Article

Chi. & WTO Rev. 2015:1; 7-34
http://dx.doi.org/10.14330/cwr.2015.1.1.01
pISSN 2383-8221

CWR
China and WTO Review

# Transparency Standards in International Investment Agreement Negotiations: A Chinese Lawyer's Perspective on the UNCITRAL Rules

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The 47th Session of the UNCITRAL finalized the draft Convention on Transparency in Treaty-based Investor-State Arbitration. It aims to provide a mechanism to allow the UNCITRAL Rules on Transparency to be applied to investment dispute arbitrations mandated by investment treaties concluded before April 1, 2014. This paper intends to examine these UNCITRAL Rules on Transparency and the draft Convention on Transparency. It is particularly in contrast with the relevant rules in the NAFTA, the U.S. Model BIT 2012 and the ICSID Rules 2006, to see if transparency can be enhanced in treaty-based investor-State arbitrations and to extrapolate the implications of the Rules on Transparency and the draft Convention for China's strategy in BIT or FTA negotiations amid the trendy advancement of transparency standards.

**Keywords:** Rules on Transparency, Transparency Convention, Treaty-based investor-State disputes arbitration; Arbitration rules

## I. Introduction: Why is Transparency Questioned in Investor-State Arbitrations?

Foreign direct investment ("FDI") was booming in the late 1990s, with the in-

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crease in bilateral and multilateral agreements. Subsequently, investment disputes began to surge, altering the landscape of the FDI regulation.[1] By the end of 2013, the number of bilateral investment treaties ("BITs") and free trade agreements ("FTAs") containing provisions on investment (hereinafter international investment agreements, or "IIAs") were as many as 3200,[2] more than 2300 of which are in force today.[3] These patchworks of IIAs have interwoven with one another, dubbed as "a spaghetti bowl."[4] Arguably, the boom in international investment activities, combined with an increasingly dense international network of treaties providing for investor-State dispute settlement ("ISDS") arbitrations, gave rise to the massive outbreak of treaty-based investor-State dispute arbitrations, i.e., investment arbitrations.[5] The UNCTAD World Investment Report 2014 indicated that investors had, by far, launched at least 568 known ISDS cases pursuant to IIAs.[6]

Arbitration of investor-State disputes is the key to understanding the investment relationship between countries that are governed by IIAs. However, it is not without flaws. One of the controversial problems in the arbitral proceedings of investment disputes is 'transparency.' A default to confidentiality and privacy in investment arbitrations has its historical origins from commercial arbitrations in accordance with the United Nation Commission on International Trade Law ("UNCITRAL") arbitration Rules or other arbitration rules of leading arbitration institutions. *E.g.*, documents submitted to the arbitrators are kept confidential, hearings closed to the public and sometimes the public does not even know of the existence of such cases.

However, there is a counter-tension in the transparency debate, as well. The large number of arbitrations have raised the issue of transparency at the international level, which would guarantee a more accountable, democratic and legitimate system of global governance. ISDS thus could not ignore this general trend, considering its open nature of dispute settlement especially in international legal institutions such as the World Trade Organization ("WTO"), the International Court of Justice ("ICJ"), and other human rights bodies.

As the New York Times pointed out that: "The secret conference held by the arbitrators on Investor-State Disputes have reached arbitration awards that abolished a state's law, doubted the judicial system and challenged the environmental regulations,"[7] the ISDS mechanisms inclined to protect the investors' interests