

Schriften zur Europäischen Integration
und Internationalen Wirtschaftsordnung

60

Camilla Marie Kamrad

The Influence of the 2014 UNCITRAL Transparency Rules on Treaty-based Investor-State-Arbitration



Nomos

Schriften zur
Europäischen Integration und
Internationalen Wirtschaftsordnung

Veröffentlichungen des
Wilhelm Merton-Zentrums für Europäische Integration und
Internationale Wirtschaftsordnung,

edited by

Professor Dr. Dr. Rainer Hofmann, Universität Frankfurt a. M.
Professor Dr. Stefan Kadelbach, Universität Frankfurt a. M.
Professor Dr. Rainer Klump, Universität Frankfurt a. M.

Volume 60

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The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Frankfurt am Main, Univ., Diss., 2022

ISBN 978-3-8487-8838-5 (Print)
978-3-7489-3398-4 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-8838-5 (Print)
978-3-7489-3398-4 (ePDF)

Library of Congress Cataloging-in-Publication Data

Kamrad, Camilla Marie

The Influence of the 2014 UNCITRAL

Transparency Rules on Treaty-based Investor-State-Arbitration

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194 pp.

Includes bibliographic references.

ISBN 978-3-8487-8838-5 (Print)
978-3-7489-3398-4 (ePDF)



Onlineversion
Nomos eLibrary

1st Edition 2022

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Preface

This present work has been accepted as a thesis by Goethe University Frankfurt faculty of law winter semester 2018/2019. Case law and literature have been considered substantially up to and including May 2021.

First and foremost I would like to thank my thesis supervisor Prof. Dr. Dr. Rainer Hofmann for many years of support during law school and throughout the whole process of this dissertation. I would like to thank Prof. Dr. Rolf Trittman for his second opinion and the valuable remarks on my work. Furthermore, I would like to thank the two aforementioned reviewers and chair Prof. Dr. Michael Bothe for the productive discussion during my thesis defence.

Special thanks to my friends from Durham, Frankfurt and Mannheim for constant support and advice. I would also like to express my gratitude to my entire family, especially my parents, for their assurance and encouragement in any situation.

I would like to dedicate this thesis to Lilli.

Frankfurt am Main, April 2022

Camilla Kamrad

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AAA	American Arbitration Association
AF	Additional Facility
AFR	Additional Facility Rules
AJIL	American Journal of International Law
ALR	Arbitration Law Review
AR	Arbitration rules
Art.	Article
Artt.	Articles
BIT	Bilateral Investment Treaty
CAA	Contemporary Asia Arbitration Journal
CAFTA-DR	Dominican Republic-Central America-United States Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States
CIEL	Center for International Environmental Law
CJEU	Court of Justice of the European Union
DSU	Dispute Settlement Understanding
EC	European Commission
ECT	Energy Charter Treaty
EEU	Treaty on the Eurasian Economic Union
EJIL	European Journal of International Law
EU	European Union
EU-China CAI	EU-China Comprehensive Agreement on Investment
EUSIPA	Investment Protection Agreement between the European Union and its Member States and the Republic of Singapore

Table of Abbreviations

EU-UK TCA	Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and the European Union and the European Atomic Energy Community
EUVIPA	Investment Protection Agreement between the European Union and its Member States and the Socialist Republic of Vietnam
FDI	Foreign direct investment
FET	Fair and equitable treatment
Finland-Mauritius BIT	Agreement between the Government of the Republic of Finland and the Government of the Republic of Mauritius on the Promotion and the Protection of Investments
France-Mauritius BIT	Treaty between the Government of the Republic of France and the Government of the Republic of Mauritius on the Promotion and Protection of Investments
FTA	Free Trade Agreement
FTC	Free Trade Commission
GroJIL	Groningen Journal of International Law
HKLJ	Hong Kong Law Journal
IBLJ	International Business Law Journal
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICLR	International Community Law Review
ICSID	International Centre for the Settlement of Investment Disputes
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
ILM	International Legal Materials
Indian J Arb L	Indian Journal of Arbitration Law
Int J Arb	International Journal of Arbitration, Mediation and Dispute Management
IPA	Investment Protection Agreement

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ISDS	Investor-state dispute settlement
JIDS	Journal of International Dispute Settlement
JoWIT	Journal of World Investment & Trade
Kan L Rev	Kansas Law Review
LCIA	London Court of International Arbitration
Member States	Member states of the European Union
MFN	Most favoured nation treatment
Michigan State ILR	Michigan State International Law Review
MTBE	Methyl tertiary-butyl ether
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organisation
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NYT	New York Times
NZZ	Neue Zürcher Zeitung
OECD	Organisation for Economic Co-Operation and Development
PCA	Permanent Court of Arbitration
PTA	Preferential Trade Agreement
RTA	Regional Trade Agreement
SCC	Stockholm Chamber of Commerce
SchiedsVZ	Zeitschrift für Schiedsverfahren
TDM	Transnational Dispute Management
TPA	Trade Promotion Agreement
TPF	Third-party funding
TR	Rules on Transparency in Treaty-based Investor-State Arbitration
U Miami Inter-Am L Rev	University of Miami Inter-American Law Review
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

Table of Abbreviations

US	United States of America
US-Bolivia BIT	Treaty between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment
US-Colombia TPA	United States-Colombia Trade Promotion Agreement
Vand J Transnat'l L	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

A. Introduction

In times where mass surveillance to an extent that 1984¹ appears less and less as faraway fiction and people like Edward Snowden or Julian Assange can become so called *public enemy No. 1* for leaking classified government documents, the real value of information itself becomes discernible for society.

The Information Age and the digital revolution changed society in every way, from ordering food online, to interaction with others on social media, to professional life, where non-computer-assisted jobs barely exist. This progress is inexorable. Everyone sharing data (which is essentially encrypted information) is part of a balancing act between privacy and transparency about their own personal information. When it comes to private data most people seek to prevent ‘oversharing’ with public or private entities or other individuals. Although the personal boundaries differ distinctly in this regard.

The need of individuals for privacy reverts to a demand for openness once governments are involved. The public requests maximum transparency and a minimum of non-disclosure regarding government actions. “*Information is the currency of democracy*”, these words, attributed to Thomas Jefferson, are more than 200 years later still valid.² The times of secret negotiations by diplomats and other government officials appear to have come to an end as society demands the publication of documents and drafts.³ Transparency does not end with the publication of political negotiations like treaties and contracts. Democratic legitimation is furthermore

1 ‘Nineteen Eighty-Four’ is a dystopian science fiction novel by George Orwell published in 1949, dealing with a protagonist who lives in a repressive regime with constant government surveillance and manipulation of truth and facts by a totalitarian state.

2 Pernice, Ingolf, ‘Part III: Study on International Investment Protection Agreements and EU Law 132’ in: Pieter J Kuijper and others (eds), *Investor-state dispute settlement (ISDS) provisions in the EU’s international investment agreements: Study* (Luxembourg 2014), 163.

3 Ibid.

A. Introduction

established through elections and the chains of legitimation connected to it and thus must likewise be exercised in a transparent manner.⁴

Transparency in context of this thesis is however not focused on the publication of drafts and documents when states negotiate international investment arbitration agreements, but rather on the consequences of signing such agreements for the respective stakeholders with or without transparency provisions. International Investment Agreements (IIA) usually provide for a dispute settlement mechanism including international arbitration. Such arbitration proceedings were usually, and still are, predominantly private meetings.

Civil society, however, called for more transparency in international investment arbitration. The United Nations Commission on International Trade Law (UNCITRAL), one of the many institutions providing arbitration rules for international investment arbitration, was responsive to this demand for more transparency and began developing the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (UNCITRAL TR). These regulations, which came into effect on 1 April 2014, entail a set of procedural rules that provide for transparency and accessibility to the public in treaty-based investor-state arbitration cases. The following chapters address the influence of these rules on IIAs and on international investment arbitration practise.

4 Bogdandy, Armin v/Venzke, Ingo, *In wessen Namen?: Internationale Gerichte in Zeiten globalen Regierens* (Berlin 2014), 234.

B. Structure

Initially, a definition of transparency is necessary as a working basis for this thesis (C.I.). However, due to the multifaceted and overloaded connotations with this term, a comprehensive definition will not be possible to achieve. Hereafter, the problems with and importance of transparency in international investment arbitration are described (C.II.).

Following these introductory remarks, the second chapter depicts the main features of Investor-State Dispute Settlement (ISDS) (D.I.) and the developments and *status quo* regarding transparency issues in ISDS (D.II.). Followed by background information on the UNCITRAL TR (D.III.) and a detailed description of the respective provisions (D.IV.). Subsequently, the field of tension of third-party funding is discussed (D.V.). Followed by a description of the influence of the UNCITRAL TR on commercial arbitration (D.VI.). The chapter concludes with a brief comparative view of the transparency standard in international adjudication compared to the standard provided by the UNCITRAL TR (D.VII.).

The third chapter deals with the European Unions (EU) recent investment policy since the introduction of the UNCITRAL TR (E.I.), followed by an analysis of the international treaty practise and its approach towards transparency issues to assess whether transparent proceedings have become a new normal in ISDS (E.II.).

The fourth chapter contains several case analyses to illustrate the transparency standards in practise (F.), providing insight on whether the provisions of the UNCITRAL TR were frequently used, since their introduction. Furthermore, it will be assessed whether the UNCITRAL TR led to more transparent proceedings and how parties and arbitral tribunals incorporate these rules and if further adjustments are required.

Finally, the last chapter (G.) concludes the findings of the previous chapters and provides prospects and suggestions to further enhance transparency in international investment arbitration.