European Federation for Investment Law and Arbitration (EFILA)

A response to the criticism against I Criticism 3: Lack of transparency in investment disputes

a) Introduction

3.1 Investment arbitration is continually evolving and the question of Transparency of the arbitral process is no exception. Transparency has also been a principle under development for the last 20 years of the ISDS system, which has been taken into account for a long time as an evolving principle of the investment arbitration practice in its different expressions (i.e. CAFTA-DR, NAFTA, Amicus Curiae and Third party rights, etc.)[39]. Transparency has evolved into its new role by positioning itself as one of the global norms in international investment law by means of the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which has been adopted by the UN as the UN Convention on transparency for investor-state dispute resolution. In addition, it is important to understand that the confidentially principle in arbitration is not equal to a lack of transparency; lack of transparency would mean that investment arbitration is not an accountable system. This is an unfounded criticism since investment treaty arbitration contains a number of different control mechanisms to ensure accountability[40]. Moreover, access to investment arbitration practice can be easily done by the numerous contributions of legal scholarship on the subject and through case law publications and databases; both sources play an important role for the transparency and accountability of investment treaty disputes.

39 ICSID Rule 32(2) and Rule 37.
40 For example, in the case of ICSID self- contained system according to Rule 50 (1)(c)(3) an award can be annulled if the Tribunal was not properly constituted; that the Tribunal has manifestly exceeded its powers; that there was corruption on the part of a member of the Tribunal; that there has been a serious departure from a fundamental rule of procedure; that the award has failed to state the reasons on which it is based.
41 Alejandro A. Escobar and Michael P. Lennon, Jr. “CAFTA-DR Chapter Ten: substantive obligations and arbitration procedures” World Arbitration Reporter (WAR) Second Edition.
42 CAFTA–DR entered into force for the US, El Salvador, Guatemala, Honduras, and Nicaragua in 2006, for the Dominican Republic in 2007, and for Costa Rica in 2009.

b) Transparency in CAFTA, NAFTA and ICSID 2006 Amendments

3.2 Practice of transparency in Investor-State Arbitration can be seen in CAFTA and NAFTA provisions, which allow non-disputing party participation. This Free Trade practice arose due to the fact that despite arbitral awards having confined and binding effects[41] only on the disputing parties, other non-disputing State Parties can have the opportunity to influence in the treaty interpretation analysis of future awards.

3.3 For example, Article 10.20.2 of the Dominican Republic –Central America- United States Free Trade Agreement (CAFTA-DR) includes the possibility of a non-disputing State Party (but CAFTA signatory[42]) to participate in an on-going investor-State arbitration case, by submitting its opinion on issues of treaty interpretation that arise in that specific case. For this purpose, CAFTA Article 10.21 obliges the Respondent (State Party) to transmit certain documents in relation to the arbitral procedure to the non-disputing Parties which permits them to become fully informed on the issues of that case before submitting its briefing to the tribunal (*Commerce Group Corp. and San Sebastian Gold Mines, INC v. El Salvador*).

3.4 CAFTA provisions on the participation of non-disputing State party were influenced by the NAFTA practice. Article 1128 NAFTA was the first treaty provision stipulating the right to make submissions by a non-disputing State Party, which has been invoked in many NAFTA cases (*Pope & Talbot Inc. v Canada, Methanex Corp. v United States and UPS Inc. v Canada, Mobil v Canada, ADF v United States, Bayview Irrigation et.al v Mexico, Chemtura Corp v Canada et.al*). Overall, the CAFTA and NAFTA practice of allowing participation of a non-dispute State Party into an arbitral proceedings dismisses the argument of lack of Transparency in investment arbitration. Conversely, it illustrates the efforts investment law has made in pursing Transparency in many and diverse ways, by monitoring not only pending cases but also by influencing and submitting opinions on issues affecting treaty interpretation of further disputes.

3.5 In 2006, ICSID's rules were amended in order to make non-dispute parties able to intervene in arbitration proceedings and attend hearings. The new rules also promote disclosure of ICSID awards. The participation on third non-disputing parties has incorporated into ISDS a different way of promoting transparency by means of public interest participation (*see below*). The other relevant amendment is in ICSID Rule 48, where the Centre shall promptly include in its publications excerpts of the legal rules applied by arbitral tribunals. The aim of this amendment is to give access to the public to the legal reasoning of the Tribunals[43]. This amendment to Rule 48 contributes to the construction of public case law and that in turn serves not only to provide persuasive reasoning for future ICSID tribunals but also ensures arbitral tribunals are subject to public scrutiny.