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The Transparency Rules and Transparency Convention: A good start and model for broader reform in investor-state arbitration

by
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In July 2013, after nearly three years of work, the United Nations Commission on International Trade Law (UNCITRAL) adopted a set of arbitration rules that will help open some investor-state arbitrations to public view. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Transparency Rules) were crafted with input from governments, academics, arbitration practitioners, and non-governmental organizations, and approved by consensus by the member states. When applied, the Transparency Rules will require disclosure of information submitted to, and issued by, arbitral tribunals throughout proceedings, mandate open hearings and expressly allow for participation by non-parties to a dispute.[1] The Transparency Rules also guard against disclosure of confidential information and establish a repository in which all information will be published.[2]

But while the Transparency Rules are an important first step in efforts to shed light on the often-opaque investor-state arbitrations, they still leave much work to be done.

The problem is not in their content but in their application. In particular, Article 1(2) of the Transparency Rules carves out from their coverage *all* treaties concluded before the Transparency Rules entered into force on April 1, 2014, unless states or disputing parties specifically take steps to "opt in" to the Transparency Rules by clear agreement. For these thousands of existing treaties, this provision effectively turns the Transparency Rules into optional guidelines.

In July 2014, UNCITRAL took a step to help close this large loophole[3] by finalizing the Mauritius Convention on Transparency (Transparency Convention).

In brief, the Transparency Convention establishes two main routes for the Transparency Rules to apply to existing treaties. First, if both the respondent state and the home country of the claimant are parties to the Transparency Convention (and have not taken relevant reservations), any arbitration initiated by a claimant—whether under the UNCITRAL arbitration rules or not—will be governed by the Transparency Rules.

Second, there is an option for states to make binding unilateral offers to arbitrate under the Transparency Rules. Even if the home country is not a party to the Transparency Convention, or is a party but has taken a specific reservation for the relevant investment treaty, the Transparency Rules will apply if the respondent state has given its advance consent under the Transparency Convention and the investor agrees to apply the Transparency Rules.

The Transparency Convention will go to the United Nations General Assembly for approval in Fall 2014 and enter into force once ratified by three states.

But as efforts to ensure wide adoption of the Transparency Convention proceed, efforts should also be made for broader and deeper reforms.

First, both the Transparency Rules and Transparency Convention leave gaps enabling states and investors to continue to avoid disclosure. Reform is thus needed in other institutions such as the International Centre for Settlement of Investment Disputes (ICSID).[4]

Indeed, ICSID, an early leader on transparency, has recently signaled that it will revisit the issue. When it does, it should ensure any reforms reflect commitment to transparency in disputes arising under existing as well as future treaties.

Second, and also relevant for ICSID, reforms need to move beyond investment treaty disputes and require disclosure of information relating to investor-state disputes arising under contracts. Particularly in an era when transparency of investor-state contracts is increasingly recognized within the United Nations and the World Bank as a fundamental element of good governance, it makes little sense to allow those disputes to remain behind closed doors.

Third, states should consider the Transparency Convention as a model for implementing broader reforms. Through its use of reciprocal commitments, unilateral offers and reservations, it shows how states can achieve changes in the investment-treaty system in addition to ensuring transparency. A similar convention could, for example, create a new standing judicial body or appellate mechanism for investor-state arbitrations.

Overall, UNCITRAL's recent steps recognize the importance of transparency in promoting good governance and accountability and show how the content and structure of the existing investment regime can be reformed. All eyes are now on other institutions like ICSID and treaty negotiators to follow suit.

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[1] For more information, *see* Columbia Center on Sustainable Investment, Submissions to UNCITRAL Working Group II on Arbitration and Conciliation, http://ccsi.columbia.edu/2013/02/05/submissions-to-uncitral-working-group-ii-on-arbitration-and-conciliation/.

[2] *See* UNCITRAL, Transparency Registry, http://www.uncitral.org/transparency-registry/registry/index.jspx.

[3] States and disputing parties can also use other paths to signal their agreement to apply the Transparency Rules to disputes arising under treaties carved out by Article 1(2). For more on this, *see* Lise Johnson and Nathalie Bernasconi-Osterwalder, "New UNCITRAL arbitration rules on transparency: Application, content and next steps," August 2013, pp. 23-25, available at http://ccsi.columbia.edu/files/2014/04/UNCITRAL_Rules_on_Transparency_commentary_FINAL.pdf.

[4] For a comparison of the UNCITRAL and other arbitration rules, *see* Johnson and Bernasconi-Osterwalder, *supra* note 3, pp. 6-7.

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