Kluwer Arbitration Blog

In the Realm of Greater Transparency: Is It Just 'Much Ado About Nothing'?

Maria Laura Marceddu (School of Law, King's College London) · Monday, December 28th, 2015

by Maria Laura Marceddu, School of Law, King's College London

Over the last years, as discussed on this blog (see here), there have been many interesting developments in the field of transparency in investor-State arbitration: the 2006 ICSID amendments, the 2013 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("the 2013 UNCITRAL Rules") (see here), and the Mauritius Convention (see here).

The digital revolution we are currently living through has made transparency the obvious cure for suspicious arbitral proceedings that take place behind closed doors. It is often assumed that a more desirable approach should include open hearings, rendering international courts and tribunals "virtually palpable" through websites, and online case law databases which are publicly available. Although this has already been done, with few exceptions, within the ICSID system, it seems that more needs to be accomplished.

Due to the influence of arbitral proceedings upon matters of public interest, civil society has pushed for greater transparency and participation in arbitration, demanding governments not to withhold information. Looking at the recent developments in the field, this post attempts to address the issue of access to information by assessing whether the emerging trends will become a norm in the future.

Investment agreement provisions

The most recent investment agreement developments came from the Transatlantic draft text and the Transpacific agreement, the TTIP and the TTP respectively. Under the TTIP, those who "have a direct and present interest in the result of the dispute (called the intervener)" may have a right "to intervene as a third party" (Article 23). Contrarily to what was established in the CETA and the EUSFTA, the openness of the hearing is not clearly enshrined in any provision of the TTIP deal. However, if the application to intervene is granted, the intervener obtains a right to request a copy of every procedural document, minutes included; thus gaining the opportunity to be fully aware of how the proceeding has been conducted.

The TTP instead adopts a more 'traditional' approach. Quite surprisingly, there is no reference to the 2013 UNCITRAL Rules. Although third parties are given the possibility to intervene, this may happen only when they are "directly affected by a proceeding", and under the condition that that

time the nature of the proceeding and the public interest permit such a submission (Article 26(3)(b)).

Case Law: BSG v. Republic of Guinea

In a recent ICSID case, transparency has once again come under the spotlight.

BSG v. Republic of Guinea is a dispute between a Guernsey-based mining company ("BSGR", "the Claimant") and the Republic of Guinea ("the Respondent"), which arose in August 2014. The claim has been brought against Guinea for the unlawful revocation of BSGR's mining rights in Guinea, without adequate or any compensation, in the wake of a bribery investigation. The Arbitral Tribunal has already been formed, and it is chaired by a Swiss arbitrator Gabrielle Kaufmann-Kohler, along with Albert Jan van den Berg (The Netherlands) appointed by the Claimant and Pierre Mayer (France) appointed by the Respondent.

The panel of BSG v. Republic of Guinea is one of the first ones to apply the 2013 UNCITRAL Rules, as the rules agreed by the Parties. The Tribunal issued two procedural orders, in May and in September 2015, in order to progressively build up the transparency regime as designed by the Parties. Interestingly, in the procedural order issued in September, the Tribunal firstly considers that "although elaborated in the framework of UNCITRAL, the Transparency Rules are available for use in non-UNCITRAL arbitrations such as this ICSID arbitration". There are no practical obstacles to the application of the 2013 UNCTIRAL Rules since both parties have agreed, but also thanks to ICSID's willingness to administer this arbitration.

In the initial phase of the dispute, it was agreed that the arbitration will not be entirely confidential. Specifically, the Parties provided a list of documents that shall be accessible to the public. Among these documents, the order mentions the Claimant's request for arbitration, the Claimant's memorial, the Respondent's counter-memorial, and any further written statements or written submissions by any Party, the exhibits, legal authorities, witness statements, expert reports (including any appended exhibits), transcripts of hearings, orders, decisions, and award of the Arbitral Tribunal. This list was not supposed to be an exhaustive one since the Tribunal, on its own initiative or upon a request from any person, may make available other documents as well. The list, however, is subject to the exception enshrined in Article 7 of the 2013 UNCITRAL Rules. Therefore, any confidential or protected information that risk, if made available to the public, jeopardizing the integrity of the arbitral process would not fall in the category of documents publicly available.

Also, the first procedural order stated that "sound recordings shall be made of all hearings and sessions". Verbatim transcripts shall be made of any hearing and session other than sessions on procedural issues. They should be available in real-time, unless otherwise agreed. The Parties will be given a 30 day period to jointly make any corrections to the transcript. In case of disagreement between the Parties, the Tribunal will rule upon it and any of its correction will be no longer editable.

Even more interestingly, the second procedural order goes quite further, stating that:

> "[t]he hearings will be broadcast and made publicly accessible by video link on the ICSID website. An audio-video recording will also be made of hearings. For logistical reasons, physical attendance by third persons at hearings shall be subject to

> the Tribunal's approval. […] In order to protect potential confidential or protected information, the broadcast will be delayed by 30 minutes (Articles 6(2) and 7(3)(c)).”

The right to protect and exclude any confidential information from the video transmission has been granted to the Parties through the possibility of temporarily suspending the hearings. The Parties are expected to inform the Tribunal before discussing topics where confidential or protected information could reasonably be expected to arise. In that case, after the consultations with the Parties, the Tribunal will decide whether to exclude the information in question from the broadcast, and the relevant portion of the transcript shall be marked “confidential”.

Further logistical arrangements are designed to ensure publication in a searchable electronic format (.pdf format), and to maintain the published documents accessible to the public on the ICSID website, even upon the completion of the case.

According to the procedural calendar, made available in May 2015, the next session that will be made available online on the ICSID website has been scheduled for February 15, and will consist of a Counter-Memorial (including preliminary objections, if any) setting out factual and legal arguments and attaching any documentary evidence, legal authorities, fact witness statements, and expert reports.

What does the future hold?

The BSG v. Republic of Guinea case comes at time when States like Congo, Gabon, and Madagascar have recently joined the Mauritius Convention, mirroring a growing tendency towards greater transparency even among non-western Countries. Further evidence of this trend can be found in recent BITs that incorporate the 2013 UNCITRAL rules, such as those signed between Canada and Senegal, Japan and Kazakhstan, Colombia and Turkey, just to mention a few of them (for the complete list see here).

Regarding the Western world, quite surprisingly, States appear to be more cautious in opening up arbitral proceedings to public. So far, just eight Member States of the EU have signed the abovementioned Convention, in spite of the EU Commission's willingness to add the EU among the signatory parties.

States are conscious that the 2013 UNCITRAL Rules and the Mauritius Convention can concretely provide for a robust design to ensure transparent arbitral procedures. While in theory they are welcoming this new approach, it seems that in practice they are still reluctant to move forwards from the signature stage, and walk the transparency path without extensively using the reservations.

Conclusion

The solution put forward in the BGS Case – video broadcasting – sounds like a good compromise, against those who claim that greater transparency necessarily entails administrative costs for a tribunal, and consequently burdens the parties with additional costs, and may generate delays in the whole resolution procedure. It is also a feasible way to handle and protect confidential information. The streaming delay (30 minutes) combined with the possibility for the parties to raise objections on the confidentiality ground seems to strike a reasonable balance between the quest for more transparency and the need of confidentiality.

It remains to be seen whether open hearings would attract a huge crowd of spectators, or whether the purported public's concern about investment arbitration is just 'much ado about nothing'.

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