

— Chapter 6 —

THE ICSID APPROACH TO PUBLICATION OF INFORMATION IN INVESTOR-STATE ARBITRATION

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6.1. GENERAL BACKGROUND

Confidentiality has always been a key feature of international commercial arbitration and is perceived by most parties as one of its strengths.¹ By comparison, one of the hallmarks of investor-State dispute settlement (ISDS) is the recent move toward greater transparency in arbitral proceedings.² This trend has been characterized by many as one of the strengths of ISDS and evidence that the ISDS system has the capacity to respond to stakeholder concerns about investment arbitration.³ The

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¹ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th ed., Sweet and Maxwell Limited 2004) 27.

² Meg Kinnear and Aïssatou Diop, 'Use of the Media by Counsel in Investor-State Arbitration' in Albert Jan van den Berg (ed.), *Arbitration Advocacy in Changing Times* (International Council for Commercial Arbitration Congress Series No 15, 2011, 40.

³ See, e.g., Center for International Environmental Law, *Webcasting as a Tool to Increase Transparency in Dispute Settlement Proceedings* (2010) 8-9 <http://www.ciel.org/Publications/Webcasting_21Jun10.pdf> accessed 31 October 2012 (praising the decision to webcast the recent hearings in the case *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12); Anthony De Palma, 'Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say' New York Times (11 March 2001) <<http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html?pagewanted=all&src=pm>> accessed 31 October 2012; Bill Moyers Reports: Trading Democracy, PBS (2 January 2002) <http://www.pbs.org/now/transcript/transcript_tdfull.html> accessed 31 October 2012; Michael Peel and Jane Croft, 'Arbitration: Case Closed' Financial Times (15 April 2010) <<http://www.ft.com/cms/s/0/1858447c-48be-11df-8af4-00144feab49a.html#axzz2AKP8dRty>> accessed 31 October

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motivation for these changes is the recognition that ‘different considerations may have to be taken into account when recourse to arbitration is sought to settle disputes affecting public interest.’⁴ Among the factors calling for a greater level of transparency in investment arbitration are the presence of a State in the proceedings (usually as respondent), the fact that State funds may defray arbitration costs and satisfy adverse awards, the possibility that questions of public policy may be raised in connection with the dispute, and the potential impact of an adverse award on the host State and its nationals.⁵ The International

2012; Gary Born and others, ‘Investment Treaty Arbitration: ICSID Amends Investor-State Arbitration Rules, WilmerHale’ <<http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=3165>> accessed 31 October 2012; Amanda L Norris and Katina E Metzidakis, ‘Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water War’ (2010) 15 *Harvard Negotiation L Rev* 31, 60-69 (‘[I]lack of transparency in arbitral proceedings. . . inhibits the creation of precedent in international law, creating inefficiencies for parties who may settle if outcomes are more predictable, for parties and adjudicators who may have to duplicate efforts of those in other proceedings on the same issue at greater expense, and for academics and practitioners attempting to evaluate and clarify international law’; ‘confidentiality rules “contribute to the mystification of ICSID”’; ‘disputes that involve governments as parties often give rise to objections that transparency is justified by virtue of the need for good governance’; and ‘[c]onfidentiality of proceedings can also cover up abuse by foreign governments’); Cornel Marian, ‘Sustainable Investment Through Effective Resolution of Investment Disputes—Is Transparency the Answer?’ (unpublished manuscript 2012) 2 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2070676> accessed 29 October 2012 (‘Procedural transparency ensures that three systemic goals are achieved: securing the *enforcement of the award*, obtaining *credibility* for arbitral proceedings and minimizing future risks through *justification* of the arbitral process. As discussed in the previous section, these interests are essential in the context of protecting environmental and sustainable development goals but they extend far beyond these interests’ (emphasis in original)).

⁴ Margrete Stevens, ‘Confidentiality Revisited’ (2000) 17(1) *News from ICSID* 1, 10; *see also* Marian (n 3).

⁵ Lee Jae Woo, *Transparency in Treaty-Based Investor-State Arbitration* (2010) <http://www.uncitral.org/pdf/english/whats_new/11_2010/1124_3_LEE_JW.pdf> accessed 31 October 2012; Nigel Blackaby, ‘Public Interest and Investment Treaty Arbitration’ (ASA Swiss Arbitration Association Conference on Investment Treaties and Arbitration, Zurich, 25 January 2002) (2004) 1(1) *Transnational Dispute Management* 1-2; Carl-Sebastian Zoellner, ‘Lightning Crashes or Mere Ray of Light? Recent Developments Regarding Transparency in ICSID Proceedings’ (2006) 3(5) *Transnational Dispute Management* 12-13; *see also* UNCITRAL, Working Group II (Arbitration and Conciliation) ‘Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session’ para 23 (4-8 October 2010) UN Doc A/CN.9/712 <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html> accessed 31 October 2012.

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Centre for Settlement of Investment Disputes (ICSID, the Centre) has been at the forefront of the trend toward increased transparency in the conduct of investment arbitration.

ICSID is an autonomous international institution mandated to provide facilities for conciliation, arbitration and fact-finding in international investment disputes. Since its establishment in 1966 under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),⁶ ICSID has administered more than 400 cases, most of which have been initiated in the past 15 years.⁷ The majority of cases at ICSID are initiated and conducted pursuant to either of two sets of rules: the ICSID Convention or the ICSID Additional Facility Rules (together, the ICSID Rules).

The ICSID Rules and practice combine transparency and confidentiality in their approach to publication of information about, or generated in the course of, investment cases. Different provisions apply to the Centre, to tribunal members, and to disputing parties. With respect to the Centre, the ICSID Rules require the publication of basic information about each case, but only allow publication of awards, decisions, procedural orders, and other key documents where both parties agree to such publication.⁸ By comparison, tribunal members must undertake to maintain the confidentiality of all information gained as a result of their participation in the proceeding, and their deliberations must be conducted in private and remain secret.⁹ Moreover, tribunal members must maintain confidentiality with regard to the contents of any award made.¹⁰

There is no express requirement governing confidentiality or transparency obligations of disputing parties under the ICSID Convention

⁶ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature on 18 March 1965, entered into force on 14 October 1966) (ICSID Convention).

⁷ This statistic is current as of 31 October 2012.

⁸ ICSID Convention (n 6) art 48(5); Administrative and Financial Regulations (2006) (Admin Fin Regulations) reg 22-23; Rules of Procedure for Arbitration Proceedings (2006) (2006 Arbitration Rules) rule 48(4); see also Additional Facility Rules (2006) art 5; Arbitration (Additional Facility) Rules (2006) (2006 AF Arbitration Rules) art 53(3).

⁹ 2006 Arbitration Rules (n 8) rules 6(2) and 15(1); *see also*, 2006 AF Arbitration Rules (n 8) arts 13(2) and 23(1).

¹⁰ 2006 Arbitration Rules (n 8) rule 6(2); *see also* 2006 AF Arbitration Rules (n 8) art 13(2).

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or Rules.¹¹ However, there is a general requirement in public international law not to exacerbate a dispute.¹² This has led to procedural rulings in several ICSID cases directing parties not to publicly release information or specific documents in ongoing cases if this would jeopardize the integrity of the arbitral process or aggravate the dispute.¹³ In addition, parties to

¹¹ See UNCITRAL (Working Group II (Arbitration and Conciliation) ‘Comments by the International Centre for Settlement of Investment Disputes (ICSID)’ para 13 (8 August 2011) UN Doc A/CN.9/WG.II/WP.167 (‘Comments by ICSID to UNCITRAL Working Group II’) <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html> accessed 31 October 2012; *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 3, para 121 (29 September 2006) (‘In the absence of any agreement between the parties on this issue, there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources’); Rules of Procedure for Arbitration Proceedings (1968) (Arbitration Rules) rule 30, note F, [1993] 1 ICSID Rep 63, 93 (‘The parties are not prohibited from publishing their pleadings. They may, however, come to an understanding to refrain from doing so, particularly if they feel that publication may exacerbate the dispute’).

¹² See e.g., *Electricity Company of Sofia and Bulgaria* (Interim Measures of Protection) PCIJ Rep Series AB No 79 (‘the principle universally accepted by international tribunals and likewise laid down in many conventions . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute’); *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Request for Provisional Measures (9 December 1983) 1 ICSID Rep 410, 412 (‘All these remarks do by no means weaken the good and fair practical rule, according to which both parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult.’); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11, Decision on Provisional Measures, para 96 (17 August 2007) (‘It relates to the general principle, frequently affirmed in international case-law, whether judicial or arbitration proceedings are in question, according to which “each party to a case is obliged to abstain from every act or omission likely to aggravate the case or to render the execution of the judgement more difficult”’).

¹³ See e.g., *Biwater Gauff* Procedural Order No 3 (n 11) para 149 (‘neither party should be prevented from engaging in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary (for example, pursuant to the Republic’s duty to provide the public with information concerning governmental and public affairs), and is not used as an instrument to further antagonise the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult.’); *Abaclat and others v Argentine Republic*, ICSID Case No ARB/07/5, Procedural Order No 3 (Confidentiality Order), para 153(a)(i) (27 January 2010) (‘Subject

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ICSID cases may enter confidentiality agreements, in which they designate specific documents as confidential and stipulate that these may only be used for the arbitration proceedings and cannot be made public.¹⁴

In 2006, the Contracting States to the ICSID Convention, as well as other stakeholders, recognized the growing importance of increased transparency in ISDS. To that end, several amendments were made to the ICSID Rules increasing access to documents,¹⁵ allowing open hearings¹⁶ and providing for submissions by third parties¹⁷ in proceedings. This article focuses on ICSID's current Rules and practices relating to the publication of awards and other case documents, as well as information about the proceedings.¹⁸

6.2. A BALANCED APPROACH

The ICSID system balances transparency and confidentiality by promoting transparency while preserving the integrity of the arbitral process. This article first examines an area where ICSID has always adopted a transparent approach: the publication of key information about ICSID cases. It then turns to an area where the Centre encourages

to further specific restrictions on disclosure of specific documents and information as set out herein, the parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary, and is not used as an instrument to antagonise the Parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult, or circumvent the terms of this Procedural Order No. 3.').

¹⁴ See Comments by ICSID to UNCITRAL Working Group II (n 11) para 13; *see also Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, para 13 (30 August 2000) (quoting the Tribunal's Confidentiality Order of 27 October 1997: 'Neither the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties in this respect. Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration.').

¹⁵ 2006 Arbitration Rules (n 8) rule 48(5); *see also* 2006 AF Arbitration Rules (n 8) art 53(3).

¹⁶ 2006 Arbitration Rules (n 8) rule 32(2); *see also* 2006 AF Arbitration Rules (n 8) art 39(2).

¹⁷ 2006 Arbitration Rules (n 8) rule 37(2); *see also* 2006 AF Arbitration Rules (n 8) art 41(3).

¹⁸ Provisions in the ICSID Arbitration Rules relating to open hearings and third party participation are beyond the scope of this article drafted in the context of the guidelines for the anonymous publication of arbitral awards.

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transparency, but subject to limits defined by the parties: the publication of awards and other documents created in the course of the proceedings.

6.2.1. Publication of Basic Case Information

Basic information about every case administered by ICSID has been publicly available since the first registered case in 1972.¹⁹ This is mandated by Administrative and Financial Regulation 23, which requires the Secretary-General to maintain registers for each case.²⁰ That regulation provides that registers shall be ‘open for inspection by any person.’²¹ The registers contain basic procedural details of each proceeding, comprising ‘all significant data concerning the institution, conduct and disposition of each proceeding, including in particular the method of constitution and the membership of each Commission, Tribunal and Committee.’²² This same regulation also requires the registers to include information about post-award remedies exercised by the parties under the ICSID Convention.²³

While making this type of information publicly available may seem uncontroversial by today’s standards, ICSID was considered a pioneer when it introduced this regulation in the 1960s. It was inspired by the public nature of the institution, which required the publication of information not only about the operation of the Centre but also on the institution of each proceeding.²⁴ Historically, such information about ICSID cases was made available in ICSID’s annual reports and other publications.²⁵ It was also possible to come to ICSID’s offices to inspect the registers in person. Today, this information is available on ICSID’s website under the list of pending and concluded cases.²⁶ Typically, the listing for each pending case includes the subject matter, the date of

¹⁹ *Holiday Inns SA and others v Morocco*, ICSID Case No ARB/72/1 (registered on 13 January 1972).

²⁰ Admin Fin Regulations (n 8) reg 23(1); *see also* Additional Facility Rules (n 8) art 5.

²¹ Admin Fin Regulations (n 8) reg 23(2); *see also* Additional Facility Rules (n 8) art 5.

²² Admin Fin Regulations (n 8) reg 23(2); *see also* Additional Facility Rules (n 8) art 5.

²³ Admin Fin Regulations (n 8) reg 23(2). The ICSID Convention allows the parties to seek a supplementary decision or rectification of the award, or the post-award remedies of interpretation, revision or annulment. *See* ICSID Convention (n 6) arts 49-52.

²⁴ Antonio R. Parra, *The History of ICSID* (Oxford University Press 2012) 104.

²⁵ *See, e.g., ICSID Annual Report* 16-41 (2006); *ICSID Annual Report* 6-16 (2000). As from 1984, such procedural details could also be found in the biannual publication *News from ICSID*. ICSID discontinued this publication in 2009.

²⁶ International Centre for Settlement of Investment Disputes <<http://icsid.worldbank.org>>.

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registration, the date of tribunal constitution, the names and nationalities of tribunal members, the names of counsel for the parties, and the status of the proceeding. Additionally, the procedural details recite the filing of submissions and their filing dates, the dates of hearings, and the issuance of decisions, orders and awards.

6.2.2. Rules Respecting Publication of Awards, Decisions and Orders

The initial drafts of the ICSID Convention were silent on the question of the Centre's authority to publish awards, decisions and orders.²⁷ A suggestion was proffered late in the drafting period to authorize the Centre to publish the award 'except as the parties otherwise agree.'²⁸ This was rejected in favor of an explicit prohibition on publication of awards by the Centre, absent the consent to publish from both parties to the particular proceeding.²⁹ This rule was enshrined in Article 48(5) of the Convention, which states that '[t]he Centre shall not publish the award without the consent of the parties.'³⁰ While Article 48(5) refers to an 'award', it also includes decisions on annulment.³¹ It is important to note that Article 48(5) applies to the Centre only; it creates no obligation on the parties to keep awards confidential.³² Often, one of the parties unilaterally makes the award or other case documents public, absent a confidentiality order or confidentiality agreement.³³

²⁷ Christoph H. Schreuer and others, *The ICSID Convention—A Commentary* (2nd ed., Cambridge University Press 2009) 835.

²⁸ International Centre for Settlement of Investment Disputes, *History of the ICSID Convention—Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1968) ('*History of the ICSID Convention*') vol II-2, 817.

²⁹ *Ibid.*

³⁰ ICSID Convention (n 6) art 48(5).

³¹ Article 52, which regulates annulment under the Convention, incorporates Article 48(5) by reference and therefore decisions on annulment cannot be published without the consent of the parties. *ibid* art 52(4).

³² See Comments by ICSID to UNCITRAL Working Group II (n 11) para 13.

³³ Stevens (n 4) 10. Traditionally one party released the award to a legal reporting service such as *International Legal Materials*, *Journal du Droit International* or *ICSID Reports*. ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* (22 October 2004) ('ICSID Discussion Paper') para 11. More recently, parties have released documents pertaining to their cases on the internet, for example to the Investment Treaty Arbitration website created by Professor Andrew Newcombe <<http://www.italaw.com>>.

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The treatment of case documents was further elaborated in the Centre's Regulations and Rules. Administrative and Financial Regulation 22 requires the Secretary-General to arrange for the publication of conciliation commissions' reports, arbitral awards, or minutes and other records of proceedings where both parties consent to their publication.³⁴ Like Regulation 23, discussed above, Regulation 22 has remained unchanged since its initial adoption.

As for the publication of awards, this was further developed in ICSID's Rules of Procedure for Arbitration Proceedings (Arbitration Rules), specifically Rule 48(4). The original (1967) Arbitration Rules contained a verbatim repetition of the prohibition on publication found in Article 48(5) of the Convention.³⁵ By 1984, certain ICSID awards had been published unilaterally by the parties, along with commentary.³⁶ Considering that 'the ICSID Secretariat was an "impartial observer of developments taking place in the context of investment disputes,"' it was argued that the Centre 'should undertake the identification and disclosure of "the legal rules that have been raised in past proceedings and may shed a new light upon the implementation of the ICSID Convention."' ³⁷ Therefore, Arbitration Rule 48(4) was amended that year to grant the Centre discretion to publish 'excerpts' of the legal rules applied by the tribunal. The rationale given for the change 'was not so much greater, as more neutral, disclosure.'³⁸ The Rule provided:

(4) 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.³⁹

The first sentence of amended Arbitration Rule 48(4) still replicated Article 48(5) of the Convention.⁴⁰ However, the second sentence

³⁴ Admin Fin Regulations (n 8) reg 22(2); Schreuer and others (n 27) 836. There is one ICSID case, *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No ARB/05/10, where the parties agreed to have the main pleadings of the original arbitration proceeding published on ICSID's website. See <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ViewPleadings>> accessed 31 October 2012.

³⁵ Schreuer and others (n 27) 835.

³⁶ Parra (n 24) 140.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Rules of Procedure for Arbitration Proceedings (1984) rule 48(4). The text of this rule remained the same through the next set of amendments to the Regulations and Rules that became effective in January 2003.

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allowed the Centre to publish legal extracts without the consent of both parties. As noted by former ICSID Deputy Secretary-General Antonio R Parra, this amendment meant that the Centre could “include in its publications excerpts of the *legal reasoning* of the tribunal.”⁴¹

ICSID’s caseload, and the number of investor–State disputes in general, began to increase in the mid-1990s. This increase was accompanied by growing attention to ISDS and a number of critiques concerning the availability of information about investor–State cases. There were ‘calls for greater efficiency and transparency—the latter particularly in view of the public importance of issues at stake in many of the new cases.’⁴² This argument was made partly in reference to cases under Chapter 11 of the North American Free Trade Agreement (NAFTA), in which commentators raised the importance of the public issues at stake in many of the proceedings and calls for public access to the written and oral proceedings became widespread.⁴³

In response to such commentary, ICSID undertook consultations with all major stakeholders about the potential for increased access to information in investor–State cases. These consultations spanned an 18-

⁴⁰ Schreuer and others (n 27) 835.

⁴¹ Antonio R Parra, ‘The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes’ (2007) 22(1) ICSID Rev—FILJ 55, 60 (emphasis added).

⁴² *Ibid.* 65; see also Parra (n 24) 238; Ibrahim F. I. Shihata and Antonio R. Parra, ‘The Experience of the International Centre for Settlement of Investment Disputes’ (1999) 14(2) ICSID Rev—FILJ 299, 360; Kinnear and Diop (n 2) 41.

⁴³ See, e.g., DePalma (n 3) (‘[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 under the North American Free Trade Agreement’); Moyers (n 3) (‘Everyone’s heard about NAFTA – the North American Free Trade Agreement – and all the talk about jobs. But almost no one heard about one obscure section of NAFTA – Chapter 11 – except for multinational corporations who are using it to challenge democracy . . . Today, foreign companies are exploiting Chapter 11 to attack public laws that protect our health – and our environment – even to attack the American judicial system . . . Secret NAFTA Tribunals can force taxpayers to pay billions of dollars in lawsuits filed by corporations against the United States . . . NAFTA’s Chapter 11 threatens radical changes in public policy. But it’s all happening out of sight. Citizens have no seat at the table.’).

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month period starting in 2004,⁴⁴ and ultimately culminated in amendments to the Arbitration Rules in 2006. An amendment to Rule 48(4) clarified that in the absence of both parties' consent to publish an award, the Centre shall publish the 'legal reasoning of the Tribunal,' which went beyond the previous rule allowing publication of the 'legal rules applied by the Tribunal.'⁴⁵ The former had 'sometimes proved difficult to identify' and the new iteration would 'allow the Centre to publish the tribunal's discussion of how to apply applicable legal principles.'⁴⁶ This change also made it mandatory to publish excerpts of awards that were not otherwise in the public domain, and was specifically intended to achieve greater overall transparency in the ICSID system.⁴⁷ A similar amendment was made to the Arbitration (Additional Facility) Rules.⁴⁸

Concern had also been expressed about the promptness of publishing excerpts, especially in light of the increased number of pending ICSID cases dealing with similar facts and issues.⁴⁹ To ensure excerpts of the legal reasoning adopted in an award were promptly released, the amendment to Rule 48(4) made early publication of this reasoning mandatory for the Centre.⁵⁰ This contrasted with the 1984 amendment, which merely stated that the Centre 'may' publish excerpts. Again, this requirement was intended to increase transparency and 'efficiency in the development of international law.'⁵¹ A similar amendment was made to corresponding Article 53 of the Arbitration (Additional Facility) Rules.⁵² The final rule, as it came into effect on 10 April 2006 and currently stands, reads:

⁴⁴ See ICSID Discussion Paper (n 33); ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations* (12 May 2005) ('ICSID Working Paper').

⁴⁵ Aurélia Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21(2) ICSID Rev—FILJ 427, 442.

⁴⁶ *Ibid.*

⁴⁷ Schreuer and others (n 27) 835.

⁴⁸ 2006 AF Arbitration Rules (n 8) art 53(3).

⁴⁹ ICSID Working Paper (n 44) 9.

⁵⁰ Antonietti (n 45) 442.

⁵¹ *Ibid.*

⁵² 2006 AF Arbitration Rules (n 8) art 53(3).

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(4) The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.⁵³

As noted above, this principle applies equally to annulment decisions. The Arbitration Rules also specify that the same principle applies to decisions on interpretation and revision proceedings.⁵⁴ Similarly, the same principle now applies to interpretations and corrections to the award, and to supplementary decisions, under the Additional Facility (Arbitration) Rules.⁵⁵

6.3. A MODERN APPROACH

Just as the ICSID Rules have changed over time to respond to calls for greater transparency in ISDS, the Centre has modernized its internal best practices to fully implement these rules. Below, we describe ICSID's current practices regarding the publication of awards and other case documents, and then turn to its current practices relating to the publication of other information about each proceeding.

6.3.1. Increased Access to Rulings

All ICSID awards, or excerpts of their key legal holdings, are published in accordance with Article 48(5) of the ICSID Convention and Arbitration Rule 48(4), or Article 53(3) of the Arbitration (Additional Facility) Rules. There are numerous benefits to increased access to such case law. In particular, the publication of awards lends to 'further development of a public body of jurisprudence which would allow investors and host [S]tates to understand how investment agreements are interpreted and applied and ultimately contribute to a more predictable and consistent system.'⁵⁶ Moreover, confidence in the investment arbitration system is likely to be bolstered through the availability of past

⁵³ 2006 Arbitration Rules (n 8) rule 48(4); *see also* 2006 AF Arbitration Rules (n 8) art 53(3) ('Except to the extent required for any registration or filing of the award by the Secretary-General under paragraph (1) of this Article, the Secretariat shall not publish the award without the consent of the parties. The Secretariat shall, however, promptly include in the publications of the Centre excerpts of the legal reasoning of the Tribunal.').

⁵⁴ 2006 Arbitration Rules (n 8) rules 53 and 48(4).

⁵⁵ 2006 AF Arbitration Rules (n 8) arts 53(3), 55(3), 56(3) and 57(3).

⁵⁶ Organization for Economic Cooperation and Development, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures* (June 2005) para 42.

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decisions.⁵⁷ Parties are also better able to select arbitrators in their cases if they have access to concluded cases, which can reveal the approach of the arbitrators.⁵⁸

Given the benefits of increased access to case law, the Centre consistently strives to obtain both parties' consent to publish orders and decisions. In most cases, ICSID receives the consent of both parties to publish these documents.⁵⁹ Often, the agreement to publish such documents is memorialized in the legal instrument conferring the Centre's jurisdiction over the case.⁶⁰ It may also be agreed to by the parties in a procedural order governing the particular case. On the basis of such consent, ICSID has published awards,⁶¹ decisions on annulment,⁶² procedural orders,⁶³ and decisions on challenges to arbitrators,⁶⁴ among other types of case documents.

⁵⁷ Schreuer and others (n 27) 838.

⁵⁸ *Ibid* 838-9.

⁵⁹ *Ibid* 839; ICSID Discussion Paper (n 33) para 11.

⁶⁰ Meg Kinnear, 'Transparency and Third Party Participation in Investor-State Dispute Settlement' (Symposium Co-Organized by ICSID, OECD and UNCTAD: Making the Most of International Investment Agreements: A Common Agenda, Paris, 12 December 2005) 2 <<http://www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf>> accessed 31 October 2012; *see, e.g.*, 2012 United States Model Bilateral Investment Treaty art 29 <<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>> accessed 31 October 2012 (requiring that documents relating to arbitral proceedings, including '(a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [Amicus Submissions] and Article 33 [Consolidation]; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal' be made 'available to the public').

⁶¹ *See, e.g., RSM Production Corporation and others v Grenada*, ICSID Case No ARB/10/6, Award (10 December 2010) <<http://icsid.worldbank.org>>; *Swisslion DOO Skopje v Macedonia, former Yugoslav Republic of*, ICSID Case No ARB/09/16, Award (6 July 2012) <<http://icsid.worldbank.org>>.

⁶² *See, e.g., Industria Nacional de Alimentos, SA and Indalsa Perú, SA (formerly Empresas Lucchetti, SA and Lucchetti Perú, SA) v Republic of Peru*, ICSID Case No ARB/03/4, Decision on Annulment (5 September 2007) <<http://icsid.worldbank.org>>; *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No ARB/05/10, Decision on the Application for Annulment (16 April 2009) <<http://icsid.worldbank.org>>.

⁶³ *See, e.g., International Quantum Resources Limited, Frontier SPRL and Compagnie Minière de Sakania SPRL v Democratic Republic of the Congo*, ICSID Case No ARB/10/21, Procedural Order No 1 (1 July 2011).

⁶⁴ *See, e.g.,* Eloïse Obadia, 'Introductory Note: Challenge Decisions' (2008) 23(2) ICSID Rev—FILJ 376; Eloïse Obadia, 'Introductory Note: Challenge Decisions' (2009)

ICSID APPROACH TO PUBLICATION OF INFORMATION

ICSID has adopted internal best practices to implement the requirements of Convention Article 48(5), Arbitration Rule 48(4) and Article 53(3) of the Arbitration (Additional Facility) Rules. At an early stage, ICSID asks the parties in each proceeding whether they would agree to publication of case documents. When this consent is given, the Centre will publish procedural orders, decisions and the award as they are released by the tribunal. In the absence of consent, the parties are asked again to consent to publication of the award when it is released. In addition, two months after the award is rendered and provided that no post-award remedy has been filed at that time, ICSID sends a letter to the parties seeking publication of all procedural and substantive decisions (including the award if no prior consent to its publication was given). If both parties consent to publication, then ICSID will prepare a version of these documents without the tribunal members' original signatures but indicating that they have been signed. These unsigned versions are posted on ICSID's website.⁶⁵

If one or both of the parties do not consent to publication of the award, then ICSID must promptly excerpt and publish the legal reasoning of the Tribunal.⁶⁶ The excerpt contains:

1. The cover page of the award;
2. The table of contents from the award;
3. All headings and sub-headings contained in the body of the award;
4. The introduction to the award, excluding facts;
5. The procedural history section of the award;
6. The Tribunal's analysis of all issues, including applicable law, jurisdiction, damages, and the parties' positions on each where introduced in the tribunal's analysis;

24(1) ICSID Rev—FILJ 193; *Participaciones Inversiones Portuarias v Gabonese Republic*, ICSID Case No ARB/08/17, Decision on Proposal for Disqualification of an Arbitrator (12 November 2009) <<http://icsid.worldbank.org>>. Since 2009, the Centre gives reasons on challenges to arbitrators. Previously, such decisions did not provide reasons.

⁶⁵ See, e.g., *RSM Production Corporation and others v Grenada*, ICSID Case No ARB/10/6 (n 65); *Murphy Exploration and Production Company International v Republic of Ecuador*, ICSID Case No ARB/08/4, Award (15 December 2010) <<http://icsid.worldbank.org>>.

⁶⁶ 2006 Arbitration Rules (n 8) rule 48(4).

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7. The section on costs;
8. The operative part of the award; and
9. Any other parts that do not discuss the facts of the dispute.

All confidential information is redacted. The excerpt is accompanied by a short description of facts to put the excerpts into context and help a reader understand the tribunal's legal reasoning, but omitting confidential information. The parties are always consulted before publishing excerpts, and are provided with a draft of the excerpts proposed to be published.

The obligation on the Centre to publish excerpts also extends to annulment, revision and interpretation decisions, which are treated as awards for this purpose.⁶⁷ Formerly, excerpts were published in ICSID's in-house law journal, the *ICSID Review—Foreign Investment Law Journal*, among other print sources.⁶⁸ Today, the Centre strives to publish these extracts on its website, and a template is in place to standardize their format and expedite the creation of an extract. Where ICSID has not received the consent of both parties to publish an award, but one or more of the parties to the particular dispute has published it elsewhere in the public domain, ICSID will not prepare extracts of that award.

The Centre also continues its efforts to publish awards, decisions, and orders in completed ICSID cases. Through an endeavor called the 'Transparency Project', ICSID contacted parties in all concluded cases since 1972 to seek their authorization to publish rulings. This project has enhanced the amount of publicly available ICSID procedural and substantive case law and promotes greater public understanding of ICSID proceedings and investment law.

⁶⁷ ICSID Convention (n 6) art 52(4); 2006 Arbitration Rules (n 8) rules 53 and 48(4); *see also* 2006 AF Arbitration Rules (n 8) arts 53(3), 55(3), 56(3) and 57(3).

⁶⁸ *See, e.g.*, Milanka Kostadinova, 'Desert Line Projects LLC v. Republic of Yemen (ICSID Case No. ARB/05/17) (Award, February 6, 2008)' (2008) 23 ICSID Rev—FILJ 175; Amine Assouad, 'Ahmonseto, Inc. and others v. Arab Republic of Egypt (ICSID Case No. ARB/02/15): Introductory Note' (2008) 23 ICSID Rev—FILJ 352; *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Award (20 November 1984), 24 ILM 1022 (1985) (excerpts), 1 Intl Arb Rep 601 (1986), 89 ILR 405 (1992), 1 ICSID Rep 413 (1993).

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6.3.2. Increased Access to Information

ICSID also has internal best practices regarding access to information about the procedural details of pending and concluded cases. As discussed above, the Secretary-General is required to maintain registers for all cases pursuant to Administrative and Financial Regulation 23. In carrying out this obligation, the Centre posts the procedural details of each case on its website. As described earlier, basic information, such as the case name, identities of the parties and their representatives, the date of registration of the case and tribunal constitution, and the subject matter of the dispute, are provided.⁶⁹ In addition, each member of the tribunal or commission is mentioned as soon as s/he is appointed, with an indication of who appointed him or her, even before constitution of the tribunal or commission. This information is particularly valuable to parties when appointing their own arbitrators or conciliators. Moreover, developments in the proceedings, including the filing of submissions, the dates and locations of hearings, as well as challenges to tribunal members and counsel, are provided in the procedural details. Finally, links or citations to published awards, decisions, orders, and other case documents are provided, where available.

The Centre also publishes biannually statistics on its caseload, which includes total numbers of cases registered; the bases of consent invoked to establish jurisdiction in ICSID cases; the geographic distribution of the caseload; State parties and economic sectors involved in the cases; outcomes of cases and the nationalities of arbitrators, conciliators, and annulment committee members. These publications are available on ICSID's website.

6.4. CONCLUSION

The ICSID Rules have evolved over time in response to requests for greater transparency, particularly with respect to publication of awards, decisions and orders and basic information about cases pending before the Centre. The ICSID Arbitration Rules in particular are praised as 'the most transparent procedural arbitration rules regularly used in

⁶⁹ See Comments by ICSID to UNCITRAL Working Group II (n 11) para 7.

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international arbitration.⁷⁰ Recent practices adopted by the Centre have complemented ICSID's implementation of these Rules. It is hoped that increased access to published awards, decisions and other procedural documents will promote the further development of international investment law and public confidence in the ISDS system.⁷¹ These advantages are also compelling in the context of commercial arbitration and commercial arbitral institutions are considering how to provide access to arbitral awards. Beyond the Bulletins of the ICC International Court of Arbitration and the Yearbook of Commercial Arbitration, the new guidelines for the anonymous publication of arbitral awards proposed by the Milan Chamber of Arbitration constitute an important step forward in the dissemination of information concerning arbitration.

⁷⁰ Nathalie Bernasconi-Osterwalder, 'Transparency and Amicus Curiae in ICSID Arbitrations' in Markus W Gehring, Marie Claire-Segger and Andrew Newcombe (eds.), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 196.

⁷¹ OECD (n 56) para 42.