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Recent Developments in Australia's Approach to Confidentiality and Transparency in International Arbitration

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Gabriele Ruscalla has recently observed that "transparency has become a fundamental principle in international adjudication". The transparency paradigms governing different types of international adjudication are, however, far from uniform. Discussions of transparency in international arbitration typically begin, for example, from a distinction between commercial and investment treaty disputes. As Cristoffer Nyegaard Mollestad explains in a recent paper:

> In commercial arbitration a presumption of "implied" confidentiality has traditionally been considered the norm… However… commentators and investment tribunals have increasingly recognized that the characteristics of investor-state disputes raise transparency issues specific to that particular field, and consequently requires its own solutions.

The history of Australia's legislative and treaty practice, as well as its more recent experiences in 2015, neatly illustrate this divide in approaches towards confidentiality and/or transparency in commercial and investment treaty arbitration. In particular, it illustrates that transparency of proceedings is indeed becoming a 'fundamental principle' of Australia's investment treaty practice, but – on the contrary – that the presumption of confidentiality is increasingly being entrenched for international commercial arbitration. This post examines the shifting treatment by Australia of procedural transparency in both regimes.

Moving towards greater confidentiality in international commercial arbitration

The transparency of international commercial arbitrations seated in Australia is governed by provisions of Australia's *International Arbitration Act*. Provisions in the Act affecting the transparency or confidentiality of such arbitrations have gone through three iterations since its enactment in 1974.

Initially, the Act did not expressly regulate the issue of confidentiality. It was widely assumed that the presumption of confidentiality averred to above would nevertheless apply in international

commercial arbitration proceedings seated in Australia. In 1995, however, Australia's High Court held in applying the Act that there was – absent the agreement of the parties – no such implied duty of confidentiality. The Court further held that even if a contract provided for confidentiality, that would be subject to override if the public interest warranted greater transparency.

In response to this decision, amendments were introduced to the Act in 2010 to provide for an 'opt-in' confidentiality regime. Under this new regime, parties could elect to apply statutory provisions governing the disclosure of information and documents from the proceedings, including provisions stipulating when documents (such as pleadings, evidence, transcripts, awards etc) may be disclosed by the parties, or made the subject of disclosure by an arbitral tribunal or Australian court. These amendments adopted the position taken in many submissions received during a public consultation process, which were overwhelmingly in favour of amending the Act to address the High Court's decision.

New legislative amendments introduced in October this year have completed Australia's move towards greater confidentiality in international commercial arbitration. These amendments provide that – unless the parties stipulate otherwise – proceedings arising from all arbitration agreements concluded from 14 October onwards will remain confidential. This opt-out regime makes it even more likely that international commercial arbitrations seated in Australia will be conducted on a confidential basis.

The recent amendments have been introduced with very little fanfare or public discussion. In fact, parliamentary speeches and the explanatory memorandum portrayed the changes to the Act as being relatively 'minor' in character. This may be because the 'opt-out' regime was initially floated in responses to the 2010 amendment's consultation process. The opt-out provisions are also closely modeled on the regime governing the confidentiality of international commercial arbitrations seated in New Zealand.

Moving towards Greater Transparency in International Investment Arbitration

Australia's approach to procedural transparency in international investment arbitration can similarly be broken into differing time periods. Contrary to Australia's experience with commercial arbitration, however, Australia is very clearly moving towards greater transparency in investment arbitration proceedings.

Australia's starting point in regulating the issue of transparency in international investment arbitration was similar to its starting point for international commercial arbitration: it initially did not expressly regulate the matter. Indeed, from 1988 to 2005, Australia concluded 22 treaties providing for investor-State dispute settlement, none of which themselves contained any provisions on confidentiality or transparency of proceedings. Rather, each treaty provided that the proceedings would be conducted according to certain procedural rules (usually, the UNCITRAL or ICSID Arbitration Rules). At the time of Australia concluding treaties referring to them, such rules did contain some provisions relevant to the issue of transparency. The ICSID Convention and Rules in force at this time, for example, provided that awards could not be published without party consent. Similarly, the applicable UNCITRAL Arbitration Rules provided for closed hearings and the non-publication of awards absent party agreement to the contrary. To the extent that the Rules left certain matters (such as *amicus curiae* participation) unaddressed, tribunals applying them would encounter the same issue faced by Australia's High Court: whether there was an implied presumption of confidentiality applicable to the proceedings. Different

tribunals have answered the question in a range of ways. For present purposes, however, it suffices to conclude that in this early period of treaty practice, Australia started from the position of silence or – to the extent that the matter was addressed by the Rules – a predominantly opt-out regime.

In the early 2000s, Australia modified its treaty practice to incorporate a smattering of provisions in its investment treaties on transparency and/or confidentiality. In particular, it concluded two free trade agreements which – whilst being generally silent on such issues – nevertheless contained a number of express provisions. The first such treaty with Singapore (2003), provided that each party was free to disclose 'statements of its own positions or its submissions to the public' if it protected 'confidential information' in doing so. A second treaty with Mexico (2005), stipulated that party consent was required for the publication of arbitral decisions.

From the mid-2000s onwards, Australia adopted a strong pro-transparency approach for investment arbitration proceedings. This is exemplified by its treaty practice and involvement in international fora.

Australia has – since 2009 – included express provisions on confidentiality and/or transparency in all of its treaties providing for investor-State proceedings. Starting in 2009, the ASEAN free trade agreement provided that either party could elect to publish any awards or decisions of a tribunal (with appropriate confidentiality redactions). Australia went even further in its treaties with Chile (2009) and Korea (2014), providing for the involvement of *amicus curiae*; mandatory disclosure of certain documents (including the notice of intent, notice of arbitration, submissions to the tribunal, and the tribunal's orders, decisions and awards); and the holding of open hearings. Australia's 2015 treaty practice confirms this pro-transparency trend. Both the China-Australia Free Trade Agreement and Trans-Pacific Partnership Agreement regulate *amicus curiae* involvement, the publication of documents, and the holding of open hearings.

Australia has also taken a pro-transparency position in intergovernmental fora. Australia was, for example, a vocal supporter of increased transparency during the negotiation of amendments to the UNCITRAL Arbitration Rules, including the preparation of a legal standard on transparency in treaty-based investor-State arbitration. In 2010, for example, Australia's comments to the Secretariat of UNCITRAL's Working Group II indicated that:

> Australia supports transparency in treaty-based investor-State arbitration and welcomes the Commission's decision to undertake work on the issue as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules.

Subsequently, in 2012, Australia (along with a number of other countries) submitted a proposal to the Working Group regarding the scope and application of the draft rules on transparency. The intention behind the proposal was to ensure that the rules would operate on an opt-out (rather than opt-in) basis, it being hoped that this would "send a powerful pro-transparency message and would promote widespread use of the transparency rules". Australia has recently retreated to some extent from this position, particularly in treaty negotiations with its Asian neighbours. In side letters to Australia's treaties with Korea and China, for example, the parties have opted out of applying the UNCITRAL Rules on Transparency. They have, nevertheless, indicated a commitment to consulting on the applicability of those rules in the future.

The Road Ahead

The legislative and treaty practice above indicate the increasing distinction being made by Australia between the treatment of transparency in investment and commercial arbitration. Perhaps more fundamentally, however, Australia's approach evidences its ability to learn from, and improve upon, developments in both domestic and international practice. It remains to be seen, however, how far Australia will push the issue of transparency in the context of future investment disputes (though see here for discussion of its approach in the only dispute it has responded to thus far), in treaty negotiations, and in multilateral fora. There are, for example, indications that Australia will soon begin negotiations with the EU for a free trade agreement. To the extent that this treaty provides for investor-State proceedings, it will be interesting to see whether Australia adopts the EU's proposal for the establishment of an Investment Court, and how far this might depart from, or bolster, the transparency regime already adopted in Australia's pre-existing treaties. Australia is also yet to sign the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, but side letters contained in recently concluded treaties indicate that it is actively considering the applicability of those rules in its own treaty practice. While the end of the transparency/confidentiality journey therefore seems to have been reached for international commercial arbitration in Australia, Australia has only recently embarked towards amending the transparency regime governing investment treaty arbitration.

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