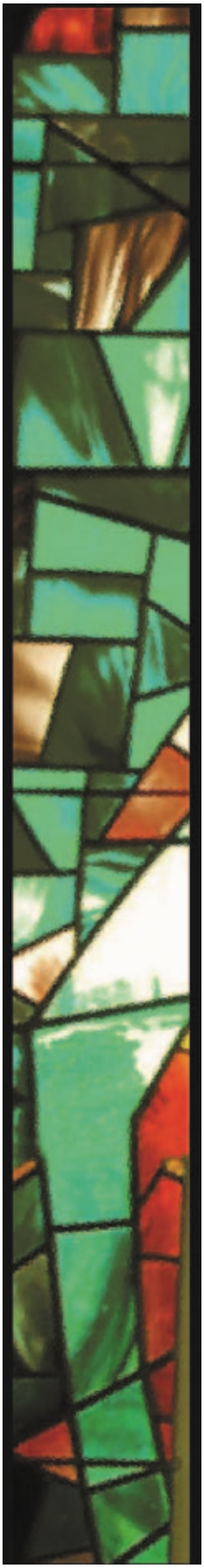

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Analysis of the Principle of Transparency with Special Reference to Its Implications for the Procedure of International Investment Arbitration

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Resumen
Teniendo en cuenta que la característica inherente de confidencialidad y las demandas de transparencia coexisten en el contexto del arbitraje de inversión internacional, este trabajo se centra en un enfoque hacia una conciliación de estas dos categorías. Desde la perspectiva del principio de transparencia en el ámbito del derecho económico internacional, y teniendo en cuenta la naturaleza del arbitraje internacional —especialmente del arbitraje internacional de inversiones—, se descubrió un argumento defendible con el fin de pasar por alto la necesidad de confidencialidad y satisfacer la demanda de transparencia en el procedimiento de arbitraje de inversión sin afectar su eficiencia.

Palabras clave
Inversión internacional, arbitraje internacional, principio de transparencia, confidencialidad.

Abstract
Given that the inherent feature of confidentiality and the demands for transparency coexist in the context of international investment arbitration, this paper focuses on an approach that makes a compromise between these two categories. From the perspective of the principle of transparency in the field of international economic law, and taking into account the nature of international arbitration, especially international investment arbitration, a defendable argument can be made to overlook the need for confidentiality and satisfy the demands for transparency in the investment arbitration procedure, without impairing its efficiency.

Keywords
International investment, international arbitration, principle of transparency, confidentiality.

1. Introduction

In the context of the current state of affairs corresponding to international investment law, the question of how to balance the concepts of confidentiality and transparency in investment arbitration is very common. In fact, both confidentiality and transparency conceptually conflict with each other to the point that it is safe to argue that there is currently an obvious tension between them. On the one hand, the demands for transparency of the international investment arbitration procedure are founded on the public interests (Mankiw, 2004: 248-251) that are ventilated in virtually every single case. This is because one of the parties is actually a state. Those who stress this argument state that investment arbitration is, in fact, a special kind of arbitration that, because of this condition, deserves a closer look (Knahr and Reinisch, 2006). On the other hand, there are also considerations to be made from the perspective of the nature of international arbitration, of which investment arbitration is a sub-category. As will be examined, an essential feature of this institution lies precisely in the fact that certain aspects of the procedure are to be kept confidential if the parties previously agreed to do so. International investment arbitration is *still* international arbitration. Accordingly, there is an element of voluntary agreement in investment arbitration that somehow made this institution attractive for potential users. A compromise is to be made between these two important categories that safeguards international investment arbitration as an efficient means of dispute settlement.

The application of the principle of transparency in the context of international economic law requires a nuanced approach when it comes to international investment arbitration, because the essential characteristics of this institution—its nature, that which makes it what it is and distinguish it from other institutions—so advise it. By overlooking the very nature of international investment arbitration, not forgetting the important role it plays in the system of international investment law, any policy towards making it more "transparent" would necessarily impair its functioning and the subjects of international investment law would lose a worthy and efficient means of dispute resolution.

In order to address this particular question, this paper will briefly examine the concept of transparency, initially from a broad perspective. By doing so, it should become clear that, in the specific context of international economic law, transparency is elevated to the category of a principle. Later, it should also become clear that the application of such a principle demands a special nuance when it comes to the procedure that takes place in international investment arbitration.

Even though the reference to the conceptualization of the transparency principle is of a crucial importance, the nature of international arbitration, with special reference to investment arbitration, will be examined first. By doing this, the essential features of this particular institution will be determined in order to differentiate it from other institutions of law. By grasping the inherent features of investment arbitration, the reasons for choosing this particular dispute settlement mechanism will be uncovered. In other words, the fundamental reason for the efficiency of this means of dispute adjudication would be known (Rothbard, 2002: 1036).

Only by doing this, keeping in sight the elements of the principle of transparency and its special application within the field on international investment arbitration, the implications of any policy directed to affect this procedure could be fully measured.

Finally, both confidentiality and transparency will be weighted in the context of international investment arbitration, with the specific goal of finding a defendable compromise that respects both the need for confidentiality and the demands for transparency in international investment arbitration. International investment arbitration is *essentially* confidential (Hwang S.C. and Chung, 2009: 612). In this sense, a valid argument needs to be made in order to justifiably overlook this essential feature.

2. International Investment Law and International Arbitration

The main reason for this section of this article is to fully understand the institution that is being examined: international investment arbitration. Only then will its inherent characteristics become clear. By grasping the

essential elements of the concept, the implications of any given policy directed to affect it can be sufficiently understood. Furthermore, more specifically, only by understanding the nature of international arbitration, taking into account the role it plays in the field of international investment law, can the application of a policy proposing a particular perspective of the principle of transparency be apprehended.

Foreign direct investment, regulated most commonly by investment agreements negotiated between state officials,[1] is a sensitive topic. On the one side, there is the state, interested in promoting investment from abroad, for this is a well-known source of economic growth, which would ultimately help it to maintain its popular support. On the other side, there is the investor, commonly a private person[2] (Sornarajah, 2007: 65-71), be it natural or juridical, which seeks to increase its own wealth by assigning resources in profitable channels of production on the territory of the host state. Naturally, both parties want to protect their interests in the most efficient way possible. This is of special relevance when a breach of the legal order is perpetrated by one of them and the original order needs to be restored, usually by deciding upon damage reparation.

Under international investment law, there have been traditional means of investment dispute settlement, such as domestic courts and international arbitration.

To resort to the national courts as an option for justice adjudication is rather limited as a means of dispute settlement. It usually takes place in absence of an agreement to settle the dispute before an arbitration tribunal or any other mechanism (Reinisch and Malintoppi, 2008: 694). Thus, a dispute between a host state and an investor would have to be settled by a court of the host state (Dolzer and Schreuer, 2008: 214). There are two problems with this option. First, whether rightly or wrongly, the investor would always tend to fear a lack of impartiality of

[1] According to Griebel (2008: 6), protection for foreign investment can take two basic shapes (*Grundkonstellationen*): investment without any extraordinary legal protection, and investment protected under an investment contract between a particular investor and its host state.

[2] Sornarajah (2007: 65-71) affirms that state entities may also act as investors.

the host state's judge, for it is not uncommon that indirect interventions of the executive would occur—despite the presumption of the independence of the judiciary—and the eventual sense of loyalty from the judge of the host state would influence the outcome of the proceedings. In addition, given the highly technical questions that arise from matters of international investment law, the investor may fear that the national judge would lack the expertise needed to deal with such cases (Dolzer and Schreuer, 2008: 214). Obviously, both parties would prefer a *forum* that would provide the minimum standard of impartiality in order to count on a safe investment scenario.[3]

Given the limitations of the above-mentioned mechanism, a large majority of international investment agreement models include an international arbitration clause in its provisions.[4] By doing so, granting access to investors to present claims before an international arbitration tribunal comes with advantages for both parties. According to Dolzer and Schreuer (2008: 221), the investor gains access to a known and effective international means of restitution, which is known for being less costly and more efficient than litigation. Furthermore, it grants high security of counting on highly skilled decision-making (Benson, 1999: 94), which is a very sensitive and important aspect. The advantages for the host state are two: investors perceive an improved climate for foreign direct investment, and it shields itself against other processes, such as diplomatic protection (Dolzer and Schreuer, 2008: 221).

The role of international arbitration in international investment law deserves a closer look. Before getting to this point, it is prudent to examine the very nature of this institution, i.e. the essential features that make it what it is and differentiate it from other institutions. Not in vain it is international arbitration, with its special features, and not other institutions of governance, to which people caught in these disputes usually resort when seeking a mechanism of resolution.

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[3] For a description of the most common problems of public courts, see Caplan and Stringham (2008) and Nieto (2004).

[4] To name a few: Article 9(2)(b) of the China BIT Model of 2003; Article 8 of the French BIT Model; Article 11(b) of the German BIT Model of 2005; Article 8(2) of the UK BIT Model of 2005; and Article 24(1)(a)(i)(C) of the US BIT Model of 2004.

3. The Nature of International Arbitration

Arbitration is a unique and fascinating institution. It is the closest thing that contemporary society has to a private means of adjudicating disputes in a time when states are expected to monopolize such means according to general public opinion. In spite of this, it is impossible to assert with total confidence that it only has such a distinction. For one thing, public institutions, at a national and international level, commonly regulate the use of arbitration. Besides, not every kind of dispute can be settled by arbitration, like criminal cases. At a local level, its functioning is conditioned by a state license of some sort, and at an international level many arbitration tribunals are inscribed in an institution regulated by an international convention, as is the case with the ICSID, which is part of the World Bank.

Nevertheless, arbitration has certain characteristics of a private service. It is not free; in some cases, the parties involved make considerably large payments for it. Thus, its supply is allocated by prices paid by consumers, as opposed to a national court system, which is financed entirely by means of taxation. There is also competition, which is a *sine qua non* of the private supply of any private service imaginable. For instance, arbitrators compete among themselves for causes, being constantly evaluated in their performance award by award. Whether international or national, the institution of arbitration is inexorably bound to these features, which will be examined more deeply below.

Competition is actually an essential feature of international arbitration; it is its very essence, which differentiates it from other institutions of law. The dispute resolution supply of international arbitration is polycentric; it contrasts with the monopolized supply of the national courts supported by the state. International arbitration not only witnesses competition among international arbitration institutions, but also presents an alternative, a very considerable one, to national courts of any number of states (Benson, 1999: 91-92). Thus, competition is found at the very nature of international arbitration. This point cannot be stressed enough.

As international arbitration competes against litigation in national courts, its use tends to spread significantly. Already at the beginning of the 1990s, almost 90 percent of all international trade contracts contained arbitration clauses (Berger, 1994: 12). Given this reliance, there are currently many sources of arbitration for disputes in matters of international business. For instance, many international traders rely on the International Chamber of Commerce (ICC) and its institution dedicated to arbitration (Benson, 1999: 93).[5] There is also *ad hoc* arbitration, "and in this regard, there is a rapidly growing market in private dispute resolution services provided by profit firms, at least in the United States" (Benson, 1999: 94).

Concerning international investment arbitration, almost every foreign direct investment agreement contains an international arbitration clause, which is actually an incentive for foreign investors to take their business to the host state's territory. For example, there is the Energy Charter Treaty (ECT), which in Article 26(4) provides three possible arbitration *fora* for the settlement of a dispute concerning an investment: *i)* an ICSID Tribunal, if both the home state of the investor and the host state itself are parties to the ICSID Convention; *ii)* the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) before one arbitrator or an *ad hoc* arbitral tribunal; or *iii)* the Arbitration Institute of the Stockholm Chamber of Commerce (Gouiffès, 2006: 25). Besides these, there are the following: *i)* the ICC; *ii)* the London Court of International Arbitration; and *iii)* the Permanent Court of Arbitration, to name a few. According to Dolzer and Schreuer (2008: 226), the procedures offered by these institutions have many elements in common,[6] which include "the competence of tribunals to decide on their own competence, the tribunal's power to determine the

[5] Additionally, international trade usually relies on other know institutions, such as the American Arbitration Association (AAA), the Hungarian Chamber of Commerce, the Australian Centre for International Commercial Arbitration (ACICA), and the Israeli Institution of Commercial Arbitration.

[6] See also Böckstiegel (2006: 174): "Regarding the procedure used in practice, of course, one relies primarily on the rules provided by the arbitral institutions. However, if we look more closely at these rules, we see many similarities and often identical solutions. This is the result of the modernization of almost all relevant arbitration rules in recent years, trying to take into account the experience and demands of arbitration practice."

rules of procedure in the absence of a choice by the parties and the principle of confidentiality."

Therefore, the units of supply regarding international arbitration, in both commercial and investment law, are plentiful. Something that is worth mentioning about this fact is that the creation of this variety of arbitration *fora* is not to be considered groundless. There have been, and still are, important incentives for it. Not in vain the Preamble of the ICSID Convention uses the word *favourable* when referring to the creation of an investment climate especially characterized by this attribution. Given that both international trade and international investment law are considered highly sophisticated and intricate matters, it is obvious that the reason behind the creation of the above-mentioned institutions is to offer an alternative that would match the expectations of the parties involved in a dispute embedded in one of those two international legal frames. An alternative to national courts, that is.

In order to be considered a true alternative to national courts, keeping in mind the sophistication of international arbitration, institutions that deal with the resolution of international legal disputes are expected to offer certain special features in their procedures. For instance, international arbitration is attractive by the specialization of the arbitrators, which allows arbitration to be faster, less formal, and less expensive[7] than litigation (Benson, 1999: 94). According to Benson (1999: 94), this is so, in part because "the parties do not have to provide as much information to the arbitrator to avoid an error in judgment as they would to a non-specialized judge […]." Taking into account the opportunity costs of the parties involved in international arbitration, another benefit is to be seen when court time is allocated by waiting, since delay can become devastating to business. In this sense, international arbitration offered by the above-mentioned institutions is expected to function without such a delay.

[7] As mentioned above, arbitration is not cheap. The reference to a lesser cost of arbitration is made taking into account not only the money paid to the arbitrators through their respective institutions, but also time, which, economically speaking, is a resource that is allocated. For more on time as a scarce resource, see Mises (2006: 101-102).

Confidentiality is an additional benefit of the international arbitration procedure. As Benson has said (1999: 94), privacy can be maintained if the parties agree to it. As for international investment arbitration, through the reform of 2006, Article 48(5) of the ICSID Convention allows the centre to publish its awards, given the proper consent of the parties to the arbitrational procedure. Thus, the parties keep the faculty of disclosure of the awards.

Confidentiality has a high rank, as it is perceived by the parties as one of the many incentives of arbitration when compared to other forms of dispute settlement, like national courts (Knahr and Reinisch, 2006: 118; Buys, 2003: 122). According to Knahr and Reinisch (2006: 118), the main reason to regard confidentiality as such an important feature in this field is that is not uncommon to assume that a lot of firms appreciate privacy and confidentiality of arbitral proceedings "because it protects business secrets and may help to protect the public image of companies when even mere fact of litigation released to the public might cause harm to its reputation." An additional reason to consider it as an advantage is that in this way the tension between the parties to the dispute would be reduced. In the absence of the requirement to publicly comment on various steps of the procedure, it might be easier to come to an agreement on specific non-disputed aspects of a particular case, thus accelerating the proceedings (Knahr and Reinisch, 2006: 110). The confidential nature of the arbitrational procedure may facilitate settlement discussions between the parties and, ultimately, a "mutually-agreed-upon solution, be it in the form of an award on agreed terms or a direct settlement agreement between the parties" (Knahr and Reinisch, 2006: 110).

The same consideration can be made regarding investment arbitration, where the respondent is typically a state. Here, both the governmental and business secrets are to be safeguarded. Another advantage of confidentiality within the procedure is the contribution to the de-politicization of the investment dispute, which is actually one of the

reasons behind the ICSID Centre (Sabater, 2010: 3).[8] Additionally, taking into consideration the long-term relationship between host state and investor, confidentiality gives the possibility of facilitating any move towards a negotiated settlement between the parties involved (Knahr and Reinisch, 2006: 118).

All of the above-mentioned advantages of international arbitration, which are derived from its competitive nature, are some of the very incentives that the parties seek in this particular dispute settlement mechanism. It applies to international commercial and investment arbitration. These features, confidentiality among them, make international arbitration efficient, in terms of satisfying the complex needs of dispute adjudication of the parties involved in a case related to international investment or commercial law.

4. The Concept of Transparency

The principle of transparency in international investment arbitration procedures has long been considered of crucial importance, along with the principle of confidentiality (Delaney and Barstow Magraw, 2008: 751). This justifies dedicating to this principle a considerably large part of whatever academic research on this topic is being made. However, there are additional reasons for that. On the one hand, the scope of the term "transparency" should become clear, as well as what it refers to. On the other hand, grasping this concept should also add clarity to the way in which it must be applied depending on the context. Furthermore, the possible implications of the execution of a general policy of transparency in international investment arbitration procedure could be better understood. As will be seen, the perspective from which the principle of transparency is applied in the field of international economic law, investment law, and investment arbitration procedural rules is very different and demands a closer look in each context.

[8] Sabater (2010: 3) makes this comment when discussing the transparency movement currently trying to influence investment arbitration: "Ironically, one of the reasons that ICSID was created was to remove the resolution of investment disputes of the political arena."

4.1. General Concept of Transparency in International Economic Law

In its most obvious meaning in the context of law, *transparency* refers to the condition of a regulation, law, or legal procedure to be transparent, i.e. to the possibility of easily *seeing* through it (Zöllner, 2006: 584). Thus, as Zöllner comments (2006: 584), "the process and effects of the legal instrument in question must be readily understandable, and the scope of its derivative rights and obligations must be easy to assess for the addressee and rights-holder respectively." On an international level, the term *transparency* refers to the accessibility and clarity of obligations contained in a specific international treaty, but also to the actions of the parties involved in such an international legal relation (Zöllner, 2006: 585). Thus, the relevant parties to a treaty must know the content and respective implications of the international legal duties that they are bound to, and the actions of those relevant parties. In this sense, the concept of transparency is considered a *principle* at an international level, which demands from the parties both openness and the disclosure to the other interested parties of critical information that could affect their legal and economic position.

Considering that international economic law is understood as the legal order that is aimed at the regulation of the economic relations between states, international organizations and private enterprises (Herdegen, 2008: 1; Tietje, 2009: 13; Lowenfeld, 2008: 3-4), it can be stated that the principle of transparency within this particular field of law regulates the accessibility of information and knowledge of the decisions of economic subjects that have engaged in an international economic relation within an international legal frame. Logically, this principle has two major implications. On the one hand, it deals with the control that parties in the international economic field exercise over their activities in accordance with international obligations—contained in international legal instruments, such as treaties; on the other hand, it deals with the parties taking action "with full, accurate, reliable and complete information and knowledge of the relevant framework" (Zöllner, 2006: 585). In this sense, the principle of transparency contains a feature of *predictability*, and as such, for instance, states are expected to make

policy and regulatory information available to foreign investors, so that investors can be relatively certain of the way in which the host state is going to handle their investment.

At this point, it can be seen how the concept of transparency reaches the category of principle. As such, its content is aimed principally, but not exclusively, at states vis-à-vis other economic actors, for it is the states, by means of treaties, that set the legal frame that regulates the economic relation with international organizations and international private enterprises. Thus, the state is supposed to make available the means by which it sets economic policy, which is traditionally the law in its formal sense, as well as administrative and judicial decisions with a broad range of applications. Hence, the transparency principle purports to secure a safe level playing field between economic actors at an international level (Zöllner, 2006: 589).[9]

The obligation to publish legal instruments that contain the policies associated with economic relationships is an unmistakable expression of the transparency principle in international economic law.[10] This provides control to economic actors to comply with said policies; it also allows them to assess the collateral economic impact that comes along with the measure (Zöllner, 2006: 590).

4.2. Transparency in Investment Law

As has been shown, transparency is an important principle within international relations in the context of international economic law. Logically, this principle is also important in the context of international investment law, particularly as an element of the standard of *fair and equitable treatment* (Yannaca-Small, 2008: 121-122). For example, expressions of this principle can be found in NAFTA. According to its preamble, the state parties are obligated to "establish clear and mutually

[9] Obviously, the principle of transparency is also to be applied to other subjects of international law, such as international companies.

[10] In the context of the WTO, the provisions concerning transparency in GATT prevent a lack of transparency, which could "deter the influx of foreign products, thus making it functionally equivalent to a tariff." One of the most significant GATT provision is the one found in Article X.

advantageous rules governing their trade and ensure a predictable commercial framework for business planning and investment."[11] According to Zöllner (2006: 596), this particular treaty contains many more procedural obligations, which aim to allow governments of other parties and investors to get sufficient understanding of the relevant domestic rule-making process and possibly to provide input. "Thus, even though the specific content of laws remains largely at the discretion of the parties, the formation and application of those laws and regulations must be transparent" (Zöllner, 2006: 596).

The Additional Facility of ICSID decided one of the most influential cases related to this principle: the *Metalclad* case. In this case, the tribunal clarified that transparency is relevant when applying the protection standard of *fair and equitable treatment*. In the words of the tribunal:

> [P]rominent in the statement of principles and rules that introduces the Agreement is the reference to "transparency" (NAFTA Article 102 (1)). The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party (Metalclad Corporation vs. United Mexican States, 2000: par. 75-76).

In this sense, the tribunal attributed to the transparency principle a highly important role, one that allows deeper interpretations of the extent of the standard of *fair and equitable treatment*. If the state does not ensure a transparent regulatory frame, it commits a serious breach of the original investment agreement to which the parties are bound.

[11] Additionally, Article 1802 of NAFTA contains the duty to ensure prompt and advance publication of laws, regulations, procedures, and administrative rulings of a general nature.

4.3. Application of the Transparency Principle

Transparency in international economic law is a principle that aims to force the subjects of international economic law to be transparent. Particularly, it is a principle designed to obligate a state that is party to a specific international treaty to disclose sufficient information about its regulatory frame as it possibly can, which would eventually affect —positively or negatively—another international economic subject, such as investors or importers and exporters of another contracting state. Transparency is one of the elements that are supposed to hold the state legally accountable in its international relations. It is also the very feature that allows investors to *trust* the state through which they will establish business. If the state does not act in a transparent manner, no investor would take their investment within its territory, for no investor would jeopardize his or her resources in a context where they would be any less than safe. Transparency is, as a principle, directed to rule the conduct of subjects of international economic law in order to maintain an environment suitable for economic relations.

4.4. Transparency in Investment Arbitration: Beyond *Due Process*

When dealing with investment arbitration, the discussion of the application of the principle of transparency is made from another perspective. Originally, the discussion takes place in the context of the legal category of *due process*. Thus, an arbitration procedure is considered nontransparent if it overlooks the procedural rights of a party, be it a claimant or a defendant (Philip, 2008: 70). This is the initial understanding of transparency in this context.

However, according to Sabater (2010: 1), the current debate on transparency in arbitrational procedure "greatly exceeds the confines of due process and enters the realm of politics." Is this sense, there is a lack of transparency in investment arbitration—and, consequently, it would be considered an illegitimate means of dispute resolution—because, in particular cases, "the written arguments from the parties and

the hearings had been kept confidential from the public in general" (Sabater, 2010: 1).[12]

If the application of the transparency principle—as explained above—is taken into account, it must be noticed that the application of this principle to investment arbitral tribunals and their actions is very different. The application explained above is directed primarily to states as subjects of international economic law and not to investment arbitral tribunals, and both are different in *nature*. States, unlike arbitral tribunals, make policy decisions. International arbitral tribunals may review such policies, but they surely do not make them. Their single and *strictly* limited function is to adjudicate disputes by means of interpreting whatever legal source the parties have previously agreed upon. They belong to two completely separate spheres. A state is, according to constitutional law, accountable to its nationals, and, following this logic, it is expected to be transparent, not only to said nationals but also to those other subjects of international economic law that are engaged in economic relationship with it. In essence, an investment arbitral tribunal does not have constituents in the same way that a state does; instead, it is an entity empowered by the parties to a dispute to give it lawful resolution according to certain rules (Sabater, 2010: 2). In fact, as mentioned above, it is part of the very nature of international arbitration—investment arbitration included—to remain confidential in its contents if the parties so decide. It is only with caution that the transparency principle can be applied to investment arbitration.

However, there is a very special consideration to be made in the case of investment arbitration. According to Sabater (2010: 2), "saying that the term 'transparency' is alien to, and cannot be freely applied in, investment arbitration, does not equate to suggesting that arbitration should always take place behind closed doors." It is true, like it has been said above, that international investment arbitration is a special kind of arbitration, for one of the parties is a state. The state, as party to the arbitral procedure, is expected to disclose to its "citizens the existence,

[12] This is especially referred to the ICSID tribunal's *Biwater Gauff vs. Tanzania* case, Award, 24 July 2008.

essential contents, and outcome of the investment arbitrations in which [it is] involved" (Delaney and Barstow Magraw, 2008: 721). In this context, a nuanced application of the transparency principle is required.

A particular problem arises when the adoption of provisions that attempt to make investment arbitration more "transparent" allow for the intervention in the proceedings of third parties with a significant interest in its outcome, without any further special consideration to the nature of the institution to which these provisions plan to be applied. This is the case of the proposal of the European Commission in the context of the entry into force of the Lisbon Treaty, which is contained, partially, in the draft *Regulation Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries* (the Draft). According to Article 13(2) of the Draft, in all cases where an arbitration procedure is initiated against a member state of the EU—given a breach of the applicable BIT—the Commission must be informed about it. Thus, the Commission and the involved member state will have to undertake measures in order to defend the latter, a participation of the Commission as party to the procedure not being excluded (Tietje, 2010: 12). According to Sabater (2010: 3), proposals such as this one "are fraught with difficulties and inconsistencies that threaten the survival of investment arbitration as a worthy and efficient dispute resolution mechanism." A similar consequence would follow the application of a general policy of transparency, which would make it compulsory for the tribunal to *fully* disclose the content and final outcome of the procedure, overlooking the possible original agreement of the parties to the contrary. Such a measure would evidently ignore one of the features that are of the nature of investment arbitration (confidentiality), and thus one of the reasons why the parties agreed to arbitration in the first place.

Even though international investment arbitration calls for special considerations, taking into account the nature of the dispute it deals with, the case for a general policy of transparency applied to arbitral tribunals needs to be examined with greater rigor. The reason for this is that such an approach, as it is initially considered[13] (full disclosure of

[13] With no further consideration of the nature of international arbitration.

what happens in the procedure and the participation of "third parties" with significant interest), could prevent the parties to the dispute to obtain what they sought in arbitration in the first place, i.e. an efficient legal solution (means) to a legal dispute (end). This could result in additional costs and delays and, what is worse, not lead to a fairer or more accurate solution to the dispute (Sabater, 2010: 4).[14]

It is now time to enter more deeply into the question of the compromise between the principles of transparency and confidentiality, which inevitably conflict in every dispute taken to an arbitral tribunal deciding cases in the context of international investment law.

5. Transparency versus Confidentiality in International Investment Arbitration

Even though the current trend towards transparency in international investment arbitration is a fact (Teitelbaum, 2010: 54-55), as evidenced in the 2006 reform of Article 48(5) of the ICSID Convention[15] and Rule 37(2) of the Arbitral Rules of ICSID,[16] and in the existence of the institution of *amicus curiae*, confidentiality is still taken into serious consideration in the context of international investment arbitration procedure. As previously said, there is currently a tension between transparency and confidentiality in international investment arbitration. When studied more closely, the entire discussion takes place in the compromise between the principle of transparency in the context of

[14] In order to gain sufficient understanding of the current state of affairs regarding confidentiality in the context of international investment arbitration, the following legal sources should be taken into account: Article 48(5) of the ICSID Convention, regarding publication of awards by the centre; Rule 6(2) of the ICSID Arbitration Rules, regarding obligations of secrecy of the arbitrators; Regulation 22(2) of the Administrative and Financial Regulations of ICSID, on publication of awards and minutes and other records of proceedings; Rule 48(4)of the reformed Arbitration Rules of 2006, regarding publication of excerpts of the legal reasoning of awards; and Article 37(2) of the Arbitration Rules of ICSID, concerning the submission of *amicus curiae* briefs.

[15] According to Article 48(5) of the ICSID Convention, "the Centre shall not publish the award without the consent of the parties."

[16] After consulting both parties, the tribunal may allow a non-disputing party to file a written submission with the tribunal regarding a matter within the scope of the dispute.

international economic law—and not from the strict perspective of *due process*—and the inherent procedural feature of confidentiality in international arbitration. The reason for this is that, unarguably, the concept of transparency does go, in fact, beyond the realm of *due process* in this particular context (Sabater, 2010), because the presence of the state as a party is an evident fact. This is actually a necessary discussion that needs to take place. For one thing, international investment arbitration is still international arbitration. Because of its nature and its inherent features, foreign investors and host states as subjects of international economic law recur to it. It is a well-known means to a very simple end: the settlement of investment disputes. The fact that there is a certain level of confidentiality contributes to this fact. However, it also takes place in the field of international investment law, and in this sense, foreign investors relate legally to states, and when the legal frame of said relation breaks for some reason, both interests have to be weighted in order to settle the dispute. This is the significantly strong reason to conclude that international investment arbitration is, in fact, a special kind of arbitration: in this context, the question of how to balance the demand for transparency against the need for confidentiality arises.[17]

One of the most commented cases regarding this particular subject is the *Biwater Gauff* case,[18] decided by an ICSID tribunal. In this case, the tribunal stated that there is no provision, whether in the ICSID Convention or in any of the applicable rules, that imposes a general duty of confidentiality in an ICSID arbitration procedure. However, there is equally no provision imposing a general duty of transparency (Bitwater Gauff Ltd. vs. United Republic of Tanzania, 2006: par. 121). In this sense, it is within the discretion of each individual tribunal to find the proper compromise when conducting proceedings. The demands for

[17] According to Knahr and Reinisch (2006: 98), "it is not easy to determine to what extent the arbitral process should be transparent and where confidentiality, which is generally considered to be one of the basic characteristics of arbitration, should prevail."

[18] In this case, the claimant filed a request calling upon provisional measures on confidentiality, complaining about unilateral disclosure of the Minutes of a first meeting of the tribunal and the Procedural Order No. 2 on the Internet.

transparency have to respect the procedural integrity and the interest of the parties over the confidentiality of certain information of the process.

In this particular case, the tribunal noted that the parties are free to conclude confidentiality agreements. Additionally, taking into account the possible disruption that an arbitral process could suffer due to the disclosure and publication by the parties of certain kinds of documents, the tribunal concluded that "the disclosure of decisions, orders and directions […] should be considered on a **case-by-case basis**" (par. 152-154; emphasis added) and only under prior permission of the tribunal. It also concluded that the publication of minutes of hearings (par. 155), pleadings or written memorials (par. 158-160), and documents produced by the opposing party (par. 157) may threaten the integrity of the procedure and should not, in principle, be allowed by the tribunal. Notwithstanding, the tribunal considered appropriated giving the parties the opportunity to ask the tribunal for exceptions to this restriction on, again, a *case-by-case* basis (par. 162).

It is worth noticing in this case that the tribunal recognized that the aspects of every one of the cases in an arbitral tribunal are very specific. Not in vain did the tribunal stress the argument for a *case-by-case* approach when making decisions on limitations of confidentiality. Thus, the merits of each case need to be sufficiently convincing in order to expect the disclosure and publication of its content, and the possible admission of non-disputing parties. This means that whatever is argued for the publication and disclosure and the admission of *amicus curiae* briefs—by means of which international arbitration is expected to be transparent—it has to carry sufficient authority and credibility in order to justify an erosion of the confidentiality of the procedure.

One important contribution made by the *Biwater Gauff* case is the fundamental idea that each case must be properly balanced. The case thus affirms that a general policy toward either one of the extremes, be it full transparency or full confidentiality, is not advisable. To take one example, consider the policy proposed by the European Commission (the Commission) in the context of the entry into force of the Lisbon Treaty. From this moment on, the EU will be negotiating and eventually ratifying investment treaties, instead of the individually considered

member states of the union. One of the policies proposed by the EU that goes in this direction is the one contained in Article 13(2) of the Draft, where the participation of non-disputing parties is taken to the extreme. According to this document, in *all cases* where an investor requests an arbitration proceeding against its host state, the Commission *must* be informed about this fact. In this way, the Commission and the host state against which the claim is being filed would undertake a joint defense of the latter. Additionally, the possibility that the Commission would participate as a party of interest in the procedure is not excluded (Tietje, 2010: 12).

Another proposal made by the Commission (2010) is to be found in the *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a Comprehensive European International Investment Policy* (the Communication). As it can be deduced from its title, the main objective of this document is to explore "how the Union may develop an international investment policy" (European Commission, 2010: 2). In this document, the Commission clearly states that one of the main challenges of the investor-state dispute settlement mechanism is the transparency of the procedure. In this sense, the Commission states that the procedure "should be conducted in a transparent manner (including requests for arbitration, submissions, open hearings, amicus curiae briefs and publication of awards)" (European Commission, 2010: 10).

There are considerably good reasons to take a closer look of these policies. No mention is made of the special condition of international investment arbitration, understood as a condition where the tribunal needs to consider the particular circumstances of each case in order to balance both the need of confidentiality and the demands for transparency. As these policies are initially constructed, their compliance could threaten the efficiency of the arbitral process, for it would add a certain level of difficulty and inconsistency to investment arbitration (Sabater, 2010: 3). In fact, as Sabater (2010: 3) points out, by allowing the intervention of third parties, investment arbitration runs the risk of resembling the procedure of national courts, with its delays, complexities, and publicity, which is exactly what the parties tried to

avoid when they opted for arbitration as the proper dispute settlement mechanism. Additionally, this could contribute to the politicization of the arbitral procedure, which the parties were also, and more emphatically, trying to avoid.

The institutions backing transparency in investment arbitration are known—and in some cases, demanded—for particular reasons. One of them is, as it is usually asserted by legal scholars, that through them higher quality decision-making is achieved. According to this argument, given the proper level of transparency, more accurate, thorough, and defensible decisions by arbitrators are assured, and, at least to some degree, "improper behavior (such as corruption in the arbitral process, and possibly with respect to activities leading to arbitration)" is avoided (Delaney and Barstow Magraw, 2008: 761). Another commonly mentioned reason is that, in this way, democratic values are served, informing those who are eventually affected by government activities. Additionally, it is commonly argued that, by having more transparency, consistency is achieved by "interpreting and applying arbitral rules, because tribunals can be aware of other tribunal's work" (Delaney and Barstow Magraw, 2008: 762). Other reasons are the accountability of the institution of investment arbitration, the legitimacy of this institution, and the possibility of systematically reforming investment arbitration (Delaney and Barstow Magraw, 2008: 762).

If examined more closely, the main reasons that underlie the demands for transparency (higher-quality decision making, democratic values, consistency, accountability, legitimacy, and systematic reforms) can be summarized in three major arguments: evolution of investment law, confidence in the system of international investment law, and public interest.

According to the argument of *evolution of investment law*,[19] the provisions of most BITs and MITs such as the ECT are worded in a

[19] According to Knahr and Reinisch (2006: 97), "The public availability of judicial or quasi-judicial decision is particularly important where the substantive rules governing disputes between parties are of a highly general and vague character. This is a phenomenon not unknown in international law where sometimes very abstract rules

rather imprecise and indeterminate character; it is only through their interpretation and application "in the context of investment arbitration that [say] fair and equitable treatment, full protection and security, expropriation and other notions become workable concepts" (Knahr and Reinisch, 2006: 112). While this is entirely true, it overlooks the fact that, in the case of the ICSID Centre, the reformed rule 48(4) of its Arbitration Rules indicates that it shall promptly include in its publications excerpts of the legal reasoning of the Tribunal. Being aware of the importance of the role of investment arbitration decisions in the evolution of international law, an institution is already contributing to this cause, but it does so without ignoring one of the characteristics that are ranked most highly among the potential users of this particular dispute settlement mechanism.[20, 21]

Another argument for publicity in investment arbitration is that it allows confidence in the system of investment arbitration to be created or reestablished (Knahr and Reinisch, 2006: 112). In this way, according to Knahr and Reinisch (2006: 112), the arbitrators, who are "unelected" and "unaccountable," will have to be professional and highly skilled experts, given that their rulings would be open to the public. These authors overlook the fact that the arbitrators to a particular investment law case have been selected by the parties to the dispute, and are actually accountable to them. This argument also overlooks the importance of the competitive nature of international arbitration, from which investment arbitration is not excluded. As has been previously

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are agreed upon in treaties, often in the form of vague compromise formulations, which are in need of interpretation by dispute settlement institutions."

[20] This is not a situation exclusive to international investment law. Bernstein (1992: 150) comments on a similar situation in the legal relations within the community of diamond dealers around the world. For instance, diamond dealers have recognized that their secrecy practices in their arbitration processes were creating uncertainty among the members of their community. In this sense, many trading clubs changed their institutions, and because of this, arbitrators now publish written announcements of the principles applied in novel cases while keeping the parties and identifying facts secret.

[21] There is a very interesting point to be made on this particular issue. Bernstein (1992: 121), writing about the diamond trading clubs, comments that there is a considerable "unofficial flow" of information through word of mouth—most commonly referred to as gossip—within this trade community. Chances are that this could also happen in the daily practice of international investment arbitration. This, however, merits a deeper examination.

stressed, an investment arbitration tribunal is the parties' tribunal. In any arbitration tribunal, the arbitrators have been chosen *precisely* because they are highly skilled and professional in their rulings. The fact that international arbitration is, by its very nature, competitive cannot be stressed enough. As arbitrators compete with each other, and arbitration tribunals compete with the national and purely public means of adjudicating justice, they are constantly being held in check by different interests groups, such as the current parties, future parties, and scholars, award by award. It is precisely because arbitrators have to build their reputation of being "good" and "highly skilled" in every case that they have a strong and credible incentive to produce clear and unbiased decisions.

Finally, there is the major argument of public interest, which is directly related to the special condition of international investment arbitration that has been profusely mentioned in this article. This public interest stems from the fact that one of the parties to the dispute is actually a state, which is supposedly legally bound to provide public services to its constituents. Thus, in virtually all cases investment arbitration concerns matters that are considered public services, which, according to the public good theory, are supposed to be produced and financed by the state (Knahr and Reinisch, 2006: 113). In this sense, cases often deal with environmental or health policies, as well as expropriation, and logically the state may be bound to make important parts of the proceedings available to the public, including the final decision.

In the context of making a decision on the submission of *amicus curiae* briefs, the *Suez-Vivendi* case acknowledged the fact that in these particular circumstances, whenever a state is a party to the dispute, the following must not be overlooked:

> [T]he Tribunal finds that the present case potentially involves matters of public interest. This case will consider the legality under international law, not domestic private law, of various actions and measures taken by governments. The international responsibility of a state, the Argentine Republic, is also at stake, as opposed to the liability of a corporation arising out of private law. While these factors are certainly matters of public interest, they are present in virtually all cases of investment

> treaty arbitration under ICSID jurisdiction. The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimant or Respondent, has the potential to affect the operation of those systems and thereby the public they serve. (Aguas Argentinas S. A., Suez Sociedad General de Aguas de Barcelona S. A., and Vivendi Universal S. A. vs. Argentine Republic, 2006: par 19)

This argument is quite important, for the situation related to the involvement of the state, and the consequences of this fact in the procedure are unavoidable when it comes to international investment arbitration. Unarguably, when a tribunal deals with a case concerning public health, the provision of water and sewage services, national security, and state responsibility, it supposes an outcome that would be the object of thorough public scrutiny. Therefore, such considerations must be taken into account when deciding upon confidentiality.

Following this reasoning, the conclusion appears to be that the specific circumstances of each particular case have to be considered when dealing with transparency in international investment arbitration. As a result, and by taking into account the importance of the role of the state, an apparently considerable reason is given to erode the principle of confidentiality in the investment arbitral process, a feature that was initially highly ranked. In principle, the reasons to conclude otherwise are rather limited. For one, the considerations in favor of the development and confidence of the system of international investment law do not seem convincing when examined more thoroughly; there are more plausible ways to achieve these goals without overlooking the inherent feature of confidentiality, and therefore without impairing its correct functioning. It seems that it is actually the very special condition of international investment arbitration that provides the answer of when publicity is expected to be enforced in these kinds of procedures. Accordingly, it is the task of the arbitral tribunal itself to decide upon

the merits to do so, on a *case-by-case* basis, always taking into consideration the significant part played by the presence of the state as a party.

6. Conclusions

After the above reasoning, the following conclusions are to be made:

6.1. Among all the available institutions satisfying the need for justice adjudication in the context of investment disputes, international arbitration is the mechanism to which most parties resort. The reasons for this are twofold. On the one hand, the limitations of the other institutions do not assure an unbiased decision and could exacerbate the differences of the parties to the dispute. On the other hand, due to the inherent features of international arbitration—to its nature—international arbitration offers an *up-to-the-task* means of justice adjudication within the system of international investment law.
6.2. By observing international arbitration and comparing it with national court systems, it can be concluded that the former is competitive in nature. This is understood as the condition of international arbitration of being polycentric, as opposed to the monopolized supply of national courts by states. Thus, international arbitration tribunals do not only compete with each other, but also offer an alternative to national courts.
6.3. In this sense, international arbitration competes by offering special features in its procedure. In addition to being less expensive, less formal, and faster than litigation, it offers the possibility to keep its procedure confidential if the parties so agree. Thus, it is in the nature of international arbitration to remain confidential if the parties have previously decided so.
6.4. Within the specific system of international investment law, confidentiality in the arbitral procedure is expected by the parties, which, in this case, are commonly a state and a foreign investor. Thus, both government and business secrets are protected. Furthermore, considering the long-term relationship between the host state and the investor, confidentiality facilitates a negotiated settlement between both parties.

6.5. Transparency has important implications in international investment arbitration, which is why it deserves a close examination. Thus, in the context of international economic law, transparency is a principle that governs the actions of international economic subjects, allowing them to comply with their international obligations and to assess the collateral economic impact of their counterparts' actions. Within the context of international investment law, the principle of transparency is a defining element of the standard of *fair and equitable treatment.*

6.6. Concerning the investment arbitration procedure, the application of the principle of transparency calls for a nuanced approach. Such a principle is initially directed to subjects of international economic law, but arbitration tribunals are institutions of a different nature. Keeping in mind the inherent features of international arbitration and the role that this institution plays in the development of the system of investment law, any policy directed at making it more transparent should take into consideration the nature of international arbitration, in order to avoid depriving this mechanism of its efficiency.

6.7. Nevertheless, the fact that one of the parties in investment arbitration is the state gives sufficient reason for demanding transparency in the procedure, because matters of public interest are often examined. Given that international investment arbitration is essentially confidential, and taking into consideration the unavoidable fact that public interests are often at stake, the need for a defendable argument that allows overlooking confidentiality in favor of transparency arises.

6.8. After reviewing the commonly stressed arguments for transparency, it can be concluded that the only defendable one is precisely the public interest at stake in the procedure. Solely on the basis of the public interest that may be at issue in a particular investment arbitral procedure can the demands for transparency be satisfied, by means of submission of *amicus curiae* briefs by non-disputing parties and by the publication of procedural documents when the parties have not agreed to the contrary.

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