

AN UNFINISHED EFFORT OR A PUSH GOES TOO FAR? AN ASSESSMENT OF ICSID'S PROPOSED TRANSPARENCY AMENDMENT

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ABSTRACT

Right after its unparalleled rapid development, the international investment legal regime now consists of some 3,000 treaties and more than 900 known arbitration cases, has become a victim of its own success. Procedurally, it is alleged that investor-state arbitration, which is largely modeled on commercial arbitration, is an undesirable method to resolve disputes involving public interests. One of the most criticized points is the lack of transparency of the arbitral proceeding. Driven by the growing dissatisfaction of common people as well as of the professional community, stakeholders have adopted or proposed various reform proposals. These proposals almost uniformly identify transparency as a central component of the reform.

Heeding the call for more transparency, the International Centre for Settlement of Investment Dispute (hereinafter "ICSID") is the first arbitral institution that introduced transparency mechanisms into its arbitration rules in 2006 (including the additional facility rules). Thereafter, United Nations Commission on International Trade Law arbitration rules and some other institutional rules followed the lead of ICSID and some of them go even further than

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ICSID rules in terms of the scope of transparency provisions.

Now, after more than ten years since the last revision ICSID is again considering how to strengthen the transparency obligations under its arbitration rules. The proposal envisages enhanced public access to arbitral awards, tribunal's order and decisions. It also intends to make open hearing a principle. Non-disputing party submission is another area introduced in this proposed amendment. This proposed amendment received mixed responses. Some consider, partly because of the limitations of the ICSID Convention, the amendment is an insufficient effort in terms of enhancing investor-state arbitration's procedural transparency. Some others, on the other hand, argue that transparency does not come for free and the push for transparency has gone too far.

This article provides an assessment of the ICSID's proposed new transparency regime. First, it reviews the pros and cons of transparency and confidentiality in arbitral proceedings as well as the recent developments in investor-state arbitration cases; Second, basing on the research result mentioned above, this article establishes an analytical framework to weight and balance different factors that might influence the decision to embrace more transparency or to keep the process in confidential; finally, this article employs the analytical framework to assess the ICSID's proposed amendment on transparency.

KEYWORDS: *investor-state arbitration, procedural transparency, ICSID*