets of rules that govern most proceedings under its auspices: the ICSID Convention, Regulations and Rules; and the ICSID Additional Facility Rules. However, ICSID also administers investment cases under other rules, such as the rules of the United Nations Commission on International Trade Law (UNCITRAL).


last one to signed it. Arguably, ICSID has become in the most important Centre to resolve disputes regarding investments nowadays.

2.1.1 Origins of the Convention

In the second half of the 1950s, many new bilateral and multilateral programs and organizations were established to provide assistance to developing countries.\(^{13}\) It was a goal back then, that private foreign investment would become an increasingly important source of funding for newly developed economies. Manifested, in the late 1950s there were certain factors and political risks that limited foreign investments. Expropriation was frequently highlighted in this context, as well as to other governmental measures that could affect the rights of the foreign investors.\(^{14}\) In the beginnings of ICSID there are no relevant elements or discussions regarding transparency or confidentiality, the main discussions were regarding expropriation, and the legitimate expectations of the host States when it came to investments.

2.1.2 The First Working Paper and Preliminary Draft of the ICSID Convention

In 1962, the Working Paper in form of a draft contained several articles,\(^{15}\) with explanatory comments with regards to the conciliation and arbitration system, but the focus mostly was on the definitions of terms, and the function of the participants in the proceedings under the Convention, including conciliators, arbitrators, parties and their counsels. The main purpose when defining the wording of the ICSID Convention as regarded by the commentators in the Working Paper was to enable a private party to

\(^{13}\) International Monetary Fund Staff. *Issues and developments in international trade policy*. Washington: International Monetary Fund. 1988.


bring a claim against a foreign State before an international arbitral tribunal, instead of seeking diplomatic protection or having the home State bring an international claim.\textsuperscript{16} Nevertheless, there were important provisions that affected directly certain elements of transparency and confidentiality. In the Working Paper Article (Art.) VI (6)\textsuperscript{17} and VI (7)\textsuperscript{18} the provisions granted the tribunal enough power and authority to protect the rights of the parties involved in the arbitration at all times. The language in this Working Paper was very clear and referred only to the parties involved in the dispute, in other words; under the wording of the Working Paper the tribunals were granted power to act as they seem convenient in order to protect the rights of the parties in the arbitration. There were no further comments whatsoever regarding the participation of third parties, transparency or even confidentiality in these first discussions.

The Preliminary Draft was concluded in 1963, and had 11 articles, divided into 65 sections,\textsuperscript{19} most of them dealing with the consolidation, organization and jurisdiction of ICSID and the importance of the arbitral award.\textsuperscript{20}


\textsuperscript{17} Article VI Arbitration Section 6. Except as the parties otherwise agree, the Arbitral Tribunal shall have the power to prescribe, at the request of either party, any provisional measures necessary for the protection of the rights of the parties.

\textsuperscript{18} Article VI Arbitration Section 7. Except as the parties otherwise agree, the Arbitral Tribunal shall have the power to hear and determine any counter-claims arising directly out of the subject-matter of the dispute.


\textsuperscript{20} The Preliminary Draft of the ICSID Convention, made it clear that the arbitral award should state the reasons on which it was based Art. IV (7)(1), something related to the functions of the Tribunal, and if not, a party could seek the annulment of an award based on this Art. IV (13)(1).
Art. IV (9)\textsuperscript{21} and IV (10),\textsuperscript{22} implemented the same provisions as in the Working Paper, with regards the power of the tribunal during the arbitration. It is very interesting to notice that the tribunal from the very beginning of ICSID was granted the power to decide ex aequo et bono,\textsuperscript{23} this means that the tribunal can decide in accordance with what is just and equitable with regards the circumstances of the case and at the same time apply the rule of law, this is fundamental and is still a cornerstone in any investment treaty arbitration today.

This Preliminary Draft opened the door for ongoing discussions and meetings that lately became in the First Draft, where the provisions were more polished and well arranged than those contained in the Working Paper and in the Preliminary Draft.

\textbf{2.1.3 The First Draft of the Convention}

On 1964, the First Draft came to light, with a preamble and 78 numbered articles, across ten main chapters,\textsuperscript{24} it also established the official name to the “International Centre for the Settlement of Investment Disputes”\textsuperscript{25} as it remains nowadays.

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\textsuperscript{21} Article IV Arbitration Section 10. Except as the parties otherwise agree, the Tribunal shall have the power to prescribe, at the request of either party, any provisional measures necessary for the protection of the rights of the parties.

\textsuperscript{22} Article IV Arbitration Section 9. Except as the parties otherwise agree, the Arbitral Tribunal shall have the power to hear and determine any counter-claims arising directly out of the subject-matter of the dispute.

\textsuperscript{23} Article IV Arbitration Section 4(1). In the absence of agreement between the parties concerning the law to be applied, and unless the parties shall have given the Tribunal the power to decide ex aequo et bono, the Tribunal shall decide the dispute submitted to it in accordance with the rule of law, whether national or international, as it shall determine to be applicable.


\textsuperscript{25} First Draft, Art. 1(1). There is hereby established the International Centre for the Settlement of Investment Disputes (hereinafter called the Centre).
In this First Draft, a new article was included, which allowed the tribunal to request the parties to produce documents or any other information that it considered necessary. 26 This is a very important article regarding transparency for two reasons. First, it allowed the tribunals to call out the parties to produce documents or any other relevant information that the tribunal considered necessary for the case. Second this article puts the figure of the tribunals as the authority to decide when a party should provide further documents or information depending on circumstances of the case.

The publication of the award to the public in general, was an issue discussed by the Legal Committee27 in charge of the elaboration of the First Draft. The publication of the award was proposed by the delegate of the United States, this new provision would allow the Centre to publish the awards unless the parties otherwise agreed. In the same discussion the delegate from India, suggested the opposite, that the Centre could not publish the awards, unless the parties consent to it.28 At the end, this last proposal was the one approved by the majority of delegates in the Legal Committee.29 Based on this important finding, transparency in a broader sense was part of the policy discussions. This is a clear example that the disclosure of information, as well as the publication of the final award were important issues. Nevertheless, the logic of international investment law

26 First Draft, Art. 46
Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings (i) call upon the parties to produce documents or other information, and (ii) visit the scene connected with the dispute before it, and there conduct such enquiries as it may deem appropriate.
28 Parra, Antonio R. The History of ICSID. (Second ed. Oxford, United Kingdom: Oxford University Press, 2017). Chapt.5. See SPLCM, December 10, 1964 (morning), reprinted in 2 History of the ICSID Convention 868, 6 (intervention of Mr. Gourevitch (United States) and Mr. Lokur (India)).
prevailed, meaning that the disputing parties are the ones to decide if some information may disclose to the public or not, this was finally agreed by the Legal Committee as well.

In this First Draft two important aspects of transparency should be mentioned, particularly with regards the disclosure of information and the participation of third parties. First, the tribunal is the one who can call on the parties for any further information. Equally, the tribunal is the one who knows when more information regarding a dispute is needed or not, and the tribunal also has the power to determine what is important for the dispute. Second, the will of the parties defined by ICSID from the very beginning of its history is the most relevant aspect that has prevailed until today. The parties have the power to decide when they want some information to go public or not. These improvements, however, opened the debate concerning the participation of States as parties in the disputes with regards the the public interest that States represent. Nevertheless, at the end the will of the parties and the power that the tribunals have are the most important and fundamental benchmarks, as well as the creators of the procedure in investment treaty arbitration.

2.1.4 The First Regulations and Rules

The Provisional Regulations and Rules were adopted in 1967,30 after the first meeting of the Administrative Council.31 These set of rules and provisions will be discussed individually below. The (a) Provisional Administrative and Financial Regulations, the (b) Provisional Rules of Procedure of the Institution of Conciliation and Arbitration Proceedings (Institution Rules) and the (c) Provisional Conciliation Rules and

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31 The ICSID Administrative Council is the governing body of ICSID. Its composition, functions and decision-making procedure are provided for in the ICSID Convention (Articles 4 to 8 of the Convention).
Provisional Arbitration Rules, as well as the (d)Definitive Regulations and Rules and the (e)Additional Facility Rules.

**a) The Administrative and Financial Regulations**

The aim of these regulations was to provide guidance on functions of the Secretariat. Further, they dealt with more administrative issues, such as the financing of the Centre and the privileges granted by the ICSID Convention to the Centre and the administrative staff.

In these regulations we can see that from the very beginning transparency was considered in this institution. The Secretariat in line with the purpose and object of the ICSID institution, and according to Regulation VI.3(a), could publish information regarding the operation of the Centre, as well as the proceedings and the conclusion of the disputes. Yet, always with the consent of the disputing parties, otherwise confidentiality should prevail as for the Centre. The same applies to the conciliation commissions, minutes, hearing and other records. As we move forward in the timeline of history, it can be noted that transparency starts to gain acceptance in the ICSID practice.

**b) The Institution Rules**

The procedural part of the Institution Rules, dealt mostly with the filing and registration by the Secretariat of the requests to initiate conciliation and arbitration under the Convention. Even if no further comments were made with regards transparency and confidentiality, the consent of the

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32 The ICSID Secretariat carries out the daily operations of ICSID. Its composition and principal functions are set out in the ICSID Convention (Articles 9 to 11 of ICSID Convention and the Administrative and Financial Regulations).

33 Such as regulations regarding immunities of the actions done by the staff of the Centre, issuing certificates of official travel, among others.


parties still was a prerequisite to access information regarding the jurisdiction of the Centre. The request by the parties should supply the information as well as the documents released to the information requested. When requesting information, the Secretariat could refused access to certain information when the requested information was manifestly outside the jurisdiction of the Centre.

c) Provisional Conciliation Rules and Provisional Arbitration Rules

These two rules dealt with the establishment of the conciliation commission and the arbitral tribunals depending on the case, and also set the proceedings of the different phases within each arbitral process.

Is interesting to note that there is a clear resemblance with the International Court of Justice Statute\(^{36}\) and the International Law Commission Model Rules on Arbitral Procedure\(^{37}\) when it comes to the deliberation made by the tribunal or the commission with respect confidentiality and transparency. In other words, and consistent with the confidential nature of conciliation and arbitration, these rules specified that the deliberations would take place in private and remain secret.\(^{38}\)

The Provisional Conciliation Rules, provided that the hearing would take place in private, except otherwise agreed by the parties. Again the parties are the ones that have the final word to their arbitration proceedings.

According to the Provisional Arbitration Rules, the public could attended the hearings only if the tribunal decided so, and both parties agreed with the decision.\(^{39}\) In the Provisional Rules, the consent of the parties was

\(^{36}\) Article 54(3) The deliberations of the Court shall take place in private and remain secret.

\(^{37}\) Article 26 The deliberations of the tribunal shall remain secret.


\(^{39}\) It is important to notice that the same provision is contained in the International Law Commission Model Rules: Article 16(1) The hearing shall be conducted by the president. It shall be public only if the tribunal so decides with the consent of the parties.
fundamental; the parties and the tribunal needed to decide together the important matters with regards not only the proceedings, but also interplay of any other elements such as transparency and confidentiality during the arbitration.

d) Definitive Regulations and Rules

In 1968, the Definitive Regulations and Rules were approved, the result was a more polished and clear guidelines, however there were no adjustments made to the provisions regarding the powers of the tribunal, and the final result was very similar to the Provisional Rules. With regards transparency and confidentiality, the result was in the same sense as seen above, no further relevant discussion were held on these matters. Is important to mention nevertheless, that hardly any changes were suggested by the Contracting States, this is interesting because all countries were given an opportunity to address any issues regarding the rules. Only one change was made on the Administrative and Financial Regulations regarding transparency, and it had to do with the publication of reports of the conciliation commissions, arbitral awards, minutes, and other records of the proceedings.

Essentially allowing the Secretariat to publish these documents, only when it obtained the consent of the parties. In this respect, this provision was not looking to get the consent from the parties explicitly, but on the contrary,

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42 Regulation 21 Publication.
(1)The Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding. (2)If both parties to a proceeding consent to the publication of: (a) reports of Conciliation Commissions; (b) arbitral awards; or (c) the minutes and other records of proceedings, the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments.
the parties were the ones that if wanted needed to indicate to the Secretariat their interest in the publication of these documents. Thus the burden was on the disputing parties. Again there is a special focus on the consent of the parties especially for the disclosure of information and documents of the proceedings.

e) The Additional Facility Rules

By the beginning of 1970, ICSID was gaining recognition among host States and investors all over the world. This growing trust allowed the Centre to provide additional administrative services\(^{43}\) and allowed ICSID to act as an authority in certain proceedings that were not within the jurisdiction of the Centre. This is how the Additional Facility Rules\(^ {44}\) were created, this was an analogy of the Convention that would confined the proceedings where one or neither party was a contracting party of the Convention, and especially was available to resolve issues that did not fall in the category of an investment.

The importance of the Additional Facility Rules for transparency issues, relies in two aspects. First, the investment law publishing activities of the Centre, the aim of this proposal was to provide assistance to States in issues relating to the promotion of investment worldwide, this was a project to cover any law relating to foreign investment in a world wide scale. This proposal became in what is today known as the ICSID Review: Foreign Investment Law Journal. According to its object the ICSID Review serves for two purposes. Namely, (1)to publish information relating to foreign investment, and (2)to discuss issues of interest for the members of ICSID.

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\(^{44}\) The ICSID Additional Facility was created on September 27, 1978. It offers arbitration, conciliation, and fact-finding services for certain disputes that fall outside the scope of the ICSID Convention. The Additional Facility Rules have subsequently been amended twice.
This is relevant because transparency is an issue that scored 98\textsuperscript{45} results in the history of this law journal, which showcases that transparency is a topic of interest for ICSID. Yet, it may grow further, especially with the increased transparency that we see in today’s practice.

Second, the importance and development of Art. 41 Schedule C-Arbitration Rules contained in the Additional Facility Rules, that regulates the participation of third parties in the proceedings. The first Additional Facility Rules in 1978, Art. 41(2)\textsuperscript{46} was silent on the participation of third parties in the proceedings, but allowed the option for the tribunal to call upon the parties to produce documents, witnesses and experts. This provision remained in the following Additional Facility Rules of 2003. However in the second amendment in 2006, a new indent was created in Art. 41(3),\textsuperscript{47} this was the first time that the Additional Facility Rules admitted the participation of a non-disputing party in the proceeding. It is important to mention that the tribunal first needed to consult both parties in order to allowed a third party to file a written submission, it should be highlighted that the participation of this third parties needed to be related only with factual or legal issues of the proceedings, and the tribunal shall


\textsuperscript{46} Article 41(2).
The Tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts. Additional Facility Rules 1978 and 2003 (same provision).

\textsuperscript{47} Article 41(3).
After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Article called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.
ensure that this participation does not disrupt the proceedings or unduly burden or unfairly prejudice either party.\textsuperscript{48} In other words, the third parties that have no interest in the dispute, or intend to disrupt the proceedings, as well as create a prejudice to one of the parties should not be consider by the tribunal. This is nowadays sometimes forgotten because the frequent participation of third parties are more political than legal, and have a hidden agenda with their own interests behind. The tribunals must ensure that the participation of third parties correspond to the purpose and object of their participation so it does not affect the proceedings and the tribunals perception in any way.

\textbf{2.1.5 First ICSID Amendment}

In the beginning of 1984, Dr. Ibrahim Shihata,\textsuperscript{49} due to the increase of cases in the ICSID, proposed a Revision of the ICSID Regulations and Rules.\textsuperscript{50} This was the first amendment of the Regulations and Rules, since their adoption in 1967. Most of the proposals regarded administrative issues, such as a uniform fee for the requests coming to the Centre among others. The main idea with these new proposals was to create more flexibility and clarity into the administration of the proceedings.

\textsuperscript{48} Ibid supra, para. 2.
\textsuperscript{49} Ibrahim Shihata, was an expert on international development and general counsel of the World Bank from 1983 to 1988 and Secretary General of ICSID from 1983 to 2000. He was responsible for the expansion of the ICSID, and Secretary- General of the Centre.
Dr. Shihata proposed to create a pre-hearing period to try to reach an amicable settlement. This idea followed the purpose of the Centre for creating a mutual confidence between contracting States and investors.

Lastly and the most important amendment was made to repeat the provision in Art. 48(2) of the Convention, regarding the publication of the award without the consent of the parties. The suggestion was to add a provision that allowed the Centre, to publish excerpts of the legal rules applied by the tribunals. This decision was taken to create a more neutral disclosure of the proceedings. By late 1984 parties were disclosing information regarding past proceedings in a unilateral way without any control, thus the Centre deemed it necessary to have a provision on these kind of publications, and even stated that this limited publications must be done with great prudence. Parties were disclosing information in a non-discriminatory way, which was bringing problems to the ICSID legitimacy. The Centre decided to step in and control the situation, regarding most of the information of the proceedings. The publication of the information was unilaterally being done by one party, which of course violated the confidentiality of the arbitrations, but also prejudiced the other party. By allowing the publication of excerpts, ICSID could have a more active role and certain control of the information regarding the awards and the decisions taken by the tribunals.

The revised Regulations and Rules came into force in September of 1984. In the following decade, the world changed. With the abrupt end of the

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51 The new procedure is set forth in the Rule 21(2) of the revised Arbitration Rules, which reads as follows:
At the request of the parties, a pre-hearing conference between the Tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement.
53 Today Art. 48 (5) of the Convention. The Centre shall not publish the award without the consent of the parties.
Cold War, democracy and capitalism spread\textsuperscript{55}, new democratic countries started to raise. Following these series of events, there was an impulse to develop regional and bilateral trade, the proliferation of BITs and the establishment of investment treaties as a normal practice encouraging foreign investment was in its prime.

In the 1990s, most BITs and several multilateral treaties included in their arbitration clause the ICSID Convention or the Additional Facility Rules to arbitrate disputes arising from these instruments, some BITs also started to provide for the UNCITRAL Arbitration Rules\textsuperscript{56} as another option. Today it is fair to say that these three options are the most used for the settlement of investment disputes, being ICSID and the Additional Facility Rules the most common and important.\textsuperscript{57}

By 1993, the World Bank, was also suffering the changes of the world, and the protests of NGOs, to improve the accountability and transparency in the ICISD were increasing and needed to be addressed. Transparency started to be regarded as an important issue globally and it had a direct impact on ICSID. This led the World Bank to create a Public Information Center to disclose information and documents.\textsuperscript{58}

\textsuperscript{56} One of the first BITs providing for the settlement of disputes under the UNCITRAL Arbitration Rules was the Agreement for the Promotion and Protection of Investments, Haiti–United Kingdom, 1985.
2.1.6 Second ICSID Amendment

In the first decade of the twenty-first century the cases brought to the ICSID increased like never before in the history of this institution. Investment treaties and arbitrations continued to proliferate, but new concerns were brought by NGOs mostly, especially concerning transparency and public participation in the arbitral process. This trend was also followed by some countries. For example, in the US Trade Act of 2002, where one of the main objectives was to maximize the transparency of the dispute settlement mechanism by ensuring that hearings were open to the public and that there was a procedure for accepting *amicus curiae* submissions from businesses, unions and NGOs.

In 2002, the Secretariat proposed three major amendments to the ICSID Regulations and Rules as well as the Additional Facility Rules. The new amended provisions came into effect on 2003. In this second amendment, the provisions regarding transparency remained almost the same as those contained in the amendment of 1984, for example Art. 48(5) of the Convention states that the consent of the parties is fundamental when it

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61 Trade Act 2002, 2102(b)(3)(H):
(H) ensuring the fullest measure of transparency in the dispute settlement mechanism, to the extent consistent with the need to protect information that is classified or business confidential, 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 non governmental organizations.
64 Article 48(5). The Centre shall not publish the award without the consent of the parties.
comes to the publication of information regarding the proceedings, in concrete it refers to the publication of the awards by the Centre.

In the Administrative and Financial Regulations, in Regulation 22, with regards publication of information about the operation of the Centre, it is stated again that for the publication of the reports of the conciliation commissions, the arbitral awards, the minutes and other records of the proceedings the consent of the parties is fundamental.

Rule 27 of the Conciliation Rules contains a general rule that the hearings will take place in private and remain secret, and the exception is when the parties otherwise agree. Further, it was also stated that the commission shall decide, with the consent of the parties when third parties may attend the hearings.

Even if transparency was gaining relevance in different instruments around the world, and was an issue in the report made in 2002, no further changes

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65 The Administrative and Financial Regulations of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(a) of the ICSID Convention.
66 Regulation 22 Publication (1).
The Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding. (2) If both parties to a proceeding consent to the publication of: (a) reports of Conciliation Commissions; (b) arbitral awards; or (c) the minutes and other records of proceedings, the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments.
67 Rule 27 Hearings (1).
The hearings of the Commission shall take place in private and, except as the parties otherwise agree, shall remain secret. (2) The Commission shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Commission may attend the hearings.
68 The Rules of Procedure for Conciliation Proceedings (the Conciliation Rules) of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(c) of the ICSID Convention.
69 The ICSID Commission, It is constituted on the date the Secretary-General notifies the parties that all conciliators have accepted their appointments (Conciliation Rule 6(1)).
can be found in this second amendment regarding the participation of third parties and the disclosure of information and documents.

2.1.7 Third ICSID Amendment

In 2004, the ICSID Secretariat issued a paper with possible improvements for ICSID arbitration. In the suggestions made in this discussion paper, the idea of having a more open and transparent arbitral process was proposed, and it specified that in the ICSID Arbitration Rules, the tribunals had the authority of accepting and considering submissions made by amicus curiae, further in paragraph 15 it was suggested that the consent of parties would not be a requirement for the tribunals acceptance of third parties in the hearings, something new within the ICSID system.

It is interesting to notice that in the third amendment there were more proposals that dealt with transparency in a broad sense, not only with the participation of third parties in the proceedings, but also with the publication of the awards.

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72 Possible Improvements of the Framework for ICSID Arbitration: ICSID Secretariat Discussion Paper, October 22, 2004 (October 2004 Discussion Paper). Para. 13 “Arbitrations under the ICSID and Additional Facility Arbitration Rules have not yielded similar precedents. There may well be cases where the process could be strengthened by submissions of third parties, not only civil society organizations but also for instance business groups or, in investment treaty arbitrations, the other States parties to the treaties concerned. It might therefore be useful to make clear that the tribunals have the authority to accept and consider submissions from third parties. It is important to mention, that the concerns were expressed with regards the participation of amicus curiae and public hearings”.
73 Possible Improvements of the Framework for ICSID Arbitration: ICSID Secretariat Discussion Paper, October 22, 2004 (October 2004 Discussion Paper). Para. 15 “The provisions concerned, ICSID Arbitration Rule 32(2) and Article 39(2) of the Additional Facility Arbitration Rules, might be amended so that the consent of both parties would no longer be required for decisions of the tribunal to permit additional categories of persons to attend the hearings or even to open them to the public”.
74 An amendment that was made in 1984 in the First Amendment.
Later on, the ICSID Secretariat issued a working paper with the suggested changes to the ICSID Rules and Regulations.\textsuperscript{75} With regards the \textit{amicus curiae} participation, it was established in Rule 37(2),\textsuperscript{76} that ICSID tribunals may accept and consider written submissions from a third party or a State, after consulting both parties as far as possible. The tribunal would have to satisfied three requirements, (1) that any such submissions would assist the tribunal in the determination of a factual or legal issue within the scope of the dispute, (2) that the non-disputing party has a significant interest in the dispute and (3) that this would not disrupt the proceeding or unfairly burden either party. Under rule 32,\textsuperscript{77} the tribunal could, without necessarily having the consent of the parties, allow third parties to attend all or part of the hearings. It was noted in the discussions\textsuperscript{78} that in certain cases it could be useful to have hearings open to persons other than those directly involved in the proceedings. The suggested changes would make clear that the participation of third parties might be considered by a tribunal after consultation with the Secretary-General and both parties as far as possible, granting the tribunal the final word to decide such participation. The

\textsuperscript{76} Rule 37 (2) Visits and Inquiries; Submissions of Non-disputing Parties. After consulting both parties as far as possible, the Tribunal may allow a person or a State that is not a party to the dispute (hereafter called the “non-disputing party”) to file a written submission with the Tribunal. In determining whether to allow such a filing, the Tribunal shall consider, among others things, the extent to which: a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding, unduly burden or unfairly prejudice either party, and that both parties are given an opportunity of presenting their observations on the non-disputing party submission.
\textsuperscript{77} Rule 32 The Oral Procedure (2).
After consultation with the Secretary-General and with the parties as far as possible, the Tribunal may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal to attend or observe all or part of the hearings. The Tribunal shall for such cases establish procedures for the protection of proprietary information and the making of appropriate logistical arrangements.
consultation with the parties was to ensure that any objection or concerns are taken into account by the tribunal in considering whether to allow any third parties to attend or observe the hearings.

It is worth mentioning, that in these amendments the general idea, was to transfer to arbitrators a broader power to decide important issues regarding public hearings and the participation of *amicus curiae*, leaving in second term the consent of the disputing parties. This is very controversial given the fact that the consent of the parties is a cornerstone of any arbitration.

The 2006 amendment, was very important for transparency, as it addressed the participation of *amicus curiae*, the publication of awards and the open hearings in arbitration. After several discussions regarding the proposed amendments, the ICSID Convention, Regulations and Rules, finally entered into force in April 2006.

**2.1.8 Fourth ICSID Amendment**

In 2016, ICSID launched a process to amend its rules and regulations. This marked the fourth amendment process in the ICSID history. All the previews amendments have had far-reaching effects on the practice of investment arbitration, and have been widely emulated in the rules of other arbitral institutions, newly negotiated investment treaties, and in parts of
the Mauritius Convention and the UNCITRAL Rules on Transparency\textsuperscript{79} in Treaty-based Investor-State Arbitration.\textsuperscript{80}

Among the many topics in this fourth amendment process, transparency is among them, and the idea is to improve it, especially the clarification on third party participation in the proceedings, as well as the publication of the decisions and orders. The Centre aims to publish these papers by early 2018.\textsuperscript{81} Nevertheless by the time this thesis was written, no further information of future improvements and amendments was available.

\textsuperscript{79} For some commentators, the UNCITRAL Transparency Rules are considered a new paradigm in investment treaty disputes, but when comparing them with the amendments made by the ICSID in 2006, the transparency provisions closely resemble, for example the UNCITRAL Transparency Rules establish that all the main documents of the proceeding must be made public (ICSID allows to publish only the documents that the parties consent to make public), the tribunals are oblige to accept and consider submissions of third parties (ICSID also allows this, but the tribunal has a power to decide what is important for each case), hearings are public (ICSID allows this if the parties agree). What can be discerned is that UNCITRAL provides ways to circumvent the need for the consent of the parties and the independence and powers of the arbitral tribunals, two fundamental cornerstones of any arbitration.


3. Transparency in Practice

The purpose of this section, is to analyze the case practice, and identify particular cases where transparency was the central issue, and determine if the role of transparency was beneficial or not for a given investment arbitration. As of December 2017, ICSID had registered 650 cases under the ICSID Convention and Additional Facility Rules. Even if it is not possible to analyze all the cases within this section, the aim is to analyze only cases concerning transparency in combination with third party participation and disclosure of information. In order to provide an overview, the cases will be summarized and only the factors relevant for transparency will be discussed.

3.1 ICSID

As it was shown in section 2 of this thesis, ICSID offers administrative and organizational support for non-ICSID disputes, frequently assistance is also provided for arbitrations under the UNCITRAL Rules, free trade agreements and other ad hoc dispute settlement provisions. Nevertheless, in the present section we will look at cases that fall under the jurisdiction of ICSID in a broad sense, this means that cases under the ICSID Convention and the Additional Facility Rules will be analyzed.

3.1.1 Aguas del Tunari, S.A. v. Republic of Bolivia

The dispute is based on the 1992 Bolivia-Netherlands BIT, and was initiated by Aguas del Tunari S.A. (Claimant), a company organized under the laws of Bolivia. This company, received under a concession contract

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the right to provide water and sewage services for the city of Cochabamba, Bolivia.\textsuperscript{83}

The claim arose out of alleged actions and omissions of the Republic of Bolivia (Respondent) leading up to the rescission of the concession agreement entered into with the claimant.

No award was rendered, as the matter was settled by the parties. The terms of the settlement provided, among other things, that the concession was terminated not because of any act done or not done by the claimant but because the civil pressure around the case.\textsuperscript{84} The civil society was pushing for the alleged increase of the water rates; politicians, newspapers, unions and the local leaders were against the concession.\textsuperscript{85}

After the arbitral tribunal was constituted, two NGOs jointly filed a petition on behalf of a number of interested civil groups and individuals to act as \textit{amicus curiae} in the case.\textsuperscript{86} The tribunal decided that the requests made by the NGOs\textsuperscript{87} were beyond the powers of the tribunal and authority,\textsuperscript{88} thus the consent of the parties was regarded as the foundation for the tribunal’s power to allow such third party involvement.


\textsuperscript{87} Four NGOs from Bolivia, The Coalition for the Defense of Water and Life (\textit{Coordinadora}), the Cochabamba Federation of Irrigators’ Organizations, Friends of the Earth-Netherlands and SEMAPA Sur, and Oscar Olivera, Omar Fernandez, Father Luis Sanchez, and Congressman Jorge Alvarado.

Some commentators stated that the main issue was a misconception between investor-state arbitration and international commercial arbitration, and that investor-state arbitration was replicating the procedure of commercial arbitration. This is a premise that is not supported in practice or in theory, there is a clear difference between commercial and investment treaty arbitration and their procedural rules. Confidentiality and privacy are not only characteristics in commercial arbitration but also are characteristics in investment treaty arbitration, in this case the tribunal decided that parties have the full power in arbitration, therefore the tribunal can not go beyond its powers without the consent of the parties.

3.1.2 Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic

The dispute is based on the 1991 Argentina-France BIT and 1991 Argentina-Spain BIT, and was initiated by Suez and Vivendi Universal S.A. and Sociedad General de Aguas de Barcelona S.A (Claimants). The Claimants had made investments in a concession for water distribution and waste of water treatment services in the city of Buenos Aires and some surrounding municipalities.

The claim arose out of a series of alleged acts and omissions by Argentina (Respondent) that breached the commitments related to the investments, including Argentina’s alleged failure to apply previously agreed

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90 When you analyze the case, it is clear that the termination of the concession was more of a political movement regarding the relationship between the government of Bolivia and its people, that with the alleged increased of the water rates by the company.

adjustments to the tariff calculation and the adjustment mechanisms that directly impacted the claimants investments.\textsuperscript{92}

The tribunal concluded that Argentina breached its obligations under the BITs, by failing to revise the tariff according to the legal framework of the concession and in pursuing the forced renegotiation of the concession contract.\textsuperscript{93}

This case was very relevant, because it was the first time that a tribunal accepted \textit{amicus curiae}\textsuperscript{94} submissions in the ICSID system,\textsuperscript{95} and did so by its own initiative. The tribunal concluded that it had the power to admit \textit{amicus curiae} submissions.\textsuperscript{96} What is remarkable in this case is that the tribunal did a broad analysis of different aspects involving the participation of third parties. The tribunal established three aspects, (1) the consent of the parties regarding the participation, (2) the nature of the submission of the \textit{amicus curiae} and (3) the interest that the third party had in the case.

In this case according to the ICSID rules without the 2006 amendments, the tribunal denied the participation of third parties in the hearings, because the claimant did not consent to it. This case elucidates that even if the

\textsuperscript{92} On the same date, the Centre received two further requests for arbitration under the ICSID Convention regarding water concessions in Argentina, these requests would later be registered by the Centre and submitted by agreement of the parties to the same Tribunal as joint proceedings.


\textsuperscript{94} In this case the arbitral tribunal decided on the participation of \textit{amicus curiae} two times. The first time the tribunal denied the participation and in the second time the tribunal permitted the participation, available at <https://www.italaw.com/cases/1057>. Accessed 16 May 2018.


\textsuperscript{96} Five NGOs were involved, Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Estudios Legales y Sociales (CELS), Center for International Environmental Law (CIEL), Consumidores Libres Cooperativa Ltda. de Provision de Servicios de Acción Comunitaria, and Union de Usuarios y Consumidores.
tribunal had inherent powers with respect the proceedings in the arbitration, it can not violate a clear rule agreed before hand by the parties in the arbitration. The tribunal decided to accept third party submissions even with the claimants opposition. This case presented the power of the tribunal in arbitration, and the freedom that the tribunal has to accept or reject any participation regarding the specific circumstances of the case.

3.1.3 Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania

The dispute is based on the 1994 Tanzania-United Kingdom BIT and was initiated by Biwater Gauff Ltd (Claimant). The Claimant had controlling interest in a local investment vehicle company that had concluded certain agreements with a Tanzanian public corporation, the Dar es Salaam Water and Sewerage Authority, to implement a water and sewerage infrastructure project.

The claim arose out of the termination of a contract, along with the lost of control of the Claimant assets, offices and business, there was also an alleged deportation of a senior manager of the investor company.

The tribunal concluded that Tanzania’s actions towards the Claimant amounted to an expropriation along with violations of several obligations under the BIT. Nevertheless, the tribunal found that there was no sufficient

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97 The tribunal based the decision on Methanex v. US and UPS v. Canada (UNCITRAL rules), in these case, the hearings were opened for public, but with a important difference, in this case both parties consent to it.
98 To decide when a submission by a third party could assist the tribunal, and address the matter of the dispute, as well as decide the interest of the third party behind the dispute.
99 This was a major case regarding public interest, where the water concession affected more than 8 million inhabitants in a direct way, and was the largest water concession in the world.
link between the wrongful acts and the claimed damage in question, thus no element of causation was found.\textsuperscript{102}

This is the first case that discussed the disclosure of information to the public during the arbitration. Due to the fact that Tanzania unilaterally disclosed information to the public, the Claimant requested that the tribunal order measures that the parties should discuss on a case-by-case basis the publication of all decisions produce in the proceedings, if no agreement of the parties could be reached then the matters should be referred to the tribunal.\textsuperscript{103} The tribunal discussed both the issue of transparency, and the need to protect the procedural integrity of the arbitration,\textsuperscript{104} and the confidential character of certain documents and information.

The tribunal stated that, in the absence of any agreement between the parties on the issue, there is no provision imposing a general duty of confidentiality in ICSID arbitration rules, nor in ICSID Convention, neither in any of the applicable rules or otherwise stated in the case.\textsuperscript{105} Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources.

Given the participation of third parties in the media campaign,\textsuperscript{106} and the risk of harm and prejudice along with the possible aggravation of the

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Three NGOs from Tanzania (The Lawyers’ Environmental Action Team (LEAT), the Legal and Human Rights Centre (LHRC) and Tanzania Gender Networking Programme
current situation, the tribunal agreed to warrant some form of control to the participation of third parties, even if it affected transparency and public information. The tribunal made a distinction between the type of documents in the proceedings and their specific role. Further, it made an analysis on the impact that these documents have and the risks that it may impose in each instance and for each party.¹⁰⁷

Christina Knahr and August Reinisch argued that the decision taken by the tribunal was nuanced¹⁰⁸ or rigid, but the reality is that the tribunal gave some guidelines on how the interplay of transparency and confidentiality should be done in investment treaty arbitration. The tribunal declared that the disclosure of any type of document should be considered on a case-by-case basis, and the tribunal itself should provide a framework in which to consider if certain documents should or should not be disclosed to a wider public.¹⁰⁹ This is the correct approach that should be taken in every arbitration. The tribunal must weight the competing interests of more transparency but also protect the procedural integrity of the arbitration.

The tribunal also allowed the parties to ask for exceptions regarding the disclosure of certain information. The premise of the tribunal was that these instruments were not used to antagonize the parties, exacerbate the dispute and complicate the resolution of the dispute.¹¹⁰ There is not doubt that both interests are important but also they need to be legitimate and

protected. The difficult part is to find the right balance, which the tribunal did in this case.

3.1.4 Piero Foresti, Laura de Carli and Others v. The Republic of South Africa

The dispute is based on the 1998 Belgium-Luxembourg-South Africa BIT and 1997 Italy-South Africa BIT and was initiated by Piero Foresti, et al. (Claimants). The claim arose out of the entry into force of the Mineral Petroleum Resources Development Act, and the alleged extinction of the investors mineral rights without prompt and adequate compensation.111

The claimants with the consent of the respondent explicitly sought a discontinuance of the arbitral proceedings, the tribunal thus dismissed all the claims on the merits and awarded the claimants to pay to the respondent the fees and costs of the arbitration.112

The importance of this case for transparency relies on the fact that during the proceedings four NGOs,113 filed a petition for limited participation as non-disputing parties. In accordance to the ICSID Additional Facility Rules, and the consent of the parties, the tribunal granted permission to file written submissions.114 The tribunal also ordered the parties to disclose key legal documents to the NGOs, this element was fundamental for the

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113 Four NGOs, the Centre for Applied Legal Studies (CALS), the Legal Resources Centre (LRC), the Center for International Environmental Law (CIEL), and INTERIGHTS (the International Centre for the Legal Protection of Human Rights).
third parties in order to make meaningful submissions, despite strong objections made by the claimants, this was the first time that an ICSID tribunal ordered such a disclosure of documents. The idea was, that the third parties could supply additional information that could be important for the tribunals to take in consideration.

For the NGOs, this decision by the tribunal marks a major step towards more transparency in investment treaty arbitration. But the reality is, that the tribunal acted accordingly to the arbitrations rules and its powers. The tribunal also noted that the NGOs needed certain documents in order to provide useful and effective information to the tribunal, thus granted access to key documents. The tribunal however denied the request of the NGOs to take part in the hearings. Nevertheless, is important to mention that there are no rules that govern the publication of documents during the proceedings in ICSID.

At the end the claimant and the respondent decided to discontinue the proceedings, so it is not possible to review the participation of the NGOs as non-disputing parties in this proceeding. Yet, it is possible to notice that the tribunal acted in a proper way in the circumstances of this case, and in the best interest of the parties.

3.1.5 Pac Rim Cayman LLC v. Republic of El Salvador

The dispute is based on the 2004 CAFTA and was initiated by Pac Rim Cayman LLC (Claimant). The Claimant owned certain Salvadoran mining companies that held rights conferred by exploration licenses,

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authorizations and permits, including the right to a mining exploitation concession in the area known as “El Dorado”.\textsuperscript{118}

The claim arose out of the Government’s refusal to issue necessary mining permits for El Dorado gold mining project in El Salvador due to alleged environmental concerns and risks to the landowners.\textsuperscript{119}

The tribunal concluded that the claimant did not comply with the requirements under the Salvador Mining Law to be eligible for the permits for the exploitation of El Dorado, and therefore the respondent did not have any further obligations with regards that project.\textsuperscript{120}

This case lends itself as very relevant and interesting for transparency in different aspects. First the tribunal defined certain characteristics that the written \textit{amicus curiae}\textsuperscript{121} submissions should fulfill. The tribunal admitted the submission of briefs which in the end it did not consider it in rendering the award. First, there was not join consent of the parties with regards the participation of \textit{amicus curiae}. Once again the parties consent is fundamental in any decision taken by the tribunal, even with regards the participation of third parties in the proceedings. Second, the tribunal considered that the information and circumstances provided by the third parties was inappropriate and there was no need to consider it for the


\textsuperscript{121} More that 300 NGOs, trade unions and civil society from El Salvador, Costa Rica and The United States, as well as the Mesa Nacional de Frente a la Minería Metálica (MESA), and the international NGO, Center for International Environmental Law (CIEL).
present case.\textsuperscript{122} This tribunal’s analysis is similar to the one in \textit{Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A v. Argentine Republic} were the tribunal had to take into consideration three basic criteria (1) the appropriateness of the subject matter of the case; (2) the suitability of a given non-party to act as \textit{amicus curiae} in that case, and (3) the procedure by which the \textit{amicus} submission is made and considered.\textsuperscript{123} Following this order, it is clear that the tribunal did not consider the submission made by the third party as suitable for the present dispute; this is the purpose of \textit{amicus curiae}, to assist the tribunal in its work.

Another interesting feature that can be noted in this case, is that the tribunal allowed the hearings to be webcasted live.\textsuperscript{124} The broadcasting of the hearings in real time, was after followed by other tribunals especially in Latin American cases.\textsuperscript{125}

In Pac Rim Cayman Case that there was a big media campaign against the company, not only in El Salvador, but in different countries, which pose three different questions with regards the participation of non-disputing parties, that should be analyze by the tribunals in each case regarding the circumstances of the dispute. First, do these NGOs and countries have a real interest in the dispute?; second, should they be allow to participate in the proceedings? and third, did the webcasted hearings reach the people

\textsuperscript{124} This was allowed according to Article 10.21(2) of CAFT, which provides for mandatory public hearings.
\textsuperscript{125} Such as Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23 and Commerce Group Corp. and San Sebastian Gold Mines Inc. v the Republic of El Salvador, ICSID Case No. ARB /09/17.
with a real interest in the case? These are just some questions that arose in this case, and haven't been analyzed to its fullest.


4. Conclusion

The purpose of this thesis, was to analyze the evolution of transparency within ICSID, and how the recent increase of transparency is affecting investment arbitration. In commercial arbitration confidentiality is one of the most appealing characteristics and probably the reason why parties chose to go there. In investment treaty arbitration, the reality is different, here States are involved and therefore there is a public interest that needs to be addressed.

The lack of transparency is an issue brought against investment treaty arbitration, under the belief that investment treaty arbitration only favors the investors and works in the shades and with opacity, but as was shown in section 2 of this thesis, the number of BITs had been growing and continues to grow, thus there must be some benefits for investors and host States out of this system, especially having in consideration as can be noted in section 3 of this thesis that in most cases transparency issues are brought by third parties to the disputes and sometimes by the pressure of the media and politicians.

It has been determined in section 2 of this thesis, that transparency in a broad sense can be found in certain provisions within the history of ICSID. Especially within the broad powers to conduct the proceedings of the arbitral tribunals. However, transparency was never an issue discussed by the members of ICSID, nor was an issue for the States during the different developments in the ICSID history. To a certain degree transparency was present lately in reports and works of ICSID, but it was not until the 2006 amendments where the issues of transparency were addressed and real developments were made to increase transparency in the proceedings, as can be noted in the ICSID Arbitration Rules, where the rules for example
in the Arbitration Rule 37(2)\textsuperscript{126} authorize the tribunal to allow non-disputing parties in the proceedings, or in the Arbitration Rule 32(2)\textsuperscript{127} where members of the public can attend the hearings and even Arbitration Rule 48(4)\textsuperscript{128} that allows ICSID to publish excerpts of the awards even without the consent of the parties, just to mention a few improvements.

In section 3 of this thesis, it is noted that the tribunals have the power to address the issues of transparency in each case by balancing the specific circumstances of the dispute, and the purpose and object of the system of arbitration.

Transparency should not longer be view as a significant problem in investment treaty arbitration, and the tribunals should instead find an equilibrium between confidentiality and transparency.

\textsuperscript{126} Rule 37(2) Visits and Inquiries; Submissions of Non-disputing Parties.
\(2\) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

\textsuperscript{127} Rule 32 The Oral Procedure.
\(2\) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

\textsuperscript{128} Rule 48 Rendering of the Award.
\(4\) The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.
4.1 Concluding Remarks

Transparency is important and necessary in investment treaty arbitration, because it involves disputes where the outcome can affect the public interest of the States.

In the last decade an evolution of transparency in ICSID occurred, thus allow us to gain some improvements like the publication of excerpt of the awards, and the open hearings, among other benefits for the investment treaty arbitration system, especially increasing the legitimacy for the future of arbitration.

Excessive transparency can be counterproductive not just to investment treaty arbitration but for investments in general, too much transparency will slow down the arbitration system, increase the costs of arbitration, extend the length of the arbitration, delay the process, create pressures from the media and public at large, what is more, it might even politicize the dispute, which may bring not only negative effects for the proceedings, but a greater damage for the parties autonomy, the flexibility of the disputes and the long-term investment relationships of investors and States.

Therefore, it is part of the arbitrator’s task to make a balance between these values in each individual case, based on the particular legal and factual background. Without a proper balance arbitration will have problems to prosper and continue to be consider the best alternative to resolve disputes between investors and States nowadays.

Today arbitrators need to find a balance that continues to guarantee investment treaty arbitration as the best mechanism to resolve disputes between investors-states, confidentiality and transparency can coexist in practice.

The powers of the tribunals as well as the will of the parties are the cornerstones of any arbitration, in other words the level of confidentiality
or transparency will depend on the agreement of the parties, the treaty and the tribunals on a case-by-case basis.

It should be highlighted that the main goal of *amicus curiae* and any disclosure of information is to assist the tribunals in its work during the arbitration.

Finally, with the evolution of transparency throughout the ICSID history, its amendments made brought more openness and participation in investment treaty arbitration. Nevertheless, even if there is always opportunity to improve its unlikely that future amendments in ICSID will bring significant new developments with regards transparency in investment treaty arbitration.
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