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The Problem of Reconciling the Principle of Confidentiality in Foreign Investment Arbitration with the Public Interest

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Abstract**—**The economical globalization through the liberalization of the markets and capitals boosted the economical development of the nations and the needs for sorting out the disputes arising from the foreign investment. The arbitration, for all the inherent advantages, such as swiftness, arbitrators' specialise skills and impartiality sets a pacifier tool for the interest in account. Safeguarded the public interest, we face the problem of the confidentiality in the arbitration. The urgent development of impelling mechanisms concerning transparency, guaranty and protection of the interest in account, reveals itself urgent. Through a bibliography review, we will dense the state of art, by going through the several solutions concerning, and pointing out the most suitable. Through the jurisprudential analysis we will point out the solution for the conflict confidentiality/public interest. The transparency, inextricable from the public interest, imposes the arbitration process can be open to all citizens. Transparency rules have been considered at the UNCITRAL in attempting to conciliate the necessity of publicity and the public interest, however still insufficient. The arbitration of foreign investment carries consequences to the citizens of the State. Articulating mechanisms between the arbitral procedures secrecy and the public interest should be adopted. The arbitration of foreign investment, being a *tertius genius* between the international arbitration and the administrative arbitration would claim its own regulation in each and every States where the confidentiality rules and its exceptions could be identified. One should enquiry where the limit of the citizens' individual rights protection and the public interest should give way to the principle of transparency

Keywords**—**Arbitration, foreign investment, transparency, confidentiality, international centre for settlement of investment disputes UNCITRAL.

I. Introduction

CONSIDERING the current economic and political situation in Europe, there has been an increase in foreign investment relations. This increase, in foreign investment relations, is due, among other things, to the liberalization of markets and capital, which aims to boost the economic development of the States. Investors are faced with a lot of obstacles, including expropriations, tax increases, restrictions on the withdrawal of capital from the investor State, among others. Such obstacles enhance litigiousness. Arbitration is an alternative dispute resolution (ADR) in foreign investment, which, for all its inherent advantages, namely greater speed, specialization of arbitrators and impartiality, is an incentive to the foreign investment.

Confidentiality is a quality of arbitration in foreign investment. However, it is important to consider the advantages and disadvantages of this confidentiality in opposition to the public interest. In fact, it is very important the implementation of effective transparency mechanisms in foreign investment arbitration, to protect the public interest, but it is also important, in the other hand, protecting the investor interest.

The characteristics of legal relations of foreign investment impose, as in the international contract in general, the confidentiality. In fact, the confidentiality is also a paradigm of the arbitration. However, because one of the protagonists of this relationship is the State and the only interest that it must pursue is the public interest, it should also observe the principle of transparency. We think that it is an imperative to have an adequacy between this alternative mode of dispute resolution and the need to permit that all interested people can follow the arbitration process.

In conclusion, in our opinion, t is urgent to find an articulate solution between the public interest and the investor interest. And for that, we think that is very important a principle of transparency in the arbitration process.

II. The Foreign Investment Relations, the Transparency Principle and Public Interest – Context

With the growth of globalization and market liberalization, foreign investment has intensified. The necessity of creation of a competitive market, coming from other countries investment, employment creation, price competitively and the creation of infrastructures were some of the factors that helped States to start celebrating foreign investment contracts, potentiating the economic growth. To understand what is withheld in foreign arbitration investment we have to define investment. Because this is not our theme, we refer only to the Washington Convention [5], in his article 25º nº4 previous a large definition for investment, leaving the subjects to define the concept when arbitration is decided [14]. It can not be left to the subjects will these definition, due to the fact that a doctrine argued otherwise considering that the mutual agreement is not sufficient to define foreign investment, under the possibility of other questions that are not foreign investment are submitted to foreign investment arbitration [4]. In this sequence the Washington Convention identifies typical

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characteristics of the investment concept. The foreign investor, many times, finds, problems with the practice of authority through the State which can affect the investor negatively, for example, nationalization of companies, expropriations, legislative alterations that increased taxes, which create conflicts. One of the incentives of foreign investment is arbitration, as an alternative for the resolution of conflicts, it is fast and effective [2]. In this resolution of conflicts mechanism the subjects can choose the arbitrators with high level of specialization. Another advantage, for the investor, associated with the arbitration of foreign investment, is the degree of confidentiality that characterizes it. In the arbitration procedure discussions about various business element issues related to the respective strategy, technology used, know-how among others, should not be disclosed under serious penalty to the investor [8].

In international commercial arbitration the issue of confidentiality does not cause major complications, the same can not be said with regard to arbitrations involving the public interest. In these cases, the principle of confidentiality conflicts with the principle of transparency inherent to the Administrative Law. The institutions which develop foreign investment arbitration, except for the International Center for the Settlement of Investment Disputes, ICSID under the jurisdiction of which derive most of those, International Chamber of Commerce, ICC or United Nations Commission on International Trade Law, UNCITRAL, are mainly directed to private arbitration, so the disciplinary rules of arbitration did not have a particular concern with the process of confidentiality, given the absence of public interest [10]. However, the logic reversed. The various foreign investment arbitrations are developed in these institutions, which prompted them to the preparation of rules on the transparency of arbitration. Historically, although the arbitrations that unfolded under the purview of the ICC and UNCITRAL could involve the States, they appeared, most often in parity position with individuals, devoid of *ius imperii*, hence where the principle of transparency was not revealed a priority.

The decisions on foreign investment have direct impact on the public interest, by the fact that the State is part of the arbitration as well as part in the consequences that may result, *eg*, consequences in the context of fundamental "traditional" rights of citizens but also the diffuse rights, those related to the environment, the cultural heritage, spatial territorial planning, among others [3]. A considerable part of the arbitration proceedings brought by investors consume in civil liability lawsuits for damages caused by the State. The compensatory amount arbitrated will be reflected in the state budget, a relevant public interest [7].

The principle of transparency allows all citizens to be aware of the size of the lesion that is subject of the public interest [1]. Most foreign investment relations is concerning to public interest sectors such as water, gas, electricity, oil, telecommunications, public infrastructure structures, environment, among others. Given the above, the principle of publicity, intrinsic to any decision involving the public administration, imposes the need for transparency in the arbitration of foreign investment and the duty to provide state accountability to citizens. The principle of transparency is inseparable from administrative law. Although the Portuguese Constitution does not refer to it expressly and such could take us to conclude that it isn't a fundamental principle of administrative activity, today this principle is enshrined in diverse administrative law and the new code of administrative procedure refers to it. The principle of transparency attributes

> "*to citizens the right to access information that general government holds (right to information)", which is "a means of achieving 'administrative democracy', which [...] assumes rejected the conception of Public Administration as a secret organization "(...) that principle" imposes a structure of proper management to maintain citizens in a position to know the information or access the knowledge that the public administration has and the juridical acts that it practices*" [9].

The administration can not assume opaque behaviors because transparency is indispensable for the exercise of sovereignty and accountability and external control of public acts. It is on the legislature to create mechanisms to ensure administrative transparency [16].

The principle of transparency translates to "*transcendental form of public interest*" [11]. Notwithstanding the foregoing, the law previews cases of "justified secret", applying this principle to protection of other constitutionally predicted values, in particular commercial or industrial secrets or on the internal life of a company, which will fit the investment foreign arbitration. Confidentiality can only concern justified situations in which it is indispensable to keep the secrecy related to certain aspects of the business that have nothing to relate to the public interest. In our opinion, with few exceptions, the principle of confidentiality and the public interest prove to be incompatible.

III. The Scope of Transparency in Foreign Investment Arbitration: Access to Information and Documents, Open to the Public Hearings and Amici Curiae

Access to information and documents requires that the parties are aware of the existence of a dispute, the respective parts and the same object. This corollary may also cover access to documents of the arbitration proceedings, as well as consultation of the transcripts of hearings and own arbitration award.

The second manifestation of the principle of transparency translates into the possibility of assistance from the public to the audience, providing a direct contact of the public with the process and with the arbitrators, which is revealed imperative where the public interest lies "*in Game*". Finally, the last form of the principle of transparency is the *Amici curiae*, designated friends of the court [6]. These are third parties not being parties to the arbitration proceedings, hold a direct interest in its development and results. These players may adduce certain factuality to the process, enriching the legal discussion.

IV. The Principle of Transparency and ICSID

Considering the need for international cooperation and the role played by international 13 private investors ISCID14 was created. The ISCID arbitration model was behind the idea

"*that many international investments, especially directed to least developed or developing States, were prevented by lack of investor confidence as to the judicial system of those States. (...) Indeed, many of these investments were focused on the construction and development of infrastructure or operation of public services, thus requiring a large initial financial commitment by investors, with the consequent amortization of invested capital and return to the investor obtained during the duration of the contract, as is characteristic of the works concession contracts and public services* ".

Foreign and State investor in the investment contract may choose, in case of dispute, the ad hoc arbitration or by institutionalized arbitration. In place of foreign investment arbitration, the most reported in investment contracts is ICSID, a member in the World Bank and dedicated to arbitration in investment [15]. Pursuant to art. 36 nº 3 of the Washington Convention and Regulations 22nd 23rd of the Administrative and Financial Regulations, arbitrations taking place under the umbrella of ICSID are public. The Convention of Washington and referred Regulations are silent with regard to transparency rules. Regulation 22 nº 2 provides that

"*the Secretary-General shall arrange for the publication of arbitral awards, minutes and other records of the arbitration proceedings if the parties agree" It is in the field of the parties the definition of scope of transparency given to arbitral procedure. In the absence of specific rules on the subject, there is the question of whether the parties can inform the public documents relating to an arbitration procedure has passed under the jurisdiction of ICSID. Since 1915*

3 "in the case Amco x Indonesia, ICSID Case n. Arb / 81/1, until 2013, in the case Telefónica, SA X Mexico (ICSID Case No. ARB (AF / 12/4), arbitral court constituted under the ICSID rules have decided there is no general rule of confidentiality that prevents the parties of the arbitration to openly speak about it and publish documents related to it ".

However, the arbitration courts also reveal a concern with the consequences that excessive transparency could lead to arbitration procedure. In the absence of specific rules on the subject, it will be up to the arbitral court to decide on transparency according to each case [17]. Regarding the possibility of third parties attending hearings, Rule 32 of the ICSID Arbitration Rules provides that the court allows it, unless opposition of the parties. With regard to amicus curiae briefs, Rule 37 (2) of the Arbitration Rules provides that "after consulting the parties, the Court may authorize a person or entity that is not an intervenient to the dispute (...) to direct a written request to the Court concerning a subject object of a litigation." The law gives the arbitrator the possibility to accept these petitions depending on the degree of assistance that they may exercise in the knowledge of matters of fact and law by the arbitral court and, when those given are subject to the matter of the dispute. The regulations are also omissive as to access by amici curiae to documents relating to the arbitration procedure. This question is under the scope of the arbitration courts, with decisions in both directions. There are cases where the Court denied access to documents by amicus curiae briefs with the argument of those could get the same information by other means, ICSID Cases No. ARB / 03/19 and ARB / 05/22 and cases where access to some documents had been granted, ICSID Cases No. ARB / 07/19 and ARB. (F) / 07/1. Regarding the publication of award art. 48 (5) of the Washington Convention preview for the need for consent of the parties, solution enhanced by Rule 48 (4) of the Arbitration Rules. If there is consent of the parties, the publication will be carried out in accordance with Regulation 22 (2) of the Administrative and financial Rules. In arbitrations ICSID, the implementation of all the manifestations of the principle of transparency are found in the will of the parties or the arbitrator will. In the case of materials that strive with the public interest, legal certainty will be shaken. There is a gap which integrated in the near future becomes imperative.

V. The Principle of Transparency and UNCITRAL

To standardize the law of arbitral procedures of international trade was established the United Nations Commission on International Trade Law (UNCITRAL), organization of the ONU. Faced with a conflict, the parties may choose between the establishment of an *ad hoc* court or an institutional court. If the parties opt for the establishment of an arbitration tribunal ad hoc may apply the rules of UNCITRAL. In 2013 UNCITRAL, due to the growth of foreign investment relations, contemplates a series of rules transparency rules [12]. Those transparency rules are directly applicable to all contracts made since April 1, 2014 previews for the UNCITRAL Arbitration Rules of as regulatory arbitrage. With respect to investment contracts concluded before that date it is permitted to the parties, by agreement, to apply the rules of transparency to respective arbitrations, and to modify them. To enhance transparency inherent in foreign investment arbitrations in December 2014, the UNCITRAL published Mauritius Convention on Transparency, which involves the application of transparency rules to contracts celebrated before April 1, 2014. The Convention requires that the parties be bound to the rules of transparency in foreign investment relations which are covered by treaties to which they are signatories. This is without prejudice to these rules may be applied to disputes between a signatory State and an investor / private a non-signatory State, provided the latter give their agreement on implementation. We think that it is a mechanism facilitating the implementation of transparency rules, avoiding that the parties maintain the secrecy of the procedure grounded on the entry into force of the rules of transparency. Otherwise, cause would be an unjustified inequality between the situation of contracts entered before April 1, 2014 and concluded after that date. In order to achieve the desired advertising, UNCITRAL created a repository for

disclosure of all information, which should be made available by the court, as originally received and in accordance with the language used throughout the procedure arbitration.

A. Registration of Litigation and Availability of Documents

This corollary of the principle of transparency is intended to inform the public of the existence of the dispute to such transparency rules in its art. 2, preview that the parties shall provide a copy of the file in the repository for publication. During the process, the parties shall provide various documents, art. 3, for the same for publication, e.g. request for arbitration; response to the request for arbitration; all written statements by the parties; annexes to documents; witness statements; statements issued by entities that are not part; transcription of hearings and the award of the arbitral court.

B. Amicus Curiae

It is allowed by art. 4.1. the rules of transparency that third parties can present petitions. In order to qualify as the third *amicus curiae* this should present to the court a statement in compliance with the formal requirements and contained in art materials. The Court will decide the qualification of the third as *amicus curiae* in terms of their interest in the dispute and the valuation of the contribution of fact or law for the arbitration, trying to gauge whether your knowledge will lead to a different position presented by the parties [13]. The court should safeguard the interests of the parties. If it is foreseeable that the intervention of the third cause's harm to the parties, the court should not admit the same.

C. Hearings

Pursuant to art. 6.1. hearings are public, with the arbitral tribunal collaborates to facilitate public access. However, in certain cases in which it imposes safeguard of confidential information and when the number of people is high, the hearings may be held in camera.

D. Exceptions to Transparency

While there is a major breakthrough in the implementation of the principle of transparency in foreign investment arbitrations imposed by the public interest that can't be unlimited. Investors hold bargaining secrets that can't be disclosed, under penalty of the arbitration becoming deterrent to foreign investment, which has no benefit to the host State's interest in the investment made. In this sense it is given investor protection, establishing exceptions to transparency. Pursuant to art. 7 is granted special attention to sensitive information. To meet this objective art. 2 sets out the scope of confidential information. Verified the existence of information that should be disclosed, the State after hearing the parties shall take the necessary measures so that the information should be private, art. 7.3.º. If there is no unanimity among the parties and the Court when the information is confidential, the party submitting the document whose confidentiality is to be maintained may withdraw the document recording of the arbitration proceedings. They can also be an exception to the transparency of the arbitration process, information that could threaten the progress of the procedure, for example, information that provides danger to the evidence, and could lead to witness intimidation, art. 7.7.º. By analyzing of art. 7, we concluded that this does not provide us an objective concept of confidential information, getting the responsibility of the arbitrator to determine these matters, legal protection needed. Everything will depend on the will of the arbitrator and the same parties. There are extremely important issues, whose classification depends on the arbitrator's will. There are numerous judgments and jurisprudential references about what is meant by confidential information, however the classification in foreign investment arbitration is available of the arbitrator. A legal enumeration constitutes "confidential information" that could be fruitless because it is unable to cover all situations in which that is true, so the legislature should preview the situations where should he or she may apply the principle of transparency, guided by the values underlying the public interest, falling all the other's within the scope of confidentiality .

VI. Concluding Remarks on the Applicability of the Principle of Transparency

As we had the opportunity to check all legislation applicable to foreign investment arbitration is a step forward towards the establishment of a principle of transparency in foreign investment arbitrations. However, there is the absence of binding force of the rules related to this issue. Even the rules of transparency designed by UNCITRAL are not inseparable of its Arbitration Rules, by which the parties may or may not apply them. Transparency is an undoubted advantage for the arbitral court, as the publication of arbitral awards may constitute a jurisprudential asset to be followed by another arbitral court in similar cases. With access to documents relating to arbitration, investors may raise awareness is the best options to take in every business, safeguarding always the confidentiality of information that should not be disclosed. However, transparency plays its most important role in relation to the public interest. As mentioned arbitration awards contend, in most cases with issues related to the public interest and to achieve this is a task which the state must follow. Transparency in these situations will enable citizens to have greater control over the activities carried out by public entities. We propose, *de jure condendo* that States, in their national laws on foreign investment arbitration materialize normative disciplining in the implementation of transparency rules, not simply applying Soft Law.

VII. Conclusions

As we were able to verify, through the analysis of the various laws governing then of foreign investment arbitration and the various rulings on the matter, clearly the great progress towards enshrining the principle of transparency, if safeguarded -"the justified secret." The of foreign investment arbitration, being a *genius tertius* next to commercial arbitration and administrative arbitration claims specific rules. The arbitral justice in foreign investment is not compatible with the total secrecy of the procedure. The procedural secrecy

is inconsistent with the public interest, in this ubiquitous arbitration mode, or with the principle of administrative transparency. It is imperative to incorporate the principle of transparency in the various State laws, not forgetting the secrecy essential in certain matters, especially negotiating forum, as long as they do not conflict with the public interest. The public interest is incompatible with the principle of confidentiality.

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