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Status of the Work of UNCITRAL's Working Group II

J. Martin Hunter (Essex Court Chambers) · Monday, September 20th, 2010 · Institute for Transnational Arbitration (ITA), Academic Council

The sense of relief enjoyed by NGO observers and other followers that UNCITRAL Working Group II's Arbitration Rules revision project was finally completed in the Summer of 2010, after seemingly endless debate, has been diminished to some extent by the publication of the agenda for the next WGII meeting, to be held in Vienna in October 2010, which puts back on the table the difficult question of 'transparency' in investment treaty arbitrations.

Confidentiality has long been perceived as an implied term in international arbitration. This was seen to follow from the privacy of arbitral proceedings. The current trend, however, is to question this proposition. This is particularly the case in investment arbitration which, while deriving its main features from commercial arbitration, differs from it importantly in that investor-state disputes often raise public interest issues that are usually absent in commercial arbitration. In particular, the awards and other decisions in investment treaty arbitrations may have a significant impact on the future behaviour of host states, their budgets and the welfare of their citizens. As a result, there is now a generally accepted need for greater transparency in investment treaty dispute resolution, which has called into question the tradition of confidential, in-camera, proceedings.

Under the UNCITRAL Arbitration Rules, as revised in 2010, hearings are to be held in camera unless the parties agree otherwise (Article 28(3), previously 25(4)). Under Article 34(5) awards are to be made public only with the consent of both parties or where and to the extent that disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority. Aside from these two provisions, there are no other provisions expressly imposing a general duty of confidentiality, or prohibiting disclosure of documents prepared for or disclosed in the arbitration. In S.D. Myers Inc v Canada (Procedural Order No 16 of 13 May 2000) the Tribunal, operating under the UNCITRAL Rules, distinguished treaty arbitrations from private commercial arbitrations, as follows (para 8):

> "The Tribunal considers that, whatever may be the position in private consensual arbitrations between commercial parties, it has not been established that any general principle of confidentiality exists in an arbitration such as that currently before this tribunal. The main argument in favour of confidentiality is founded on a supposed implied term in the arbitration agreement. The present arbitration is taking place pursuant to a provision in an international treaty, not pursuant to an arbitration agreement between disputing parties."

(At the same time, the Tribunal did impose restrictions on hearings and materials that formed part of the hearings).

The potential for greater transparency in investment arbitrations is usually seen as encompassing three levels. These are (1) open hearings; (2) publication of documents relating to the arbitral procedure; and (3) participation of non-disputing parties in the proceedings.

The trend to greater transparency is clearly evidenced by the changes to arbitral rules, international investment agreements and case law.

The 2006 ICSID Arbitration Rules expressly allow for participation of non-disputing parties as amicus curiae. Other 2006 amendments to the ICSID Rules aim at increasing transparency include the amended Rules 32 and 48. The former regulates the possibility of open hearings and provides that while explicit consent of the parties is no longer required, while each party retains a veto right by way of objection to non-parties being allowed to attend. The amended Rule 48 makes publication of ICSID awards mandatory and expands publication from excerpts of the legal rules applied by the tribunal to excerpts of the legal reasoning of the tribunal.

As mentioned, the move towards greater transparency is reflected also in the new generation of investment agreements, notably the recent US Free Trade Agreements, provide that the main documents related to the dispute settlement procedures must be made public and the hearings must be open to public, with a safeguard allowing the Tribunal to provide for protection from disclosure of sensitive information. The same provisions are found in the most recent version of the US Model Investment Bilateral Treaty (Article 29).

The move towards greater transparency has been reflected in arbitral practice. A recent case on this topic, *Biwater Gauff v. Tanzania*, dealt with the highly problematic question of publication of documents. Echoing Tanzania's concern over the need for a state to inform its citizens in cases of national interest, the Tribunal refused to prevent the parties from discussing the case in public to the extent that such discussions did not serve to aggravate the dispute. (para. 149). As for the decisions, orders, and directions issued by the Tribunal (other than the awards and the actual Procedural Order No 3), it was maintained that the disclosure of documents would be considered on a case-by-case basis. (para. 153). Minutes and records of hearings, however, would not be disclosed unless both parties agreed, in accordance with Regulation 22(2) of the Administrative and Financial Regulations and Rule 32(2) of the 2003 ICSID Arbitration Rules. (para. 155). The parties remained free to disclose their own documents. Conversely, the distribution of documents produced by the opposing party was restricted in the interest of procedural integrity (para. 137). In regard to this issue, the tribunal ruled that whilst it is in the wider public interest to ensure that accurate information about the parties' dispute and its resolution is broadcast, this is not always easy to achieve. That is particularly important while an arbitration is ongoing, and the record has yet to be completed. The Tribunal agreed with the observations (in the context of NAFTA) made in *The Loewen Group, Inc. and Raymond L. Loewen v. USA* (ICSID Case N° ARB (AF) 98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, January 5, 2001) and *Metalclad Corp. v. United Mexican Sates* (ICSID Case N° ARB (AF)/97/1, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information Regard the Case, 27 October 1997), that "*it would be of advantage to the orderly unfolding of the arbitral process if during the proceedings they were both to limit public discussion of the case to what is considered necessary*" (Loewen, § 26), "*… subject only to any externally imposed obligation of disclosure by which either of them may be legally bound*" (Metalclad, § 10).

Similarly, the publication of pleadings, written memorials, along with witness statements and expert reports attached to them, were restricted altogether given the likelihood that such documents would refer to the opposing parties' documents which were subject to a restriction. (paragraphs 158–9).

Thus, important steps towards greater transparency have been made both in the relevant rules and international agreements as well as in practice through the decisions of arbitral tribunals.

The debate now starting in UNCITRAL Working Group II will analyse the adequacy and sufficiency of such steps, not only to address the public interest issues, but also to strike a balance between the legitimate requirement of transparency and the interests and commercial enterprises in confidentiality (as well as protection of their trade secrets) and the often parallel interests of States in conducting strategic activities outside the unforgiving gaze of public scrutiny. It is an important topic for the future of international dispute resolution, and the purpose of this commentary is to encourage readers to contribute to the debate by expressing their views in this forum . . .

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