

# Preserving Public Interests Involved in Investor-State Arbitration through Transparency: A Perspective from the China and ASEAN Free Trade Area

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## Abstract

For the last decade, the regime of transparency in investor-state arbitration has been officially incorporated into numerous investment treaties and recent modified arbitration rules due to the public interests involved in investment disputes. The Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and China (“the Agreement on Investment”), as the investment treaty promoting foreign direct investment and protecting legal rights of foreign investors in the China-ASEAN Free Trade Area (“CAFTA”), lacks explicit provisions governing transparency in investor-state arbitration. Due to this absence, the Article raises the concern that public interests involved in investor-state arbitration in the CAFTA cannot be well preserved. In order to alleviate such concern, the Article aims to propose ASEAN and China to establish a mandatory transparent regime applicable to the investor-state arbitration in the CAFTA.

**Keywords:** CAFTA, Investor-State Arbitration, Public Interest, Transparency

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## 1. Introduction

For the last two decades, the world has witnessed an exponential growth in investor-state arbitration. Accompanying this fact, a number of criticisms of the arbitration processes have been voiced, especially in terms of the legitimacy of arbitration. In order to promote the legitimacy of investor-state arbitration process, three elements must be taken into account. The first element is the independence, accountability and expertise of arbitrators. The second element is the coherence in the law, in particular the prevention of inconsistent decisions. The third one is transparency of the investor-state arbitration process.<sup>2</sup> For the present purpose, this Article will only analyse the legitimacy relating to arbitral transparency in arbitration.

Traditionally, the investor-state arbitration was based on a decidedly commercial approach to dispute settlement favoring privacy and confidentiality. Privacy restricts the general public's access to arbitral hearings and documents, and confidentiality restricts disputants, tribunals, and arbitral institutions from releasing information regarding a dispute to the public.<sup>3</sup> The traditional commercial approach, also known as the "orthodox approach", aims to promote speedy, and "business-like" resolution of disputes,<sup>4</sup> which could protect proprietary information, ensure dissemination of trade secrets, and avoid a similar claim from "free riders".<sup>5</sup> In order to promote these goals, neither pleadings made by disputing parties or statements produced by witnesses or experts nor oral hearings of arbitral proceedings could be made available to the public.

From the 1990s, the "orthodox approach" has received a lot of criticisms. Critics claimed that transparency is not restricted to governments at the national level, but

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<sup>2</sup> Fiona Marshall, "Defining New Institutional Options for Investor-State Dispute Settlement," last modified 2009, accessed July 27, 2017, <http://www.iisd.org>

<sup>3</sup> Robert Argen, "Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration," *Brooklyn Journal of International Law* 40, no. 1 (2015):215.

<sup>4</sup> Alessandra Asteriti and Christian J. Tams, "Transparency and Representation of the Public Interest in Investment Treaty Arbitration," in *International Investment Law and Comparative Public Law*, ed. Stephan W. Schill (Oxford Oxford University 2010), 3.

<sup>5</sup> Charles F. Forer, *Keeping the Confidential Arbitration Proceeding Confidential* (Pennsylvania: Legal Intelligencer, 2015).



should be applied to the behaviors of states at the international level.<sup>6</sup> As one of the greatest legal philosophers wrote in 1790,

“In the darkness of secrecy, sinister and evil in every shape shall have full swing [. . .]. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.”<sup>7</sup>

In addition, critics have raised a serious doubt that confidentiality and privacy are undermining the legitimacy of arbitral proceeding because: “traditional tribunals’ meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a group of international tribunals handles disputes between foreign investors and governments can lead to national laws being revoked and environmental regulations changed. And it is all in the name of protecting foreign investors.”<sup>8</sup>

In order to present the main difference between international commercial arbitration and investor-state arbitration, section 2 will highlight the concern of public interests involved in investor-state arbitration. After reaching the conclusion on the necessity to protect the public interests through transparency, section 3, from the perspective of modern arbitration rules, will review the recent development of arbitral transparency in investor-state arbitration. Furthermore, section 4 will explore the current practice of arbitral transparency in China and the ASEAN. Since the investment agreement between China and the ASEAN lacks a mandatory requirement on arbitral transparency, in order to well preserve public interests involved in investor-state arbitration in the CAFTA, section 5 will propose several pragmatic steps. Last section will restate the importance of arbitral transparency and conclude the main question examined in this Article.

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<sup>6</sup> James Harrison, *Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration* (Edinburgh: University of Edinburgh School of Law Working Paper Series, 2011), 2.

<sup>7</sup> Jeremy Bentham, *Draught of a New Plan for the Organization of the Judicial Establishment in France; Proposed as a Succedaneum to the Draught Presented, for the Same Purpose, by the Committee of Constitution, to the National Assembly* (London: n.d., 1790).

<sup>8</sup> Nigel Blackaby, “Public Interest and Investment Treaty Arbitration,” *Transnational Dispute Management* 1, no. 1 (2004): 355.



## 2. Public Interests Involved in Investor-State Arbitration

The main difference between international commercial arbitration and investor-state arbitration is that a state, as the disputing party to an investment dispute, is being sued for exercising public powers, which could trigger the concern of public interests in the arbitral proceedings. Increasing arbitral transparency could preserve the following interests:

### 2.1 Promoting Democracy

An investment dispute claim against a state normally refers to the state's judicial, executive, and legislative measures concerning issues of the general welfare, like environmental regulation, labour standards, etc., it has been argued that the nationals of the disputing state have a strong interest to know how the arbitration goes.<sup>9</sup> Therefore, the public has a right to receive enough information about the ongoing dispute.<sup>10</sup> Where a proceeding isolates state conduct from public input, this could contribute to a problem of democratic deficit.<sup>11</sup> Increasing transparency of arbitral proceeding could conquer this obstacle because "transparency contributes to public acceptance of investment arbitration by defusing distrust of the unknown and reassuring the public about the process."<sup>12</sup> Also the tribunal in *Sue and others v. Argentina* held that "public acceptance of the legitimacy of international process, particularly when they involve states and matters of public interests, is strengthened by increased openness and increased knowledge as to how these processes function."<sup>13</sup>

### 2.2 Preserving Significant Interests

Investment disputes involve a state or a state-owned entity as a disputing party, so the disputes are often arose from public sectors such as water, electricity, oil, gas, and

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<sup>9</sup> Robert Argen, "Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration," 228.

<sup>10</sup> Alessandra Asteriti and Christian J. Tams, "Transparency and Representation of the Public Interest in Investment Treaty Arbitration," in *International Investment Law and Comparative Public Law*, 5.

<sup>11</sup> Robert Argen, "Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration," 229.

<sup>12</sup> Joachim Delaney and Daniel Barstow Magraw, "Procedural Transparency," in *The Oxford Handbook of International Investment Law*, ed. Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford: Oxford University, 2008), 762.

<sup>13</sup> *Suez and others v. Argentina*, in ICSID, Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, May 19, 2005, at para. 22.

transportation. Public interests not only refer to the interests of state and its constituents<sup>14</sup> but also the interests of human beings, like environment rights, human rights, labour standard, etc.<sup>15</sup> Also Non-Disputing Parties ('NDPs'), for instance, NGOs, who defend public interests, such as protection of human rights or environmental rights, by representing various and changing persons or collectives, are strictly forbidden to participate in arbitral proceedings. One of the key goals of NDP participation aims to ensure that arbitral tribunals take public interests or perspective of rights holders impacted by a potential award into account, even though the negative consequences of NDP involvement have been claimed to refuse the necessity of transparency in investor-state arbitral proceedings, if NDP is well used, it could play an important role to improve the legal quality of arbitral awards.

### 2.3 Protecting State's Budget and Exposing State's Misconducts

The investor-state arbitration normally involves significant potential monetary liability against the public treasuries of a state; so if a damage award is issued against the state, the state's budget will be directly impacted. The nationals of the state, as the taxpayers of the public purse to the state, should have "a right to see their tax dollars at work and a right to know about arbitrations that impact state finances."<sup>16</sup> Also it is not surprising that misconducts of disputing states usually occur in international investment environments, so increasing transparency of arbitral proceedings could expose the misconducts to the public.<sup>17</sup>

## 3. Recent Development of Arbitral Transparency in Investor-State Arbitration

Based on the current practice worldwide, transparency can be introduced into arbitral proceedings in two ways. Firstly, arbitral tribunals have inherent power to introduce

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<sup>14</sup> Barnali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit," *Vanderbilt Journal of Transnational Law* 41 (2008): 775.

<sup>15</sup> Ibid.

<sup>16</sup> Robert Argen, "Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration," 231.

<sup>17</sup> Ibid., 232.



a transparent regime into arbitral proceedings because they are granted the power to regulate procedural issues of arbitration. Also, in order to grant explicit discretionary power for arbitral tribunals, many arbitration institutions have begun to rewrite their arbitral rules catering to the growing demand for arbitral transparency since 2006. Secondly, a number of states have already adopted the practice of incorporating provisions concerning arbitral transparency of arbitration into the investment chapter of their investment agreements.<sup>18</sup> The following sections review the recent development of the transparency regime under international arbitral rules, namely the International Centre for Settlement of Investment Disputes (“ICSID”) Arbitration Rules<sup>19</sup> and the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules and the Rules on Transparency in Treaty-Based Investor-State (“UNCITRAL Transparency Rules”). Unlike the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules is not connected to a single institution, which can be introduced to institutional or ad hoc arbitration if both disputing parties give their explicit consent.

### 3.1 Publication of Information at the Commencement of Arbitral Proceedings

According to Article 36 (3) of the ICSID Convention, the Secretary General is obliged to maintain a public register of all requests for arbitration.<sup>20</sup> During this stage, the ICSID is strictly bound to release information regarding the identification of disputing parties, date of registration, subject matter, constitution, and composition of the tribunals

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<sup>18</sup> James Harrison, *Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration*, 3.

<sup>19</sup> ICSID, “Rules of Procedure for Arbitration Proceedings (‘Icsid Arbitration Rules’) (Adopted April 2006),” last modified n.d., accessed July 29, 2017, <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention-Arbitration-Rules.aspx> (In 1962, the Executive Directors of the World Bank proposed a study on the subject of establishing an arbitration institutional facility with the purpose of safeguarding economic interests of investors from developed countries investing in developing countries. After putting a numerous efforts by the World Bank, the ICSID Convention was officially adopted on March 18, 1965 in Washington, and came into force on October 14, 1966. One of the most outstanding achievements of the Convention was that a new organ, the ICSID, had been officially established, which provides administrative services for investor-state arbitration proceeding in accordance with the provisions under the Convention.)

<sup>20</sup> ICSID, “The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Opened for Signature 18 March 1965, Entered into Force October 14, 1966) (‘Icsid Convention’), Art 14. .,” last modified n.d., accessed July 27, 2017. <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.p>

through the ICSID website. Thus, the information listed above is subject to a mandatory disclosure and neither disputing party can withhold the information from being released to the public. Under the UNCITRAL Arbitration Rules,<sup>21</sup> there is no requirement in terms of case registration as well as publication of general information.

It is not surprising that the UNCITRAL Arbitration Rules has a very limited transparency provision governing arbitral proceedings because the Rules was drafted and primarily designed to address international commercial disputes between private parties. Due to the increasing debate regarding the importance of transparency versus confidentiality and privacy in investor-state arbitration, the United Nations Commission on International Trade Law has promulgated a new arbitral rule, the UNCITRAL Transparency Rules, which aims to address the issue of transparency and to change the landscape of transparency under investor-state arbitration. Pursuant to Article 2, when a respondent state receives notice of arbitration made by a claimant investor, both disputing parties should promptly communicate a copy of the notice of arbitration to the Repository established pursuant to Article 7, and the repository shall “promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made.”<sup>22</sup>

### 3.2 Publication of Documents

In terms of the publication of documents, the ICSID Arbitration Rules is silent on the publication of the pleadings of the parties, evidence submitted by the parties, or orders and decisions of the tribunal (not final awards).<sup>23</sup> This issue was well examined by several ICSID tribunals, especially the tribunal of *Biwater v. United Republic of Tanzania*<sup>24</sup> (“*Biwater*”). In *Biwater*, the tribunal found that in the absence of any agreement made between the disputing parties, either party should refrain from disclosing these documents

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<sup>21</sup> UNCITRAL, “United Nations Commission on International Trade Law Arbitration Rules (‘Uncitral Arbitration Rules’) (as Adopted in 2013),” last modified n.d., accessed July 29, 2017, <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>

<sup>22</sup> UNCITRAL, “Rules on Transparency in Treaty-Based Investor-State Arbitration (‘Uncitral Transparency Rules’) (Came into Force April 1, 2014),” Article 2.

<sup>23</sup> James Harrison, *Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration*, 6.

<sup>24</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (“*Biwater*”), in ICSID, Case No. ARB/05/22, accessed July 27, 2017. <http://www.italaw.com/cases/157>



to a third party because disclosure of document “might undermine the procedural integrity ... and might aggravate or exacerbate the dispute”.<sup>25</sup>

The UNCITRAL Arbitration Rules, standing on the same side with the ICSID Arbitration Rules, contains no provision regulating the issue of publication of documents.<sup>26</sup> With the growing demand for arbitral transparency in arbitral proceedings, the 2013 UNCITRAL Transparency Rules addressed this issue with a high degree of transparency requirement for the first time in the arbitral rules history. Under Paragraph 1 of Article 3, it requires that the following documents should be made available to the public through the repository in a timely manner:

“the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written sub-missions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.”<sup>27</sup>

Furthermore, pursuant to Paragraph 2 of Article 3, upon request by a third party, expert reports and witness statements, exclusive of the exhibits thereto, shall be released to that party. Also after consultation with the disputing parties, the arbitral tribunal may decide, on its own initiative or upon request from any person, and, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above.<sup>28</sup>

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<sup>25</sup> Biwater, in ICSID, Case No ARB/05/22 Procedural order n.3 par.163, accessed July 27, 2017. <https://www.italaw.com/sites/default/files/case-documents/ita0089.pdf>

<sup>26</sup> Dimitrios Katranstiotis, “Transparency in International Investment Arbitration: From the Current Towards the Future Normative Framework,” (Master’s thesis, International Hellenic University, 2014), 9.

<sup>27</sup> UNCITRAL, “Rules on Transparency in Treaty-Based Investor-State Arbitration (“Uncitral Transparency Rules”) (Came into Force April 1, 2014).”, Article 3.

<sup>28</sup> Ibid.



### 3.3 Open Hearings

Pursuant to Rule 32 of the ICSID Arbitration Rules, the oral procedure shall only consist of the hearings by the tribunal of the parties, their agents, counsels and advocates, and of witnesses and experts. If a mutual agreement has been reached by both of the disputing parties, other persons should attend the oral hearings. Similarly, under Article 28(3) of the UNCITRAL Arbitration Rules, all oral hearings shall be conducted on a camera without public participation. Thus, if an investment agreement lacks a mandatory requirement of open hearings, based on the ICSID and the UNCITRAL Arbitration Rules, without a mutual consent made from both the disputing parties, oral hearings must be conducted in private and any third party is strictly forbidden to participate in. The new UNCITRAL Transparency Rules, pursuant to Article 6 (1), on the contrary, provides a different approach by establishing a mandatory requirement of public hearings, which requires that all hearings for the presentation or for argument shall be made in public, unless “where there is a need to protect confidential information or the integrity of the arbitral process pursuant to Article 7, the arbitral tribunal shall make arrangements to hold in private.”<sup>29</sup>

### 3.4 Publication of Awards

The notion of publication of ICSID awards can be dated back to the time when the ICSID Convention came into force. Under Article 48(5) of the Convention, arbitral awards rendered by tribunals under the auspices of ICSID cannot be published without the consent of the parties. Even though the modified 2006 Arbitration Rules restates the position, the tribunal should promptly release the excerpts of the legal reasoning even if neither party gave consent for the publication of the full award.<sup>30</sup> Article 32(5) of the 1976 UNCITRAL Arbitration Rules provided that, unless both parties agree otherwise, any award shall not be released to the public. The 2010 amendment, in acknowledgement of the importance of transparency, modified this strict requirement to that “an award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before

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<sup>29</sup> Ibid., Article 6.

<sup>30</sup> Dimitrios Katranstiotis, “Transparency in International Investment Arbitration: From the Current Towards the Future Normative Framework,” 10.



a court or other competent authority.”<sup>31</sup> As to the publication of award under Article 3(1) of the UNCITRAL Transparency Rules, awards should be made available to the public in a timely manner, subject to the exception of confidential and protected information.<sup>32</sup>

#### 4. Arbitral Transparency in the International Investment Agreements: China and ASEAN

Last section reviewed the current practice of arbitral transparency from the perspective of arbitral rules, so this section will illustrate the second way of incorporating arbitral transparency into arbitral proceedings, namely investment agreements. Since the Article aims to explore the suggestion on arbitral transparency under investor-state arbitration in the CAFTA, the section will focus on the investment treaties concluded by China and the ASEAN only.

##### 4.1 China

The practice of arbitral transparency in Chinese investment agreements started from the 2008 China-Mexico BIT.<sup>33</sup> Even though the BIT only provided that, unless the disputing parties agree otherwise, arbitral awards issued in accordance with the BIT shall be publicly accessible,<sup>34</sup> such a requirement on disclosure of awards, without doubt, can be treated as the first acknowledgement regarding transparency in investor-state arbitration in China. Furthermore, with respect to the publication of arbitral documents, in 2010, the UNCITRAL Secretariat circulated a questionnaire to States on their current practice regarding transparency in investor-state arbitration. China delivered the following reply pursuant to the Reply to the questionnaire: “there is currently no such practice of treaty-based investor-State arbitration in China. Given the confidentiality of arbitration,

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<sup>31</sup> James Harrison, *Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration*, 7.

<sup>32</sup> UNCITRAL, “Rules on Transparency in Treaty-Based Investor-State Arbitration (“Uncitral Transparency Rules”) (Came into Force April 1, 2014),” Article 3.

<sup>33</sup> “Agreement between the Government of the United Mexican States and the Government of the People’s Republic of China on the Promotion and Reciprocal Protection of Investment (Signed July 11, 2008, Entry into Force 6 June 2009) (China-Mexico Bit),” last modified n.d., accessed July 26, 2017, <http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/938>

<sup>34</sup> *Ibid.*, Article 20.

we do not consider it appropriate to impose provisions of publicity and transparency on treaty-based settlement of investor-State investment disputes.”<sup>35</sup>

The Agreement between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments (“Canada-China FIPA”), signed on 9 September 2012, constituted a landmark in the history of the development of China’s investment treaty practice on arbitral transparency. Pursuant to the provisions, several transparency requirements<sup>36</sup> are laid down, which grant the public access to arbitral information as well as oral hearings. As Professor Malanczuk concluded: “these are the most progressive provisions China has so far accepted in a treaty in the area of transparency in investor-state arbitration.”<sup>37</sup> In October 2013, When the UN General Assembly discussed the work of UNCITRAL and its Rules on Transparency, the Chinese representative imposed a totally different perspective. The Chinese Delegation appreciates and supports the formulation and adoption of the Rules on Transparency and believes that the implementation of the Rules on Transparency will be conducive to enhancing the

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<sup>35</sup> Settlement of commercial disputes: Transparency in treaty-based investor-State arbitration - Compilation of comments by Governments A/CN.9/WG.II/WP.159/Add.1(2010) at p.11 (Question 5)

<sup>36</sup> “Agreement between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments (Signed 9 September 2012, Entered into Force 1 October 2014) (Canada-China Fipa),” last modified n.d., accessed July 26, 2017, (“(1) Any Tribunal award under this Part shall be publicly available, subject to the redaction of confidential information. Where a disputing Contracting Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, all other documents submitted to, or issued by, the Tribunal shall also be publicly available, subject to the redaction of confidential information. (2) Where, after consulting with a disputing investor, a disputing Contracting Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, hearings held under this Part shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera. (3) A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents. (4) The Contracting Parties may share with officials of their respective federal and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents. (5) To the extent that a Tribunal’s confidentiality order designates information as confidential and a Contracting Party’s law on access to information requires public access to that information, the Contracting Party’s law on access to information shall prevail. However, a Contracting Party should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal.”) <http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/778>

<sup>37</sup> Peter Malanczuk, *China and the Emerging Standard of Transparency in Investor-State Dispute Settlement* (Wellington: New Zealand Association for Comparative Law, 2015).



transparency of international investment arbitration procedures.<sup>38</sup> Since then, China has officially acknowledged transparency in investment arbitration.

#### 4.2 The ASEAN

With respect to the transparency requirements under the investment agreements concluded by the ASEAN, the Article will focus on the investment agreements concluded between ASEAN and its dialogue partners, namely, China, Australia, New Zealand, and the Republic of Korea. The ASEAN and the Republic of Korea concluded the Agreement of Investment Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea<sup>39</sup> on 2 June 2009. Also the Agreement on Investment between ASEAN and China was successfully negotiated and signed in Bangkok, Thailand on 15 August 2009. None of them addressed the arbitral transparency issue. In addition, the ASEAN Comprehensive Investment Agreement<sup>40</sup> (“ACIA”) is described as a conservative investment agreement relating to the issue of transparency of arbitral proceedings.<sup>41</sup> Pursuant to Section B Article 39, any disputing Contracting State may make awards publicly available, but the issues of open hearings, publication of documents have not been addressed. Sharing the same practice of Article 39 of the ACIA, Article 26, Chapter

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<sup>38</sup> Shang Zhen, “Chinese Delegate at the 68th Session of the Un General Assembly on Agenda Item 79 Report of Uncitral on the Work of Its 46th Session” (In so doing, it will help dispel people’s apprehension that international arbitration tribunals tend to protect investors at the expense of the public interest, and will reinforce social monitoring of the implementation of host countries’ legislations related to foreign investment management, thus building the overall trust of the international community in investment arbitration mechanisms),” last modified n.d., accessed July 29, 2017, <http://www.china-un.org/eng/chinaandun/legalaffairs/sixthcommittee1/t1091525.htm>

<sup>39</sup> “Agreement of Investment under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea (Asean-South Korea)(Signed June 2, 2009),” last modified n.d., accessed July 26, 2017, <http://akfta.asean.org/index.php?page=investment-legal-text>

<sup>40</sup> ACIA, “Asean Comprehensive Investment Agreement (Asean Member States)(Signed February 29, 2009, Entered into Effect March 29, 2009),” last modified n.d., accessed July 26, 2017, <http://agreement.asean.org/media/download/20140119035519.pdf>

<sup>41</sup> Fiona Marshall, “Defining New Institutional Options for Investor-State Dispute Settlement,”

11 of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area<sup>42</sup> established an identical practice concerning arbitral transparency under investor-state arbitration in ASEAN and Pacific investment region.

In conclusion, even though China and ASEAN have started to alter the traditional view favoring privacy and confidentiality to the modern view promoting arbitral transparency, based on the studies made above, the degree of transparency under different treaty contexts varies. The following section will mainly examine the current practice of arbitral transparency in the CAFTA, and in order to preserve the public interests, relevant suggestion will be given to China and the ASEAN.

## 5. Preserving Public Interests through Transparency in the CAFTA

Due to the proposal to establish a China-ASEAN Free Trade Area (“the CAFTA”) raised by the former Chinese Prime Minister Zhu Rongji on behalf of China in November 2000, facing competing interests and major differences in levels of development, under the mutual efforts of both sides, the Framework Agreement on Comprehensive Economic Cooperation Between ASEAN and the People’s Republic of China (“the Framework Agreement”)<sup>43</sup> was concluded on 4 November 2002 in Phnom Penh, Cambodia, which provided the legal basis for both sides to the creation of the CAFTA by 2010. One of the objectives of the Framework Agreement is to strengthen and enhance investment cooperation as well as to progressively create a transparent, liberal and facilitative investment regime between the contracting Parties. Article 5 of the Framework Agreement provides that both sides shall: “enter into negotiations in order to progressively liberalize the investment regime; and to strengthen cooperation in investment, to facilitate investment and improve transparency of investment rules and regulations; and to provide for the protection of investments.”<sup>44</sup>

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<sup>42</sup> “Agreement Establishing the Asean-Australia-New Zealand Free Trade Area (Asean-Australia-New Zealand) (Signed February 27, 2009, Entered into Force January 1, 2010),” last modified n.d., accessed July 26, 2017, <http://www.asean.org/storage/images/archive/22260.pdf>

<sup>43</sup> “The Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the ASEAN and China (“the Framework Agreement”) (ASEAN-China)(Adopted November 4, 2002, Entered into force July 1, 2003)”

<sup>44</sup> “The Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the ASEAN and China (“the Framework Agreement”) (ASEAN-China) (Adopted November 4, 2002, Entered into force July 1, 2003)”



Since then, investment relations between ASEAN and China have reached a new era in which the two sides have established an economic, legal and political framework for their comprehensive cooperation. Because the Framework Agreement only provided a basic framework concerning investment promotion and protection, ASEAN and China entered into the Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the ASEAN and China (“the Agreement on Investment”)<sup>45</sup> during the ASEAN - China Summit meeting in Bangkok on 15 August 2009, which reaffirmed the intention to establish the CAFTA. The CAFTA was fully established in January 2010, and has become not only the biggest free trade area among developing countries but also a model for the south-south cooperation.<sup>46</sup> Pursuant to the statistics released by the Ministry of Commerce of China, ASEAN-China two-way investment totaled US12.18\$ billion in 2014. In the same year, both sides launched negotiations on an upgrading of the CAFTA, focusing on key areas of trade in goods, services, and settlement of investment disputes.

As concluded in previous section, arbitral transparency plays a crucial role in preserving public interests involved in investment disputes. Thus, there is an urgent demand to conduct a research on the current arbitral transparency practice pursuant to the ASEAN and China Investment Agreement. Article 14 of the Agreement on Investment itself did not address the issue of arbitral transparency, so public interests involved in investor-state arbitration in the CAFTA cannot be well protected due to such absence. In order to enhance arbitral transparency as well as preserve public interests involved in arbitral proceedings, the Article aims to provide the following pragmatic steps for the CAFTA: (1) publication of information at the commencement of arbitration; (2) publication of documents; (3) exception of publication; (4) the organ responsible for arbitral transparency.

### **5.1 Publication of Information at the Commencement of Arbitration**

Both the ICSID Rules and the Transparency Rules provided a mandatory requirement concerning the issue of publication of information at the commencement of arbitration.

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<sup>45</sup> “Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the Asean and China (“Agreement on Investment”) (Asean-China) (Adopted August 15, 2009, Entered into Force August 1, 2010).”

<sup>46</sup> United Nations, “South-South Cooperation in International Investment Agreements,” last modified n.d., accessed July 29, 2017, [http://unctad.org/en/Docs/iteiit20053\\_en.pdf](http://unctad.org/en/Docs/iteiit20053_en.pdf) .



Both Rules explicitly provide that the ICSID Center and the UNCITRAL Depository, upon receipt of the information, shall promptly release the information of the names of the disputing parties, the economic sector involved and the treaty under which the claim is being made to the public through their official websites. Publication of general information is important because the public can get the information as early as possible, which could avoid potential risks associated with the delay of disclosure.

Based on the practice, the Article proposes that the CAFTA shall establish a mandatory disclosure of information at the commencement of arbitration. Once the notice of arbitration has been received by the respondent State, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to a designated organ (will be examined in 5.4). Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the organ shall promptly make available to the public information regarding the name of the disputing parties, date of registration, subject of the dispute, the economic sector involved, the arbitral rules governing the dispute.

## 5.2 Publication of Documents

With regard to the second issue, the ICSID Rules failed to explicitly address the issue of publication of documents, so the ICSID tribunals have made different decisions on the publication of documents, which caused the concern of inconsistency.<sup>47</sup> As to the Canada-China FIPA, the documents shall be disclosed to the public only based on the determination of the disputing Contracting State, which could cause uncertainties for the public to get access to key arbitral records. The Transparency Rules, so far,

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<sup>47</sup> For instance, in *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (“Biwater”), ICSID Case No. ARB/05/22., the tribunal found that “there is no provision imposing a general duty of confidentiality in ICSID arbitration, .. however there is no provision imposing a general duty of transparency or non-confidentiality in any of these sources.” So in the absence of any agreement reached between the disputing parties, any disputing party should refrain from disclosing to public these documents “which might undermine the procedural integrity ... and might aggravate or exacerbate the dispute.” But the *Piero Foresti v. Republic of South Africa*. In *Piero*, five NGOs filed seven individual requests to access relevant records for preparing *amicus* submissions. After reviewing the reasons provided in the petition, the tribunal acknowledged the importance of access to arbitral documents by stating: “Accordingly, the Tribunal has taken the view that the NDPs (Non-disputing parties) must be allowed access to those papers submitted to the Tribunal by the Parties that are necessary to enable the NDPs to focus their submissions upon the issues arising in the case and to see what positions the Parties have taken on those issues.”



can be regarded as the most comprehensive arbitral rules concerning the publication of documents. It not only requires certain documents to be mandatory and automatically disclosed, or mandatory disclosed once any person requests disclosure from the tribunal but also grants the tribunal the discretionary power to decide whether to publicize other documents not falling into Article 3(1) and (2). Releasing documents contained in Article 3(1) and Article 3(2) plays a key role for the public to gain understanding on the legal and factual issues of the dispute.

The approach chosen by the UNCITRAL Transparency Rules shall be adopted by the CAFTA because disclosing arbitral documents could help the public to fully understand the issues of the dispute, the arguments raised by the disputing parties, the reports given by the experts, and statements submitted by witnesses. Also the Article suggests that once the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party, a table listing all exhibits to the aforesaid documents and to expert reports and witness statements are produced during the proceeding, the respondent state shall communicate the documents to the organ. Upon receiving the documents, the designated organ shall make the documents available to the public in a timely manner, in the form and in the language in which it receives them

### **5.3 Exception of Publication**

In light of the exception of transparency, the ICSID itself lacks a provision regarding publication of arbitral documents. Under general circumstances, without getting a mutual consent from both disputing parties, all information produced during arbitral proceedings shall be maintained from disclosure to the public. The Canada-China FIPA also grants the disputing Contracting States the discretionary right, after taking the public interests into account, to make certain documents or information from available to the public or not. According to these documents, disputing parties maintain the power to decide the confidentiality of arbitral information. The concern is that although certain information does not fall into the scope of confidential information, due to the discretionary power of both disputing parties, they shall maintain the information from disclosure. Also even if a tribunal shares the same view that the information cannot be deemed as confidential information, they have no power to order a disclosure.

The UNCITRAL Transparency Rules, on the contrary, chose different approach governing the issue. As stated earlier, all information and documents produced during arbitral proceedings shall be disclosed to public, where a disputing party seeks to protect certain information from releasing to the public, the party shall apply for protection or redaction of documents from the tribunal. Pursuant to the Transparency Rules, tribunals have been granted the discretionary power to decide whether documents produced during arbitral proceedings shall be made available to the public. The Transparency Rules also provides a comprehensive structure concerning the determination on the confidentiality of documents. For instance, the Rules provided the content of confidential or protected information,<sup>48</sup> the arrangements to prevent any information from being made available to the public, and the situation which could jeopardize the integrity of the arbitral process.<sup>49</sup>

Granting tribunals the power to decide the confidentiality of information should be regarded as a better approach on the basis that disputing parties are not in the best position to decide whether the information produced by them can be kept from releasing to the public. Also tribunals, as impartial settlement bodies, can conduct a balancing act to decide whether a document contains confidential or protected information. Also the tribunals shall either choose to prohibit the document from releasing to the public or order the disputing parties to redact the document and then release the reduction to the public. In order to preserve the goals promoted by arbitral transparency, the Article proposes that China and the ASEAN should adopt the practice of Transparency Rules in the CAFTA.

#### **5.4 Organ Responsible for Arbitral Transparency in the CAFTA**

With respect to the last issue, the ICSID Center is bound to release all information of a dispute through the ICSID website immediately after the dispute was filed. Also the Depository of the UNCITRAL is obliged to publicize every single document produced during the arbitral proceedings in a timely manner. Appointing an organ to be responsible for publication of information and documents is essential because this could impose a strict duty on the organ to release key arbitral information and further protect the public

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<sup>48</sup> UNCITRAL, “Rules on Transparency in Treaty-Based Investor-State Arbitration (“Uncitral Transparency Rules”) (Came into Force April 1, 2014).”, Article 7(2).

<sup>49</sup> *Ibid.*, Article 7(3).



interests involved in the dispute. Therefore, it is important for the CAFTA to appoint an organ to be responsible for the publication.

Based on the above practice, the CAFTA should appoint a designated organ to be responsible for the public register and the publication of arbitral information. Pursuant to Article 22 of the Agreement on Investment, pending the establishment of a permanent body, the AEM-MOCFOM<sup>50</sup>, with the support and assistance of the SEOM-MOFCOM<sup>51</sup>, shall oversee, supervise, coordinate and review the implementation of the Agreement. Since a designated body has not been officially established, the Article proposes the CAFTA to appoint a designated organ responsible for public register of arbitration and publication of information of dispute in a timely manner. With respect to the publication of arbitral documents, based on the Transparency Rules practice, the respondent State is bound to deliver all of the documents to the designated organ within a reasonable time after the arbitration was registered, and upon receiving the documents, the organ is bound to release the documents in a timely manner through its official website.

## 6. Conclusion

Up to present, investor-state arbitration has become the most widely used investment dispute settlement mechanism. Although disputing parties in traditional arbitration could gain benefits from the principle of confidentiality and privacy, investor-state arbitration involves a state party, which raises significant public interest in arbitral proceedings. In order to fully preserve the public interests and further enhance the legitimacy of arbitral proceedings, it is necessary to establish a mandatory transparent regime for investor-state arbitration. The Agreement on Investment itself failed to address the issue of transparency, so in order to preserve the public interests involved in investment disputes in the CAFTA, the Article proposed the CAFTA to adopt a more transparent investor-state arbitration regime. Bases on the proposal, mandatory publication of information at the commencement of arbitration and mandatory publication of documents during the proceedings should be established. Indeed, where there is a need to protect confidential information, the tribunals

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<sup>50</sup> “AEM” means ASEAN Economic Ministers. “MOFCOM” means Ministry of Commerce of the People’s Republic of China.

<sup>51</sup> “SEOM” means ASEAN Senior Economic Officials Meetings;



should strictly examine whether the information falls into the scope of confidential and protected information. Also in the CAFTA, a disputing State to an investment dispute is bound to deliver the general information and arbitral documents to the designated organ immediately when they are available. Upon receiving the arbitral information, the organ is obliged to release all of the information to the public in a timely manner.



## References

- “Agreement between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments (Signed September 9, 2012, Entered into Force October 1, 2014) (Canada-China Fipa).” Last modified n.d., Accessed July 26, 2017. <http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/778>
- “Agreement between the Government of the United Mexican States and the Government of the People’s Republic of China on the Promotion and Reciprocal Protection of Investment (Signed July 11, 2008, Entry into Force June 6, 2009) (China-Mexico Bit).” Last modified n.d., Accessed July 26, 2017. <http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/938>
- “Agreement Establishing the Asean-Australia-New Zealand Free Trade Area (Asean-Australia-New Zealand) (Signed February 27, 2009, Entered into Force January 1, 2010).” Last modified n.d., Accessed July 26, 2017. <http://www.asean.org/storage/images/archive/22260.pdf>
- “Agreement of Investment under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea (Asean-South Korea) (Signed June 2, 2009).” Last modified n.d., Accessed July 26, 2017. <http://akfta.asean.org/index.php?page=investment-legal-text>
- “Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the Asean and China (“Agreement on Investment”) (Asean-China) (Adopted August 15, 2009, Entered into Force August 1, 2010).” Last modified Accessed July 29, 2017. <https://cil.nus.edu.sg/rp/pdf/2009%20Agreement%20on%20Investment%20of%20the%20Framework%20Agmt%20on%20Comprehensive%20Ec%20Coop%20ASEAN%20and%20China-pdf.pdf>
- ACIA. “Asean Comprehensive Investment Agreement (Asean Member States) (Signed February 29, 2009, Entered into Effect March 29, 2009).” Last modified n.d., Accessed July 26, 2017. <http://agreement.asean.org/media/download/20140119035519.pdf>

- Argen, Robert. "Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration." *Brooklyn Journal of International Law* 40, no. 1 (2015): 215.
- Asteriti, Alessandra, and Christian J. Tams. "Transparency and Representation of the Public Interest in Investment Treaty Arbitration." In *International Investment Law and Comparative Public Law*, edited by Stephan W. Schill, 3. Oxford: Oxford University, 2010.
- Bentham, Jeremy. *Draught of a New Plan for the Organization of the Judicial Establishment in France; Proposed as a Succedaneum to the Draught Presented, for the Same Purpose, by the Committee of Constitution, to the National Assembly*. London: n.d., 1790.
- Blackaby, Nigel. "Public Interest and Investment Treaty Arbitration." *Transnational Dispute Management* 1, no. 1 (2004): 355.
- Choudhury, Barnali. "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit." *Vanderbilt Journal of Transnational Law* 41 (2008): 775.
- Delaney, Joachim, and Daniel Barstow Magraw. "Procedural Transparency." In *The Oxford Handbook of International Investment Law*, edited by Peter Muchlinski, Federico Ortino, and Christoph Schreuer, 762. Oxford: Oxford University, 2008.
- Forer, Charles F. *Keeping the Confidential Arbitration Proceeding Confidential*. Pennsylvania: Legal Intelligencer, 2015.
- Harrison, James. *Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration*. Edinburgh: University of Edinburgh School of Law Working Paper Series, 2011.
- ICSID. "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (Opened for Signature 18 March 1965, Entered into Force 14 October 1966) ("Icsid Convention"), Art 14. Last modified n.d., Accessed Access Date, Access Year. <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.p>



- ICSID. “Rules of Procedure for Arbitration Proceedings (‘Icsid Arbitration Rules’) (Adopted April 2006).” Last modified n.d., Accessed July 29, 2017. <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention-Arbitration-Rules.aspx>
- Katranstiotis, Dimitrios. “*Transparency in International Investment Arbitration: From the Current Towards the Future Normative Framework.*” Master’s thesis, International Hellenic University, 2014.
- Malanczuk, Peter. *China and the Emerging Standard of Transparency in Investor-State Dispute Settlement.* Wellington : New Zealand Association for Comparative Law, 2015.
- Marshall, Fiona. “Defining New Institutional Options for Investor-State Dispute Settlement.” Last modified 2009, Accessed July 27, 2017. <http://www.iisd.org>
- UNCITRAL. “Rules on Transparency in Treaty-Based Investor-State Arbitration (‘Uncitral Transparency Rules’) (Came into Force 1 April 2014).” Last modified n.d., Accessed July 29, 2017. <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>
- UNCITRAL. “United Nations Commission on International Trade Law Arbitration Rules (‘Uncitral Arbitration Rules’) (as Adopted in 2013).” Last modified n.d., Accessed July 29, 2017. <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>
- United Nations. “South-South Cooperation in International Investment Agreements.” Last modified n.d., 2005. Accessed July 29, 2017. [http://unctad.org/en/Docs/iteit20053\\_en.pdf](http://unctad.org/en/Docs/iteit20053_en.pdf)
- Zhen, Shang. “Chinese Delegate at the 68th Session of the Un General Assembly on Agenda Item 79 Report of Uncitral on the Work of Its 46th Session” Last modified n.d., Accessed July 29, 2017. <http://www.china-un.org/eng/chinaandun/legalaffairs/sixthcommittee1/t1091525.htm>