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Could Blockchain Become The New Standard For Transparency in Investment Arbitration?

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In a world hurtling through one technological breakthrough after another, we are entering into an exciting new era. In recent contributions to this Blog, blockchain and its potential applications in arbitration have been well-documented by practitioners and early-adopters. However, there is one exceptional feature in blockchain that might be useful in investment arbitration.

The notion of transparency was once unfamiliar in international arbitration. Nonetheless, recent regulations have popularized the concept and the debate about transparency in investment arbitration shows little sign of fading. Investment arbitration has moved from being a highly confidential mechanism to one where transparency is a key component to the legitimacy and credibility of the system.

Transparency is a procedural notion that corresponds to openness, clarity, and reliability. At the same time, transparency, accessibility, openness, and democratization are concepts that lie at the heart of the value of blockchain. Blockchain is more than just a platform that further enhances our ability to communicate. Blockchain is a technology that tackles the issue of trust between peers. So, could we use this enhanced form of technology in investment arbitration?

The Rise of Transparency

The debate about transparency lies around the notion of a greater democratic participation in a globalized world. To many, the turning point towards greater transparency was the decision in SD Myers Inc. v. Government of Canada arbitrated pursuant to the North American Free Trade Agreement. The tribunal went on to determine that confidentiality was not an inherent component of the investor-state arbitration. The trend acquired a new flavor in Methanex Corp. v. United States of America when the tribunal permitted a joint amicus curiae brief from several interested civil society groups.

The fundamental argument became whether increased transparency would enable the state to better explain their actions to the people. The argument relies on the concept that is the obligation of a state to seek the welfare of its citizens at all times and transparency is a key mechanism for democracy to keep the State accountable for its actions. This was a compelling argument to promote transparency on all parts of the arbitration procedure, including the hearings, to ensure democracy and allow access to policy decision-making.

It was under this context that the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration ("UNCITRAL Transparency Rules") sought to clarify the extent of confidentiality and transparency in investment arbitration. The rules are a compilation of previous pro-transparency trends such as the publication of arbitral documents, amicus curiae submissions by third parties and, perhaps most controversially, the accessibility to arbitral hearings. This trend was later cemented with the subsequent Mauritius Convention on Transparency .

Despite the advantages, transparency in investment arbitrations does have some disadvantages. Primary among them is the notion that transparency can result in delays and higher costs. Allowing the stream of information and involvement of non-parties would require more time and, consequently, higher costs.

The Transparency Registry

Under Article 2 of the UNCITRAL Transparency Rules, information is made public through the UNCITRAL Transparency Registry, which is the central source for the publication of information and documents in treaty-based investor-state arbitrations managed by the UN Secretary-General through the UNCITRAL secretariat.

Under the Rules, the Transparency Registry is freely accessible to the public; hence information and documents in the arbitration process are made public, subject to certain safeguards, including the protection of confidential information or the integrity of the arbitral process.

The Registry, as the central repository for the publication of information and documents in treaty-based investor-state arbitrations, requires that the arbitral tribunal appoints a person from the tribunal from whom the Registry will receive information and to whom the Registry can revert for questions. In all cases in which the Transparency Rules are applicable, the arbitral tribunal has to submit the documents by email, through upload to https:// or by courier, on USB stick, CD-ROM or DVD. Furthermore, the documents sent to the Registry are required to be in searchable PDF format, 300 dpi, and not exceed 5 MB. If a document exceeds this size, it should be divided into smaller documents. Finally, any costs for submission of documents shall be borne by the submitting party or the submitting tribunal.

In principle, the service of the Registry is at no cost to the parties, tribunals, and the public. However, it would be remiss, to neglect the issue of the transaction costs associated with transparency (e.g., courier of documents, information chain, and time elapsed).

Merging with Blockchain

Everywhere, people are demanding more transparency. Curious individuals want distributed access to information. Now, everyone wants to increase trust and transparency in information exchanges of all shapes and sizes, and blockchain technology has the answer.
Blockchain removes the need for a central authority (i.e., Transparency Registry) to manage information, making it highly secure and impenetrable to hackers. Blockchain systems include a fully auditable and valid ledger of information. Entries into the ledger can only be made if they are validated by the system, and in order to change it, every single other blockchain in the system would also need to be changed. Therefore, the "trust mechanism" does not reside solely in a central authority, but in the members of the chain itself.

In the not too distant future, arbitrators should have the power to share the information that the

UNCITRAL Transparency Rules mandates directly to a blockchain system. With the use of this enhanced form of technology, a protocol could be introduced to protect highly sensible information under the limits of the Transparency Rules. Consequently, the system would be automated to minimize the discretion to be exercised by the arbitral tribunal and enhance the efficiency in the process.

With higher transparency comes the need for information to be passed in a faster way. Currently, transparency is achieved with a long chain of information and parties involved, starting from the contracting parties to the arbitral tribunal and subsequently ending with the Transparency Registry. However, higher transparency requires that the information be shared with all participants simultaneously in a fast-paced manner.

Using a blockchain system to share the information directly by the arbitrators could mean that third parties and non-disputant parties can learn about a given dispute faster. This could enhance the participation in the arbitration process earlier while it is ongoing; for example, as observers at oral hearings or as drafters of amici curiae. With blockchain, a person wholly unconnected to the dispute, a third person requesting participating rights, and a non-disputing Party to the relevant investment treaty, are all entitled to the same level of access, encouraging a pre-award transparency in a low-cost and efficient manner.

Conclusion

Blockchain and the Transparency Rules are compatible; both strive to achieve an effective balance between that necessary cost – imposed on behalf of the public interest in transparency– and ensuring the efficiency and fairness of the proceedings for the disputing parties.

UNCITRAL's Rules on Transparency, with a complementary enhanced form of technology present an opportunity for States to improve investor-State arbitration. The primary cost of opting out of transparency is the loss of an opportunity to legitimize a State's actions under investment treaties and the loss of an opportunity to legitimize investor-State arbitration itself. These critiques could translate to a legitimacy problem, which could have more consequences for the future of the institution.

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