THERE ARE CONCERNED CALLS FOR MORE TRANSPARENCY IN STANDARDS FOR INVESTMENT TREATY ARBITRATION, WRITE JOÃO RIBEIRO, TONY ANDRIOTIS, LEE SOO-HYUN AND JEAN-ISAMU TAGUCHI

# NEED FOR CLARITY

Much ink has been spilt on discussing whether or not the investment treaty arbitration regime has played a role in encouraging the growth of developing economies by creating a more secure system for foreign direct investment (FDI). As of late, the viability of the treaty arbitration system has been called into question.

Some developing countries are threatening to retract themselves from the system completely, while sovereignty-related alarms can now be heard loudly in the halls of cities such as Washington, London and Brussels. The authors do not wish to reiterate or re-litigate any of the arguments advanced by such states. They do see, however, mutually shared advantages to international trade and investment, and in harmonizing legal codes.

These advantages include bolstered investor confidence in the certainty of due diligence by recipient states, and improved trade and investment flows that can provide the necessary capital to help economies pursue inclusive and sustainable economic development. There are also advantages to embracing a model of transparency in dispute resolution as put forth in the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration, and in the UN Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014 – the Mauritius Convention), referred to from here on as the UNCITRAL transparency standards, in situations where disputes are directly related to the interests of citizens and taxpayers, namely on what concerns public-private partnerships (PPPs).

The Mauritius Convention was adopted by the UN General Assembly in December 2014, by which parties to investment treaties concluded before 1 April 2014 express their consent to apply the UNCITRAL rules on transparency, and is significant with regard to the suggested reforms to the arbitral processes for resolving investor-state disputes to ensure greater transparency and accessibility to the public.

The authors see advantages in heightening transparency in the current investment treaty arbitration system, specifically through the UNCITRAL transparency standards. Such transparency in dispute settlement results in strengthening the rule of law while continuing to emphasize the importance of encouraging FDI flows to the growth of developing economies.

## Defining PPPs

In a recent published reference guide on PPPs, the World Bank describes them as entailing "long-term contract[s] between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risks and management responsibility, and remuneration is linked to performance". Apart from these features (long-term contract, risk management and responsibility), PPP projects are considered to be complex in designing and managing/governing contracts and, as noted above, concern the interests of current and future citizens, both as taxpayers and service users.

However, even where such funds are not primarily rooted in the tax base of the contracting sovereign, such as where development funds are utilized, the need for transparency is of particular importance. Regardless of the extent to which the state becomes involved in a PPP, its involvement imposes marginal social costs, in either the form of an explicit cost or an opportunity cost.

The contractual structure of a PPP is particularly prone to disputes due to the existence of multiple contractual relationships, as well as the risks transferred between stakeholders. The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects distinguishes three types of disputes that can arise between the stakeholders: (1) disputes between the contracting authority and the special purpose vehicle [SPV]; (2) disputes between the SPV and sub-contractors; and (3) disputes between the SPV and other parties, such as end users.

It is necessary to mention that within a PPP, specific disputes can arise at various stages of the project that are related to the awarding of contracts. The authors are focusing primarily on the first type of dispute – those between a sovereign state and a private party.

## Dispute resolution in PPPs

When PPPs involve long-term arrangements between two or more parties, the risk of conflicts over issues such as service quality, customer satisfaction, and tariff reviews are especially high. The World Bank mentions that "PPP arrangements are long-term and complex, contracts [that] tend to be incomplete", so that "this creates room for differences in interpretation". Therefore, "defining a dispute resolution process helps ensure disputes are resolved quickly and efficiently, without interruption of service – reducing the risk of disruption due to disputes to both the public and private parties". In giving its recommendation related to the governance of PPP projects, the Organization for Economic Co-Operation and Development (OECD) provided that "clear,

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predictable and transparent rules for dispute resolution should be in place to resolve disagreement ... between the public and private parties". Practitioners have also argued that careful attention must be given to managing potential disputes in PPP projects. Finally, in the context of developing countries, the lack of trust in the treatment that will be given to sovereign states (or, more likely, parties opposed to a sovereign) under domestic judicial systems is also a factor in favour of alternative dispute resolution systems.

As to treaty arbitration, the International Centre for Settlement of Investment Disputes (ICSID) has been criticised for disproportionately emphasizing commercial and private interests. New practices of local dispute resolution have also emerged. During the UNCITRAL colloquium on PPPs in 2014, for example, participants questioned the suitability of utilizing international arbitration for PPP-related disputes, mainly because of the "multiple investment treaties, multiple international arbitration forums, cases and rulings, and the poor enforcement of international arbitral awards". Participants added that the tendency of using local dispute resolution involving governments should be taken into account and that "a more practical approach would be helpful".

The considerable variation in the type of arrangements made in PPPs, combined with the unique characteristics of PPPs themselves, enable the use of a wide range of dispute resolution mechanisms. Jeffrey Delmon, who has written extensively on the classification of PPP projects, described a comprehensive concession agreement as employing a mixture of dispute resolution mechanisms that best minimizes the "detriment to [the contracting parties'] working relationship".

This echoes the recommendations given in the UNCITRAL Legislative Guide on Privately Funded Infrastructure Projects, which calls for the use of dispute settlement mechanisms "that avoid as much as possible the escalation of disagreements between the parties and preserve their business relationship; that prevent the disruption of the construction works or the provision of the services; and that are tailored to the particular characteristics of the disputes that may arise". Given the necessity to maintain the

continuity of public services in PPP projects, intergovernmental bodies, such as the World Bank, the United Nations Development Programme (UNDP), UNCITRAL and the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), have cautioned against the use of litigation as a primary means of resolving PPP-related disputes.

## Settlement through the sovereign

The efficacy of national judicial processes or related national bodies to resolve grievances through litigation is largely dependent on whether these domestic processes can render an adequate and unbiased ruling. As the European Investment Bank (EIB) expressed through its European PPP Expertise Centre (EPC), the use of national regulatory bodies or national court systems involves judicial or regulatory discretion, which may present risks for private investors in the partnership.

Given the considerable public interest involved in a PPP project, objective decisions are more likely to be found through a third-party arbitration process. Since PPP projects are complex in that they can involve a variety of parties from different backgrounds, whether cultural or technical, it can be difficult to identify a national court system that can satisfy these different needs or that would be acceptable by all contracting parties.

## Commercial arbitration

Due to its flexibility, neutrality and accessibility, commercial arbitration is commonly used to settle PPP-related disputes. Despite, however, considerable developments that have made commercial arbitration procedures more transparent and predictable, barring the occasional need to file awards with courts that require transparency, where one seeks to enforce an award, commercial arbitration tends not to be the most transparent vehicle of dispute settlement.

Many practitioners have continued to raise "confidentiality" as a key reason why they recommend commercial arbitration to their clients. In the 2015 Queen Mary University of London/White & Case survey titled Improvements and Innovations in International Arbitration, 33% of respondents said that confidentiality was of primary importance in their decision to use arbitration as a dispute settlement mechanism. As commercial arbitration tends not to include sovereign parties, there is far less of a need for the same level of transparency that is being demanded in the UNCITRAL transparency standards.

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## Investment arbitration

While investment arbitration in its traditional form may be limited in its capacity to handle PPPs, a recent development that warrants comment is the Investment Court System (ICS), which was approved by the European Commission in September 2015. Emphasis on transparency and the inclusion of an appeals tribunal are notable characteristics of the proposed system. Whether the new system can break the extant ISDS mould and remain relevant in the face of fluctuating investment patterns remains to be seen. Increasing criticism of ISDS for its lack of transparency, and the release of the UNCITRAL transparency standards, have increased global calls for change in the system.

Criticism against the existing ISDS framework partly led to the creation of an arbitration centre under the Union of South American Nations (UNASUR). Although Latin American countries were involved in 39% of all investment arbitration cases before the ICSID, Argentina, Mexico, Venezuela, Ecuador and Bolivia particularly stand out in relation to their involvement in investment treaty disputes. Ecuador first proposed the new system in 2010 and the UNASUR responded and began work on the creation of a new dispute settlement system. As of August 2016, a consensus was reached over almost 80% of the proposed rules of the UNASUR Arbitration Centre, and a code of conduct for arbitrators was adopted.

The proposed rules of the UNASUR Arbitration Centre are relevant to specific concerns regarding PPP disputes, such as enhanced transparency and the availability of an appeals mechanism. The proposed rules provide that arbitral award and conciliation agreement must be made available to the public unless domestic legislation forbids the release of such information, or if the information is confidential. The proposed article 31 provides an appeals mechanism

that can be utilized where there is error in the application of law in the arbitral award.

Argentina, Paraguay, and Venezuela proposed an additional reason for appealing on the basis of a manifest error in the application of facts. Increased transparency in dispute resolution also meets the specific requirements of PPPs, where users and taxpayers are relevant stakeholders in these projects.

More generally, this framework shows that some countries believe that adjustments in investment arbitration procedures should reflect public interest-related issues. This is particularly true when it comes to PPPs.

## Transparency standards

The Mauritius Convention, which will enter into force on 18 October 2017, is an instrument by which parties to investment treaties concluded before 1 April, 2004 express their consent to apply the rules on transparency, a set of procedural rules for making publicly available information on investor-state arbitrations arising under investment treaties. The Mauritius Convention reads, in articles 2(1) and (2), that the rules on transparency apply to disputes initiated based on international investment agreements (IIAs) unless a party declares single or multiple reservations under article 3.

In addition to this, although a signatory has the flexibility to formulate reservations, whether the arbitration is initiated under the UNCITRAL arbitration rules or not has no impact on the application of the Mauritius Convention.

Regardless of the arbitration rules applied to the dispute, the Mauritius Convention applies to existing IIAs concluded before April 1, 2014 without formulated reservations, denunciation, and/or rejection of amendments. The Stockholm Chamber of Commerce (SCC) noted that the Mauritius Convention is inapplicable in the following situations:

- Either of the disputing parties has made reservations under the Mauritius Convention; and
- The home state of the respondent and host state are not parties to the Mauritius Convention.

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Although article 2(1) specifically mentions the UNCITRAL arbitration rules, the Mauritius Convention is applicable to about 3,000 IIAs in force as of April 2014, regardless of the arbitration rules selected. States that are parties to the Mauritius Convention may formulate reservations in a negative-list approach, for instance, identifying specific IIA(s) to which the Mauritius Convention is/are not applicable.

Once the home state of the respondent and host state are parties to the Mauritius Convention, the conditions apply prospectively to investor-state disputes save for reservations as per article 5, rejection of specific revision of the Mauritius Convention as per article 10, or denunciation as per article 11. Both signatory states and regional economic integration organizations must observe article 18 of the Vienna Convention on the Law

of Treaties, or the obligation not to defeat the object and purpose of the treaty prior to its entry into force.

According to UNCITRAL, "together with the rules on transparency, the convention takes into account both the public interest in such arbitration and the interest of the parties to resolve disputes in a fair and efficient manner. The convention foresees UNCITRAL performing the repository function, through the Transparency Registry, a publicly available database on information and documents in treaty-based investor-state arbitration.

While, at the time of writing, there are 18 signatory and two ratifying states, and the items in the registry remain sparse, the Mauritius Convention, as commented by Stephan W Schill in the *Journal of World Investment & Trade*, is a step towards a system of international investment law that is "fundamentally different from the current one, which is still principally based on confidentiality".

Furthermore, the "normative pull" of the UNCITRAL transparency standards and its opt-in nature are significant in the endeavour to address questions that are of public interest and possible appellate body functions.

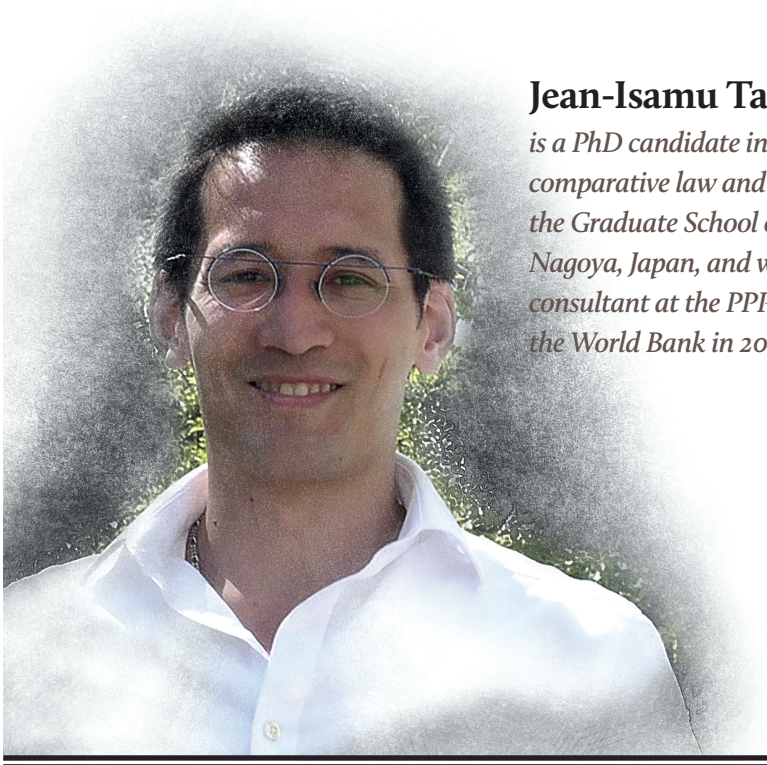
## Improving the current system

When contemplating how to best create a viable system that both sovereign and private parties will be encouraged to utilize, all the discussions about the future of the current investment treaty framework must be kept in mind. As is also set out above, we should strive to improve the current system(s) by encouraging transparency and consistency. To that end the authors proposed the following:

- The creation of a "repository"-like organization, or the assignment of such a role to an existing organization, whose sole directive will be to act as a collector of PPP arbitration filings, and to make information related to these filings available to the public. In this way, it will be relatively easy to find out how many PPP-related disputes have been filed in a particular year and, if the parties were to agree to transparency in relation to their awards, they could turn to previous awards as a means of seeking out the wisdom of previous tribunals. Though such previous awards will not technically act as precedents, they may act as creating an increased sense of certainty and conformity amongst possible parties to a PPP agreement. The Transparency Registry, currently run by UNCITRAL, would seem to be a reasonable repository that could be utilized instantly.
- As opposed to setting up an additional treaty-basis of empowerment, the use of standard PPP ADR clauses should be encouraged. Efforts to enact a model clause through a recognized legislative international body, such as UNCITRAL, could lend the necessary legitimacy for its widespread adoption, particularly by developing states. Such clauses will require direct disputes involving a sovereign state to utilize the above-mentioned repository, while also requiring that transparency, as envisioned by the UNCITRAL transparency standards, be utilized.
- Consider the creation of regional arbitration organizations, such as what is being attempted in Latin America in relation to investment state arbitration, or as is envisioned in the CETA (EU-Canada Comprehensive Economic and Trade Agreement), which calls for the creation of some form of a permanent adjudicating body.
- Consider the creation of an appellate body that can quickly hear appeals made from ADR (or even possibly court litigation) related to PPPs. Again, this can be contracted for, and the enforcement mechanism can be the New York Convention, if applicable.

The authors stress that it is not their desire to re-litigate the state of investment treaty arbitration and its future. They are simply turning to the lessons that the system has to offer for guidance when addressing the issues of settlement of international PPP-related disputes.

The authors are seeking to continue the momentum towards a system that will encourage investment in infrastructure projects, while also encouraging transparency. As has been made clear above, the authors believe that the public nature of PPP projects makes transparency imperative, regardless of the selected vehicle of dispute resolution. A system in which both sovereigns and investors can take solace and comfort is a system that is likely to pass the test of time.



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