A Right of Public Access to Investor-State Arbitral Proceedings?

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The text of the proposed Trans-Pacific Partnership ('TPP') as agreed upon between the United States and Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam on 5 October 2015 provides for public arbitral hearings. The approach taken by the prospective signatories of TPP is still rare in investment arbitration: arbitral hearings under TPP would be presumptively open to the public. Article 9.23(2) of TPP states:

> The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. If a disputing party intends to use information in a hearing that is designated as protected information or otherwise subject to [protection under] paragraph 3 it shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect such information from disclosure which may include closing the hearing for the duration of the discussion of that information.

Article 9.23(2) of TPP is different from previous provisions on procedural transparency because its application is mandatory and it only allows arbitral hearings to be closed temporarily. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('Rules on Transparency'), for example, which also provide for the presumptive openness of arbitral hearings, are not mandatory. Even if an investment treaty provides for the application of the Rules on Transparency and does not allow disputing parties to derogate from them, the arbitral tribunal may nonetheless derogate from the Rules in consultation with the disputing parties under Article 1(3)(b) of the Rules on Transparency. 'Logistical reasons' or the 'integrity of the arbitral process' further serve as sufficient reasons under Article 6(3), and Article 7(6) and (7) of the Rules on Transparency to close arbitral hearings to the public – not only temporarily but entirely. The text of TPP neither grants the arbitral tribunal a residual discretion to derogate from the provisions on transparency nor does it allow exceptions to the openness of arbitral hearings on the grounds of 'logistical reasons' or the 'integrity of the arbitral process.' The text of TPP is thus a welcome step forward on the road to more transparency in investment arbitration.

Maybe the time is now ripe to consider a *right* of public access to investment arbitrations. The applicability of a right of public access to arbitral proceedings has been answered in the affirmative by

the United States District Court for the District of Delaware and by the United States Court of Appeals for the Third Circuit in *Delaware Coalition for Open Government v Strine* in relation to Delaware arbitrations. Delaware arbitrations were those conducted in accordance with § 349 of Title 10 of the Delaware Code and Rules 96-98 of the Delaware Court of Chancery. § 349(a) provided that the Court of Chancery shall have the power to arbitrate business disputes when the parties request a member of the Court of Chancery to arbitrate a dispute. § 349(b) clarified that arbitration proceedings shall be considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal. Rules 96-98 of the Delaware Court of Chancery implemented § 349 of Title 10 of the Delaware Code. Rules 96-98 have since been amended to implement aspects of the Delaware Rapid Arbitration Act, 10 Delaware Code § 5801 et seq., which was recently enacted in response to the result in *Strine*.

In *Strine*, both courts found that Delaware arbitrations, i.e. private arbitrations before sitting judges, violate the First Amendment. Both courts placed particular emphasis on the fact that sitting judges were acting as arbitrators in Delaware arbitrations. Even though the District Court entertained the possibility that judges could theoretically serve as arbitrators outside their official obligations, it held that the judges were acting within their official obligations in Delaware arbitrations. Even when acting as arbitrators, Delaware Chancery Court judges were receiving their usual salary as remuneration for their services, were using state personnel and facilities, and were exercising state authority. For these and other reasons, the United States District Court for the District of Delaware concluded "that the Delaware [arbitration] proceeding functions essentially as a non-jury trial before a Chancery Court judge. Because it is a civil trial, there is a qualified right of access and this proceeding must be open to the public."

In what follows, I use the test applied by the United States District Court for the District of Delaware in *Strine* to explore the applicability of a right of public access to investor-state arbitral proceedings. One aspect of the rationale for a right of public access to court proceedings is the control of the body which authoritatively interprets the law and creates judicial precedent. Investor-state arbitral tribunals do not only decide whether a particular state action violates an investment treaty, but they also create arbitral precedent. Arbitral tribunals frequently rely on previous arbitral awards when interpreting investment treaties. By doing so, arbitral tribunals over time shape the body of international investment law, which in turn impacts national laws and policies. Gary Born and Ethan Shenkman touch upon the theoretical significance of the development of a common law of investment arbitration, when they note in their article on 'Confidentiality and Transparency in Commercial and Investor-State International Arbitration' in Catherine A. Rogers and Roger P. Alford (eds), *The Future of Investment Arbitration* (OUP 2009) 5-42, at 39:

> [T]o the extent investor-state tribunals are, in effect, making law (their decisions being treated by other tribunals as highly persuasive authority), transparency in tribunal decisions helps the law develop in a coherent fashion and enables investors and governments alike to conform their conduct to evolving legal standards

If the law-making power of investor-state arbitral tribunals in fact so closely resembles the law-making power of national courts, investor-state arbitral tribunals should be subject to the same control by the public as national courts. A functional resemblance between investment arbitrations and court proceedings is however not enough to grant the public a right of access to both. The equal treatment would also have to be reasonable. A right of public access to investment arbitrations is reasonable, if it does not unduly abridge the parties' procedural autonomy or otherwise unduly affect the arbitral process.

One could argue, for example, that the opening of arbitral proceedings to the public would have unduly adverse effects on the 'integrity of the arbitral process,' in particular on the speed and efficiency of arbitral proceedings. It could take up additional time (and funds) to arrange suitable facilities for public hearings and to organise the necessary support and security. Physical access is however not necessary for a meaningful right of public access. Investment arbitrations could be webcast instead. Inasmuch as disputing parties fear public hearings might trigger 'trial by media,' their concerns should be taken seriously – although by the arbitral tribunal when deciding whether or not to close arbitral hearings to the public. If disputing parties make a compelling argument that public hearings would deprive them of a fair hearing, the arbitral tribunal should order the hearing to be held *in camera*. Short of furnishing proof of fundamental unfairness, the disputing parties should have to bear minor interferences with the 'integrity of the arbitral process.'

The parties' procedural autonomy is further not absolute under the New York Convention. Article V(2)(b) of the New York Convention permits national courts to override the parties' procedural autonomy where the agreed procedure is contrary to public policy. National courts may raise issues of public policy *ex officio*. This permits a court to find fault with the arbitral procedure where the parties do not. Article V(2)(b) is thus not restricted to protecting the interests of the disputing parties but permits national courts to interpret 'public policy' as requiring investment arbitrations to be open to the public, also and, in particular, against the wishes of the disputing parties. Given the development of a common law of investment arbitration by investor-state arbitral tribunals, the limitation of the parties' procedural autonomy does not seem out of proportion. A right of public access to investment arbitrations would equal the right of public access to court proceedings. Arbitral proceedings would thus only be *presumptively* open to the public and arbitral awards could be redacted where necessary. Arbitral tribunals, like national courts, could permit hearings or parts thereof to be held *in camera* – for example where the protection of confidential information so requires. It is thus reasonable, in my view, to extend a right of public access (as it exists in relation to court proceedings) to investment arbitrations. If an arbitral tribunal did not recognise the presumptive openness of arbitral proceedings or erred in closing (or opening) the proceedings to the public, a national court could refuse to recognise and enforce an arbitral award under Article V(2)(b) of the New York Convention or similar public policy exceptions.