Making the proceedings public and allowing third-party interventions: are the new generation bilateral investment treaties (U.S., Canada) bifurcating investment arbitration from international commercial arbitration?

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Making the Proceedings Public and Allowing Third-Party Interventions

Are the New Generation Bilateral Investment Treaties (U.S., Canada) Bifurcating Investment Arbitration from International Commercial Arbitration?

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Does the new generation of bilateral investment treaties introduce a new type of arbitration, particularly with respect to more “traditional” commercial arbitration? Is there something new in procedural terms? Is there a split between both types of arbitration, specifically in regard to the publicity of the proceedings and third-party intervention? The following remarks are offered with the intent of raising questions which might not, at this point, all receive clear answers. At the outset it should also be noted that these two topics are closely linked to the debate about a new type of investment arbitration. In a way, they are two faces of the same coin.

I. MAKING THE PROCEEDINGS OF INVESTMENT ARBITRATIONS PUBLIC

The first question that should be asked is to what does the term publicity apply? To the arbitration, yes, but to what part of the proceedings? What exactly are the “proceedings” of the arbitration that should—or should not—be made public? Many different parts of the arbitration process can be subjected to publicity, from the filing of an arbitration claim, its submissions, hearings and evidence-gathering, to its award and, thereafter, to the possible—yet probable—action to enforce the award through national courts.

It is therefore important to know to which part of such proceedings one refers when addressing the publicity issue. One could argue, for instance, that the entirety of the arbitration proceedings should be confidential (leaving aside national court proceedings for enforcement that naturally will be subject to the publicity attached to courts). Alternatively, one could argue that, for transparency’s sake, the whole of the arbitration process should be open to the public. A middle road is to examine the balance between

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confidentiality and publicity, considering that some aspects of the proceedings should be made public and some others should remain confidential. This middle-road approach seems to be the one followed by some investment treaties, making investment arbitration, in this respect, different from international commercial arbitration.

The issue of publicity entails another set of questions. Whom does publicity benefit? The public at large? Interested groups? The arbitration community? Here again, different approaches can be identified.

As is known to all, arbitration is held to be an interesting dispute resolution mechanism not least because of its confidential nature. Whether parties want to hide the existence of the dispute itself, the type of claim or defence they would use or the substance of the award, they know that by resorting to arbitration the sought-for confidentiality can be achieved.

It is interesting to note, however, that although the secrecy attached to arbitration is commonly known to be a highly valued asset of this dispute settlement procedure, a recent survey demonstrates that confidentiality is considered less important by users of arbitration than a certain number of other criteria looked for in arbitration, such as speed, efficiency, monetary compensation and effectiveness of enforcement. This makes the need for confidentiality less important than one would first think. This being said, it is still to be considered as a distinctive feature of arbitral proceedings in the sense that it distinguishes such proceedings from court procedures. Without the confidential nature of arbitration, one could argue that the procedures would come close to litigation before national courts.

The main argument in favour of lifting partially or totally the confidentiality of arbitration proceedings rests on the fact that where investment arbitrations are concerned—or what can also be termed as semi-public arbitrations, a State authority being a party to it—other interests than purely private ones are at stake. The enforcement of an award may lead a State to change its laws or regulations, thereby affecting a large number of people. This has led some commentators—and, on occasion, tribunals themselves—to assume a new approach to confidentiality. A democratic approach to arbitration might lead one to consider that investment arbitration involves the public at large. In addition, it has been argued that, should a State be condemned to pecuniary compensation, it is through taxpayers' funds that such condemnation would be executed, thus giving more strength to the need for transparency vis-à-vis the taxpaying community.

The fact that a State becomes involved in a dispute naturally raises the question as to what extent it can act without public scrutiny and consent. There might be an issue of legitimacy attached to the choice of such a dispute resolution mechanism. In practice,

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this issue has been recognized as problematic and might be the cause for the departure from international commercial arbitration practice. Full confidentiality is still perceived as the norm in international commercial arbitrations, but there is some space for more publicity in investment arbitrations.

In the context of the North American Free Trade Agreement (NAFTA), it has been found that NAFTA rules contain no specific duty of confidentiality. Nothing precludes the parties themselves from providing public access to documents submitted to or issued by a Chapter Eleven tribunal. For instance, the Metalclad case shows that nothing in the NAFTA or in the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) precludes parties from making the information about an arbitration public. Even more, in the Loeven case, although the Tribunal found a duty not to reveal certain documents, it suggested that a general duty of confidentiality would be undesirable because it would deprive the public of knowledge concerning public affairs.

In the context of the ICSID, it does not seem that there is a general duty of confidentiality. The Notes published with the first edition of the ICSID Regulations provide with respect to award publication that “as a matter of principle, arbitration proceedings should not be public”. However, in practice, certain trends demonstrate an evolution. Indeed, hearings, for instance, are not always closed (upon parties’ consent and tribunal’s decision: Arbitration Rule 32(2) and Additional Facility Rule 39(2)). The opening of hearings to the public were consented to by the parties in an ICSID case, the Ups case. It should be specified that the case was brought in the context of NAFTA’s Chapter Eleven.

Another interesting feature is the fact that there is no award publication absent parties’ consent. However, the Centre usually tries to obtain the parties’ consent for the

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2 This applies to the Arbitration Rules of the International Chamber of Commerce, the United Nations Commission on International Trade Law, the World Intellectual Property Organization and the London Court of International Arbitration; those of the American Arbitration Association have a presumption of confidentiality for hearings but consider that selected awards, decisions and rulings can be made public where identifying details have been redacted.


4 Id.

5 Metalclad Corporation (Claimants) and United Mexican States (Respondent), ICSID Case No. ARB(AF)/97/1, Final Award of 2 September 2000, ICSID Rev.-F.I.L.J., Vol. 16, No. 1, 2001. See also the ICSID Website at: www.worldbank.org/icsid/cases/awards.htm#award28.

6 The Loeven Group, Inc. and Raymond L. Loeven (Claimants) and United States of America (Respondent), Final Award of 26 June 2003; available at: www.naftaclaims.com/disputes_us/disputes_us_5.htm. See also Buys, supra, footnote 1, for a comment on this point.


9 Article 48(4) of the ICSID Arbitration Rules provides: “The Centre shall not publish the award without the consent of the parties. The Centre may, however, include in its publications excerpts of the legal rules applied by the Tribunal.”
publication, and usually does so. Many of the awards can thus be found on the ICSID Website, and some are published (in the *ICSID Review—Foreign Investment Law Journal*). It must be noted that absent one party’s consent, the other party often provides the award to another source, such as *International Legal Materials*. In any event, where the consent of the Parties is not obtained by the ICSID, the key legal holdings are published without any identifying feature.10

There is an ongoing discussion about improvements that are to be made to the framework for ICSID arbitrations. A recent Discussion Paper prepared by the ICSID Secretariat has notably established a call for more rapid award publication and increased accessibility to third parties.11

The U.S. free trade agreements (FTAs) with Singapore and Chile indicate that there is a clear evolution of the notion of confidentiality.12 Indeed, hearings, for instance, are open to the public. According to Article 22.10(a) on rules of procedure in the United States–Chile FTA, there should be at least one hearing and the hearings should be open to the public. Article 15.20(2) regarding the transparency of arbitral proceedings in the United States–Singapore FTA provides that all hearings conducted shall be open to the public. Additionally, all submissions/statements are made publicly known (within ten days of their submission, subject to specific rules of information protection in the United States–Chile FTA (Article 22.10(c)) and “promptly” in the United States–Singapore FTA (Article 15.20)).

More generally, the U.S. Model BIT significantly promotes transparency at all levels (Article 29).13 As such, all parts of the proceedings are to be made public, whether the notice of intent, the notice of arbitration, the pleadings, memorials, briefs, etc., as well as the hearings, orders and awards (Article 29(1)). Naturally, there is protection planned with respect to information “designated as protected information” (Article 29(2), (3) and (4)).

Interested parties may submit *amicus curiae* briefs (Article 28(3)) and the non-disputing Party to the BIT (i.e. the Party which is the investor’s home State) may make oral and written submissions to the tribunal regarding the interpretation of the treaty (Article 28(2)).

To summarize, there is an uncoordinated approach to confidentiality regarding investment arbitrations, with a tendency to move towards the lifting of certain restrictions in the field of award publication (even with redacted identifying features—i.e. without the features that would enable the identification of the Parties involved) and the possibility to attend hearings for at least some non-signatory parties.

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11 Ibid.
12 For the final texts of the U.S. FTAs with Chile and Singapore, see the Website of the U.S. Trade Representative at: `www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.htm.`
13 For the updated text of the U.S. Model BIT, see the Website of the U.S. Department of State at: `www.state.gov/documents/organization/38710.pdf.`
It is interesting to note that, with respect to the opening of the hearings, the U.S. Model BIT has been largely followed in new investment treaties, which even provide for open hearings in all investor-to-State arbitrations. For instance, the United States–Morocco Free Trade Agreement notably holds a provision according to which hearings before the panel shall be open to the public (Article 20.8 on rules of procedure). The reason lies no doubt in the fact that there is an increased general awareness that these arbitrations may be of interest or incidence to the civil society or simply to a large enough number of interested parties.

Increasing transparency would indeed help alleviate such concerns with respect to civil society and, in addition, would no doubt assist potential arbitration users in understanding the functioning of the mechanisms. Noteworthy is also the fact that it may, in turn, increase public confidence in what is still sometimes perceived by the public as a somewhat doubtful means of dispute resolution.

On a more specific issue, a more generalized publication of awards, be it even with redacted identifying features, would serve multiple purposes. It would assist in giving consistency and predictability, thus providing these procedures with more legitimacy. It would enable parties to avoid unnecessary disputes by avoiding mistakes made by previous parties and would benefit in general scholars and practitioners in analysing, understanding and—where need be—improving dispute resolution mechanisms.

II. THIRD-PARTY INTERVENTION

As I mentioned, there is a trend and desire for more openness in investment arbitration proceedings and, as one author put it, a need to “give voice to public interest”. Transparency is one way to provide such a voice, but there is another way, and that is the one of third-party intervention. Indeed, third-party intervention can be seen as another aspect of the question of publicity. It is true that third-party intervention can also be seen as a result of tribunals’ openness or of the lowering of the level of confidentiality. In spite of these correlations, the issue of third-party intervention exists in its own right and has been treated as such by rules of arbitration and tribunals themselves.

Third parties may be many and diverse. They may be:

- a party affected by the contract who seeks remedy by trying to join the arbitration claim. This may be the beneficiary to the contract, but also a corporate parent, guarantors, or other State entities, whether a controlling State or other States (in NAFTA cases);
- a party who is held accountable in the dispute (a contracting party wishing to bring it into the dispute);

a party to another dispute against one of the parties to the dispute in question, wishing the consolidation of the claims and, in general, parties in multiple-party disputes;

- a party wishing to enforce the award or having it enforced against it;

- non-governmental organizations (NGOs) that are particularly interested by the dispute or related to the dispute by reason of their involvement in the subject-matter at hand;\(^\text{15}\)

- an interested party in the larger sense; that is, a person or an entity that is part of the population and who could be affected by the result of a particular dispute.\(^\text{16}\)

It is probably with respect to the subject of third-party intervention that tribunals' orders and awards in the area of investment arbitration are the most interesting, because in spite of the absence of procedural endorsements of intervention, tribunals have taken evolutionary steps towards third-party participation. Particularly noteworthy in this context are the NAFTA tribunals' decisions.

There is little said in the NAFTA rules about third-party standing. It is mentioned that third parties are allowed for purposes of interpretation of the Agreement (NAFTA Article 1128).\(^\text{17}\) In two recent NAFTA cases, tribunals have accepted amicus briefs, thereby accepting some form of third-party participation in the proceedings.

In the first case, the UPS case,\(^\text{18}\) the request was for full third-party standing. That request was denied by the Tribunal, which considered that it could only decide a dispute between parties to the arbitration. However, the Tribunal granted the lesser request aimed at providing it with an amicus brief. The justifications relied on by the Tribunal were the public interest in the subject matter and the fact that the in camera provision of the applicable Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) did not bar it from accepting the request. Article 15 of the UNCITRAL Rules also gives the arbitral tribunal broad discretion in the proceedings and has been interpreted as implying the possibility for the arbitral tribunal to accept submitted amicus briefs.

\(^{15}\) See, for instance, the Cochabamba case (Aguas del Tunari S.A. v. The Republic of Bolivia, ICSID Case No. ARB/02/03, registered 25 February 2005) where several NGOs pressed for third-party participation, a petition that was denied by letter of the Tribunal on 29 January 2003. For the text of the letter denying third-party standing, see the Website of Earthjustice at: www.earthjustice.org/news/documents/2-03/ICSIDResponse.pdf.

\(^{16}\) See also the Cochabamba case, ibid., where the request for third-party standing was made on behalf of concerned citizens. For more information on the case, see the Website of Earthjustice at: www.earthjustice.org/urgent/display.html?ID=107.

\(^{17}\) NAFTA Article 1128, concerning “participation by a Party”, provides that: “On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.”

\(^{18}\) UPS, supra, footnote 8.
In the second case, the Methanex case, an interested NGO, the International Institute for Sustainable Development (IISD) had sought to be granted third-party standing. Indeed, through a petition and a final submission, it requested to submit *amicus* briefs, to be allowed to make an oral contribution in support of its written submission and to obtain an “observer status”. In response, the Tribunal accepted only the submission of an *amicus* brief.

It is worth observing that where semi-public arbitration is concerned, there is a trend established by the United States in its conclusion of investment and free trade agreements with other States, as well as by some NAFTA Chapter Eleven tribunals, to make it more transparent in general, both by providing more transparency in the proceedings and by allowing tribunals to consider and accept *amicus curiae* briefs. This is shown by the United States–Singapore FTA, signed in May 2003, which contains both a section on “transparency of arbitral proceedings” (Article 15.20) and a section on “conduct of arbitration” (Article 15.19), providing for the acceptance of *amicus* briefs.

The United States–Morocco FTA also provides an example of increased openness. Its dispute settlement provisions, contained in Chapter 20 of the Agreement, also provide for transparency by making available to the public all written submissions (including a written version of oral statements) as well as the possibility for the public to attend the hearings. Additionally, *amicus* briefs are considered, with the condition that the non-governmental entity wishing to provide its views is located within one of the Parties’ territory.

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19 Methanex Corporation (Claimant/Investor) and United States of America (Respondent/Party), UNCITRAL Arbitration under Chapter Eleven of the North American Free Trade Agreement; all relevant documents available at: www.naftaclaims.com.


21 Article 15.20 provides: “1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public: (a) the notice of intent referred to in Article 15.15.4.; (b) the notice of arbitration referred to in Article 15.15.6.; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 15.19.2 and 15.19.3; and Article 15.24; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal. 2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure. 3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 21.2 (Essential Security) or Article 21.4 (Disclosure of Information). 4. Protected information shall, if such information is submitted to the tribunal, be protected from disclosure in accordance with the following procedures …”

22 Article 15.19(2) and (3) provides: “2. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement. 3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from any persons and entities in the territories of the Parties and from interested persons and entities outside the territories of the Parties.”

23 For the full text of the United States–Morocco FTA, see the Website of the U.S. Trade Representative at: www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html.

24 Ibid., Article 20.8(1)(a) provides that the rules of procedure to be adopted under the Agreement shall ensure “a right to at least one hearing before the panel and that, subject to subparagraph f, such hearings shall be open to the public”. Article 20.8(1)(c) provides that “each Party’s written submissions, written versions of its oral statement, and written responses to a request or questions from the panel shall be made available to the public within ten days after they are submitted, subject to subparagraph (f) [protection of confidential information]”.

25 Ibid., Article 20.8(1)(d) provides that “the panel shall consider requests from non-governmental entities located in the Parties’ territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the Parties …”
Additionally, the United States–Chile FTA already mentioned (see Section 1) contains a similar provision regarding third-party participation. Its Article 22.10(d) provides that “the panel will consider requests from non-governmental entities located in the Parties’ territories to provide written views regarding the dispute”.

Finally, as stressed in the ICSID Discussion Paper when examining possible improvements to third-party participation:

“There may well be cases where the process could be strengthened by submissions of third parties, not only civil society organizations but also for instance business groups or, in case of investment treaty arbitrations, the other States parties to the treaties concerned.” 26

This is to say that the notion of “third party” should not be narrowed down to NGOs and civil society agents. Third parties can be many and their interventions have different profiles and functions.

III. CONCLUSIONS

In the area of investment arbitration, one can note a clear move towards transparency and some form of intervention of third parties. The latter is in fact limited for the time being to the submission of amicus curiae briefs. These trends are shaped by treaty practice as well as by arbitral tribunals themselves.

As to the extent of these trends, one may note that it is mostly shaped by the United States in its negotiations of investment treaties with other States, as well as by the NAFTA experience. A question to bear in mind relates to the possible international outreach of this trend. The ICSID Discussion Paper 27 might become the means towards a possible universalization of such practice.

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27 Ibid.