INTERNATIONAL COUNCIL
FOR COMMERCIAL ARBITRATION

ARBITRATION'S AGE OF ENLIGHTENMENT?

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with the assistance of the
Permanent Court of Arbitration
Peace Palace, The Hague

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: lrs-sales@wolterskluwer.com
Website: www.wolterskluwer.com/en/solutions/kluwerlawinternational

Sold and distributed by:
Wolters Kluwer Legal & Regulatory U.S.
920 Links Avenue
Landisville, PA 17538
United States of America
E-mail: customer.service@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-94-035-1377-5

e-Book: ISBN 978-94-035-1387-4
web-PDF: ISBN 978-94-035-1397-3

Printed in the Netherlands.

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A Letter to the Editor

Mallory Silberman[*]

Dear ISDS colleagues,

In the spirit of this year's Congress objectives, which include "taking stock" and "exploring ideas,"[1] I would like to propose the retirement of the so-called "transparency debate" at our conferences. To explain why that is, though—and for the sake of transparency—we must have a frank conversation about the debate.

***First*, there is no debating "transparency."** The word itself is a rhetorical trump card. The reason for this is that the obverse of "transparency" is a concept that has sinister (even criminal) connotations,[2] and people are therefore loath to be painted as someone who opposes, or even just questions, "transparency." Accordingly, if we truly wish to debate—as opposed to just replicating the effects of an echo chamber—we must begin using nomenclature that does not implicitly inhibit or halt any further discussion.[3] Just think about how your thinking might change if the issue were

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1. *See* Invitation from the ICCA President, *available at* https://icca2020.scot/ (last visited March 14, 2020).
2. *See, e.g.*, Oxford English Dictionary (defining "concealment," first and foremost, as "[t]he crime of concealing or suppressing information so as to cause injury or disadvantage to another ... ."), *available at* https://oed.com/view/Entry/38070?redirectedFrom=concealment#eid (last visited June 18, 2021).
3. For an explanation of how a loaded term can warp thought, debate, and discussion, *see generally* Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Straus, and Giroux 2011), Chapter 7 (explaining that one way to exploit cognitive biases, and to make the mind jump to a particular conclusion, is by presenting a question in a manner that suggests that there is only one possible answer); *see also id.*, pp. 60-62 (explaining that, due to the wiring of the human brain, "familiarity is not easily distinguished from truth," and—accordingly—the mere repetition of a statement can sometimes convince a person of its accuracy).

presented as being about party autonomy ... or the sanctity and efficiency of proceedings ... or the insulation of a decision-maker from bias. We are doing the term "transparency" a disservice by using it in a way that might obscure commentary.

***Second*, the debate is not ours to decide.** There does not seem to be any dispute about this. We can lobby for access to more information—and debate and propose default presumptions on publication. But, in the end, we do not make the call; any final decisions about publication are for the parties (and potentially the tribunal) to make. This reality is even reflected in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.[4] Thus, for example, even though the Rules set out a presumption that various case materials will be published,[5] the Rules also make it clear that the parties remain free to reject the presumption in their arbitration agreement.[6]

***Third*, there is not all that much to debate.** Or, at least, there *no longer* is all that much to debate. For example, there is already consensus regarding the framework that a tribunal should use if it is faced with a party dispute (and no prior agreement) about publication.[7] It is also accepted that, unless the parties agree otherwise, they are permitted in principle to speak about their own cases[8]—and that the presumption is the

4. *See, e.g.*, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014), Article 3(3) ["UNCITRAL Rules on Transparency"] (explaining that, if a member of the general public would like to have access to case materials beyond what the parties have already agreed to publish, the issue will be decided by tribunal following consultations with the parties).
5. *See* UNCITRAL Rules on Transparency, Article 3(1) (stating that, "[s]ubject to [certain caveats], the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings ... any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons[;] transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal").
6. *See* UNCITRAL Rules on Transparency, Article 1(1) ("The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ... shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ('treaty') concluded on or after 1 April 2014 *unless the Parties to the treaty have agreed otherwise*") (emphasis added); *see also* Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009), p. 75 (explaining that, even though an investment treaty alone does not constitute an arbitration agreement, its text is effectively treated as such, because the text represents "a unilateral offer to arbitrate" that "must be deemed to be accepted [in order for] an agreement to arbitrate [to] come[] into existence"); *see also id.*, p. 76 (explaining that "the validity of the agreement to arbitrate is contingent upon the investor claimant's acceptance of [the terms of the offer set forth in the investment treaty]," and that the investor cannot unilaterally "modify those terms in any respect . ...").
7. *See generally, e.g.*, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1 (Decision on Request for Provisional Measures, December 9, 1983) (Goldman, Foighel, Rubin) ["*Amco I*"]; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Decision on Request for an Order Prohibiting the Claimant from Revealing Information Regarding the Case, October 27, 1997) (Lauterpacht, Civiletti, Siqueiros) ["*Metalclad*"]; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Procedural Order No. 3, September 29, 2006) (Hanotiau, Born, Landau) ["*Biwater Gauff*"]; *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7 (Award, October 4, 2006), ¶ 16 (Guillaume, Rogers, Veeder) ["*World Duty Free*"]; *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5 (Procedural Order No. 3, January 27, 2010) (Tercier, van den Berg, Abi-Saab).
8. *See, e.g.*, *Amco I*, ¶ 5; *Metalclad*, ¶ 4; *World Duty Free*, ¶ 16.

opposite when it comes to the disclosure of an opponent's materials.[9] Further, there seems to be broad recognition that, even though publication plainly has certain virtues,[10] it can also be disruptive at times, and/or unfairly impact one or more of the parties.[11] For that reason, there seems to be no dispute that there are certain limits in practice to what the parties may say and/or share.[12] (Indeed, even the rules and the treaties that set out a presumption of "transparency" will often contain caveats and exceptions to publication.)[13]

Moreover, and notably, on the practical level, many details about investor-State cases are already available to the public.[14] For example, since the very beginning,

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9. *See, e.g.*, IBA Rules on the Taking of Evidence in International Arbitration (2020), Article 3(13) ("Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfill a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority").
10. *See, e.g.*, Report of UNCITRAL Working Group II (Arbitration and Conciliation) on the Work of its Fifty-Third Session (Vienna, October 4-8, 2010), ¶ 17 ("[E]nsuring transparency and meaningful opportunity for public participation in treaty-based investor-State arbitration was said to constitute a means to promote the rule of law, good governance, due process, fairness, equity and rights to access information. It was also seen as an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such").
11. *See, e.g.*, *Biwater Gauff*, ¶ 136 ("It is self-evident that the prosecution of a dispute in the media or in other public fora, ... may aggravate or exacerbate the dispute and may impact upon the integrity of the procedure. This is all the more so in very public cases, such as this one, where issues of wider interest are raised, and where there is already substantial media coverage, some of which is already being the subject of complaint by the parties").
12. *See, e.g.*, *Amco I*, ¶ 5 (explaining that, even though no rule existed that expressly prohibited the parties from speaking to the media, there nevertheless remained "practical rule [that] both parties to a legal dispute should refrain [from] any [behavior] that could aggravate or exacerbate the [dispute]," and "render[] its solution possibly more difficult"); *Metalclad*, ¶¶ 4, 10 (concluding that, while the parties could not be expected to "refrain entirely from every public utterance mentioning the existence, or speculating upon the possible outcome, of the proceedings," public comments and disclosures could not be allowed to interfere with the "orderly unfolding of the arbitral process," or "the maintenance of working relations between the [p]arties ... ."); *World Duty Free*, ¶ 16 ("direct[ing] the Parties to avoid any action that would aggravate or exacerbate the dispute," and "further direct[ing] that any public discussion should be an accurate report").
13. *See, e.g.*, Dominican Republic-Central America Free Trade Agreement, Article 10.21: Transparency of Arbitral Proceedings ["*DR-CAFTA*"] (establishing a presumption that certain materials will be published, and then stating that "[n]othing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 21.2 (Essential Security) or Article 21.5 (Disclosure of Information)"); *see also* UNCITRAL Rules on Transparency, Article 7(1) ("Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6"), Article 7(7) ("The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consulting with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence[;] lead to the intimidation of witnesses, lawyers acting for the disputing parties or members of the arbitral tribunal[;] or in comparably exceptional circumstances").
14. Such details can often be found in a variety of locations, including the website of an administering institution; the annual reports of a corporation; the regulatory filings of a corporation or sovereign; an online database of arbitration awards; arbitration periodicals;

ICSID has kept certain "registers" that any person may "inspect,"[15] which contain "all significant data concerning the institution, conduct[,] and disposition of each proceeding … ."[16] Further, in the many years since the media and others began asking for access to ISDS awards,[17] numerous parties have answered the call. Nowadays, it is common for parties to publish investment awards and decisions.[18]

Thus, it would seem that what we are really debating is whether the parties also routinely should publish their written and oral submissions.[19]

***Fourth*, no one needs to lose this debate.** And no one *can* lose it, as both sides can be right. After all, the decision is up to the parties, and different sets of parties may reach different agreements about what approach would be best for their case. There are many ways that the parties could balance transparency concerns with other important objectives.[20]

Further, and as noted above, publication can be both copacetic and worrisome; as a practical matter, that means necessarily that there is not only one correct answer here. In fact, there may even be ways to achieve the objectives of more than one side of debaters. For example, if there are any concerns that the real-time publication of pleadings would be problematic—e.g., because there are often several-month stretches between a memorial and a counter-memorial—the parties could always consider agreeing to release the submissions only at the end of the case. This might serve to address calls for more access while assuaging the fears about a "trial by media."

***Fifth*, we could be discussing so much else.** Instead of just debating an issue that is not ultimately up to conference-goers to decide, why not put our minds to the task of actually making something out of "Arbitration's Printing Press?" The materials

academic journals; and listservs. A basic search through these resources can yield, among other things (1) the names, nationalities, and CVs of the arbitrators; (2) the identity of the parties' representatives and their contact details; (3) the principal procedural events; (4) a summary of each party's key arguments and evidence; (5) the identities of the attendees at the hearings; (6) the tribunal's final ruling and reasoning; (7) the total amount of procedural costs; and (8) the fees and expenses incurred by each party.

15. ICSID Financial and Administrative Regulations (1968), Regulation 23(2).
16. *Id.*, Regulation 23(1). These registers are now published online (and have been for more than a decade).
17. *See, e.g.*, A. DePalma, *NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. Times, March 11, 2001.
18. For example, the website "italaw" contains rulings (and/or other materials) from 1,199 different investor-State cases. *See* https://www.italaw.com/browse/claimant-investor/all (last visited June 30, 2021).
19. Some arbitration agreements already contemplate the publication of these sorts of materials. *See, e.g.*, DR-CAFTA, Article 10.21.1 ("Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 10.20.2 and 10.20.3 and Article 10.25; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal").
20. *See, e.g.*, The Tea on International Arbitration Podcast: The Tea, Czech Edition (Part 1), *available at* https://anchor.fm/dcbartea/episodes/The-Tea--Czech-Edition-Part-1-etssbo (last visited June 30, 2021) (explaining that "transparency is only one of the virtues you want to see in any investment arbitration proceedings," and that any decision about what to publish must also consider such issues as equality of arms and efficiency).

that have already been published recount some of the most fascinating stories in the world, and—collectively—they surely have lessons to teach us. Should we prepare a modern treatise on government? Are there other ways to make use of the printing press? (Or other modes of communication to try?)

Let us look ahead to the future, and put the old debate into retirement.