Die 5%-Hürde ist auch geeignet, der Parteienzersplitterung entgegenzuwirken.

Jedoch ist angesichts der letzten Wahl fraglich, ob nicht auch andere, weniger intensive Eingriffe geboten wären. Denkbar wäre eine Absenkung der Hürde auf 3%. Denn ungeachtet der hoch anzusiedelnden Zielsetzungen bedeutet es für die Parteien, die es nicht ins Parlament schaffen, einen erheblichen Eingriff. 5% der Stimmen sind sicher relativ wenige, aber absolut gesehen vereinen auch diese Parteien große Bevölkerungsanteile hinter sich. Daher scheinen 5% eine hohe Hürde zu sein. Die betroffenen Parteien haben hierdurch existenzielle Probleme. Außerdem führt die 5%-Hürde zu Demokratieverdrossenheit, da kleine, neue Parteien es schwer haben und so tendenziell Wähler ganz von der Wahl fernbleiben.

Doch eine Absenkung auf 3% würde der Wirksamkeit entgegenstehen. Zudem sichert die Grundmandatsklausel, § 6 III 1, 2. Alt. BWG, dass regional bedeutende Parteien im Parlament berücksichtigt werden. Insofern ist den bestehenden Bedenken zumindest teilweise Rechnung getragen worden.

**2. Ergebnis**
Die Maßnahme ist daher verhältnismäßig, der Eingriff zu rechtfertigen.

### II. Ergebnis zu I.

Die 5%-Sperrklausel ist materiell verfassungsgemäß.

## Aufgabe 3 b)

Gefragt ist nach der Beteiligtenfähigkeit politischer Parteien im Organstreitverfahren.

Gemäß § 63 BVerfGG sind politische Parteien nicht beteiligtenfähig. Das Wort „nur" deutet auf eine abschließende Aufzählung hin. Jedoch wird § 63 BVerfGG von Art. 93 I Nr. 1 GG als höherrangige Norm verdrängt. Im GG ist auch „anderen Beteiligten", die Rechte nach dem GG haben, Beteiligtenfähigkeit eingeräumt. Politische Parteien sind durch Art. 21 GG mit eigenen Rechten ausgestattet. Somit sind sie beteiligtenfähig im Organstreitverfahren.

Dies ist der Fall, da andernfalls die verfassungsmäßigen Rechte der Parteien nicht justiziabel wären, wenn sie von anderen Staatsorganen verletzt würden. Die Verfassungsbeschwerde nach Art. 93 I Nr. 4a GG kommt nicht in Betracht, da Art. 21 GG weder ein Grundrecht noch grundrechtsgleiches Recht ist. Somit wäre Art. 21 GG insgesamt nicht gerichtlich durchsetzbar.

Zudem zeichnet Parteien eine besondere Staatsnähe aus. Nach Art. 21 I 1 GG wirken sie bei der politischen Willensbildung mit und sind so Mittler zwischen Staat und Gesellschaft. In diesem Bereich muss gewährleistet sein, dass sie bspw. gleichberechtigt sind und angemessen finanziert werden. Diese sensiblen Rechte werden durch die Beteiligtenfähigkeit im Organstreitverfahren justiziabel.

Ole Schley*

# Transparency in Investment Arbitration

*In recent years, concerns about transparency in international investment arbitration have been ever-increasing and have been answered, to different degrees, in all major international investment arbitration frameworks as well as in arbitration practice. The following paper will provide a brief introduction into the international investment arbitration system and examine transparency aspects of international investment agreements, focussing on ICSID, NAFTA and UNCITRAL. The paper concludes that, given most recent developments especially in the 2014 UNCITRAL Rules on Transparency, the overall level of transparency in investment arbitration has risen to an all-time high, yet still leaving room for institutionalized improvements.*

* Stud. iur. an der Universität Hamburg. Der Beitrag beruht auf einer von Prof. Dr. Markus Kotzur, LL.M. (Duke), im Wintersemester 2013/2014 im Schwerpunktbereich Europa- und Völkerrecht mit dem Thema „'Transparency in Investment Arbitration' – Die Bedeutung des Transparenzgrundsatzes in der Streitschlichtung (Schiedsgerichtsbarkeit) zu investitionsschutzrechtlichen Fragen" gestellten Schwerpunktbereichshausarbeit des Verfassers, die mit „gut" bewertet wurde. Die Arbeit konnte in englischer oder deutscher Sprache abgefasst werden und sollte gemäß der Aufgabenstellung – anhand ausgewählter Fallbeispiele – die Grundzüge der „investment arbitration" herausarbeiten und dabei auf die Bedeutung des Transparenzgrundsatzes (und eventueller Transparenzdefizite) eingehen.

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(nicht abgedruckt; kann unter www.hamburger-rechtsnotizen.de eingesehen werden)

## List of Abbreviations

| | |
|---|---|
| BIT | Bilateral Investment Treaty |
| DR-CAFTA | Dominican Republic-Central America Free Trade Agreement |

| | |
|---|---|
| EU | European Union |
| FTA | Free Trade Agreement |
| FTC | Free Trade Commission |
| ICC | International Chamber of Commerce |
| ICJ | International Court of justice |
| ICSID | International Centre for Settlement of Investment Disputes |
| ICSID AF | Additional Facility of the International Centre for Settlement of Investment Disputes |
| ICSID Convention | Convention of the International Centre for Settlement of Investment Disputes |
| IIA | International Investment Agreement |
| NAFTA | North American Free Trade Agreement |
| New York Convention | The Convention on the Recognition and Enforcement of Foreign Arbitral Awards |
| NGO | Non-Governmental Organization |
| OECD | Organization for Economic Cooperation and Development |
| PCA | Permanent Court of Arbitration |
| UN | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCITRAL Arbitration Rules | Arbitration Rules of the United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| USA | United States of America |
| US | United States |
| WTO | World Trade Organization |

## Transparency in Investment Arbitration

*„Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors (…)".*[1]

### Abstract

In recent years, concerns about transparency in international investment arbitration have been ever-increasing, together with the amount of cases dealt in front of arbitration tribunals. These concerns have been answered, to different degrees, in all major international investment arbitration frameworks as well as in arbitration practice. The following paper will provide a brief introduction into the international investment arbitration system and review arguments in favor of transparency and those advocating confidentiality. It will then examine, while taking institutional rules as well as existing case-law into consideration, transparency aspects of international investment agreements, focussing on ICSID, NAFTA and UNCITRAL. Although the admission of amici curiae to arbitration tribunals is a topic on its own, it is one very closely connected to transparency in investment arbitration, hence covered in many parts of this paper. The paper concludes that, given most recent developments especially in the 2014 UNCITRAL Rules on Transparency, the overall level of transparency in investment arbitration has risen to an all-time high, yet still leaving room for institutionalized improvements.

### I. International Investment Arbitration – an Introduction

The last two decades have seen a rapid increase in the number of international investment arbitration. With more than 2800 BITs and numerous FTAs concluded worldwide,[2] the vast majority of them containing dispute settlement agreements, investor-state arbitration cases have amounted from only a handful until the early 1990s to 514 known cases until 2012,[3] making investment law currently one of the most dynamic fields in public international law. From this newly found "veritable flood"[4] of cases, about 60 percent are governed under the framework of the ICSID convention, followed by approximately 28 percent under UNCITRAL arbitration rules.[5] Regardless of the governing framework, certain core characteristics, such as the constitution of the three arbitrator panels, the role of a private investor acting as the claimant against a respondent state, and the protection standard offered under investment agreements, are usually quite similar. Given the advantages of BITs and similar agreements in an increasingly globalized world – offering investors from capital exporting countries some legal security while at the same time providing especially developing states with a chance to attract foreign capital – investment arbitration can be expected to gain further relevance.

1 DePalma, New York Times 11.03.2011.

2 Haftel/Thompson, International Organisation 67 (2), 355, 356 (2013).

3 UNCTAD Issue Note Nr. 1, May 2013 <www.unctad.org/diae> 58 cases have been filed in 2012 alone.

4 Dolzer/Schreuer, Principles of Investment Law, at 10 (2012).

5 Hafner-Burton/Steinert-Threlkeld/Victor, Transparency of Arbitration, at 4 (2013).The remaining share is mostly taking place within commercial frameworks such as the ICC.

However, the explosion of arbitration cases in recent years has also been accompanied by increasing concerns for the legitimacy of the arbitration system as a whole. Especially those states facing tribunals more often than others have voiced concerns that investors are using the system to undermine legitimate public policies, turning arbitration into a serious burden in terms of time and money. In some cases, states have withdrawn from the ICSID convention.[6] Highly influential countries such as the USA have openly questioned the suitability of arbitration for investment disputes as a whole.[7] The investment arbitration system is also alleged of lacking accountability, mainly due to secrecy and confidentiality of proceedings.[8] In summary, this has quickly led to a major "legitimacy crisis"[9]. The question of how to balance needs for transparency and confidentiality can hence be described as a key problem investment arbitration is facing today.[10] This problem will be examined in the present paper.

## II. About Confidentiality in Investment Arbitration

### 1. Why is Confidentiality Valuable in Investment Arbitration?

Arbitration provides a forum for dispute settlement which, under ideal circumstances, allows the parties involved to disassociate themselves from a potentially politically charged dispute.[11] While there are many reasons disputing parties might prefer referring to arbitration instead of court litigation – inter alias aspects of time, money, the expertise of party appointed arbitrators compared to judges, the fear of bias in a national court system or the superior enforceability of arbitration awards in accordance with the New York Convention[12] – confidentiality is often considered to be the "hallmark"[13] of arbitration. Besides from the obvious benefit of protecting business informations and trade secrets, especially litigious companies or states facing similar claims and defenses might wish to keep proceedings confidential, even more so in case of a loss. Due to long term contracts, parties might also be forced to cooperate again after their dispute has been settled, making them reluctant to accuse, or vice versa be accused, their counterpart of certain misbehaviors in public, further poisoning the relationship. Furthermore, confidentiality can help to find a more rational settlement along the way, since it can prevent parties from becoming tied on positions as a result of public outrage.[14] Any additional transparency measure, however, is likely to turn into some sort of burden for the parties and the tribunal, having to comply with the need of facilitating documents, hearings and participation possibilities to the public, what usually will require time, money and resources.[15]

### 2. Orthodox Approach to Arbitration

The aforementioned reasons contribute to arbitration traditionally being conducted with what can be called the "orthodox approach".[16] International investment arbitration is developing from an entirely private and commercial background, with all frameworks and institutions handling arbitration cases except the ICSID originally being drafted for private arbitration.[17] Within these frameworks, it is more often than not impossible to know whether arbitration proceedings have been initiated at all, and with proceedings taking place in camera, even less is disclosed about disputes involved and decisions awarded.[18] Transparency rules, if existent, remain completely within the discretion of the parties involved and instead of permanent judicial bodies, ad-hoc tribunals are constituted for each case. Additionally, the majority of arbitrators still has a decidedly commercial background.[19] This orthodox approach is obviously suitable for private arbitration, where disputants are keen on having efficient solutions and are neither willing nor obliged to reveal their disputes to the public in any form.[20]

## III. Calls for Reform

Arbitration involving investor-state disputes, however, is a fairly young concept. Prior to the ratification of the ICSID convention in 1965, the ideas for solving these disputes varied, but certainly did not include the idea of an investor suing the host state on an autonomous basis,[21] and rules developed for private arbitration were used. While it is, given these circumstances, not surprising that confidentiality took such a high stand in the early years of investor-state arbitration, the need for enhanced transparency seemed so obvious that the time it took to address these matters appeared to be a "mystery" to some observers.[22]

6 This goes for Venezuela, Bolivia and Ecuador, with Argentina having declared the intention for withdrawal as well. See Hafner-Burton/Steinert-Threlkeld/Victor, Transparency of Arbitration, supra 17 (2013).
7 Cook, 34 Pepp. L. Rev. 4, 1085, 1099 f (2007).
8 Harrison, Working Paper Series, at 1 (2011).
9 See for many just Franck, 73 Fordham L. Rev., 1521 (2005).
10 Knahr/Reinisch, 6 Law & Prac. Int'l Cts & Tribunals 97, 98 (2007).
11 Norris/Metzidakis, 15 Harv. Negot. L. Rev. 31, 70 (2010).
12 Dolzer/Schreuer, Principles of Investment Law, at 235 ff (2012).
13 Knahr/Reinisch, 6 Law & Prac. Int'l Cts & Tribunals 97, 109 (2007).
14 Buys, Am. Rev. Int'l Arb. 121, 123 (2003).
15 Levine, Berkeley J. Int'l Law, 200, 220 f, (2011).
16 Asteriti/Tams, Transparency and Representation, at 789 (2010).
17 Ibid.
18 Bernacosci-Osterwalder/Johnson, IISD #2, at 1 (2011).
19 Schill, ZaoeRV, 247, 259 f (2011).
20 Yves Frontier describes this conclusion as "self evident". Quoted from Asteriti/Tams, Transparency and Representation, at 790 (2010).
21 That is, of course, under the presumption an IIA exists. For a more detailed retrospective see Dolzer/Schreuer, Principles of Investment Law , at 1–13, 233 ff (2012).
22 Kinnear, Transparency and Third-Party Participation, OECD, at 1 (2005).

### 1. Accountability of Public Entities / Public Scrutiny

Unlike private disputants, public entities do have the obligation – and often the will – to disclose informations to the public and act in a transparent way, behavior generally associated with good governance.[23] In front of an international investment arbitration tribunal, however, due to the aforementioned orthodox approach, disclosure often requires consent of the parties,[24] which is especially questionable when considering the powers such a tribunal is vested with – effectively, it has the power of striking down national legislations, altering governmental economic concepts and judging administrative measures even in times of economic crisis, a judicial review power which, if existent at all, is normally reserved for highest constitutional courts in the host state. Additionally, it can impose hefty fines on the host state, which usually have to be paid from the public treasury and thus affect every tax payer.[25] Already the threat of a claim in front of such a tribunal could very well lead to a "chilling effect" e.g. on the host states environmental policies.[26]

Awards of arbitration tribunals are under regular circumstances no subject to a judicial review in front of a domestic court and even though under international investment law very limited grounds for annulment exist, these usually do not include an annulment on the grounds of merits.[27] They possibly impact states in areas those might consider their national prerogative. States also lack the possibility of a counterclaim. Hence, an investment tribunal, often deciding awards with a slight margin of 2 to 1 arbitrators, for the feeling of many lacking the mandate from the people its decisions affect, seems to be struggling to establish a basis of legitimacy anyhow. This being said, there are also scenarios conceivable where the need for greater codified transparency rules becomes especially manifest, that is, when serious breaches of international standards seem nearby.[28] It is not hard to imagine states or powerful investors accused of human rights violations, breaches of minimum labor law standards, or equivalent misconduct, be firm supporters of confidentiality. There may also be cases where for domestic political reasons a state fails to emphasize on human rights or environmental issues.[29] Transparency and inclusiveness might help to fill the relevant gaps and it is hard to think of any justification why the decision about disclosure of these issues should be left to the state, a private investor or an ad-hoc tribunal.

Accordingly, the first and major concern raised with an increasing intensity was the one for accountability, both of the arbitration tribunals, which compared to domestic courts have a very limited democratic legitimation, and also the respondent state, who was sued for his exercise of public powers in front of the tribunal instead of a domestic court.[30]

### 2. Enhanced Acceptance

Transparency in this regard can help in many ways to enhance legitimacy of a dispute settlement system. It is a precondition for the evolution of a coherent case-law that can at least serve as a general guideline for expected outcomes and can help avoiding cases before they arise, an aspect investment arbitration so far has had certain difficulties with.[31] The quest for transparency does, of course, not stop with the publication of the award itself. Since investment arbitration involves the public or parts thereof, commencement of proceedings has to be put on public notice, and the public should also be able to participate to some extent.[32] As the tribunal in *Vivendi II vs Argentina* noted, "[p]ublic acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function."[33] Following a possibly unfavorable award, the public will most certainly be more likely to accept a transparent outcome it additionally had the chance to participate in.

### 3. Comprehensive Review

But besides from that, transparency can also actually help to decide the outcome of a case on the merits. Especially environmental NGOs have proven to actively seek possibilities to submit briefs to tribunals and while they might, more often than not, not be crucial to decide the outcome of a case, already the gesture of permitting them might be valuable. It should, of course, also be noted that naturally, very few NGOs will participate in a conflict on behalf of the claimant, in other words, on behalf of a foreign investor. This might, however, help balancing the scale especially for those states which have

23 Feliciano, The Ordre Public Dimensions of Confidentiality and Transparency, in: Transparency in International Trade and Investment Dispute Settlement, 15, 19 (2013).
24 See Chapter IV for details.
25 An example award in this regard is *S.D. Myers vs. Canada,* Partial Award 13.11.00, 2nd Partial Award 21.10.2002, which led the Canadian government to revoke a regulation, while also being fined for 13 million US$. See also Asteriti/Tams, Transparency and Representation, at 791 f (2010).
26 Ishikawa, NGO Participation, at 111 (2009).
27 Dolzer/Schreuer, Principles of Investment Law, at 300 ff (2012).
28 See Reiner/Schreuer in: Human Rights in International Investment Law and Arbitration, at 82–94 (2009).
29 McLachlan/Shore/Weiniger, International Investment Arbitration, at 3.5.0 (2007).
30 Harrison, Working Paper Series, at 2 (2011).
31 Knahr/Reinisch, 6 Law & Prac. Int'l Cts & Tribunals 97, 111 (2007). In regard of famously diverging sister cases see e.g. *SGS vs Philippines,* Decision on Jurisdiction, 29.01.2004, contrary to *SGS vs Pakistan,* Decision on Jurisdiction, 06.08.2003, or *Lauder vs. Czech Republic,* Final Award, 03.09.2001, contrary to *CME vs Czech Republic,* Partial Award, 13.09.2001.
32 Harrison, Working Paper Series, at 2 f (2011).
33 *Suez and others vs Argentina (Vivendi II),* Order in Response to a Petition for Transparency and Participation as Amicus Curiae, at para 16, 19.05.2005.

voiced concerns that tribunals might be prejudiced in what they consider to be an unlevel playing field.[34]

Hence, procedural transparency and inclusiveness can – and in the following chapters will – be measured among several categories, namely the transparency of proceedings, the transparency of documents and awards, and the possibility for amici curiae to participate in proceedings.[35]

## IV. Evolution of Transparency in Investment Treaty Regimes and Arbitration Practice

### 1. ICSID

The ICSID, founded 1965 under the auspices of the World Bank, provides the only ruleset designed specifically for "a legal dispute arising directly out of an investment".[36] It provides a Secretary-General maintaining a public repository of cases and is available when both the investors home state and the respondent state have signed the convention. The ICSID AF, providing a less strict ruleset, is available when only one of the parties has signed the convention. As of today, 150 states have deposited their ratification at the institute.[37] Following calls for reforms in the investment arbitration system, the ICSID Convention was revised in 2006.

#### a. Transparency of Proceedings

The transparency of proceedings in front of the ICSID – that is, the commencement and subsequent oral hearings – is contained within a strict ruleset. In accordance with ICSID's Administrative and Financial Regulations, disputes have to be registered at the Secretary-General, who then is under the obligation to publish general information in the public repository.[38]

Regarding oral hearings, however, the arbitration rules state that only "[u]nless either party objects, the tribunal (…) may allow other persons, (…) to attend or observe all or part of the hearings (…)."[39] Thus, any party can veto the possibility of open hearings during the proceedings, and even if none objects, the tribunal is still under no obligation to open hearings to the public. It can come as no surprise that based on this restrictive rule, ICSID cases have not particularly distinguished themselves as being open. This changes for rare cases where parties agree otherwise. Especially cases arising from the DR-CAFTA treaty have been broadcasted live on the homepage of the ICSID, exemplifying how the internet can help to facilitate proceedings to the public.[40]

#### b. Inclusiveness

Much like the general problem of transparency, the inclusiveness of proceedings, in particular the possibility to participate as amicus curiae, was overlooked in the early years of investment arbitration. Until 2006, ICSID Arbitration Rules did not provide any regulation concerning the submission of amici curiae briefs. The first tribunal confronted with this issue presided in 2002 over the case *Aguas del Tunari vs. Bolivia*.[41] Massive local protests against the foreign investor, which had been awarded a concession for the privatization of water and sewage services, led to the abandonment of the project and a subsequent claim for compensation. Several environmental NGOs, siding with the respondent, filed petitions for status as amici curiae, yet to no avail. The tribunal unanimously held that, given the absence of specific provisions, "it is manifestly clear" these requests were "beyond the power or the authority of the tribunal to grant".[42] Due to the turmoil surrounding this case, this decision attracted a major amount of criticism, and rightfully so. The tribunal possibly underestimated or was simply unable to cope with the impact of what should become known as the "Cochabamba Water War", but by keeping proceedings confidential and private, the tribunal harmed and frustrated ICSID's goal of providing a recognized dispute settlement forum considerably.[43]

*(Der Beitrag wird fortgesetzt; zweiter Teil abrufbar unter www.hamburger-rechtsnotizen.de.)*

34 Hafner-Burton/Steinert-Threlkeld/Victor, ILAR Working Paper #18, at 3 (2013).
35 Bernacosci-Osterwalder/Johnson, IISD #2, at 3 (2011).
36 ICSID Convention, Article 25 I.
37 See <www./icsid.worldbank.org/>.
38 ICSID 2006 Administrative and Financial Regulations, Regulation 22.
39 ICSID Arbitration Rule 32 (2).
40 E.g. *Pac Rim Cayman vs. El Salvador,* ICSID Case No. ARB/09/12. See Plagakis, Feliciano, Webcasting, in: Transparency in International Trade and Investment Dispute Settlement, 85 (2013).
41 ICSID Case No. ARB/02/3.
42 *Aguas del Tunari vs. Bolivia,* Letter from President of Tribunal Responding to Petition, 29.01.2003.
43 Norris/Metzidakis, 15 Harv. Negot. L. Rev. 31, at 32, 69 f (2010).