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ICSID and Open Justice: Two Steps Forward, One Step Back

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The ICSID reform bells are ringing. ICSID has long been working on its latest rule amendment project, intent on modernising, simplifying and streamlining the ICSID rules also in light of ongoing criticisms of the investment arbitration system as a whole. From November 11-15, 2019, ICSID held what it hopes to be the final, or at least penultimate, consultation with ICSID Member States on **Working Paper #3** before the amended rules are placed before the Administrative Council for a vote. In its introduction, Meg Kinnear, ICSID Secretary-General, promises that the text in Working Paper #3 "offers a modern, sophisticated and balanced set of investment settlement rules that will ensure both due process and an effective process" (para 6). While efficiency has always been a promise of arbitration and its realisation is desirable, this post focuses on whether the latest reform proposal will ensure due process, as suggested.

Due process includes the right to a fair hearing. As has consistently been held by the European Court of Human Rights (**1995**, para 33; **1998**, para 42; **2001**, para 55; **2006**, para 39; **2016**, para 22; **2018**, para 189), one of the elements of a fair hearing is that it takes place in public. In the words of the United States Supreme Court, it is public access that *renders* hearings fair by discouraging the misconduct of participants (**Richmond Newspapers 448 US 555,** at 569). The knowledge that hearings are subject to review in the forum of public opinion functions as an effective restraint on participants in this context (**In re Oliver 333 US 257**, at 270). Review refers here to public scrutiny, *i.e.*, members of the public observing a hearing. The principle of open justice is not absolute, however. It only prescribes that hearings are presumptively open to the public, subject to a contrary determination by a competent court or tribunal. That the principle of open justice is applicable to investment arbitration in the first place is due to the law-making function of arbitrators, an argument I advanced **here**, **here** (pp 128-129) and **here**. Both the wording and the comments to the proposed ICSID Arbitration Rule (AR) 64 reveal that ICSID has not embraced the principle of open justice just yet. AR 64(1) (proposed) reads:

> "The Tribunal shall determine *whether* to allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal, to observe hearings, after consulting with the parties."

While this rule would eliminate the existing option for a disputing party to block the openness of hearings (*see* **existing ICSID Arbitration Rule 32(2)** – potential openness "[u]nless either party objects"), it does not go far enough in securing public access, in my opinion. Shifting the decision-

making power in relation to the openness of arbitral hearings to Tribunals, while a step in the right direction, would only alter the identity of the decision-maker. Working Paper #3 even acknowledges that the proposed AR 64 would merely permit a Tribunal to *address* whether hearings shall be open to the public. The proposed new Arbitration Rules do not prescribe a presumption of openness, leaving Tribunals with an unfettered discretion to conduct hearings behind closed doors. If Tribunals remain under no obligation to hold arbitral hearings in public, there is a risk, however small, that Tribunals will continue to conduct them *in camera*, even if only to appease the disputing parties. The proposed AR 64(2) does not alleviate this dilemma either, as it merely requires Tribunals to establish procedures to prevent the disclosure of confidential or protected information to persons observing the hearings. There will be no persons observing the hearings, if the Tribunal decides not to allow public access.

It is telling that the proposed Arbitration Rules define confidential or protected information to which the public is not to have access, without providing any guidance as to when hearings are to be open to the public. Even if, arguendo, it is to be assumed that the latest ICSID reform proposal was written with a presumption of open arbitral hearings in mind, absent an explicit provision to this extent, the proposal remains less ambitious than it could be and less ambitious than the **UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration**, which, in Article 6(1), prescribe the presumptive openness of arbitral hearings. That the ICSID rule amendment project lags behind the Rules on Transparency was a point already made by the European Union and its Member States in relation to **Working Paper #2** (see para 20, **here**). The same is true for WP #3 which, in a step forward from WP #2, only abolishes the possibility for a disputing party to single-handedly block the openness of hearings, without, at the same time, introducing a presumption of openness. The ICSID Arbitration Rules fall short of the principle of open justice in this regard which requires such a presumption of openness.

That the proposed Arbitration Rules in Working Paper #3 diverge from the principle of open justice is also evident from the wording of the proposed AR 65 which defines confidential or protected information as, among other things, information that is protected from disclosure by agreement of the parties. This definition would allow the *disputing parties* to agree on the confidentiality of any information in relation to the dispute, rendering arbitral hearings private in the process, arguably in violation of the principle of open justice which, in self-governing groups, requires the law-making court or tribunal to determine whether hearings are to be held *in camera*. This loophole is a step back and, if not fixed, exposes the ambiguity with which ICSID is approaching reform. Given the high demand for public access to hearings, ICSID seems intent on amending its Arbitration Rules, yet at the same time unwilling to depart from the principle of party autonomy in relation to public access. The hesitation can of course be explained with the premium that is placed on party autonomy in arbitration and the need to find a two-third majority among ICSID Contracting States for the amendment of the Arbitration Rules (Article 6(1)(c) of the Convention). The less radical the change, the more likely it is that it will find favour with the multitude of Contracting States. Yet, if the Rules are amended as proposed, and provided the parties are able to reach a consensus on confidentiality, the Rules might not increase the transparency of hearings in practice, given the lack of a presumption of openness and the power of the parties to designate any information as confidential or protected.

This approach stands in stark contrast to the Rules on Transparency, which, while not perfect either, at least introduce a presumption of open hearings and curb party autonomy in relation to the designation of information as confidential or protected. What is more, Article 1(3)(a) of the Rules on Transparency, if applicable, disallows disputing parties to derogate from the same Rules, except

to the extent permitted by the underlying investment treaty. Given that Article 44 of the ICSID Convention permits disputing parties to divert from the Arbitration Rules in effect on the date on which the parties consented to arbitration, the ICSID Convention itself would have to be amended, if transparency is to be guaranteed to the same extent as under the Rules on Transparency. Revising the Convention would require unanimity among Member States. Yet, even if that step is ultimately not taken, there is no reason why the amendment of the ICSID Arbitration Rules should not be more ambitious in their aim to ensure due process – both an explicit guarantee that hearings are to be presumptively open to the public, subject to a contrary determination by the Tribunal, coupled with a narrower definition of confidential or protected information would be steps in the right direction. In sum, the principle of open justice has not found adequate protection in the latest ICSID reform proposal just yet. There is thus still room for improvement if the aim is to ensure due process.

This entry was posted on Friday, November 29th, 2019 at 9:00 am and is filed under ICSID Amendments, Transparency in investment arbitrations, UNCITRAL Transparency Rules

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