



Research on the latest trends in the revision of ICSID arbitration rules on transparency

Zhou Xin-Jun¹, Deng Zhi-Shan², Niu Jing-Han¹

¹ Department of Law School, Guangdong University of Foreign Studies, China

² Department of Legal Affair, Quanpu Semi-Conductor Technology Ltd, China

Abstract

The International Center for Settlement of Investment Disputes (hereinafter referred to as ICSID), as a permanent institution that specializes in settling investment disputes between the contracting states and the nationals of other contracting states, is the main platform for investor-host state dispute settlement mechanism. In a new round of ICSID arbitration rules revision starting from 2016, one of the main issues to deal with is to enhance transparency of the arbitration proceeding. The 2016 revision mainly focuses on the balance of confidentiality and openness. The arbitration tribunal's discretion is relatively limited, considering the provisions regarding disclosure of documents and amicus curiae participation. The recently promulgated CIETAC International Investment Arbitration Rules is relatively conservative, and the rules are not detailed enough. Therefore, China may draw lessons from the ICSID arbitration rules 2016 revision. We should increase the scope and form of disclosure of documents and promote amicus curiae participation, establishing an open information management system by refining the transparency rules.

Keywords: ICSID, arbitration rules, transparency, amicus curiae

Introduction

The main contents of the ICSID Rules 2016 revision on transparency

ICSID was established in accordance with the ICSID Convention, which came into effect in 1966, aiming at effectively settling international investment disputes between investors and host states. There are complete and detailed provisions in terms of the composition of the arbitration tribunal, the interpretation, revision and annulment of the arbitration award, as well as the costs in the ICSID arbitration regime, which makes the mechanism reasonable and legitimate, and reduces the judicial cost of the investor and the host state in settling disputes.¹ ICSID is deemed as a delocalized disputes settlements mechanism system that is different from the traditional international commercial arbitration system, since the awards made by ICSID are directly binding to the contracting state, with no need for domestic court recognition. Article 44 of the ICSID Convention stipulates that any arbitration proceedings shall be conducted in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. The ICSID arbitration proceeding is independent and not subject to territorial jurisdiction. Without considering the domestic arbitration procedure of the seat of arbitration, the ICSID arbitration highly secures the autonomy and independence of the disputing parties and strengthens the efficiency and safety of the arbitration proceeding.

However, some questions remain. The purpose and object of international commercial arbitration is to protect the interests of the parties, which means that third-party participation is prevented. The public has no way to get aware of the arbitration process. In other words, the arbitration proceeding is relatively secret, which inevitably causes problems such as information closure and limitation of remedies, thus causing speculation and distrust among the common people as well as the professional community^[1].

Therefore, the confidentiality of arbitration has been criticized by the international community. As noted above, international investment arbitration is different from international commercial arbitration. International investment arbitration not only involves the private interests of investors but also has a significant impact on the public interests of the host state. Moreover, in order to avoid risks caused by uncertain factors in international investment, investors have to collect and research all kinds of information, which also brings high information costs. In recent years, we have witnessed a trend of increased transparency in all arbitration disputes. This trend is much more obvious in investment arbitration, with ICSID currently being in the process of amending its Rules in order to among others - reflect the request for enhanced transparency expressed by the Contracting States and by the public. The transparency principle of the international investment dispute settlement procedure is not only able to keep the investors abreast with the case, but also to supervise the fair and effective implementation of the arbitration proceeding, ensuring the stability and effectiveness of the ICSID dispute settlement mechanism. Furthermore, by participating in arbitration proceedings, investors may have a clear understanding of both the

legal system and risks of the host state as well as the interpretation and application of some key treatments in relevant treaties.

Although transparency rules are unable to thoroughly eliminate the incompleteness and asymmetry of information, the information disclosure provides investors with sufficient channels for obtaining information, reducing the cost of information collection. It would also help the investors deeply understand the host state's legal system and risks and the key treatment in the relevant treaties, preventing the investors from being in a passive situation due to information asymmetry. Moreover, it would build a healthy and transparent competitive environment by strengthening investors' confidence and reducing the international investment barriers.

ICSID Centre officially launched a new round of revision in October 2016 and released the working paper for the amendment proposal on August 2, 2018, for public comments. This Proposal for Amendment of ICSID Arbitration Rules on Transparency has the following changes compared to the current transparency regime:

1. **Publication of Documents.** Proposals for Amendment of ICSID Rules stipulates that the ICSID Center shall publish the hearing record unless any disputing party raises objections,¹ which further increases the transparency and public participation.
2. **Participation of Amicus Curiae.** The current transparency regime stipulates that the arbitration tribunal may decide whether to adopt the third-party's written submission after considering the relevant circumstances and the opinions of both parties. Article 57 of the Proposals for Amendment of ICSID Rules refines the amicus curiae design². First, it lists in detail the relevant circumstances that the arbitral tribunal shall consider when deciding whether to allow the non-disputing party to submit, including a) how the submission would assist the tribunal in determining a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from the disputing parties; b) whether the non-disputing party has a significant interest in the proceeding; c) the identity, activities, organization and ownership of the non-disputing party; d) any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party; and e) whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission. Second, it stipulates that the disputing party shall have the right to make observations where a non-disputing party is permitted to file a written submission. Third, where the non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party and where the disputing parties do not raise objections, the tribunal shall provide the non-disputing party with access to relevant documents filed in the proceeding. To this end, the tribunal may impose conditions on the non-disputing party participation, including the format, length, and scope of the submission and the time limit to file the submission. The tribunal may also ask the third-party making the submission for payment of increased cost related to its participation.
3. **Arbitration Procedure.** The proposed amendment contains only minor changes to the relevant provisions. It provides, similar to the current ICSID Arbitration Rules Regime, that the tribunal shall allow persons in addition to the disputing parties, their representatives, witnesses, experts and persons assisting the tribunal, to sit in on the hearing, unless either party objects. Furthermore, the tribunal shall establish procedures to prevent the disclosure of confidential information to persons observing the hearings^[2].
4. **Publication of Awards and Decisions Other Than Awards.** The current ICSID transparency regime stipulates that the excerpt of the legal reasoning of the awards should be made public, on which the Proposal for Amendment of the ICSID Arbitration Rules insists. However, other parts of the awards can only be public only with the consent of the parties. By contrast, the Proposal for Amendment of the ICSID Arbitration Rules stipulates that the awards, supplementary, revision, interpretation, and annulment shall be made public within 60 days after the decisions are made unless either party raises objections^[3]. In other words, the Proposal for Amendment introduced a "deemed consent" approach. The parties are deemed to consent if none of them objects within 60 days of the dispatching of the awards or other decisions. Lacking express or deemed consent, the ICSID will publish the awards and other decisions.

It can be seen that the new amendments goes deeper and more refined in the setting of the rules than before. In particular, they are more open in terms of the disclosure of documents and amicus curiae participation. Moreover, the Proposes for the amendment of ICSID Rules expands the public's right to know and significantly increases the degree of transparency by appropriately limiting the discretion of the arbitral tribunal.

A comparative analysis of the revision of ICSID arbitration rules on transparency and other investment agreements

The basic content of NAFTA on the transparency of arbitration

NAFTA is different from ICSID's direct modification of the arbitration rules, but it supplements the original rules with a statement on transparency issues. Article 1115 to Article 1138 of Chapter 11 of NAFTA draws on the ICSID Arbitration Rules, the ICSID Additional Facilitation Rules, and the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Arbitration Rules). The specific provisions are as follows

Documents Publication

Apart from the stipulation that the public is entitled to access to all documents submitted or issued by the arbitral tribunal, 1 NAFTA does not contain specific provisions in terms of documents publication methods. Therefore,

the publication scope usually covers memorial, counter-memorial and arbitral awards in early practice, which seems slightly narrow.

Amicus Curiae Participation

NAFTA contains provisions concerning amicus curiae submission. On one hand, the third-party can only make submissions by applying to the arbitration tribunal. On the other hand, only written notice is permissible.² Moreover, the tribunal may deny the third-party submission when it finds that the third-party has no direct interest in the case or the third-party does not pursue public interest in the case. the tribunal may even reject the request of the third-party under the proposals by disputing parties.

Arbitration Proceedings Publicity

NAFTA is the first arbitration rule which contains principle rules of trial proceedings publicity. But it does not bring practical results since it lacks specific operating procedures. Having said that, most of the contracting states support the openness of the hearing procedure. Therefore, except for the cases involving significant trade secrets or confidential information, most of the cases under NAFTA have carried out open hearings.

Arbitration Award Publication

NAFTA provides that the arbitration awards may be made public by the contracting states with the consent of the disputing parties. The arbitration tribunal and disputing parties may also make public the arbitration award.

It is worth noting that amicus curiae under NAFTA is different from the one that is traditionally recognized by domestic courts. The *Methanex v. USA* is the first attempt of the third-party participation under the framework of NAFTA. The tribunal, in this case, ruled that the opinions of amicus curiae may be regarded as a reference for the arbitral tribunal. This case is also regarded as a pioneer to enhance the transparency of international investment arbitration^[4]. NAFTA was designed to strictly limit amicus curiae participation. For example, it stipulates that the third-party can only make written submissions by applying to the arbitration tribunal. Moreover, if the third-party does not have significant interest in the case, or it does not pursue the public interest in the case, the arbitration tribunal may deny leave to the third-party^[5].

Furthermore, the arbitration tribunal is entitled to the absolute right to decide whether the third-party may participate in the proceedings. That means even if both disputing parties require the third-party to participate in the arbitration, the arbitration tribunal is still authorized to refuse its leave. The international community has commented negatively on this system of severely limiting amicus curiae participation and believed that this is the reason for low-level transparency in the NAFTA arbitration regime^[6].

To alleviate people's dissatisfaction with the arbitration rules, openness and transparency reform is currently undertaken under NAFTA. The statements issued by the Free Trade Commission in 2001 and 2003 respectively point out that one, except for cases involving trade secrets protection under relevant arbitration rules or domestic laws and regulations, written documents submitted to or issued by the arbitration tribunal may be disclosed; two, arbitration proceedings should be conducted in public. These are important ways to improve transparency, except that it does not provide specific implementation provisions in NAFTA.

The basic content of the CETA Agreement on the transparency of arbitration

On September 20, 2017, the EU-Canada Comprehensive Economic and Trade Agreement (hereinafter referred to as CETA) came into effect temporarily^[7]. This is the first free trade agreement in the field of investment since the EU obtained the exclusive power of direct investment from the Lisbon Treaty. In 2016, the European Union and Canada replaced ISDS from an investment arbitration mechanism to an investment court mechanism, thus realizing the judicialization of the investor-state dispute settlement mechanism.

Documents Publication

Learning from UNCITRAL Transparency rules³, CETA provides transparency rules in Chapter 8, Article 37 in the Investment chapter⁴. It stipulates that a disputing party may disclose to other persons in connection with the proceedings, including witnesses and experts, and the European Union, Member States of the European Union, and sub-national governments, such unredacted documents as it considers necessary in the course of proceedings. The relevant institution shall make publicly available the documents regarding deification of the disputing parties, the treaty on which the parties object, the time of the objection, mediation, consultation, objection to the case, reasonable request, and so on.

Amicus Curiae Participation

In order to ensure transparency, CETA contains the following provisions regarding third-party participation¹. One, the Tribunal shall accept or, after consultation with the disputing parties, may invite, oral or written submissions from the non-disputing Party regarding the interpretation of CETA. The non-disputing Party may attend a hearing. Two, the non-disputing party has access to the relevant documents of the case. Three, the disputing parties are given a reasonable opportunity to present their observations on a submission by the non-disputing Party. It can be inferred that the arbitral tribunal under CETA is authorized less discretion. It is not for the arbitral tribunal to decide whether to approve the third-party participation but should be approved as long as the conditions are met.

Arbitration Proceedings Publicity

CETA also incorporates UNCITRAL Transparency Rules. To be specific, it provides that hearings shall be open to the public. The tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings. If the Tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection. It can be assumed that although CETA's transparency rules has been more advanced, the basic framework is still learning from the UNCITRAL Transparency Rules with little breakthroughs compared with other international transparency rules.

Comparison and Analysis

Going through NAFTA, CETA, and ICSID, these rules are turning more favorable to transparency. The arbitration awards have not been completely public. To be specific, the legal reasoning retains both confidentiality and publicity. Those provisions are able to achieve the dual purpose of public supervision and protection of the interests of the parties.

1. Document Disclosure. NAFTA contains no detailed regulations in this regard, making the NAFTA-based tribunal difficult to exercise rights to disclose relevant documents. CETA basically draws on the UNCITRAL Rules, stipulating that relevant institutions shall disclose to the public the relevant information of the disputing parties and various documents related to the case, including the memorial, counter-memorial, awards, as well as the objections raised by the disputing parties. Moreover, the arbitral tribunal under CETA is granted the discretion to decide whether to disclose some specific documents. The newly revised ICSID Rules stipulates that relevant documents shall be disclosed by default unless the parties raise objections. This regulation greatly increases the openness of public participation, thus facilitating public supervision and ensuring due process.
2. Amicus Curiae Participation. The arbitral tribunal under NAFTA has the absolute discretion to decide whether the third-party may or may not participate in the arbitration, regardless of the disputing parties' opinions. Compared with NAFTA, CETA limits the discretion of the arbitral tribunal by allowing the third-party to participate in the proceedings to make oral or written statements and access to the information. In this regard, CETA contains a provision that allows the third party to make oral submissions while other international arbitration rules remain silent on this issue. Turning to ICSID, it stipulates that both the arbitral tribunal and the disputing parties have the right to express their opinions on whether to adopt the written submission of the amicus curiae. In the situation where the arbitral tribunal adopts the non-disputing party's written submission, the disputing parties shall be entitled to the right to express their opinions, which further weakens the arbitration tribunal's discretionary power. ICSID is more specific in the ruleset, and its framework is relatively mature. However, it may be easier to implement amicus curiae participation rules under ICSID if it learns from CETA, which allows the third party to make oral or written submissions.
3. Open Hearing. Although NAFTA is the first rule containing the provision stipulating open hearing, it contained no detailed regulations. Seen from this perspective, CETA not only stipulates that hearings should be open to the public but also requires the arbitral tribunal to bear the obligation of preparing to facilitate the public. The opening degree of the newly revised ICSID Rules is similar to that of CETA. The existing rules have been relatively complete. Specifically, under the premise of confidentiality, the arbitral tribunal under ICSID Convention may allow other persons except for the disputing parties, witnesses, experts and staff of the tribunal to attend all or part of the hearing.
4. Disclosure of the Arbitration Awards. While CETA remains silent on disclosure of the arbitration awards, NAFTA expressly stipulates that the arbitration awards may be public by either the disputing parties or the tribunal under the premise of the parties' unanimous agreement. Turning to ICSID Rules, in principle, the arbitration awards should be made public. The arbitration awards, supplementary decisions, arbitration corrections, arbitration interpretations and the annulment decisions shall be made public within 60 days after it is made, which further refines the original rules and enhances operability.

The three rules mentioned above are similar to each other in some aspects. They all follow the international trends to increase the transparency of arbitration procedures and improve amicus curiae participation. What is different is the level of refinement. Compared with NAFTA and CETA, the Proposal for Amendment of ICSID Arbitration Rules formulates the amicus curiae in more detail by providing that any non-disputing party may apply for submission. It is up to the disputing parties to decide whether or not to adopt it. However, considering that the method of document disclosure is relatively simple, ICSID is relatively conservative in regard to information disclosure. On the other hand, NAFTA and CETA are not perfect, although the two form a certain concept, they have not continued to refine the rules and have no breakthroughs.

Indisputably, international investment dispute arbitration often involves the public interest of sovereign states. People's assessment of whether acts with public-law nature are legal and reasonable depends largely on transparency and public participation. The fundamental purpose of third-party participation is to supervise the fairness of the arbitration procedure. It requires the third party to cause no undue burden or unfair prejudice to the procedure and to the rights and obligations of the disputing parties and the authority of the arbitral tribunal. ICSID, NAFTA, and CETA all stipulate and improve the existing transparency rules according to the practice of investment arbitration in recent years, but there are still many problems to be refined. For example, under ICSID

arbitration rules, the third party can only make written submissions. Through the above research, it can be found that allowing the third party to participate in the arbitration to increase transparency is a recognized improvement measure, which can not only ensure the effective supervision of the arbitration proceeding but also protect the public's right to know when the documents are open, which is helpful for investors and host countries to further understand the application and interpretation of investment terms.

The Enlightenment of the Trend of ICSID Arbitration Rules Amendment to the Improvement of China's Investment Arbitration Rules

Although the proposed amendment of ICSID Rules on Transparency is not perfect, it still has important implications for China. There are still some deficiencies in the international investment arbitration mechanism in China. Specifically, the recently-issued CIETAC International Investment Arbitration Rules is not detailed enough. In terms of system design, China has not made specific provisions on the *amicus curiae*. In terms of transparency, China is faced with a situation where the disclosure method is single, to which the arbitration tribunal has a large discretion. Moreover, there is no provision on information disclosure management.

Seen from the three above-mentioned arbitration rules, NAFTA's elaboration on *amicus curiae* is the most specific one. On one hand, it provides an opportunity for the third party to participate in the arbitration. On the other hand, it entitles the arbitral tribunal discretion to grant leave to the third party, which increases the possibility of the arbitration proceedings being supervised. Contrastly, ICSID Convention pays more attention to the balance between openness and confidentiality as far as possible. To be specific, the tribunal under ICSID conditionally adopts the participation of *amicus curiae*. It also provides that the ICSID Centre will publish the recordings and transcripts of the hearings if no party raises an objection. As for CETA, it has formed a relatively complete system for the transparency of arbitration procedures. It absorbs the advantages of the UNCITRAL Transparency Rules on the issue of publicity and *amicus curiae* participation. Compared with the NAFTA and the ICSID Convention, CETA also adds the trial of evidence that should be submitted publicly or hearing of oral debate, which has strong practicality.

It is suggested that China may actively learn from the new trend of the ICSID Convention 2016 revision and from other arbitration rules, further improving the relevant provisions in terms of transparency of investment arbitration procedures.

First, broaden the scope of documents publication. CIETAC International Investment Arbitration Rules specify the types of documents that can be made public only when under the condition where the arbitration tribunal considers the specific circumstances of the case and solicit the opinions of disputing parties. Regarding this prerequisite, China may learn from the ICSID Convention which stipulates that, in principle, the relevant institutions shall make public the case and the relevant information of the parties in a timely manner, unless the parties raise objections. In order to protect the control power of the arbitral tribunal and gradually adapt to the improvement of transparency, it is also advisable to learn from CETA to grant the arbitral tribunal the discretion to decide whether to make some specific judicial documents public. In addition, both CIETAC International Investment Arbitration Rules and the three above-mentioned arbitration rules ignore the disclosure of the settlement agreement. In fact, settlement procedures conducted secretly outside the context of the arbitration procedure will affect the host state's policy and huge public funds expenditure. It is estimated that the probability that the disputing parties reach a settlement agreement before the final award is made is not low under ICSID arbitration. Therefore, it is desirable to bring the settlement agreement reached by the disputing parties into the scope of public documents, covering all aspects of public doubts as far as possible when designing rules in China. Second, allow the *amicus curiae* participation and make detailed provisions. CIETAC International Investment Arbitration Rules is roughly consistent with the current ICSID arbitration rules. However, the newly revised ICSID rules contains provisions having reference value, such as weakening the arbitral tribunal's discretion by granting the parties the same decision-making power and increasing the possibility of the *amicus curiae* participation. In addition, it is advisable to permit the third party to make oral submissions so as to expand the degree of third-party participation. The main purpose of *amicus curiae* participation is to supervise and prevent the host state from being excessively eroded by the advantages of investors in investor-state disputes settlement mechanism and reduce the adverse effects on the host state as far as possible, and ensure the fairness of the award. Third, improve the information disclosure management system while insisting on awards disclosure. To achieve a breakthrough reform of transparency, it is necessary to make public arbitration awards. In this regard, the current ICSID regime has not contained specific provisions. Although preliminary attempts have been made in CIETAC International Investment Arbitration Rules, there is ample space for improvement. It is suggested to require to file and register the arbitration award in accordance with the domestic laws while disclosing the arbitration award and its legal reasons. In principle, the arbitral tribunal may disclose the identity information of the disputing parties. In the author's opinion, the establishment of an information disclosure website that contains the award made by the tribunal, fully making the award public, would help ensure the fairness of arbitration. At present, international arbitration still requires confidentiality. However, increasing numbers of international arbitration cases, such as environmental pollution cases, labor disputes, and other cases of public concern, require public supervision by information disclosure in arbitration procedures. Notably, this does not mean that confidentiality is completely abandoned. It is required to strictly define the scope of public interest when disclosing information. On the other hand, although information disclosure facilitates the arbitration proceedings in many cases and the practical value of confidentiality is constantly weakening,

questions remain, notably the longer trial period, more complicated procedures, and higher costs. Moreover, excessive information disclosure makes the advantage of confidentiality disappear, since the information of the disputing parties is completely exposed to the public, impacting their credibility. Therefore, when increasing the transparency of international investment arbitration, investors and the host state should not be required to disclose the relevant information unconditionally in order to pursue transparency. The balance between conservatism and openness should be kept, which means that the improvement of transparency is a means to improve the supervision mechanism of international investment arbitration, rather than a way harmful to the interests of disputing parties. The principle of moderation is of particular importance when introducing relevant rules. Based on the rules of relevant arbitration institutions and the practical experience of investment arbitration, more complete transparency rules would be formulated. In order to make China's international investment dispute arbitration rules more credible, a set of systems that can adapt to China's domestic conditions and balance the interests of all parties to the greatest extent must be constantly explored.

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13. Under the UNCITRAL Rules on Transparency, once a case has been registered, basic information relating to the dispute should be made available to the public through a specially established repository.
14. See CETA. "Comprehensive Economic and Trade Agreement (CETA), Chapter Eight, Section F- Resolution of investment disputes between investors and states, Art.8.37-Information sharing", <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> (visited in 9 May, 2019).
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