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Investor-State Arbitration Under ICSID: A Case for Presumption Against Confidentiality?

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(*)

Abstract

One of the main advantages of arbitrations is confidentiality. The private nature of the arbitral proceedings implies confidentiality and is thus one of the reasons why arbitration is preferred over other dispute resolution processes for the resolution of commercial and investment disputes. However, the issue of confidentiality has been called into question in the case of investor-state arbitration. Given that the matters raised in investor-state arbitration are usually of interest to the public, there have been calls for such proceedings to be more open and transparent. The aim of this article is to determine whether, in light of the recent amendments to the ICSID Arbitration Rules, transparency and public involvement can be presumed to now be the underlying theme in investor-state arbitration under ICSID. The article examines the background to investor-state arbitration under ICSID and looks at how the issue of confidentiality is treated in the ICSID Convention, the ICSID Rules, and cases. It then analyses the arguments for and against confidentiality. The article concludes that the emphasis should be on balancing the conflicting demands for confidentiality on the one hand, and the public's interest in greater transparency and involvement in such arbitrations on the other.

I. Introduction

Confidentiality is regarded as one of the benefits of arbitration as a dispute settlement method. In the case of investor-state arbitration, the presumption of confidentiality of the arbitral process ensures privacy of the proceedings and the protection of sensitive government documents as well as confidential documents relating to the business of the investor.

The subject matter of the investment disputes usually involves issues of public policy, in the outcome of which the public has an interest. Decisions in such arbitration usually have the potential to affect the welfare of the citizens of the state involved in the dispute.

The public interest issues, amongst others, have given rise to a debate as to whether confidentiality should be a norm in investor-state arbitration; or should investor-state arbitrations held under

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the auspices of the International Centre for the Resolution of Investment Disputes (ICSID) be open affairs, with cases requiring confidentiality considered as exceptions? There is no doubt that confidentiality of the arbitration process has certain advantages; on the other hand, there are also advantages to having more open and transparent investment arbitrations.

page "479"

In the face of ongoing calls for greater transparency in investor-state arbitrations, a substantial majority of which is handled by ICSID, amendments have been made to the ICSID Arbitration Rules and Regulations, with effect from April 10, 2006.(1)

The aim of this article is to examine whether there are sufficient grounds on which to base a presumption of non-confidentiality in ICSID arbitration. The article adopts an analytical approach. First of all, it looks at the general framework for investor-state arbitration under ICSID. It then considers how the question of confidentiality is treated in the ICSID arbitration regime. It goes on to examine the various arguments for and against confidentiality. The article concludes that although some degree of confidentiality is needed to maintain the integrity of the arbitral process, this must, however, be balanced with a greater degree of transparency and public involvement.

II. Investor-State Arbitration under ICSID: Overview

A. Aim of the ICSID Convention

The Convention on the Settlement of Disputes between States and Nationals of Other States ("ICSID Convention")(2) is designed to foster an increase in private international investment by providing an institution, ICSID, specially designed for the settlement of investment disputes between private investors and states.(3) It guarantees to the private investor a forum for dispute settlement in which he has a standing to present his claims, thus removing the need for the investor to seek diplomatic protection from its home state.(4)

For states, the presence of ICSID encourages investment in such states since investors are assured of a neutral arbitration forum in the case of any dispute arising from the investment, such as expropriation.

The ICSID Convention thus provides, for both parties, a specialized centre for the settlement of their dispute. It also seeks to maintain a balance between the interests of the foreign investor and those of the host state.(5)

B. Jurisdiction of ICSID

With regard to its personal jurisdiction, Article 25(1) of the ICSID Convention provides, inter alia, that: page "480"

> The jurisdiction of the Convention shall extend to any legal dispute … between a Contracting State (or any constituent subdivision or agency of a Contracting

State designated to the Centre by that State) and a national of another Contracting State.

For ICSID to have jurisdiction over the parties, the dispute must be between a state and a private party, not two states. The Convention also gives standing to any constituent sub-division or agency of a Contracting State where the state in question has designated such constituent sub-division or agency to appear before ICSID.(6) In addition to designation, the Convention also requires that the consent to ICSID arbitration by a constituent sub-division or agency of a Contracting State be approved by that state.(7)

In determining whether a state is a Contracting State for the purpose of jurisdiction, the status of the state at the time of request for arbitration is a critical factor. If at the time of request for arbitration, a state is not a Contracting State of the Convention, then it will not be subject to the jurisdiction of ICSID.

With regard to the foreign investor, Article 25(2) of the ICSID Convention defines who may be regarded as a “national of another Contracting State.” Investors who are natural persons and hold the nationality of another Contracting State can be parties to proceedings before ICSID provided they do not also hold the nationality of the host state.(8) Juridical persons having the nationality of another Contracting State can also bring claims before ICSID.(9) The nationality of companies is determined either from the place in which they are incorporated or the place in which the company has its headquarters. Companies that have the host state's nationality by virtue of local incorporation, are allowed access to ICSID by the Convention provided the host state has agreed to treat them as foreign nationals.(10)

The subject matter jurisdiction of ICSID focuses on legal disputes that arise directly out of investments.(11) The dispute to be submitted must be one of a legal nature and must also be an investment dispute. The Convention does not define what an investment is and thus creates the possibility of a broad definition of the term.

In the event that the parties do not meet the jurisdictional requirement of ICSID, they can avail themselves of the ICSID Additional Facility Rules(12) subject to certain criteria. The Additional Facility Rules are used where one of the parties is not a Contracting State or the national of a contracting state or where the dispute does not arise directly from an investment.(13)

With this background on ICSID arbitration, we now proceed to examine how the question of confidentiality is addressed under the ICSID framework.

page "481"

III. Confidentiality in ICSID Arbitration

As earlier noted, the reasons for confidentiality in investor-state arbitration include the need to protect sensitive business and government information, and to prevent the arbitral proceedings from being bogged down by undue publicity. In ICSID arbitration,

the manner in which the confidentiality of the arbitral process is treated can be seen from an examination of the ICSID Convention, Regulations, and Arbitration Rules, the ICSID Additional Facility Rules, and ICSID decisions.

In light of the calls for greater transparency in investor-state arbitration, certain provisions in the ICSID Convention, Regulations, and Rules have been amended. These amendments entered into force on April 10, 2006.

According to Article 44 of the ICSID Convention, ICSID arbitrations are to be conducted in line with the Arbitration Rules in force on the date on which the parties consented to arbitration, unless the parties agree otherwise. As a result of the above provision, some ICSID arbitrations may be proceeding under the old rules. Therefore, it is imperative to consider the relevant provisions under the ICSID Convention and Rules as they were prior to April 10, 2006, as well as the recent amendments to ICSID Rules and Additional Facility Rules.

A. Confidentiality in the ICSID Convention and Arbitration Rules

Unlike the old ICSID Rules, in which emphasis is placed on confidentiality of the arbitral process, the recent amendments to the ICSID Arbitration Rules appear to be a move towards incorporating greater transparency and public involvement in ICSID arbitration. The implication is that the new ICSID Rules contain a mixture of both confidentiality provisions and transparency provisions, which are now examined.

The first step in ICSID arbitration would involve the filing of a request for arbitration to the ICSID Secretariat. The ICSID Regulations require the Secretary-General to maintain a register of each request for arbitration, which must contain information on the institution, conduct and disposition of each case and the constitution of each tribunal.(14) This register is to be made publicly available(15) and this can be found in the ICSID Annual Report and on the ICSID website. This requirement remains unchanged under the current amendments. Publication of the register is meant to provide information to the public on the existence of a dispute, the parties to the dispute, the subject matter of the dispute, and the status of the proceedings.

page "482"

As to the hearing stage, the old ICSID Rules provided only for attendance of the parties, their agents, counsel, witnesses, and experts. The new ICSID Arbitration Rules, on the other hand, expand the list of persons who can be involved in the arbitration proceedings. Rule 32(2) provides that the tribunal may allow other persons aside from those listed above to attend all or part of the hearings if none of the parties object. If any party to the proceedings objects to opening up the proceedings to third parties, then the hearing must be held in private. In the absence of any objections, the tribunal is required to take steps to ensure the confidentiality of "proprietary or privileged information."(16) This amendment thus allows for increased participation in the arbitral procedures by persons other than the parties to the dispute. At the same time, it provides measures for guaranteeing the parties to

the dispute their privacy.

In both the old and new ICSID Arbitration Rules, tribunal members are to keep all information which they obtain through the proceedings confidential.[17] This emphasis on confidentiality continues in Rule 15 of the ICSID Arbitration Rules,[18] which provides that the tribunal shall carry out its deliberations in private and such deliberations must be kept secret.

The new ICSID Arbitration Rules, aimed at increased transparency, incorporate the practice of *amicus curiae* submissions into the arbitration procedure. The tribunal may allow third parties to the proceedings to submit *amicus curiae* briefs subject to certain conditions being met.[19] Although the parties' consent is not required in this regard, the tribunal is, however, required to consult with the parties before it makes its decision on the issue.[20] This requirement appears to be a way of ensuring that the parties to the dispute remain involved throughout the process.

As noted earlier, the submission of *amicus curiae* briefs is subject to certain conditions. The tribunal, in deciding on an *amicus curiae* submission, must consider: (1) whether the non-party has a significant interest in the proceedings; (2) whether the *amicus curiae* submission addresses a matter within the scope of the dispute; and (3) whether the submission would help the tribunal resolve a factual or legal issue by providing a perspective, knowledge, or insight different from that of the parties.[21] In addition, the tribunal must ensure that the *amicus curiae* submission does not disrupt the proceedings or unfairly prejudice any of the parties. The parties must also be given adequate opportunity to comment on the *amicus curiae* submission. The reason for these conditions may be the need to regulate the *amicus curiae* process and ensure that the arbitral procedure remains party-oriented.

page "483"

After the tribunal has given the award, the arbitrators are under a duty, in both the old and new Rules, to keep confidential the contents of the award.[22] Also, both the old and new ICSID Arbitration Rules prohibit ICSID from publishing the award unless the parties give their consent. This restriction on publication of the awards is directed only at ICSID. The parties themselves are not obliged to keep the awards confidential.[23] Under the old Rules, where ICSID does not have the requisite consent from both parties, it has the discretion to publish “excerpts of the legal rules applied by the tribunal.”[24] The new ICSID Arbitration Rules, however, remove this discretion and place a duty on the Centre to publish *promptly* excerpts of, not the legal rules, but “the legal reasoning of the Tribunal.”[25]

B. ICSID Additional Facility and confidentiality

The provisions of the ICSID Arbitration (Additional Facility) Rules on the issue of confidentiality are similar to those already discussed above. According to Article 13(2) of the ICSID Arbitration (Additional Facility) Rules, arbitrators are obliged to keep all information arising from the arbitral proceedings

confidential. Similarly, they are also under an obligation not to disclose the contents of the award made. The tribunal members are required to hold private deliberations and these must remain confidential.(26)

The ICSID Arbitration (Additional Facility) Rules (as amended) also provide for third party access to the hearings, provided the parties do not object. Measures must be put in place to protect the sensitive information.(27)

Under the Additional Facility system, recent provisions have been made for *amicus curiae* briefs. *Amicus curiae* submissions may be allowed subject to conditions similar to those outlined previously under the ICSID Arbitration Rules.

The Centre cannot publish the award without the parties' consent. According to the recent Rules, however, the Centre has an obligation to publish excerpts of the legal reasoning of the tribunal without any delay.(28)

In a number of cases before ICSID, tribunals have been required to determine the issue of confidentiality in accordance with the ICSID Rules and Regulations outlined above. The decisions in these cases on the question of confidentiality in ICSID arbitration are analysed below, in a bid to find out if a case for a presumption against confidentiality can be successfully sustained.

page "484"

C. ICSID cases on confidentiality

The earliest ICSID decision on the issue of confidentiality was in 1983, in *Amco Asia Corp. & others v. Republic of Indonesia*,(29) where the respondent brought a request for provisional measures before the tribunal to restrain the claimant from further publishing details about the case. The request for provisional measures resulted from the claimant disclosing some details about the proceedings in newspaper articles. The respondent alleged that such publications might exacerbate the dispute and discourage foreign investments in Indonesia. The respondent also stated "the claimant's actions are incompatible with the spirit of confidentiality which imbues these international arbitral proceedings."(30)

The tribunal, in rejecting the request for provisional measures, stated that:

> As to the "spirit of confidentiality" of the arbitral procedure, it is right to say that the Convention and the Rules do not prevent the parties from revealing their case.(31)

Although the ICISD Convention and Rules contain specific duties on the Centre itself to maintain confidentiality, it is silent on whether the parties have a duty to maintain confidentiality in the arbitral proceedings. The tribunal in the *Amco* case provided a clarification on the issue, stating that the parties are not bound by any duty of confidentiality, but also highlighted the need for restraint by the parties in the interest of the dispute.

A similar issue arose under the ICSID Additional Facility. The

tribunals in *Metalclad v. United Mexican States*[32] and *Loewen Group Inc. & Raymond L. Loewen v. United States*[33] had to resolve the issue of whether the parties to the proceedings were bound by a general duty of confidentiality.

In *Metalclad*, the respondent sought an order declaring that the arbitral proceedings were confidential. The complaint was directed against the claimant's CEO for having provided information to its shareholders regarding the steps taken in the arbitral proceeding.[34] The tribunal in that case was of the view that nothing in the treaty under which the dispute was brought or the ICSID Additional Facility Rules restricted the parties' freedom to discuss their case publicly.[35]

The tribunal in *Loewen* reiterated the same view. In *Loewen*, the respondent requested that all filings in the case, including the minutes, be treated as publicly accessible.[36] The claimant in reply alleged the existence of a general duty of confidentiality on each party to the proceeding. Denying the respondent's request, the tribunal ruled out the *page "485"* existence of any general duty of confidentiality which might prevent the parties from public discussion of the case, especially where one of the parties was a state.[37]

The most recent decision by an ICSID tribunal on the subject of confidentiality can be found in the case of *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*.[38] The tribunal in *Biwater* considered the new amendments to the ICSID Rules. The claimant requested provisional measures in order to prevent the respondent from unilaterally disclosing certain documents submitted in the arbitral proceeding.[39]

It alleged that the respondent had unilaterally published some documents produced during the proceedings on a certain website and that an order was necessary to protect the arbitral process.[40] The respondent contended that the claimant failed to demonstrate an imminent threat to its rights that would necessitate the making of the order sought and that the ICSID system currently enjoys a high level of transparency since most of the orders, decisions, pleadings, and awards are available on the Internet.[41] References were made to the decisions in the *Amco, Metalclad*, and *Loewen* cases.

The tribunal held that, in the absence of any agreement between the parties, there was no provision in the ICSID Arbitration Rules imposing a general duty of confidentiality in ICSID arbitration.[42] However, it pointed out that there was no general rule of transparency either.

The tribunal acknowledged that there is no provision in the ICSID Arbitration Rules requiring that pleadings and other documents submitted by the parties during the proceedings should be kept confidential.[43] It stated, however, that certain considerations, such as the need to protect the procedural integrity of the proceedings and to prevent exacerbation of the dispute, might necessitate a restriction on the disclosure of such documents prior to the conclusion of the proceedings.[44]

In its recommendations, the tribunal stated that the parties were

free to publicly discuss the case, provided that such discussions were limited to what was necessary.(45) The tribunal also placed restrictions on the disclosure of certain documents used in the proceedings for the duration of the arbitral proceedings, subject to review in light of new circumstances.(46)

It is evident from the decision in *Biwater* that the tribunal sought to balance the claimant's interests in the confidentiality of the process, on the one hand, and the respondent's wish for transparency on the other. The decisions on all the cases discussed agree, however, that in the absence of any agreement, the parties themselves are not under a duty of confidentiality.

page "486"

IV. A Case for a Presumption against Confidentiality?

In examining whether or not there is a case for a presumption against confidentiality, it is important to consider both the arguments for and against confidentiality in investor-state arbitration generally and ICSID arbitration in particular.

A. Arguments for confidentiality

Party autonomy is an essential part of most arbitral processes, subject to certain exceptions. It is usually up to the parties to determine the parameters of the arbitration proceedings and most arbitration rules reflect this. The ICSID Arbitration Rules, for instance, emphasize the role of consent of the parties in the manner in which the arbitration proceedings are administered, whether with regard to access to the hearings or publication of the award. As such, where it is the parties' expectation that the arbitral process remain private and thus confidential, effect must be given to the wishes of the parties.

Maintaining the privacy of the arbitral process reduces the possibility of external influences on the proceedings and allows the dispute to be effectively resolved between the parties. Pressures on the arbitral proceedings from the media or the public at large may have a negative effect on the proceedings, thus lending weight to the need for confidentiality.

As noted in the cases discussed above, ICSID tribunals have sought to maintain restrictions on public disclosure of documents used in the proceedings in order to ensure that the dispute is resolved without further escalation. In addition, the need to protect proprietary information, such as trademarks, patents, etc. and sensitive government information, may warrant the presumption of confidentiality of arbitral proceedings.(47)

It has been argued that maintaining confidentiality in investor-state arbitration can be a cost-saving mechanism for the parties in relation to arbitration costs.(48) Public involvement in the arbitral process may result in a delay in the proceedings. This may in turn mean that the cost of the arbitration would increase beyond that estimated by the parties.

B. Arguments against confidentiality

The main arguments for the presumption of non-confidentiality in investor-state arbitration turn on the subject matter of the disputes. More often than not, investor-state arbitration involves issues in which the public has an interest.(49)

page "487"

A look at the list of cases on the ICSID website shows that most of the disputes involve the provision of public services. There have been and still are disputes involving the provision of water and sewer services (*Biwater Gauff (Tanzania) v. United Republic of Tanzania*), gas distribution (*LG&E Energy Corp. & others v. Argentine Republic*) and electricity generation (*PSEG Global Inc. & anor v. Republic of Turkey*), to name a few.(50)

These cases involve investments aimed at improving people's standard of living, supporting the demand for public involvement in the event of a dispute. Awards in such cases have the potential of affecting the daily lives of the ordinary citizens of the countries concerned. As a result, some commentators are of the view that confidentiality cannot play the same role as it does in international commercial arbitration, which involves private parties only.(51)

It has also been argued that state involvement in investor-state arbitration and the need to promote good governance and accountability tilts the scale towards non-confidentiality.(52) Most investment disputes arise from investments with developing countries, where good governance and accountability are an issue. Greater transparency in the arbitral process would afford the citizens the opportunity, not only to be aware that there is a dispute, but also to question the actions of their governments.(53)

Greater transparency through prompt publication of awards has also been cited as a means of ensuring the development of international law on foreign investments.(54) In order to aid such development, there may be a need for a climate of non-confidentiality in ICSID arbitration. It may be argued that international law on foreign investment as we know it has grown despite the alleged air of confidentiality surrounding investor-state arbitration. Such growth, however, can be attributed to those awards, decisions, etc. which were made publicly available as opposed to those which were not.

Under the ICSID system, awards, decisions, and orders are usually published on its website. Such publications, however, can only be made with the consent of the parties. Parties can, however, unilaterally publish such awards without going through ICSID. In order to ensure that more awards may be published promptly, it is suggested that ICSID may adopt the concept of “negative consensus” found in the World Trade Organization Dispute Settlement Understanding (WTO DSU). If this concept is applied to the publication of awards in ICSID arbitration, then the Centre can publish all ICSID awards unless the parties expressly agree otherwise. In that way, all ICSID awards would be publishable except in the cases where parties would come to a consensus that it should not be published.

page "488"

The degree of confidentiality in ICSID arbitration depends on the

Arbitration Rules and the parties' agreement. The recent amendments of the ICSID Arbitration Rules and the ICSID Arbitration (Additional Facility) Rules indicate a shift in focus from confidentiality to transparency in recognition of the changing dynamics in investor-state arbitration.

Investor-state arbitration under the North American Free Trade Treaty (NAFTA) has also witnessed a move towards transparency. On the issue of confidentiality, in the Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, the Free Trade Commission stated that there is no general duty of confidentiality under NAFTA, militating against public access to documents except where expressly stated.(55) Under the NAFTA system, documents used in the proceedings are readily available.

New investment agreements by the NAFTA parties, especially the United States and Canada, now include provisions for public access to hearings and third party involvement in disputes through *amicus curiae* submissions.(56) Examples include the U.S. Free Trade Agreements with Chile, Singapore, Uruguay, the Dominican Republic, and Canada's model Foreign Investment Promotion and Protection Agreement.(57)

V. Conclusion

Recent changes in the ICSID arbitration system and general trends in investor-state arbitration seem to support the case for transparency in arbitral proceedings. To some degree, the question of transparency or non-transparency may depend on the general perception of the ICSID arbitral procedure. The lack of provisions for transparency and public involvement in ICSID arbitration prior to the amendment may have been viewed as a lack of recognition of the public interest issues that may be involved. This need not, however, be the case.

This analysis shows that there are legitimate arguments both for and against confidentiality. Considering the legitimacy of the arguments on both sides of the divide, the question need not necessarily be whether a case for a presumption of non-confidentiality can be made, for it obviously can, but whether a case for presumptive non-confidentiality can also be countered. The ICSID approach aimed at balancing the conflicting needs of confidentiality on the one hand and transparency on the other, may be the right approach to the issue, aiming to accommodate the expectations of the parties in the arbitral process as well as the interests of the public. *page "489"*

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[41] *Id*. paras. 45 and 50.

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