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Transparency and Fairness: Challenges and Solutions in ICSID Arbitration Procedures

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Abstract: The issue of transparency in the arbitration procedures of the International Centre for Settlement of Investment Disputes (ICSID) has long been a contentious matter. In particular, the provisions regarding the substantive participation of arbitrators and amicus curiae have led to the impairment of the public's right to information and public interests. This article focuses on exploring whether the current procedural rule reforms and their practical applications have potential problems that undermine the legitimacy, fairness, and authority of ICSID, and also conducts an in-depth exploration of strategies to alleviate these issues. Through a comprehensive review of academic literature and a systematic analysis of typical cases such as Mobil v. Venezuela and Philip Morris v. Uruguay, it is found that the ambiguity of some procedural rules has left the arbitration process lacking in effective supervision, and both enterprises and states have significant room for maneuver in information disclosure. To this end, this paper proposes that ICSID needs to further refine its existing legal framework, clearly define the participation standards and boundaries of responsibilities for arbitrators and amicus curiae. At the same time, an effective incentive mechanism should be established to provide policy support and reputation incentives to enterprises and governments that actively fulfill their transparency obligations. In this way, the negative impact of insufficient transparency on the fairness of arbitration can be reduced, and the healthy development of the international investment arbitration system can be promoted.

Keywords: ICSID, transparency, international arbitration, amicus curiae

1. Introduction

Since the Washington Convention came into force in 1966, ICSID has played a crucial role in the international economic arena. Moreover, the adjustment and revision of ICSID's applicable rules in 2022 have had a significant impact on the practices of states and other stakeholders. In reality, however, the Washington Convention and related ICSID documents contain relatively few provisions on the transparency requirements of arbitration procedures. According to Article 48(5) of the Washington Convention, ICSID may not publish an award without the consent of both disputing parties. However, ICSID will promptly make public a summary of the arbitral tribunal's legal reasoning. In cases concluded by ICSID, only approximately half of the disputing parties have consented to the publication of awards [1]. A similar provision is found in Article 39(2) of the ICSID Arbitration Rules, under which a third party cannot participate in the hearing process if any party objects, and ICSID does not even require the objecting party to provide a reasonable justification for

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its opposition. This seemingly minor provision has, in reality, had a significant impact on undermining transparency [2].

However, there remains substantial room for improvement in terms of document accessibility and the acceptability of evidence submission. Many scholars have addressed the issue of third-party funding, offering valuable insights that enhance our understanding of rule changes and their underlying rationale [3]. In reality, the impact of arbitration transparency on fairness and authority extends beyond third-party funding and is also reflected in problems related to information disclosure.

2. Thesis and road map

The research question of this article is about how the lack of transparency has undermined the legitimacy, fairness, and authority of ICSID, particularly through restrictions on disclosing case-related information to the public and stakeholders, and what measures should be taken to protect stakeholders' interests. The argument posits that enhancing transparency in ICSID is essential to promote fairness in arbitration, indicating that there remains room for improvement in the transparency of international arbitration systems represented by ICSID.

The next section of the article introduces academic perspectives on ICSID arbitration within the fields of international economic law and international commercial law, revealing certain limitations. Section 5 discusses the research methodology employed and outlines several hypotheses. Section 6 evaluates past cases that demonstrate the practical application of arbitration rules. Section 7 proposes recommendations for addressing the research question based on practical cases and the existing system. Finally, Section 8 summarizes the article and its findings.

3. Literature review

3.1. Arbitrators and transparency rules

The formulation of ICSID transparency rules has significantly impacted arbitrators' work. Scholar Smith notes that higher levels of document disclosure require arbitrators to be more cautious in handling cases [4]. As awards and related documents may be widely publicized, arbitrators' decision-making processes and rationale must be clearer and more reasonable to withstand public scrutiny. This ensures fairness to states and stakeholders to some extent and avoids secret operations. However, Jones argues that excessive disclosure may impose external pressure on arbitrators, affecting their independent judgment and negatively impacting fairness, particularly in cases involving sensitive commercial information or national sovereignty issues [5].

Both scholars highlight the pressures and influences on arbitrators themselves, suggesting that arbitrators' actions can impact arbitration outcomes. However, under Article 14(1) of the ICSID Convention and the Additional Facility Rules, arbitrators must meet these criteria: high moral character; recognized competence in law, commerce, industry, or finance; and the ability to exercise independent judgment. Both legal provisions and academic research focus on arbitrators' professional capabilities and qualities. In reality, arbitrators' historical backgrounds and past rulings are key issues affecting transparency and fairness. Public disclosure of arbitrators' qualifications and past award records breaks information asymmetry, making the arbitration process more observable and understandable. Additionally, their backgrounds should be made public to scrutinize professional and interest-related relationships, ensuring neutrality in subsequent arbitration outcomes.

3.2. Amicus curiae and fairness

The participation of amicus curiae in ICSID arbitration has advanced with the growth of transparency rules. Brown contends that the presence of amicus curiae brings diverse perspectives to arbitration,

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facilitating the full consideration of factors relevant to the case and increasing fairness [6]. They can supply specialized knowledge and take public interests into consideration, particularly increasing the possibilities for stakeholders to voice their opinions.

Nonetheless, if there isn't effective regulation of the rules governing amicus curiae participation, it could enable certain well-connected interest groups to utilize this mechanism to influence arbitration verdicts, causing unfair results for states or other stakeholders.

3.3. The impact of document disclosure levels

The extent of document disclosure is a key part of ICSID transparency rules. White's research indicates that proper document disclosure can boost the credibility of arbitration, enabling states and stakeholders to better oversee the arbitration process and maintain fairness. Public documents let all parties grasp the case progress and evidence, facilitating the preparation for defense and the protection of their just rights.

However, the level of disclosure must be reasonably balanced. Excessive disclosure may expose state secrets or corporate commercial secrets, harming the interests of relevant parties and undermining the foundation of fairness. ICSID's transparency rules are centered on "party consent," fundamentally differing from UNCITRAL's "presumptive disclosure" model. However, scholars may not have fully uncovered the historical background, legal logic, and impact of this institutional design on document disclosure levels [7]. For example, ICSID rules default to confidentiality, with limited disclosure only upon party consent or arbitral tribunal rulings (as mentioned in Article 48(4) of the ICSID Arbitration Rules in Abstract 2). The theoretical rationale and practical effects of this "consent-based" model lack in-depth exploration.

4. Methodology and hypothesis

To investigate the research questions, this article employs a qualitative approach, examining primary and secondary sources. Primary sources include relevant ICSID rules and arbitration awards, while secondary sources consist of academic papers and expert commentaries. Additionally, case studies are integral, along with the practical application of arbitral tribunals in international contexts, such as Metalclad Corporation v. Mexico and Vivendi Corporation v. Argentina. Data was sourced from online platforms, including CNKI, Google Scholar, the Social Science Research Network (SSRN), and news articles. Due to the specific nature of the research questions and the anticipated limited volume of data, quantitative methods were not considered.

This article tests five hypotheses as potential answers to the research questions: H1: No, the current transparency standards of ICSID have achieved a balance through the 2023 reforms. H2: Yes, the background and past rulings of arbitrators should be mandatorily disclosed. H3: Yes, civil society should be allowed to apply for amicus curiae status. H4: Yes, document disclosure should be appropriately increased.

5. Case studies

This section of the article analyzes real cases of disputes submitted to ICSID arbitration, each with its own unique circumstances and conditions. Through this analysis, it can shed light on some transparency issues present in practical applications.

5.1. Metalclad Corporation v. Mexico

When analyzing the case of Metalclad Corporation v. Mexico (ICSID Case No. ARB(AF)/97/1), we can delve into the impact of the transparency of the ICSID arbitration procedure on promoting fairness.

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This case represents a landmark ruling in the ICSID's history, as it was the first instance to make a ruling on a dispute between an investor and a state.

Metalclad Corporation, a US waste management company, purchased a landfill site in Guadalcázar, Mexico in 1993. Although it obtained a land use permit from the federal government, the local government refused to issue a construction permit. The Mexican government lacked transparency and due process during the approval process. Subsequently, Metalclad had to stop its operations and suffered a full-scale loss of its investment without actually commencing. Eventually, Metalclad brought an arbitration action against the Mexican government and was given around US$16.685 million as compensation.

The case suggests the tensions that can pop up between investors and host governments due to conflicting environmental and local policies. It also stresses the role of IIAs in safeguarding the rights and interests of foreign investors, as well as the legal intricacies that can emerge when local and central government policies are incompatible. However, besides the prominence of these vital issues, essential questions on transparency in the arbitration procedure were also unmasked. Metalclad Corporation argued for open hearings so that the public could be informed of the progress of the case and the outcome of the award. The Mexican government, on the other hand, argued that open hearings would jeopardize national security and trade secrets. This dispute has led to a number of conflicts and extensive discussions.

In response to H4, since the case took place in 1997, ICSID's transparency practices were not yet mature. The case demonstrates that the issue of transparency in ICSID arbitration proceedings is a complex topic that requires balancing public and private interests. However, in practice, the ICSID arbitral tribunal had a certain degree of flexibility in dealing with the issue of transparency, and it made a reasonable judgment based on the specific circumstances and partially disclosed the documents that could be disclosed. In my opinion, the case has had a positive impact on the reform of the ICSID rules on transparency in arbitration proceedings, promoted the transparency and fairness of ICSID arbitration proceedings, proved the reasonableness of H4, and provided a reference for future arbitration practice.

I believe that although this case cannot prove Hypothesis 1, as there is limited information on the specific backgrounds of the arbitrators in the publicly available materials, the ruling of this case shows that the arbitration tribunal conducted a detailed analysis of the facts of the case and the application of the law, reflecting the reliance on the professionalism of the arbitrators. This may imply the need for the disclosure of the arbitrators' backgrounds, but it may also reflect the trust in the independence and professional judgment of the arbitrators [8].

In conclusion, the case of Metalclad v. Mexico provides us with a window to observe the evolution of the ICSID arbitration procedure in terms of transparency and fairness. Through the analysis of this case, we can better understand the background of the current ICSID rules and the possible future directions for reform to promote a fairer and transparent arbitration environment. Of course, due to its timeliness, in 2022, ICSID also made some amendments regarding the publication of awards and the openness of the procedure, including a new chapter on "Publication of Procedure Participation and Submissions by Non-Disputing Parties." In terms of award publication, if neither party objects in writing to the publication within 60 days after the award is rendered, it shall be deemed that both parties consent to the publication. In terms of procedure openness, unless one party objects, the arbitration tribunal shall allow persons other than the parties, their representatives, witnesses, and experts to attend the hearings, but the arbitration tribunal is responsible for establishing procedures to prevent the disclosure of confidential or protected information. Therefore, this arrangement for the participation of third parties with the consent of both parties is conducive to the protection of the rights of both parties, the improvement of transparency, and the guarantee of fairness.

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5.2. Vivendi Corporation v. Argentina

The case of Vivendi Corporation versus Argentina (ICSID Case No. ARB/03/19) is a crucial investment arbitration case that has had a far-reaching impact on international investment law and arbitration practice. Analyzing this case facilitates an in-depth understanding of issues such as the transparency of ICSID procedures, arbitrators' disclosure responsibilities, the participation of non-disputing third parties, and the management of arbitration courses and settlement steps.

The strife between Vivendi Corporation and the Argentine government stemmed from the emergency measures adopted by Argentina during the economic crisis. These measures influenced Vivendi's investment returns in Argentina. Vivendi alleged that Argentina had broken the investment protection treaty between them and asked for compensation. In the arbitration proceeding, the tribunal heard whether Argentina's emergency measures were an illegal confiscation of Vivendi's investment. During the economic crisis, Argentina implemented a series of emergency economic measures, such as keeping public service prices unchanged and restricting the alteration of public service fees. These measures had a significant impact on Vivendi's investment returns. Vivendi believed that these measures violated the investment protection treaty between the two countries, leading to the initiation of this arbitration case.

In the case, the arbitration tribunal mainly applied the Argentina-France Bilateral Investment Treaty, as well as the ICSID Convention and arbitration rules. The arbitration tribunal examined whether Argentina's emergency measures met the legality criteria under the treaty, especially whether they constituted illegal expropriation. At the same time, the necessary ICSID Arbitration Procedure Rules were also applied. Initially, each party appointed one arbitrator for the arbitration tribunal of the case. In the situation where Argentina failed to appoint an arbitrator on time, the third arbitrator was appointed by ICSID. In the re-submitted arbitration procedure, the arbitration tribunal was also reconstituted in accordance with these rules.

I believe that the case can mainly confirm Hypothesis 2. In this case, ICSID has a procedure for the annulment of awards, and both parties can apply for the annulment of an award based on certain grounds. If the disclosure issues of arbitrators in the past have affected the fairness of the arbitration procedure, this may become one of the grounds for the parties to apply for the annulment of the award. Argentina applied to annul the ICSID awards twice, and it is possible that these applications involved questions regarding the backgrounds and disclosure situations of the arbitrators. Therefore, for the fairness of the procedure and the efficiency and effectiveness of the arbitration, the backgrounds and past awards of arbitrators should be disclosed [9]. The discussions about the potential interest conflicts of arbitrators in this case confirm the need for disclosing arbitrators' backgrounds and past awards, and also manifest the significance of arbitrators in the given case.

5.3. Aguas del Tunari v. Bolivia

The Aguas del Tunari v. Bolivia instance (ICSID Case No. ARB/02/3) is a significant case related to international investment arbitration and public service management, raising vital questions regarding the transparency and fairness of ICSID procedures as well as arbitration practices.

With an economic crisis as the backdrop, the Bolivian government attempted to bring in foreign investment and improve effectiveness via privatizing public services. In 2000, the Bolivian government handed over the water management concession in the city of Cochabamba to Aguas del Tu. After assuming charge, the firm hiked the average water fee by more than 50%, which incited strong protests from local residents. The protest movements finally made the government end the company's concession. Subsequently, Aguas del Tunari put forward an arbitration to the International Centre for Settlement of Investment Disputes (ICSID) alleging a violation of the Netherlands-Bolivia bilateral investment treat, seeking for compensation. In the arbitration, due to the extensive and

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significant interests of third-party citizens involved, the participation of amicus curiae was rather complex and limited, and there were restrictions on their participation.

The arbitration tribunal mainly applied the Netherlands-Bolivia bilateral investment treaty, as well as the ICSID Convention and the arbitration rules. The arbitration tribunal examined whether the Bolivian government's act of canceling the concession constituted an illegal expropriation of Aguas del Tunari or a violation of the standard of fair and equitable treatment.

Regarding Hypothesis 2, the backgrounds of the arbitrators were not disclosed in this case. The public was unable to confirm whether the arbitration tribunal's procedures were independent, or whether the awards from their previous experiences would affect the award of this case [10]. There were potential conflicts of interest or biases, which increased the instability and uncertainty of the arbitration in the public's mind, thus leading to doubts about the outcome. Importantly, this dispute involved Bolivia's water policy, which was related to the living interests of the entire population. As a result, it triggered nationwide protests and had a significant social impact. Whether the outcome is fair or not has a great influence on the authority of ICSID. Therefore, it is necessary to disclose the backgrounds of the arbitrators as stated in Hypothesis 2.

Regarding Hypothesis 3, due to the large number of the public and the complexity of the interests involved in the case, the public's participation in the case was restricted to a certain extent. It was impossible for all those who suffered losses of interest to participate in the arbitration as amicus curiae. Therefore, the provision of some information was insufficient, which also had an impact on the arbitration of the case. Some key evidence might not be disclosed to the public or the other party on the grounds of confidentiality, which could lead to information asymmetry and affect the other party's ability to understand and defend the case [11]. For example, evidence involving trade secrets or sensitive information might be overly confidential, preventing the other party from fully understanding the content and impact of the evidence, thus affecting the fairness of the arbitration. Therefore, I believe that when there is an imbalance of rights and interests, more attention should be paid to the protection of the rights of amicus curiae. For example, representatives of those who suffered losses of interest should be selected, the public's opinions should be fully collected, and these opinions should be expressed during the arbitration. This is very important for improving transparency and also helps the public to supervise the arbitration and avoid some behind-the-scenes manipulation of interests [12].

5.4. Cross-Case analysis

In reviewing the application, the arbitral tribunal noted that while the 2006 ICSID Arbitration Rules permitted amicus curiae participation, they lacked specific applicable rules. Thus, the tribunal drew reference from the groundbreaking NAFTA case Methanex and the practice of the arbitral tribunal in the ICSID case Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic. It also recognized the expertise of five non-governmental organizations (NGOs) in sustainable development, environmental protection, human rights, and government policy, acknowledging that their input could assist the tribunal in adjudicating the case. Ultimately, the tribunal granted the NGOs' request to submit amicus curiae written submissions but delayed the application for public document disclosure. Pursuant to Article 32 of the new rules, the arbitral tribunal rejected the NGOs' application to participate in the arbitration hearing on the grounds of the claimant's refusal. This case marked the first application of the revised transparency rules under the ICSID Arbitration Rules, demonstrating that transparency rules had been implemented in both formal documents and practice at ICSID. Given that ICSID handles the majority of international investment dispute cases, this development reflects that transparency rules will be applied in most international investment arbitration cases, representing a significant advancement in transparency norms [13].

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These cases occurred prior to ICSID's transparency reforms to its arbitration rules. Although specific regulations governing transparency issues were absent at the time, the arbitral tribunals demonstrated a proactive approach to enhancing transparency through their actions. This constituted a favorable development in the field of international investment arbitration and laid the footing for subsequent alterations to ICSID's arbitration procedure transparency.

Scrutinizing the arbitral tribunals' approaches to transparency rules in these three cases shows that prior to the rule modifications, ICSID's acceptance of transparency rules developed gradually. Initially, tribunals clearly denied the right to embrace third-party participation, but subsequently they asserted their right to enable such participation. This shift demonstrates that ICSID moved from spurning transparency rules to welcoming them, and it actively initiated reforms of its own arbitration rules.

6. Recommendations

Through a rigorous examination, it can be concluded that constraints on the disclosure of commercial and state secrets, along with limitations on the substantial participation of amicus curiae and the lack of transparency in arbitral tribunal decision-making, have degraded the legitimacy, impartiality, and authority of ICSID across recent years.

6.1. ICSID itself

Tweaking and enhancing its legal framework is an official and useful approach. ICSID should clarify the procedural guidelines for amicus curiae participation, regulating their eligibility requirements and the scope of submissions. The basic motivation for such reforms is to ensure transparency and fairness, as individuals naturally pursue the truth.

ICSID could start by establishing clear procedural guidelines for amicus curiae involvement, including criteria for demonstrating expertise relevant to the case, deadlines for submitting applications, and specific rules governing the scope of submissions. This would address ambiguities in current rules (as seen in pre-2022 cases) and ensure that third-party participation is both meaningful and regulated [14].

Beyond amicus curiae, disclosing arbitrators' professional backgrounds, past rulings, and conflicts of interest is crucial to enhancing decision-making transparency. However, the current "party consent" system has inherent flaws. ICSID should build on the 2022 rule revisions to reduce reliance on this mechanism, which often limits the disclosure of awards.

6.2. Governments and organizations

While reforms two years ago improved transparency in areas such as third-party funding disclosure and the publication of awards and annulment decisions, further refinement of disclosure details and thresholds is necessary [15]. Governments and organizations should clarify which information qualifies as core commercial secrets or state secrets exempt from disclosure, and which sensitive information should still be partially disclosed to balance transparency with legitimate interests. Additionally, they should explore more effective disclosure methods to ensure the public can accurately and comprehensively understand case-related information.

For example, in Case 3, disclosing government decisions and public interest-related information during disputes could help the public better understand government actions and the causes of investment disputes, thereby mitigating social conflicts and protecting public interests [16].

Businesses and organizations, as key stakeholders in international investment dispute arbitration, should be encouraged to participate in transparency initiatives. Member state governments should strengthen education and guidance for domestic enterprises and investors, enhancing their

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understanding of ICSID rules and procedures, compliance awareness, and risk management capabilities [17]. They should also encourage enterprises and investors to actively engage in transparency efforts within ICSID proceedings, voluntarily disclose relevant information, and respect public's right to information. Furthermore, businesses should be incentivized to support public participation in arbitration through amicus curiae submissions, thereby increasing case transparency.

7. Conclusion

These cases confirm that transparency at ICSID still requires enhancement, particularly in terms of document disclosure and public participation. Three hypotheses were supported, as issues such as arbitrators' backgrounds, commercial confidentiality, and limitations on public oversight in practice have affected public interests and business operations, undermining the balance and fairness of resource allocation in the international community and impacting ICSID's authority.

The legal loopholes arising from arbitration transparency disrupt the fairness of transactions and resource allocation in the international economic sphere [18]. If the transparency of arbitration is called into question, legal regulations become meaningless. Addressing this challenge requires international cooperation and robust legal frameworks. By implementing the proposed measures, the global community can unlock new possibilities for international economic and arbitration systems, fostering a more stable economic and legal order.

While this article discusses key aspects of the issue, it alone cannot eradicate the problem. Scholars must collaborate on further research to develop more effective solutions and advocate for their implementation.

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