Columbia Center on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues
No. 141 February 16, 2015
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The other side of transparency

by
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In her *Perspective*, Lise Johnson takes a strong stance in favor of the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules").[1] The Rules apply in UNCITRAL proceedings, and may be adopted in non-UNCITRAL proceedings, under future investment treaties. Since coming into force in April 2014, the Rules have been welcomed as a ground-breaking, positive development.

The Mauritius Convention on Transparency ("Convention"), adopted by the United Nations General Assembly on December 10, 2014, provides a mechanism for the application of the Rules under existing investment treaties, for those states wishing to do so.

This *Perspective* queries whether states are adequately informed of, and prepared for, the practical aspects of increased transparency in investor-state arbitration proceedings. These include the management of lay opinions and media reactions to the state's legal case, decisions to settle and perceived loss of face, and the tribunal's lack of power to contain public reaction.

Those states that have long placed transparency at the center of their treaty policies made early provisions to shoulder the impact of public scrutiny. Several other states view the Rules as an important policy instrument that should be endorsed, both for strategic positioning and credibility in the international investment landscape. Until jurisprudence develops indicating how investment tribunals will apply the Rules and "*ensure that* [their] *transparency objectives … prevail*",[2] there is little to inform states about the impact of that endorsement in practice, and how vigorously they should pursue and maintain it.

UNCITRAL veterans say that the Rules are possibly one of the most politically fraught projects in the history of UNCITRAL. In a room where non-governmental organizations were numerous and outspoken, and where investors were under-represented, transparency was viewed as a "megatrend" mostly centered on state (as opposed to investor) interests, and that no state could comfortably oppose.

Nevertheless, an active "transparency-skeptical" group of states left its fingerprint on the Rules:

- Article 1 limits their application to disputes arising under future/new bilateral investment treaties (BITs). Sound arguments underpin this approach, notably that state parties to existing treaties providing for *in camera* proceedings cannot be deemed retrospectively to have agreed to rules largely to the opposite effect. Politically, however, Article 1 is a significant point in favor of the skeptics' camp. It is widely understood that, had the proponents of transparency not accepted Article 1 as it stands today, the project would very likely have failed.
- Article 7(5) provides for a self-judging exception to transparency based on essential security interests. It is an important concession on the part of the transparency proponents in light of Article 1(3)(a) prohibiting derogation from the Rules by disputing parties.
- Article 3 of the Convention provides a wide ambit for reservations, even after ratification: specific investment treaties, or proceedings to which the state expressing reservation is a disputing party, may be excluded.
- At the skeptics' insistence, the mandate given to the UNCITRAL Working Group on Arbitration and Conciliation to draft the Convention was specifically conditioned upon the proviso that the Convention will not create "*any expectation that other States would use the mechanism offered by the convention*."[3]

Whilst the Rules were unanimously approved, their field of application for the time being is largely hypothetical. The new Swiss-Georgian BIT of June 3, 2014 is the first BIT with an express reference to the Rules. The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, agreed in principle on September 26, 2014 but awaiting ratification, also refers to the Rules.[4]

The next test for transparency is the signature of the Convention, scheduled for March 2015. Entry into force is to occur six months after the deposit of the third instrument of ratification.[5] In the current context of the review of the legitimacy of investor-state arbitration by the European Union, there is no doubt that the Convention and Rules are landmark documents. Their application and effect have the potential of transforming investor-state arbitration. This rests in large measure with investment tribunals. In charting their way forward, tribunals hopefully will do the Rules justice by giving realistic, as opposed to hortatory, thought to the practical application of transparency, balancing the interests of investors as well as states, in light of the checkered support that marked the elaboration of the Rules.

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[1] Lise Johnson, "The Transparency Rules and Transparency Convention: A good start and model for broader reform in investor-state arbitration," *Columbia FDI Perspectives*, No. 126, July 21, 2014.

[2] Article 1(6) of the Rules.
[3] UNCITRAL, "Draft report, Forty-seventh session, July 7-18, 2014," United Nations document A/CN.9/XLVII/CRP.1/Add.1, para 2.
[4] CETA, Article X.33.
[5] Article 9 of the Convention.

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