

International Hellenic University

**LLM in Transnational and European Commercial Law and Alternative Dispute
Resolution 2013-2014**

Dissertation by Dimitrios Katranstiotis

**Transparency in International Investment Arbitration: From the
Current towards the Future Normative Framework**

Abstract: The purpose of this dissertation is to examine in a succinct way the issue of transparency in investor-State arbitration proceedings. In order to address the main aspects of the concept the paper is separated into four sections. Section I includes an introduction to the issue highlighting the differences between commercial and investment arbitration and delineating the concept of public interest. In section II there is an overview of the current normative framework followed by an analysis of the most commonly used procedural rules in investor-State disputes on each stage of the proceedings and in regard to relevant orders and decisions of arbitral tribunals in the most important cases. There is also an outline of the most significant concerns that have been raised against increased transparency. In section III a look towards the forthcoming normative framework between the two sides of the Atlantic and in particular the concerns that are raised on transparency issues about the two major agreements that the European Union is intended to conclude with Canada and the United States of America.

I Introduction

Transparency has received and continues to gain significant attention in international, regional and national legal regimes. However, transparency is a notion that cannot be easily defined since it can have different contexts depending on the field of law that is related to¹. From the perspective of international investment law transparency could be defined as: “The adequacy, accuracy, availability, and accessibility of knowledge and information about the policies and activities of (the international investment law regime and its participants), and of the central organizations (functioning within) it on matters relevant to compliance and effectiveness, and about the operation of the norms, rules, and procedures (underlying the regime)”².

The importance of transparency in International Investment Arbitration

Since international investment disputes are predominantly resolved by arbitral tribunals instead of State court proceedings³ many commentators focus on transparency in international investment arbitration. The first question that arises is why transparency is so important in investor-State disputes. The question could be better answered by examining the special characteristics of investment disputes in comparison to regular commercial arbitration disputes. According to prominent representatives of the transparency movement: “Arbitration brought by an investor against a State differs significantly from commercial arbitration that concerns only private parties implicating the public interest in ways the latter do not, a fact that is now widely acknowledged within the international investment arbitration community ... the existence of this public interest has implications for the conduct of the arbitration

¹ Carl-Sebastian Zoellner, Transparency an Analysis of an Evolving Fundamental Principal in International Economic Law p. 580-581

² Juile A. Maupin, Transparency in International investment Law: The Good, the Bad and the Murky p.6 based on a definition originally suggested by Chayes, Chayes and Mitchel in managing compliance : a comparative perspective

³See also United Nations Conference on Trade and Development (UNCTAD) IIA Issues Note Recent Developments in Investor State Dispute Settlement p.4 available at: http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf

which means that according to principles of human rights law and good governance, government activities should be subject to basic requirements of transparency and public participation⁴. Thus, the main argument of the transparency movement is that since there is a public interest in investment arbitration, proceedings must become more transparent through greater access to documents and to the arbitration process itself⁵. In addition, unlike commercial disputes investor-State arbitration may involve significant monetary liability for public treasuries since awards often order states to compensate foreign investors directly affecting their budget⁶. Therefore, the public's concern is justified on the basis that investment arbitration proceedings may have an adverse effect to the State's financial situation because of a possible monetary award that will eventually be paid out of the public's tax revenues⁷.

Furthermore, investment arbitration disputes involving public interest considerations often raise democratic concerns. Indeed, the secretive nature of arbitration has received strong criticism as incompatible with the "rule of law", especially in democratic societies where the resolution of disputes involving issues of public nature demands that citizens and the press have access to the information relating to public affairs⁸. Some commentators arguably note that investor-State disputes contribute to the problem of the democratic deficit since arbitrators without being elected or appointed, are considered to interfere with regulations promulgated by the elected officials of the people that are meant to protect the welfare of the State's citizens and nationals⁹. The problem is more intense in developing or less democratic nations where there is an additional reason for governments to be accountable to their electorate and come under scrutiny in the political process if they are engaged in conduct contrary to their international obligations¹⁰. Transparency's role is thus crucial to a State's democratic function and the promotion of good governance.

The concept of public interest

It is evident that public interest is one of the main features of investment disputes that distinguish them from commercial ones. On a theoretical level, public interest can refer on the one hand to the interest of a State and its constituents and on the other hand matters that encompass the common interests of mankind such as environmental concerns and human rights¹¹. However, the relevant legal provisions do not make any direct reference to the term¹². Thus, the concept has been elaborated by arbitral tribunals in a number of significant investment disputes. In *Methanex v United States of America* dispute, the tribunal held that

⁴ Center of for International Environmental Law and International Institute for Sustainable development, revising the UNCITRAL Arbitration rules to address State arbitrations p.3 available at: http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf

⁵ Ruth Teitelbaum, a Look at the Public Interest in Investment Arbitration: Is it Unique? What should we do about it? p.55

⁶ Ibid.

⁷ Barnali Choudhury, Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit? p.809

⁸ Marcos A. Orellana, The right of Access to Information and Investment Arbitration p.61

⁹ Choudhury p.782

¹⁰ Nigel Blackaby, Public Interest and Investment Treaty Arbitration p.360

¹¹ Choudhury p.791

¹² see supra note 78

“there is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public interest than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions”¹³.

In the *Suez-Vivendi v Argentine Republic* case, the tribunal highlighted that “The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a larger metropolitan area, the City of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve”¹⁴. Thus, the Suez tribunal did set the main requirements for a dispute to concern public interest without however any indication that these elements constitute an exclusive list leaving it open for a future tribunal determine the existence of public interest based on different criteria¹⁵. One year later, in the case *Aguas Provinciales de Santa Fe* the tribunal provided a more comprehensive definition according to which third party intervention has been accepted by courts in cases that involve issues of public interest “because decisions in those cases have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case”. Following a similar approach to *Suez-Vivendi* the tribunal emphasized that “The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of urban areas in the province of Santa Fe. Those systems provide basic public services to hundreds of thousands of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve”¹⁶.

These cases apart for other reasons are helpful in what they shed light in an otherwise vague concept. The conditions however are quite broad since matters that concern vital services such as water, electricity and other significant infrastructure problems are likely to be met in most investor-State disputes¹⁷. In addition public interest is not necessarily attached to investment disputes only. It could be argued that commercial arbitrations involving States or State entities may equally involve essential matters of public policy having an impact to

¹³ Methanex corporation v United States of America - decision on petitions from third persons to intervene as amici curiae par.49

¹⁴ Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi universal S.A. v Argentine Republic ICSID Case No. ARB/03/19 - Order in Response to a Petition for Transparency and Participation as Amicus Curiae of May 19, 2005 par.19

¹⁵ Epaminontas E. Triantafilou, Is a Connection to the “Public Interest” a Meaningful Prerequisite of Third Party Participation in Investment Arbitration p.41

¹⁶ Aguas Provinciales de Santa Fe S.A, Suez, Sociedad General de Aguas de Barcelona S.A, and Interaguas Servicios Integrales del Agua S.A. v the Argentine Republic ICSID Case No. ARB/03/17 Fe - order in response to a petition for participation as amicus curiae par.18

¹⁷ Epaminontas E.Triantafilou p.43

public liabilities and raising a State's international obligations¹⁸. Therefore the issue of transparency should be dealt in a more general framework taking into account that the involvement of a State or a State entity in a dispute may by itself give rise to public interest concerns even if the claim is based on a private contract¹⁹.

II An Overview of Transparency in International Investment Arbitration

The existing normative framework

Arbitration is now the most commonly used method to resolve international investment disputes²⁰. Arbitral tribunals however do not resolve investment disputes on their own initiative; instead they draw their jurisdictional powers from a number of different regional, sectoral and bilateral regimes. Currently it is estimated that the overall number of concluded international investment agreements (IIAs) including bilateral investment treaties (BITs) and other forms of IIAs such as regional trade agreements (RTAs) exceeds 3.000²¹. On the basis of this complicated framework, there is an ever-increasing number of BITs. Historically, international investors were concerned about being subject to arbitrary and discriminatory treatment by developing-countries, leading numerous governments that seek to attract foreign investments to enter into agreements that incorporate standards of protection for foreign investors²². These agreements evolved to guarantee the investor a series of substantive rights, such as national treatment, fair and equitable treatment, most-favored-nation treatment, and fair expropriation, as well as access to dispute resolution mechanisms, such as international arbitration, for resolving disputes that may arise from the investment²³. Therefore, the main objective of a BIT is to minimize the risks taken with an investment by giving the right to the investor to file against a possibly harmful action from a foreign government and thus eventually increase foreign direct investment between the two States²⁴. Since their first appearance in the late 1950's with the first agreement concluded between Germany and Pakistan, the use of BITs has grown rapidly and currently they are widely used throughout the investment world²⁵.

Some of these BITs, especially the more recent ones, address directly the issue of transparency in the arbitral process allowing open hearings, public access to documents and

¹⁸Jan Heiner Nedden, Friedrich Rosenfeld, The new UNCITRAL Transparency rules: How the Trend Towards Transparency Differs in Investment and Commercial Arbitration p.61 -62, Teitelbaum p.56

¹⁹ Ibid.

²⁰ See also : UNCTAD IIA issues note recent developments in ISDS available in

<http://unctad.org/SearchCenter/Pages/Results.aspx?k=isds>

²¹See also : <http://investmentpolicyhub.unctad.org/IIA>

²² Eugenia Levine, Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third Party Participation p.202

²³ Katia Fach Gómez, Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for Public Interest p.524-525

²⁴ Emilie M. Hafner-Burton, Zachary C Steinert-Threlkeld and David G. Victor, Transparency of Investor-State Arbitration Transparency in Arbitration p.3

²⁵ Katia Fach Gómez p.524

third party participation in the proceedings. For example both, the U.S. Model BIT and the Canadian Model Foreign Investment and Promotion Agreement (“Model FIPA”) provide for transparent proceedings²⁶. In addition to the bilateral regimes, there are multilateral treaties containing substantive rules on foreign investment, such as the North American Free Trade Agreement (NAFTA) which addresses both matters of trade and investment, as well as sector-specific arrangements, such as the Energy Charter Treaty (ECT), that provide for investor-State arbitral proceedings²⁷. Again the level of transparency among these agreements varies. NAFTA was indeed an innovative agreement when concluded the text however is remarkably silent regarding transparency with the only reference being in Article 1137(4) which allows the investor of the host state to publish an award if they are a disputing party²⁸. Due to this fact the NAFTA Free Trade Commission (FTC) has played a key role in promoting transparency through the interpretation of NAFTA provisions²⁹ with recommendations that are binding for arbitral tribunals and reflect the general approach that they have already taken towards this direction in many cases³⁰. In regard to transparency, some of the most liberal provisions are contained in Dominican Republic-Central America Free Trade Agreement (DR-CAFTA). Incorporating the language of the U.S. model BIT, DR-CAFTA adopts a transparent and open process which allows third party participation by written submissions³¹. Furthermore, Article 10.21 requires tribunals to open proceedings to the public and make available all written submissions³² establishing a regime that promotes maximum openness compared to other multi-lateral frameworks.

The predominant rules in International Investment Arbitration

International investment agreements whether bilateral or multilateral usually give the discretion to the disputing parties to choose between a variety of institutional and ad-hoc arbitration rules. According to NAFTA Chapter 11³³ for example, investors can choose to conduct the proceedings under the institutional regime of the International Center for Settlement of Investment Disputes (ICSID) choosing ICSID Arbitration Rules (ICSID Rules)³⁴, ICSID Additional Facility Rules, or under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules)³⁵ if they choose for ad-hoc proceedings. The majority of BITs concluded, also provide access to arbitration under both ICSID and UNCITRAL Arbitration rules³⁶. Although most BITs provide for arbitration under ICSID it is not uncommon for some agreements to refer to

²⁶ Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration* p.1289

²⁷ Rudolf Dolzer and Christoph Schreuer, *Principals of International Investment Law* p.27-28

²⁸ Jeffrey T. Cook, *the evolution of investment state dispute resolution in NAFTA and CAFTA* p. 1103

²⁹ NAFTA Article 1131 (2)

³⁰ Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes: Adoption, Adaptation and NAFTA Leadership* p.1366

³¹ Jeffrey T. Cook. p.1107

³² DR-CAFTA Articles 10.21.(1) and 10.21(2)

³³ NAFTA Article 1120 (1)

³⁴ Available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf

³⁵ Available at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>

³⁶ Cristoffer Nyegaard Mollestad *See no Evil? Procedural Transparency in International Investment Law and Dispute Settlement* p.37

different institutional rules such as the Arbitration Rules of the International Chamber of Commerce (ICC)³⁷.

From the arbitration rules that were most commonly used so far ICSID Rules were the only established exclusively for Investor-State disputes³⁸ something that perhaps explains their popularity³⁹. On the other hand the UNCITRAL Rules have been drafted for addressing primarily commercial arbitration disputes between two private parties⁴⁰. It is thus not surprising that their transparency provisions are limited. The recently adopted UNCITRAL Rules on Transparency in Treaty-Based Investor-State arbitration (UNCITRAL Rules on Transparency) however are expected to change the landscape in International Investment Arbitration and are indeed of particular interest. Pursuant to Article 1(1), “the rules on Transparency apply to investor State arbitration initiated under the UNCITRAL Arbitration rules pursuant to a treaty ... concluded on or after the 1st of April 2014, unless the parties to the treaty have agreed otherwise”. However, according to 1(2), for Investor State arbitrations initiated pursuant to a treaty concluded before 1st of April 2014 there need to be an agreement of a) the disputing parties or b) the State Parties to the treaty after the 1st of April 2014 to their application. This may raise concerns that the scope of application will initially be very limited since the vast majority of BITs is concluded before this date. However the replacement of older investment treaties with newer ones will eventually limit the need for the parties to explicitly agree⁴¹. Furthermore, the recently adopted UNCITRAL convention on transparency in treaty-based investor-State arbitration aims to further extend the application of the UNCITRAL Rules on Transparency even for arbitrations conducted pursuant to a treaty concluded before 1st of April 2014⁴².

The different forms of transparency

In order to comprehend and distinguish all the different forms of transparency it is worth examining the various provisions of the most commonly used rules in investment arbitration during each stage of the arbitral proceedings. The need of the public to be informed of a dispute arises at the early stage of the initiation of arbitration proceedings. ICSID addresses the issue providing some basic information about its cases regarding the identification of the parties, date of registration, subject matter, constitution, and composition of the Tribunal on its website⁴³. Furthermore, according to Article 36 (3) of the ICSID Convention, requests for arbitration shall be registered by the Secretary General unless the dispute is manifestly

³⁷ Eugenia Levine p.203

³⁸ ICSID convention Art.25 (1)

³⁹ United Nations Conference on Trade and Development (UNCTAD) IIA Issues Note Recent Developments in Investor State Dispute Settlement p.4 available at: http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf

⁴⁰ Lise Johnson and Nathalie Bernasconi-Osterwalder, New UNCITRAL Rules on Transparency : Application, Content, and Next Steps p.6

⁴¹ Jan Heiner Nedden, Friedrich Rosenfeld p.48-49

⁴² form the combined wording of Articles 1 and 2 of the UNCITRAL convention on transparency in treaty-based investor-State arbitration available at: http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html

⁴³Information available at:

<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>

outside the jurisdiction of the center and the registers shall be open for inspection by any person giving a public character to the to the ISCID case register⁴⁴. The ISCID register is an important feature of ICSID that provides a high level of transparency, compared to other arbitration regimes that do not provide any registry services at all⁴⁵. The new UNCITRAL Transparency Rules also contain a provision on the commencement of arbitral proceedings, in Article 2: “Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 8 ... the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made”. The provision which was the result of a compromise requires a prompt disclosure of some basic facts of the dispute and the limited scope of it was justified on the ground that a potential publication of the notice of arbitration itself before the constitution of the arbitral tribunal could create problems regarding issues of protected or confidential information⁴⁶. Nevertheless, the introduction of registration mechanism is a significant step towards increased awareness for the disputes resolved under the UNCITRAL Arbitration Rules.

The next layer of transparency concerns the publication of documents that are used in the arbitral proceedings. The ICSID Arbitration rules are silent regarding the disclosure of documents during the written procedure⁴⁷. In the absence of relevant provisions arbitral tribunals have dealt with the issue in many cases. In the *Biwater v United Republic of Tanzania* case for example the tribunal tried to strike a balance between the notions of transparency and confidentiality, recognizing that “... there is no provision imposing a general duty of confidentiality in ISCID arbitration whether in the ICSID Convention, any of the applicable rules or otherwise. Equally, however there is no provision imposing a general duty of transparency or non-confidentiality in any of these sources”⁴⁸. This statement was in line with a number of earlier decisions such as *Amco*, *Metaclad*, *S. D. Myers* and *Loewen* that denied the concept of an inherent confidentiality principal in treaty based arbitration⁴⁹. Furthermore, the *Biwater* tribunal distinguished certain types of documents such as the minutes of the hearings, the pleadings by the parties and decisions of the tribunal other than the final award⁵⁰. From this perspective, the tribunals decision was considered innovative since it contained a specifically tailored solution on how much document transparency seemed appropriate, based on the circumstances of the specific dispute⁵¹. It did conclude however, that in the absence of any agreement between them, the parties should refrain from disclosing to third parties these documents “which might undermine the procedural integrity ... and/or might aggravate or exacerbate the dispute”⁵² considering that the risks of disrupting the procedural integrity of the process will frequently outweigh the interest of publication. The *Biwater* transparency approach was indeed influential on later tribunals although it has

⁴⁴ ICSID Administrative Financial Regulations, regulation 23 (2)

⁴⁵ Cristoffer Nyegaard Mollestad p.80

⁴⁶ Lise Johnson and Nathalie Bernasconi-Osterwalder p.13

⁴⁷ See also ISCID Arbitration Rule 31

⁴⁸ Procedural order n.3 par.121

⁴⁹ Cristoffer Nyegaard Mollestad p.87-88

⁵⁰ *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* ICSID Case No ARB/05/22 Procedural order n.3 par.151-161

⁵¹ Christina Knahr, August Reinisch, *Transparency vs Confidentiality in International Investment Arbitration* p.115-116

⁵² Procedural order no 3 par.163

been criticized for placing strict restrictions on the disclosure of documents and relying for its decision in the principal of “procedural integrity” without defining the term⁵³. Hopefully however, it didn’t hold tribunals in a few cases to follow a more liberal approach on the issue of document transparency.⁵⁴

Similar to the ICSID rules, UNCITRAL Arbitration Rules do not contain any specific provision on the publicity of documents. The UNCITRAL Rules on Transparency however, address the issue for the first time, establishing in Article 3, three distinct categories of documents⁵⁵. The first category consists of documents that shall be made available irrespective of a request and includes documents such as “the notice of arbitration, the response to the notice of arbitration, the statements of claim and defense and any further written statements or written submissions by any disputing party ... any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings ... and most importantly orders, decisions and awards of the arbitral tribunal”. The second category involves documents that shall be made available to the public only upon a request by any person to the arbitral tribunal, namely “expert reports and witness statements, exclusive of the exhibits”. The last category leaves to the tribunal the discretion to decide “on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal” not falling within the first two categories. “This may include, for example, making such documents available at a specified site”. The new provision is certainly on the right direction granting access to a wide range of documents. It also provides the possibility for further transparency in case of investment treaties that go beyond the disclosure requirements of Article 3 pursuant to article 1(7) that expressly notes that in case any broader disclosure requirements in the governing treaty will prevail⁵⁶.

Another crucial transparency aspect is the presence of persons other than the parties during the oral hearings. For many years the prevailing rule has been that of Art. 28 (3) of the UNCITRAL Arbitration Rules according to which, hearings shall be held "in camera"(in chambers) unless the parties agree otherwise. ICSID Arbitration Rules contained a similar provision that was subject to the 2006 revision⁵⁷. Thus the amended ICSID Arbitration Rule 32(2), provides that unless either party objects, “the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties ... 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”. Since the rules on the issue of publicity of the hearings are rather strict the tribunals in most cases respected the agreement of the parties to keep hearings private. According to the tribunal’s decision In *Methanex* case, “The phrase "in camera" is clearly intended to exclude members of the public, i.e. non-party third persons such as the Petitioners. ... as a result of article 25 (4)⁵⁸, hearings are to be held in camera unless both parties consent otherwise. The Claimant has given no such content. The tribunal must therefore apply Article 25 (4) ... it

⁵³ Christina Knahr, August Reinisch p.106,Cristoffer Nyegaard Mollestad p.94-95

⁵⁴ See supra note 93

⁵⁵ Article 3(1),(2) and (3) respectively of the UNCITRAL Rules on Transparency

⁵⁶ Lise Johnson and Nathalie Bernasconi-Osterwalder p.15

⁵⁷ article 32, par.2 gave the tribunal the authority to decide the issue of non-party access to the hearings , but only with the consent of the parties

⁵⁸ now Article 28 (3)

follows that the tribunal must reject the petitioners request to attend oral hearings of the arbitration”⁵⁹. Similarly tribunals denied the request of third parties to attend oral hearings in a number of subsequent cases⁶⁰. Despite the fact that the provisions so far have left the matter to the discretion disputing parties creating a rather rigid system, recently there are notable steps towards a level of openness during the oral proceedings⁶¹. In 2010 *Pac Rim LLC v Republic of El Salvador*⁶² was the first case where the hearing was webcasted live giving the opportunity to the public to watch the proceedings in real-time on the basis of DR-CAFTA Article 10.21 (2) which provides for mandatory public hearings. The case was followed by a number of other Latin American cases⁶³ that had their hearings webcasted creating a positive precedent.

Furthermore, the UNCITRAL Rules on Transparency also address the matter, providing in article 6 (1) that the hearings for the presentation of evidence or for oral argument shall be public subject to the two exceptions following in paragraphs 2 and 3 according to which “where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection and ..., the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible”. It is thus evident that the new Rules approach to the publicity of oral proceedings is radically different from the “in camera” rule that has prevailed so far in most arbitration regimes⁶⁴. As correctly argued, the opening of the physical proceedings can be beneficial for the overall legitimacy of the system since it signifies that neither the host State nor the tribunal has anything to hide something that will eventually be useful for the investor as well⁶⁵. Thus, despite the possibility of holding the hearings in private based on the exceptions of the provision, the new rule is certainly on the right direction.

At the end of the arbitration proceedings comes the rendering of the award one of the procedural stages where transparency is mostly needed. ICSID may publish an award only when both parties give their consent, and publication is made either on the ICSID website⁶⁶ or in ICSID Review -Foreign Investment Law Journal (FILJ)⁶⁷. More specifically, Article 48(5) of the ICSID Convention provides that: “The Centre shall not publish the award without the consent of the parties”. This prohibition, which is addressed to the Centre itself only, is

⁵⁹ Methanex decision of the tribunal on petitions from third persons to intervene as amici curiae par.41-42

⁶⁰ Biwater procedural order no.5 par.69-72, Suez-Vivendi order in response to a petition for transparency and participation as amicus curiae par.4-7

⁶¹ Cristoffer Nyegaard Mollestad p.103-104

⁶² *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No. ARB/09/12

⁶³ see also, *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

⁶⁴ see also ICC Rules Ar. 26 (3)

⁶⁵ Jack J. Coe, Jr. p.1361

⁶⁶ Information available at:

<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=OnlineAward>

⁶⁷ Rodrigo Polanco Lazo, *International Arbitration in Times of Change: Fairness and Transparency in Investor State Disputes* p.594

repeated in Rule 48(4) of the ICSID Arbitration Rules and extends to ICSID arbitrators through declarations of confidentiality as provided for in Rule 6(2) of the ICSID Arbitration Rules⁶⁸. Under Article 34(5) of the UNCITRAL Arbitration Rules, an award may be publicized “only with the consent of the parties” as well. The same confidentiality requirement constrains parties under other institutional rules of arbitration⁶⁹. In practice, despite the ever increasing pressure for transparency and the institutional reform towards this direction, there is a large percentage of cases where the parties choose not to disclose the outcome⁷⁰.

The UNCITRAL Rules on Transparency rules going much further include the awards at the first category of documents. Thus, awards under the provision of Article 3(1) should be made available to the public subject to the exception of Article 7. The significance of the new provision becomes evident by examining the perceived advantages. Publicity of final awards contributes to the development of predictability for both States and Investors by establishing a body of case law and at the same time satisfies public interest by making available the outcome of the dispute resolution. Greater publication of awards is the best way to increase popular acceptance and the overall legitimacy of the arbitration system⁷¹. Publication of awards also prevents inconsistent judgments that may be rare but when they do occur they raise doubts about the reliability and the authority of the entire arbitral system⁷². As successfully put “much of the of the value of the doctrine of the rule of law lies in consistency ... Social and economic stability, as well as respect for the law requires that parties have the ability to know the likely legal consequences of what they do in advance, at the time they act”⁷³.

Amicus curiae

In investor-State disputes, it has been increasingly common for third or non-disputing parties to ask to participate in the arbitration proceedings as “amici curiae”, a Latin term that could be broadly translated as “friend of the court”⁷⁴. Generally speaking, the basis on which amicus curiae participation is justified, is that these friends of the court are in a position to provide the court or tribunal their special perspective or expertise in relation to the dispute, the arbitral process could benefit from being perceived as more open or transparent and the proceedings they are interested in participating to, concern issues of public interest⁷⁵.

⁶⁸ Christina Knahr, August.Reinisch p.99

⁶⁹ Permanent Court of Arbitration Rules (PCA) 34(5), London Court of International Arbitration Rules (LCIA) 30,Stockholm Chamber of Commerce Rules (SCC) 46

⁷⁰ Emilie M. Hafner-Burton, Zachary C Steinert-Threlkeld and David G. Victor p.4-5

⁷¹ Joshua D. H. Karton, a conflict of interests-seeking a way forward on publication of international arbitral awards p. 472

⁷² Ibid. p.465

⁷³ Ibid. p.461 quotation from D.A. Ridgeway

⁷⁴ Eugenia Levine p.206-207

⁷⁵ Boris Kasolowsky and Natalie Harvey, Amici Curiae in Investment Treaty Arbitration: Authority and Procedural Fairness p.1

The provisions that allow amicus participation

Historically, amici curiae asked to intervene in State court proceedings through written submissions. These “amicus submissions” aim to assist the court by broadening its perspective on controversial issues and providing relevant information on the dispute⁷⁶. In investment arbitration however, the issue of amicus curiae submissions was not addressed in early institutional rules. In the absence of any specific provisions, arbitral tribunals have interpreted their powers to encompass the authority to allow amicus submissions under certain conditions; *Methanex* became the first case in which the arbitral tribunal allowed four petitioners to file written submissions as amici curiae⁷⁷. The tribunal based its decision on the discretion provided in article 15 (1)⁷⁸ of the UNCITRAL Arbitration Rules⁷⁹ which “grants the arbitral tribunal broad discretion as to the manner in which arbitration proceedings are going to be conducted and is intended to provide the broadest procedural flexibility within fundamental safeguards”⁸⁰. Similarly the tribunal in the UPS case found it had authority to receive amicus briefs pursuant to article 15 (1)⁸¹. A few years later, in the *Suez-Vivendi* Arbitration the ICISID tribunal held that it “it can exercise its powers under Article 44 (of the ICSID Convention) in such a way to minimize the additional burden on both parties ... the tribunal unanimously concludes that article 44 grants it the power to admit amicus curiae submissions from suitable nonparties in appropriate cases”⁸²

Since 10 April 2006, the amended ICSID Arbitration Rules⁸³ have explicitly given tribunals the power to allow for submissions of non-disputing parties. Thus, according to ICSID Arbitration rule 37(2): “After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute ... 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 also 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.”

⁷⁶ Katia Fach Gómez p.516-517

⁷⁷ Epaminontas E.Triantafilou p.39

⁷⁸ now Article 17(1)

⁷⁹ *Methanex* decision of the tribunal on petitions of third parties to intervene as Amici curiae of 15 January 2001 par.53

⁸⁰ *Ibid.* par.26-27

⁸¹ *UPS V Canada* decision on Petitions for Intervention and Participation as Amici Curiae of 17 October 2001

⁸² *Suez-Vivendi* Order in Response to a Petition for Transparency and Participation as Amicus Curiae of May 19, 2005 par. 15-16

⁸³ See also the NAFTA Free Trade Commission(FTC) Statement on non-disputing party participation, 7 October 2003

Rule 37 (2) has been relied in a number of cases including the influential *Biwater* dispute. In its decision, the tribunal accepted the petitioners' submissions noting "that it may benefit from a written submission by the Petitioners, and that allowing for the making of such submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal's mandate, and in securing wider confidence in the arbitral process itself"⁸⁴.

The new UNCITRAL Rules on Transparency could not omit the inclusion of an amicus provision. Thus according to Article 4(3) "the arbitral tribunal in determining whether to allow such a submission such consider among other factors:

- (a) Whether the third person has a significant interest in the arbitral proceedings; and
- (b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties"

Based on the wording of both texts, the requirement of a "significant interest" of the third person in the arbitral proceedings is of particular importance especially in relation to the general concept of public interest which surprisingly is not included as condition to accept amicus submissions⁸⁵. Of course as held in many cases, the public interest that is entailed in a dispute suffices to justify third party participation in the form of amicus submissions. Traditionally petitioners in most investment disputes, where non-local actors most commonly Non Governmental Organizations (NGOs) that have been interested in certain general topics such as environmental protection, business and human rights without being related to any specific community⁸⁶.

However this does not prevent, local or regional actors that may represent those who are directly affected by the dispute, but they are not primarily intended to extend the objectives of public interest elsewhere to file amicus submissions. Thus for these petitioners the requirement of a significant interest is essential⁸⁷. A number of cases highlight this diversification of entities that are granted amicus curiae status. For example, in the NAFTA dispute *Glamis Gold Ltd. v. United States of America* the tribunal expanded the scope of third party participation beyond civil society groups. Although the tribunal did not allow any third parties to actively participate in the case the Quechan Indian Nation appeared to have represented a more concrete interest in the outcome of the proceedings than the NGOs that had intervened in previous disputes⁸⁸ leading the tribunal to accept its submission⁸⁹. The trend was also confirmed in the recent ISCID cases *AES and Electrabel vs Hungary*, where the

⁸⁴ Biwater procedural order no5 par.50

⁸⁵ although the UNCITRAL Rules on Transparency rules provide in Art 1.4 that "arbitral tribunals shall exercise their discretionary powers while taking into account a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and b)The disputing parties' interest in a fair and efficient resolution of their dispute"

⁸⁶ Christian Schlieman, Requirements for Amicus Curiae Participation in International Investment Arbitration p. 374

⁸⁷ Ibid.

⁸⁸ Eugenia Levine p. 213

⁸⁹ *Glamis Gold Ltd. v the United States of America* decision on application and submission by Quechan Indian Nation, September 16 2005 par.13

arbitral tribunals allowed the European Commission to file written submissions⁹⁰ on the basis of enforcement of EU competition due “to alleged breaches by Hungary of commitments contained in long term power purchase agreements (PPAs) between AES and Electrabel and a Hungarian entity...”⁹¹.

Amicus submissions have been increasingly popular since they became accepted in many investment cases by arbitral tribunals something that is also reflected in the amendment of the main institutional Rules. However, despite the increased tolerance the quantity and particularly the quality of amicus participation had been limited. First of all, there is a significant number of requests to participate as amici curiae that have been outright rejected⁹². Most importantly, despite the relative success in accepting amicus submissions other aspects of third party participation are significantly underdeveloped. For example the revision of the ICSID Arbitration Rules which introduced Rule 37(2), did not deal with the amicus curiae’s access to procedural documents. Therefore, in most cases tribunals following a similar approach to general document transparency appeared negative towards the relevant requests by third parties. In *Suez-Vivendi*, the tribunal held that as a general proposition, an amicus curiae must have sufficient information on the subject matter of the dispute to provide “perspectives, expertise and arguments” which are pertinent and thus likely to be of assistance to the Tribunal ... a function that they can fully carry out without access to the record⁹³. Similarly in *Biwater* the tribunal denied the application for access to documents⁹⁴, adhered to the arguments of the first procedural order. The exceptions to this overall trend were quite limited. In the case *Piero Foresti v. South Africa* the amici were allowed not only to file written submissions but also to have access to key case materials⁹⁵. This example however does not characterize the general situation in regard to transparency. On the positive side, the new UNCITRAL Rules on Transparency along with a possible further revision of the ICSID rules will create a suitable framework for tribunals to adopt a more flexible conduct towards third party participation during all parts of the arbitral proceedings.

Some concerns about transparency in international investment arbitration

It can be concluded that transparency in International investment arbitration is generally a good thing for the public. Broadly speaking, the main argument would be that it eases concerns on disputes that involve public interest because of their very nature. Furthermore, it dispels public fear about the secretive nature of arbitration by enhancing the overall

⁹⁰ AES Summit Generation Limited & Another v. Republic of Hungary, ICSID case No. ARB/07/22, Award, 23 Sep. 2010, para. 8.2, Electrabel S.A. v. Republic of Hungary, ICSID case No. ARB/07/19, para. 1.18

⁹¹ Ibid. supra note 62

⁹² Lucas Bastin, Amici Curiae in Investor-State Arbitration: Eight recent trends p.9-10

⁹³ Suez-Vivendi order in response to a petition by five non-governmental organizations for permission to make amicus curiae submission 12 February 2007 par.24-25

⁹⁴ Biwater procedural order no5 par 66-68

⁹⁵ Piero Foresti, Laura de Carli and others v. Republic of South Africa ICSID Case No ARB(AF)/07/01 Letter from ICSID regarding non-disputing parties, 5 October 2009

legitimacy of the arbitration system⁹⁶. Third party participation can also assist the arbitral tribunal in resolving the dispute since interested third parties can provide their knowledge, expertise or different perspective to the matter in question⁹⁷. In the long term, it can even prove beneficial for the economy of the host state; promoting the public's confidence in a system that handles rather costly disputes by making investor-State proceedings accessible to the public improves the country's international reputation and eventually makes it desirable for foreign investments⁹⁸.

There are however considerable disadvantages especially for the side of investors as parties to a dispute. On a practical level it is argued that there are justifiable concerns on the increase of costs and delays of the arbitration process that may prove damaging for the parties to the dispute⁹⁹. Moreover transparency contradicts with the traditional foundations of arbitration such as the consensual nature of arbitration and most importantly the principals of privacy and confidentiality. Confidentiality in particular, is considered to be one of the hallmarks of arbitration and among the main reasons why private parties choose commercial arbitration instead of state court proceedings¹⁰⁰. This is due to the fact that companies prefer to protect their business secrets and public image from possible facts revealed to the general public in the litigation proceedings that could prove harmful¹⁰¹. As a consequence most commercial arbitration rules contain provisions protecting the confidential nature of the proceedings that may range from broad confidentiality obligations to more restrictive provisions¹⁰². For example, according to Article 22.3 of the ICC Arbitration Rules "upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings ... and may take measures for protecting trade secrets and confidential information". Privacy which concerns the exclusion of third parties from the hearings is also the default rule under the majority of institutional rules in commercial arbitration¹⁰³.

It could be argued that most of the advantages of confidentiality such as the protection of business secrets as well as governmental secrets are equally applicable to investor-State arbitration¹⁰⁴. Furthermore according to many commentators, confidentiality during proceedings could contribute to the de-politicization of investment disputes, and it might equally increase the possibility of a dispute settlement between the investor and the host-State, promoting the establishment of a long-term relationship which negative publicity could damage¹⁰⁵. So why do we have to allow increased transparency in investor-State disputes since the investors interests are undermined? Of course a simple answer to that question would be that transparency is necessary because of the public interest that investment disputes involve with all the advantages that stem from it for society and the arbitration system itself. However the answer to that question is not that easy. As successfully put "Confidentiality and

⁹⁶ Kyla Tienhaara, *Third Party Participation in Investment-Environment Issues: Recent Developments* p.22

⁹⁷ *Ibid.*

⁹⁸ Epaminontas E.Triantafilou p.38

⁹⁹ Katia Fach Gómez p.553, Kyla Tienhaara p.19

¹⁰⁰ Christina Knahr, August Reinisch p.109

¹⁰¹ *Ibid.*

¹⁰² Jan Heiner Nedden Friedrich Rosenfeld p.54

¹⁰³ *Ibid.* p.56

¹⁰⁴ Christina Knahr, August Reinisch p.110

¹⁰⁵ *Ibid.*, Kyla Tienhaara p.20

transparency are competing values which need to be accommodated and adjusted one to the other in specific cases”¹⁰⁶. As seen in detail above arbitral tribunals have tried to keep the same distance from the two values. Although they did recognize “an overall trend in this field towards transparency”¹⁰⁷, they came in most cases in restrictive decisions. Therefore, even though the overall advantages of transparency outweigh those of confidentiality, it is difficult if not impossible to achieve a perfectly balanced situation where both principals will be of equal gravity. After all, it is part of the arbitrators’ difficult task to assess the values that they should give priority to in each individual case, based on the particular legal and factual background.

III Transparency under CETA and TTIP

CETA and TTIP the new framework in International Investment Arbitration

As aforementioned, bilateral and multilateral investment treaties are the cornerstone of the international investment arbitration system. In a European level however, EU member States are no longer able to conclude investment treaties whether BITs or FTAs with third countries since the treaty of Lisbon¹⁰⁸ transferred, the competence for concluding agreements relating to foreign investment to the European Union. Within this new framework the EU initiated negotiations on the two most ambitious free trade and investment agreements it has ever enter into, the Comprehensive Economic and Trade Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP) with two of the most advanced economies in the world, Canada and the US respectively. The significance of both agreements is evident by looking at the figures of these economies. The EU and US together account for over half of the world’s Gross Domestic Product¹⁰⁹ while the EU’s overall trade in goods and services with the US has reached the amount of EUR 800 billion and with Canada that of EUR 88 billion¹¹⁰. Both agreements will be of immense size and like other FTAs they will primarily include provisions on trade with protection of investment being addressed in specific chapters.

CETA: By October 2014, negotiations on the CETA, have come to an end after 5-year talks between Canada and the EU¹¹¹. CETA will cover a broad range of trade issues including tariff elimination in industrial and agricultural products, prohibitions on export duties, rules on product origin, liberalization of services and investment, government procurement, intellectual property rights e.t.c.¹¹². Regarding investment provisions in particular according to its drafters, CETA introduces important innovations, ensuring a high level of investment protection while preserving the EU and Canada’s right to regulate on significant issues of

¹⁰⁶ Florentino P. Feliciano quoted in Cristoffer Nyegaard Mollestad p.85

¹⁰⁷ Biwater Procedural order no.3 par. 122

¹⁰⁸ Art. 207(3) Treaty on the Functioning of the European Union (TFEU)

¹⁰⁹ Christian Tietje and Freya Baetens, the impact of Investor-State Dispute Settlement in the Transatlantic Trade and Investment Partnership p.11

¹¹⁰ Maya Rostowska, Trade Agreements across the Atlantic: What Lessons form CETA for TTIP? p.3

¹¹¹ European Commission MEMO, 26 September 2014 available at: http://europa.eu/rapid/press-release_MEMO-14-542_en.htm

¹¹² CETA summary on the final negotiating results available at: <http://ec.europa.eu/trade/policy/in-focus/ceta/>

public policy, such as the protection of health, safety or the environment¹¹³. Thus, CETA is expected to present clearer and more precise investment protection standards including the rules that the arbitration tribunals will apply and new rules on the conduct of procedures in arbitration tribunals¹¹⁴.

TTIP: Unlike CETA, negotiations on the TTIP are still under way with both parties intention to reach an agreement within the next few years covering many parts of the economy including manufacture, services and agriculture¹¹⁵. According to the negotiators, the main goal of TTIP is to increase economic growth by removing trade barriers in order to boost and facilitate the buying and selling of goods and services as well as the investment in these two major economies¹¹⁶. The three main elements of TTIP are the improvement of market access, by removing custom duties on goods and restrictions on services; improved regulatory coherence and cooperation by dismantling regulatory and bureaucratic barriers and improved cooperation on setting international standards¹¹⁷. In regard to investment provisions, similarly to the CETA approach TTIP is expected to introduce innovative provisions that clarify the meaning of the main investment protection standards such as fair and equitable treatment and indirect expropriation¹¹⁸.

The criticism

Both CETA and TTIP are without doubt ambitious agreements with far reaching consequences for the economies of the State-parties but also for their citizens. From the beginning of the negotiating process, mounting criticism and concerns have been raised by various social and economic actors including civil society groups, private industry representatives even government officials¹¹⁹. At this point however, there should be a clear distinction. While part of the criticism focuses on the lack of transparency during the stage of the negotiations the main source of concern relates to the substantive provisions of both texts and in particular the inclusion or not of an Investor to State Dispute Settlement mechanism (ISDS). Then the problem of how much level of transparency will exist during the arbitration proceedings arises, since the presence of an ISDS system is obviously the main reason why transparency is needed after all. Each of these issues is of particular significance with a vast number of arguments and counter arguments from both the side of the drafters and that of the critics that will be briefly examined.

¹¹³ Investment provisions in CETA p.1, available at: <http://ec.europa.eu/trade/policy/in-focus/ceta/>

¹¹⁴ Ibid.

¹¹⁵ <http://ec.europa.eu/trade/policy/in-focus/ttip/questions-and-answers/>

¹¹⁶ The Transatlantic Trade and Investment Partnership TTIP explained p.1, available at: <http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/>

¹¹⁷ Ibid.

¹¹⁸ Public consultation on modalities for investment protection and ISDS in TTIP p.2 available at http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179

¹¹⁹ Christian Tietje, Freya Baetens p.7

Transparency during the negotiations

The stage of the negotiations for both agreements has become subject to strong public scrutiny and raised a significant level of concern. Although negotiations on CETA have come to an end, accusations of poor transparency towards EU and Canadian officials have shown that making some basic information available is not sufficient to ease the public's concern something that is particularly evident in TTIP's negotiations which are currently under way¹²⁰. Despite the efforts from Brussels to raise awareness of the new agreement, since the beginning of TTIP talks, The European Commission has received strong criticism for the lack of transparency during the negotiations by a considerable number of civil society groups and Members of the European Parliament (MEPs). Concerns which have been raised relate to the non-disclosure of negotiation documents and positions to the public, the limited access to negotiation documents provided to Parliaments and EU member states as well as the excessive secrecy around meetings in which TTIP was discussed, with persons that are characterized as lobbyists¹²¹. In response to that criticism, the EU Commission has promised to take additional transparency measures such as more extensive access to TTIP documents by making available all the negotiating texts that the commissions shares with Member states and the Parliament as well as common negotiating documents with the explicit agreement of the US¹²². It also committed for further transparency measures such as, a revision of the classification of trade information, provision of broad access to MEPs, e.t.c.¹²³

ISDS concerns

Investor State Dispute Settlement is nothing more than the legal instrument that allows a foreign investor to bring claims before an arbitral tribunal and not in front of the national courts of the state hosting the investment, compromising the standard feature of all the 3.000 investment agreements that currently exist¹²⁴. As earlier noted, Investment arbitration has always been the source of considerable public concern. Thus it is not surprising, that the ISDS mechanism envisaged to be included in TTIP has already triggered an intense public debate since Several NGOs and parties of national Parliaments have questioned the need for including an investment protection chapter with ISDS rules in the TTIP¹²⁵. Similarly CETA which already includes an ISDS mechanism has been strongly criticized by NGOs and commentators for giving to investors the opportunity to bypass domestic courts and address directly to arbitral tribunals for disputes that concern health, environmental and financial issues that should be domestically safeguarded¹²⁶. Concerns about the democratic legitimacy

¹²⁰ Maya Rostowska p.3

¹²¹ response of Corporate Europe Observatory to EU ombudsman p.1 available at: <http://corporateeurope.org/international-trade/2014/10/ttip-talks-ceo-response-ombudsman-consultation-transparency>

¹²² communication to the commission concerning transparency in TTIP negotiation, 25.11.2014 available at : <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1205>

¹²³ Ibid.

¹²⁴ public consultation on modalities and investment protection and ISDS in TTIP, p.9 available at : http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179

¹²⁵ Christian Tietje, Freya Baetens p.14-15

¹²⁶ See also Pia Eberhardt, Blair Redlin, Cecile Toubeau, Trading away democracy-how CETA's Investor protection rules threaten the public good in Canada and the EU p.4 available at: <http://corporateeurope.org/international-trade/2014/11/ceta-trading-away-democracy>

of the system are once again at the center of the public dialogue. Thus opponents argue that with investor-State arbitration, the arbitrators have the power to decide what a sovereign state should do and what should be the consequences if it is found to have acted unlawfully¹²⁷ something that they deem unacceptable in agreements with the significance of CETA and TTIP. Another recent argument against investment arbitration is that ISDS prevents governments from exercising their sovereignty in fear of costly investment arbitration awards causing a “regulatory chill”¹²⁸. On the other hand, according to the EU, an ISDS system is necessary to protect investors against unlawful expropriation by governments since even in countries with strong legal systems it is possible that foreign investors will not be adequately protected¹²⁹.

Transparency in the arbitration proceedings

The dispute over the inclusion or not of ISDS is fundamental, it goes however beyond the scope of this analysis since it requires a thorough examination of all the advantages and disadvantages of both investment arbitration and State court proceedings. Instead it would be more relevant to focus on the available provisions that will guarantee transparency in the arbitration proceedings, assuming that both CETA and TTIP will eventually be ratified without any crucial changes especially regarding the inclusion of an ISDS mechanism. In the consolidated CETA text¹³⁰ transparency in ISDS proceedings is safeguarded with the incorporation of the UNCITRAL Transparency rules¹³¹ which indeed provide for an enhanced transparency in all levels of the arbitral proceedings. On the other hand TTIPs provisions are not yet available to the public. The commission did however promise to take a positive approach towards transparency in TTIP ISDS system. Recognizing the importance of transparency it ensures that in ISDS cases brought under TTIP, all documents will be publicly available, hearings will be open to the public and interested parties from civil society groups will be able to file amicus submissions in order to make their views and arguments known to the ISDS tribunal¹³². The commission taking a step forward has also expressed the intention to include the UNCITRAL Transparency rules into TTIP as well¹³³. Therefore, since so far only CETA provisions have leaked to the public, it is worth examining their main features in relation to the UNCITRAL Transparency rules (Rules on Transparency) that are expected to play a key role in both agreements.

Regarding the scope of application, CETA Article X33 (1) provides that “the UNCITRAL Transparency Rules shall apply to the disclosure of information to the public concerning disputes under this Section (Section 6. Investor-State Dispute Settlement) as modified by this Chapter (Chapter 10. Investment)”. This seems to include not only arbitration initiated under

¹²⁷ Gus Van Harten, comments on the European Commission’s approach in TTIP and CETA p.31

¹²⁸ Christian Tietje, Freya Baetens p.40

¹²⁹ Public consultation on modalities for investment protection and ISDS in TTIP p.9 available at : <http://ec.europa.eu/trade/policy/in-focus/ttip/questions-and-answers/>

¹³⁰ available at <http://ec.europa.eu/trade/policy/in-focus/ceta/>

¹³¹ Article X33 (1)

¹³² Public consultation on modalities for investment protection and ISDS in TTIP Question 6 p.10-11 available at http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179

¹³³ Ibid.

the UNCITRAL Arbitration rules but also other institutional rules or ad-hoc proceedings¹³⁴ since the proposed text gives the possibility to the parties to submit a claim under the arbitration rules of the ISCID convention or any other rules on agreement of the disputing parties¹³⁵. The draft provisions provide for an extensive transparency in all stages of the arbitral proceedings that surpass in some aspects even the UNCITRAL Rules on Transparency. First of all, CETA gives the possibility of disclosure of information at a stage prior to the constitution of the arbitral tribunal. Thus according to Article X33 (4) Canada or the European Union depending on the case, “shall make publicly available in a timely manner relevant documents ... subject to the exception of confidential or protected information. Such documents may be available by communication to the repository”. Furthermore the proposed CETA Provision of Article x33 (2) requires an extensive disclosure of procedural documents that is even broader from the UNCITRAL Rules on Transparency, since “the request for consultations, the notice requesting a determination of the respondent, the notice of determination of the respondent, the agreement to mediate, the notice of intent to challenge, the decision on an arbitrator challenge and the request for consolidation” are included in the first category of documents¹³⁶. It also provides that “Exhibits shall be included in the list of documents mentioned in Article 3(2) of the UNCITRAL Transparency Rules X33 (3)”. Finally, the CETA transparency provision in paragraph 5 also adopts the approach of hearings open to the public subject to the logistical arrangements exception and the protection of confidential or protected information¹³⁷.

In addition, according to paragraph 6 of Article X33: “Nothing in this Chapter requires a respondent to withhold from the public information required to be disclosed by its laws (the law of the respondent State). The respondent should endeavor to apply such laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected”. In the absence of any further details on what information could be considered protected or confidential, tribunals will most likely apply Article 7(2) of the UNCITRAL Rules on Transparency, which includes four potentially overlapping categories of information that are characterized as confidential or protected, namely:

- (a) Confidential business information;
- (b) Information that is protected against being made available to the public under the treaty;
- (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or
- (d) Information the disclosure of which would impede law enforcement

Whether and what information will fall under the exceptions will be an issue to be decided on a case-by-case basis based on the nature of the information and the applicable law¹³⁸. The

¹³⁴ see also article 1 (9) of the UNCITRAL Rules on Transparency

¹³⁵ CETA Article X22

¹³⁶ Article 3(1) of the UNCITRAL Rules on Transparency

¹³⁷ Similarly to the exceptions of Article 6(2), (3) of the UNCITRAL Rules on Transparency

¹³⁸ Lise Johnson and Nathalie Bernasconi-Osterwalder p.22

rules also leave it up to the tribunal to determine how parties and non parties should proceed when designating information as confidential or protected¹³⁹. Due to this wide margin of discretion, commentators are concerned that some of these exceptions especially this of “confidential or business information” will be often invoked in practice although they are not clearly defined by the provisions¹⁴⁰. The same could be said about the other exceptions of article 7¹⁴¹ which although are not included in CETA X33 (6) it is possible that they will be a source of uncertainty as part of the general application of the UNCITRAL Rules on Transparency in CETA and TTIP. For instance Article 7(5) stipulates that “Nothing in these Rules requires a respondent State (the EU or the US) to make available to the public information the disclosure of which it considers to be contrary to its essential security interests” without however making clear who and how will strike the balance between national security interests and transparency.

Furthermore, concerns can be raised about paragraph (6) of the same article, since it provides a further exception : “Information shall not be made available to the public ... where the information, if made available to the public, would jeopardize the integrity of the arbitral process as determined pursuant to paragraph 7” which holds that “the arbitral tribunal may, on its own initiative or upon the application of a disputing party ... take appropriate measures to restrain or delay the publication of information where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties or members of the arbitral tribunal, or in comparably exceptional circumstances”. It is argued that Article 7(7) of the UNCITRAL Rules on Transparency would allow ISDS arbitrators to apply analogy to enlarge the list of exceptions contained therein based on the expression “or in comparably exceptional circumstances”. Therefore according to critics, the expression should be excluded from possible application by the drafters¹⁴². These concerns can be justified to a large extent since some of the exceptions are based on notions that are not clearly defined and could be often invoked during the proceedings by the parties to the dispute, third persons or even by the arbitral tribunal “proprio motu”, without ever having being invoked by the parties¹⁴³. After all, it should be acknowledged, that the *Biwater* tribunal received strong criticism for placing strict restrictions to document transparency based on the vague notions of “procedural integrity” and “non aggravation non exacerbation of the dispute”¹⁴⁴. These considerations should be taken into account form the drafters of CETA and TTIP in order to succeed in concluding two trade and investment agreements that will ensure maximum transparency in the proceedings while safeguarding a level of protection for investors.

¹³⁹ Ibid.

¹⁴⁰ Christian Tietje, Freya Baetens p.107

¹⁴¹ Particularly these of Article 7(5), 7(6), 7(7) UNCITRAL Rules on Trabsparency

¹⁴² European Digital Rights response to ISDS consultation p10-11 available at : http://eu-secretdeals.info/upload/2014/07/EDRi_response_ISDS_Consultation.pdf

¹⁴³ Christian Tietje, Freya Baetens p.108

¹⁴⁴ See supra note 49

IV Conclusion

It is beyond any doubt, that in the field of the international investment system the transparency movement has gained increasing popularity and has indeed been successful in some key issues. NGOs and civil society groups have achieved more participation rights in international investment arbitration proceedings especially in the form of acceptance of amicus curiae submissions something that is reflected in the amendment of ISCID Arbitration Rules, the adoption of the new UNCITRAL Rules on Transparency as well as a growing body of case law. Most analysts however agree that the level of third party participation in the proceedings is still limited. Document transparency is relatively restricted and most hearings are held in private although recent efforts show signs of improvement.

The most breathtaking shift however in regard to the normative framework of international investment arbitration, is going to take place with the first two agreements that the EU is going to conclude as an entity with two other developed nations. Indeed, both CETA and TTIP are two colossal FTAs that are going to affect trade between their State-parties in a profound way. Thus, at some level it is justifiable for the public to be concerned about the lack of openness during the negotiations as well as the possible consequences of their substantive provisions after their conclusion. The debate is still raging especially in relation to the ISDS system that the drafters intent to include, with civil society groups, national governments and private actors having strong arguments for and against it. Things however should be seen from the right perspective. The drafters should take all this criticism into account. Opponents on the other hand should among other things consider that in case of an ISDS mechanism, the treaties will provide for maximum transparency based on the most liberal provisions existing so far in the field, the UNCITRAL Rules on Transparency. In any case, whether or not there will be a compromise is yet to be seen as there is a long way before the new treaties are ratified. After all, what is important for a free trade agreement is to achieve its goal which is to increase trade and foreign investment something that will be also proved in the nearby future.

REFERENCES:

Lucas Bastin “Amici Curiae in Investor State-Arbitration: Eight recent trends” *Arbitration International* LCIA Kluwer Law International (2014) Volume 30 Issue 1 pp.125-143

Andrea Bjorklund “The Emerging Civilization of Investment Arbitration”

Nigel Blackaby “Public Interest and Investment Treaty Arbitrationin” Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions ICCA Congress Series*2002 London11 Kluwer Law International (2003) pp. 355 – 365

Barnali Choudhury “Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit”, 41 *Vanderbilt Journal of Transnational Law* (2008), pp. 775–832.

Jack J. Coe Jr. “Transparency in the Resolution of Investor-State Disputes: Adoption, Adaptation, and NAFTA Leadership” *University of Kansas Law Review* 54 (2005-2006) pp.1339-1385

Rudolf Dolzer and Christoph Schreuer “Principles of International Investment Law”, Oxford University Press (2008)

Katia Fach Gómez “Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for Public Interest”, *Fordham International Law Journal* (2012) Vol. 35. pp. 510-564 available at: <http://ssrn.com/abstract=1999374>

Emilie M. Hafner-Burton, Zachary C Steinert-Threlkeld and David G. Victor Transparency of Investor-State Arbitration Transparency in Arbitration (September 2013)

Lise Johnson and Nathalie Bernasconi-Osterwalder with input and comments from Marcos Orellana, Lisa Sachs, Daniel Magraw and Howard Mann CIEL, IISD New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps (August 2013)

Joshua D. H. Karton “A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards” *Arbitration International*, Vol. 28, No.3 LCIA(2012) pp.447-486 available at: <http://ssrn.com/abstract=2030948>

Boris Kasolowsky and Caroline Harvey “Amici Curiae in Investment Treaty Arbitrations: Authority and Procedural Fairness”, *Stockholm International Arbitration Review* (2009)

Christina Knahr and August Reinisch “Transparency versus confidentiality in International Investment Arbitration”, 6 *The Law and Practice of International Courts and Tribunals* (2007), pp. 97–118.

Rodrigo Polanco Lazo “International Arbitration in Times of Change: Fairness and Transparency in Investor State Disputes”

Eugenia Levine “Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation”, 29 *Berkeley Journal of International Law* (2011), pp. 200–224.

Juile A. Maupin “Transparency in Investment Law: The Good, the Bad and the Murky” in Andrea Bianchi and Anne Peters (eds.), *Transparency in International Law*, (Cambridge 2013) pp. 142–171

Cristoffer Nyegaard Mollestad “See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement” *PluriCourts Research paper No 14-20* (2014) available at: <http://ssrn.com/abstract=2516242>

Jan Heiner Nedden, Friedrich Rosenfeld “The new UNCITRAL Transparency rules: How the Trend Towards Transparency Differs in Investment and Commercial Arbitration, New Developments in International Commercial Arbitration” *Schulthess* (2013) Christoph Muller, Antonio Rigozzi (Eds), pp.41-63 available at: http://www.lalive.ch/data/publications/04_Ehle.pdf

Marcos A.Orellana “The right of Access to Information and Investment Arbitration” *ICSID Review, Foreign Investment Law Journal* pp.59-106

Maya Rostowska, PISM The Polish Institute of International Affairs, Strategic File No 9.(36), December 2013 “Trade Agreements Across the Atlantic: What Lessons form CETA for TTIP?”

Christian Schliemann “Requirements for Amicus Curiae Participation in International Investment Arbitration A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15” *The Law and Practice of International Courts and Tribunals* 12 (2013), pp. 365–390

Ruth Teitelbaum “A Look at the Public Interest in Investment Arbitration: Is It Unique? What Should We Do About It?”, 5 *Berkeley Journal of International Law Publicist* (2010), pp. 54–62

Kyla Tienhaara “Third Party Participation in Investment Environment Disputes: Recent Developments”, 16 *Review of European Community & International Environmental Law* (2007), pp. 230–242

Christian Tietje and Freya Baetens with the assistance of Theodora N. Valkanou and Ecorys, “The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)” Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands (2014)

Epaminontas Triantafylou “Is a Connection to the “Public Interest” a Meaningful Prerequisite of Third Party Participation in Investment Arbitration” *Berkeley Journal of International Law* (2010), pp.38-46.

Gus Van Harten “Comments on the European commission’s Approach to Investor-State Arbitration in TTIP and CETA” *Osgoode Legal Studies Research paper* No. 59 Vol. 10, Issue. 13 (2014) available at: <http://ssrn.com/abstract=2466688>

Carl Sebastian Zoellner “Transparency: An Analysis of an Evolving Fundamental Principal in International Economic Law” *Michigan Journal of International Law* pp.579-626 (2005-2006)

All cases used are available at: <http://www.italaw.com/>