



Fourth round of break-out sessions: Reform of investment dispute settlement Transparency¹

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In the break-out session on transparency in investor-State dispute settlement (ISDS), the experts noted that although there are various challenges relating to how transparency is actually implemented in investor-State arbitration, there are a number of advantages of increased openness, and an observable trend in that direction. The discussion focused on ways in which that trend could be advanced.

At the outset of the session, various comments were made about why transparency of investor-State dispute settlement was a desirable objective. These included that transparency was needed to:

- increase the legitimacy of the system;
- reflect broad stakeholder interests in the disputes;
- enable sharing of information among States about ISDS;
- reveal abuses of the system (e.g., cases in which one investment and one set of facts triggered multiple claims against the State);
- promote the rule of law, good governance and due process; and
- comport with the public's rights to information.

The experts took note of recent developments in the United Nations Commission on International Trade Law (UNCITRAL), where significant work has been done among member States to increase transparency in ISDS. Elaborating on those developments, one expert highlighted UNCITRAL had adopted a new set of rules (the "Transparency Rules") that, *inter alia*, provides the public access to procedural documents and arbitral awards, calls for open hearings, permits participation of *amicus curiae*, and provides non-disputing State parties the right to make submissions to the tribunal on issues of treaty interpretation. It was also highlighted these rules can be applied in any treaty-based investor-State arbitration (not just arbitrations under the UNCITRAL arbitration rules), and that a new convention (the "Mauritius Convention") will be open for signature in March to facilitate States' adoption of the Transparency Rules to disputes under their existing treaties.

¹ The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

It was also noted that, as information is already being leaked, an advantage of applying the Transparency Rules is that they can help better govern that disclosure.

The experts, however, also noted that there are concerns and challenges regarding transparency. One expert described how the Transparency Rules aimed to address those issues, such as how to efficiently manage the process, protect the safety of witnesses, and minimize costs.

After addressing these issues regarding the general advantages of transparency, and the strategies for addressing potential challenges raised by greater openness, the experts proceeded to discuss three related questions:

- Should you consider that more transparency is a desirable objective, what can be done to foster this objective?
- What can be done to facilitate implementation of the various UNCITRAL mechanisms?
- Aside from UNCITRAL developments, what other avenues could be pursued?

With respect to **the first question**, the experts interpreted it as asking what gaps in terms of transparency might remain even assuming application of the UNCITRAL Transparency Rules. Speakers highlighted two areas.

One area related to settlement agreements. It was noted that the Transparency Rules did not specifically address settlement agreements, but that the Rules could be interpreted to cover them if the settlement agreement were embodied in an award. It was also noted that States could agree to go beyond the Transparency Rules to provide a greater degree of disclosure, and that some States were in fact doing so. An example was given of States negotiating for provisions that would require disclosure of both agreements to mediate and agreements reached through mediation.

The second area in which it was said that increased transparency was needed was in negotiation and renegotiation of investment treaties. On the issue of renegotiation, one expert stated that it was important for the public to be aware when its government received a request for renegotiation from its treaty parties so that there could be a political discussion of the appropriate response to that request.

Turning to **the second question**, the experts discussed what could be done to facilitate implementation of the Transparency Rules and the Mauritius Convention. Comments highlighted that this should be a multi-stakeholder initiative in which diverse actors could play roles. For example:

- **States and regional organizations** could include and even go beyond the Transparency Rules in their treaties (as some have already done) and agree to apply the Transparency Rules in the context of particular disputes;
- **Investors** could agree with States to apply the Transparency Rules in disputes. In this context, it was noted that it was important to inform investors about the benefits of transparency and ask them to push application of the rules. It was also noted that **States** could potentially implement policies calling for their investors to seek to use the rules when initiating disputes against other States;
- **Arbitral institutions** such as International Center for the Settlement of Investment Disputes (ICSID), International Chamber of Commerce (ICC), Stockholm Chamber of Commerce (SCC), London Court of International Arbitration (LCIA) and the Permanent Court of

Arbitration (PCA) (which, it was noted, have already been supportive of the Transparency Rules), could continue to disseminate information about those rules and recommend their application;

- **Intergovernmental organizations** such as UNCTAD and the Organization for Economic Co-operation and Development (OECD) could disseminate information about and spread awareness of the instruments;
- **Development banks and development institutions** could include adherence to these instruments as part of their good governance criteria; and
- **Civil society** could call for adoption of the Mauritius Convention by States and monitor adherence to the Rules.

Some of these strategies, it was noted, were also relevant for the third question, which asked the experts what other avenues apart from the developments in UNCITRAL could be pursued to increase transparency. Efforts to enhance investors' understanding of the benefits of transparency, for example, could go beyond efforts to enhance awareness of the Transparency Rules themselves.

An additional suggestion for increasing transparency outside the context of the UNCITRAL developments was to include transparency as a condition for enforceability of awards. Awards that were not public could be deemed unenforceable. This, it was said, would create an incentive for investors to seek transparency.