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Transparency as a Global Norm in International Investment Law

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Transparency is one of the hot topics in international law. With governance functions increasingly shifting from the domestic to the international level, transparency is demanded, as Andrea Bianchi and Anne Peters show in their new seminal study, in order to compensate for the lack of a full-fledged international system of checks and balances. Transparency promises a more accountable, more democratic and hence more legitimate system of global governance. International investment law cannot escape from this general drift. As I noted in my Editorial for the latest issue of the Journal or World Investment and Trade (JWIT), secrecy in treaty negotiations and confidentiality in dispute settlement, two hallmarks of investment law so far, are eroding. Four developments are noteworthy: 1) new approaches to treaty negotiation by the EU Commission in the Transatlantic Trade and Investment Partnership (TTIP); 2) the UNCITRAL Rules on Transparency; 3) the use of freedom of information acts; and 4) the contribution of scholarship. Building on earlier approaches to increase transparency, namely the 2001 Note of Interpretation of the NAFTA Free Trade Commission, the 2006 amendments to the ICSID Rules and Regulations, and the transparency rules under CAFTA, among others, these elements contribute to transparency becoming a global norm in international investment law.

Transparency and the EU Commission's Public Consultation on the TTIP

As a reaction to the persistent criticism of investment treaty negotiations as backroom politics, transparency has forcefully entered the negotiations on TTIP. In fact, the European Commission has just closed a "Public consultation on modalities for investment protection and ISDS in TTIP" that returned almost 150.000 responses. It consisted of a questionnaire on key issues, ranging from the scope of application of investment treaties, via substantive standards, to various issues concerning investor-State dispute settlement, and had the purpose of collecting the public's views on the biggest bilateral trade and investment deal ever. While such consultations are not entirely new, the Public Consultation on TTIP has tapped a wider public and concerns an international treaty that would have deeper impact than any earlier external EU agreement. It is therefore hardly an exaggeration to state that this consultation process constitutes a paradigm shift in how international investment law is made.

The Public Consultation changes the way the public and EU government communicate with each other and opens up new paths for democratic input. By allowing direct input into the EU

negotiation process, the Public Consultation circumvents traditional channels of policy-making within the EU. Above all, the consultation parts with the usual assumption that the interests of the public are represented and mediated through the Member States. The direct corridor of communication through the Public Consultation can give a voice to interests not well-represented through Member States governments and allows for new transborder interest coalitions.

Furthermore, the Public Consultation can also impact the legal discourse within the EU by bridging the divide between the international and domestic legal communities. The Public Consultation brings the debate about international investment law to professional communities at the domestic level that have so far been at the periphery, at least from the international perspective. For example, the "verfassungsblog", the internet platform of German *Staatsrechtslehre*, has launched a debating series on TTIP, which will certainly help increase investment law's importance in domestic constitutional debates, while also furthering the reverse process of bringing more domestic constitutional law thinking into investment treaty-making. This is likely going to replicate a process within the EU that has taken place more than a decade ago in the United States, where the recalibrated provisions on expropriation in the 2004 US Model BIT were inspired by US takings law. The EU Commission's initiative, and transparency more generally, will therefore not only tap existing publics, but likely create new ones and affect the relations between center and periphery.

UNCITRAL Rules on Transparency

Another major development on the transparency front is the coming into effect of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration on 1 April 2014. While allowing parties to opt out of the new framework, the Rules reverse the presumptions of confidentiality and privacy in investment treaty arbitration in favor of a presumption of openness. While containing exceptions to protect confidential business information and national interests, the Rules provide for transparency concerning all phases of investment treaty-based arbitral proceedings, including submissions to arbitral tribunals and arbitral awards. The Rules also address participation of non-parties, including amici curiae, and deal with the extent to which hearings should be public. The Rules complement, but also go beyond, the transparency rules already in existence in some regional regimes, such as NAFTA or CAFTA, and, albeit to a more limited extent, in the context of ICSID proceedings, as mentioned before.

In my view, the openness of hearings will positively affect the public's assessment of investor-State arbitration. It will show that investor-State arbitration constitutes an adjudicatory process which is, despite its idiosyncrasies, similar to that of any other domestic or international court. Moreover, transparency is likely to increase the quality of reasoning, as arbitrators will know that the world will read and critically assess their words. However, there are also critical aspects, such as the limited scope of application of the Rules. They only apply to arbitrations under the UNCITRAL Arbitration Rules that are based on an investment treaty concluded on or after 1 April 2014, unless the parties have opted out of the Rules. Application to treaties concluded prior to that date is only possible if the disputing parties or the contracting States so agree. This significantly limits the otherwise far-reaching transparency obligations under the Rules.

To remedy this shortcoming, UNCITRAL has prepared a transparency convention, which was approved at the beginning of July for submission to the UN General Assembly. In parallel, it may also be worth exploring whether the Rules on Transparency could influence investor-State arbitrations beyond their proper scope of application as soft law. One could, for example, consider

whether the principles enshrined in the Rules can be viewed as expressions of general principles of law, in light of the fact that transparency is widely recognized in governing public-private dispute settlement in domestic adjudicatory systems and also increasingly at the international level.

Domestic Freedom of Information Acts

In addition, there are important statutory instruments that can make international investment law more transparent but are little discussed. I am referring here to freedom of information acts that exist in many countries and at the EU level. These can be used – and successfully have been used as early as 2000 in the context of NAFTA arbitrations – to obtain decisions and awards by investment tribunals. Yet, there are also signs that they could enable access to documents relating to (ongoing) investment treaty negotiations. A ruling by the Court of Justice in C-350/12 P, handed down on 3 July 2014, has been interpreted in this way.

Still, freedom of information acts contain various exceptions that can frustrate information requests. They often exclude requests relating to ongoing proceedings and may contain exceptions for information protected under specific confidentiality agreements. If push comes to shove, it will be important to analyze whether such confidentiality agreements can block the statutory right to information, and if it does, whether such agreements are valid under the applicable constitutional law. The path towards transparency via domestic laws may be long and winding. This notwithstanding, the gateway is open; it is just waiting to be used…

Transparency through Scholarship

Finally, scholarship –and by prolongation academic journals and blogs, such as the present one– can play an important role in increasing transparency. They can uncover unknown data and interpret existing data in ways that help our understanding of the world we live in. Scholarship can thereby help to make the invisible visible and also increase the transparency of what is going on in global governance, including in international investment law. A fitting example are the contributions in JWIT's latest Special Issue with the allusive title "The Anatomy of the (Invisible) Model EU BIT". They are aiming at distilling the EU's approach to international investment policy from the ongoing negotiations on the EU-Canada Comprehensive Trade and Economic Partnership. Given that the EU, unlike many other countries, has not formally adopted a model BIT, this scholarly approach can help make the substance of the EU's negotiations and its assessment by the European public more transparent.

Overall, increasing transparency is certainly not the solution to all problems of international investment law, but it is perhaps the single most important avenue for bringing the system in line with principles of democratic governance and the rule of law. The multiple avenues towards transparency can help in this process.

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