CHAPTER-11

TRANSPARENCY MOMENTUM IN INTERNATIONAL INVESTMENT ARBITRATION AND ITS IMPLICATIONS FOR CHINA'S INVESTMENT ARBITRATION PRACTICE

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I INTRODUCTION

Transparency, as opposite to confidentiality or secrecy attached to privacy, roots deeply in western culture. It is a concept often associated with public-related situations or where public interests get involved. Transparency, as a demand, is often advocated by public to regulate or oversee government, public institutions, or certain type of specialized behavior of public power, such as judicial adjudication or crisis public relations.[1] It is therefore impossible to provide a general definition of transparency for all fields of international law. While in the arena of dispute settlement, it is often associated with access to information and activities related to the proceedings and outcome of dispute resolution, which could simply be referred to as procedural transparency in lawsuit in court and more lately in international investment arbitration. It is also in this sense that the concept of transparency is used in this chapter, although it may contain much more broad meanings even in international investment law field.[2]

The international investment law regime is mainly composed of approximately 3000 international investment agreements or treaties (hereinafter referred to as IIAs) follows

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[1] Beyond these public areas, there seems to be a trend that the need of transparency also extends to personal or private life and has become a moral standard to judge people's conduct, since "A narrative of transparency permeates our daily life…transparency is all around us." See Andrea Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law' in Andrea Bianchi and Anne Peter(eds) *Transparency in International Law* (Cambridge University Press 2013).

[2] Although in international investment law regime, there are different understandings toward transparency, such as the transparency process for investment treaty drafting, information concerning the substantive laws and regulations in host state, among others. This chapter simply focuses on the transparency during dispute settlement proceedings, namely procedural transparency. For a broad sense of transparency in International investment law, see Julie A. Maupin, 'Transparency in International Investment Law: The Good, the Bad and the Murky', in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013).

similar patterns,[3] which often include substantive protection provisions, and a procedural mechanism to enforce these protection standards, referred to as investor-state arbitration. Investor-state arbitration features that an investor as claimant could bring a claim directly against the host state to an *ad hoc* arbitral tribunal to hear a dispute. Even though the IIA and investor-state regime have made its contribution to the rule of law in international investment law, it attracts increasing large amounts of criticism in recent years, along with the rise of anti-globalization movements worldwide. Apart from academic discussion, controversies also come from the media and public, and this contagious distrust and legitimacy crisis have even spilled over into politics. Opponents worry that secretly conducted arbitration proceedings in some cases may incur national security issues, and economic safety problems, among other concerns. Among these opponent voices, lack of transparency, or the doubt over justice being done "behind closed doors" has become one of the first criticisms involving the arbitral proceedings.

Under such a backdrop, transparency, has been emphasized and remedied significantly in the reform of investor-State arbitration in the last decade, and the foremost and pre-eminent milestone of this transparency transformation is the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (hereinafter referred to as the "Transparency Rules") and of UN Convention on Transparency in Treaty-based Investor-State Arbitration (hereinafter referred to as the "Mauritius Convention on Transparency").

II UNCITRAL RULES ON TRANSPARENCY AND ITS APPLICATION

2.1 Transparency Rules and Its Significance

Before the Rules and Convention, regulations on the transparency in major sources, such as treaties and disputing party agreements, mostly reserved the discretion to decide on the extent of transparency to the parties. And transparency provisions were typically included in treaties involving parties of North American States, with the Chapter 11 of NAFTA as the model. Although the ICSID Rules in 2006 had permitted attendance of third parties at hearing unless a party objects and it has allowed partial publication of its awards, for other matters involving the transparency and publicity, it still left a great discretion for parties to deal with on a case-by-case basis.

The UNCITRAL Rules, along with Convention on transparency in Treaty-Based Investor-state Arbitration is the first attempt of its kind to codify the standards of procedural transparency in institutional documents, turning the principle into law. These two instruments have been made as a response to the questioning of procedural issues of investment arbitration. By requiring disclosure of a wide range of information submitted to and issued by tribunals and facilitating participation of *amicus curiae* and non-disputing State parties, it aims to bolster the legitimacy and confidence of the investment treaty arbitration.

However, despite the unprecedented high standards of transparency it has

[3] The latest figure according to International Investment Agreements Navigator is 3332, including BITs and broader sense of bilateral or multilateral FTAs or trade and economic agreements containing a chapter or provisions on investment promotion and protection. 'International Investment Agreement Navigator'<http://investmentpolicyhub.unctad.org/IIA> accessed 1 January 2018.

established, the rules have their scope of applicability, as the name clarified, as they only apply to treaty-based investor-state dispute settlement, which leaves out all other possible arbitrations that could be put into the category under the name of Investment Arbitration.

In total 8 articles, the UNCITRAL Rules stipulate three forms of transparency requirement: the first form of transparency refers to publication of information and documents. The content of publication includes two parts: the first is information about the existence of such a case, including name of the dispute parties, the economic sector involved and the investment treaty based on which the dispute is brought up;[4] The second kind of publication includes documents generated throughout the proceedings.[5] The second form of transparency is submission by a third person or by non-disputing parties to the treaty involved.[6] The third one refers to hearings open to the public or public access to hearings.[7] In order to collect and make sure the relevant information is published to all, the Rules designate the Secretary-General of the UN or a special institution to serve as a centralized repository to function as an information hub for all investment arbitration conducted under the Rules.

The Rules have been viewed broadly as "the most wide-ranging set of transparency commitments seen thus far in international practice", signifying the UNCITRAL's endeavor to lead the reform of transparency standard in investment arbitration.

2.2 Three Elements within Transparency Requirement

To look into general transparency or confidentiality articles, three distinct but inter-related elements of obligations under the concept of transparency could be distilled, which are the right of public access, the obligation of information publication, and the disclosure duty.

2.2.1 Public Access

Public Access refers to an individual citizen's right to submit by written or physically attend or get access to proceedings. Physical attending entails open hearing to the public.

In UNCITRAL Rules, open hearing for public is set as a principle, with exceptions where it is necessary to hold private of the hearings. And it also imposes obligations of logistical arrangements to facilitate this kind of public access.[8] Besides open hearings, third party participation is largely included in the category of public access, if the public shrinks to only interested parties instead of all citizens.[9]

Although public access is often discussed as part of transparency, there is a slight

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[4] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014, Article 2.
[5] Ibid Article 3.
[6] Ibid Articles 4 & 5.
[7] Ibid Article 6.
[8] Ibid.
[9] The UNCITRAL Rules contain two kinds of third-party submission: the first one refers to third person, person that is not a disputing party, and not a non-disputing Party to the treaty; the second one refers to a non-disputing Treaty Party. The matters touched by the first kind of submission are limited to be "within the scope of the dispute", while the second kind of third-party submission could, however, mainly regards to "issues of treaty interpretation". Ibid Article 4.

distinction. When public access as a right of all citizens is normally linked to the notion of a political community, whereas transparency largely refers to publication of information about a decisional process,[10] All in all, public access could be seen at least as a mechanism for promoting transparency, although not a core requirement to transparency.

2.2.2 Publication

There are two kinds of information to be published:

2.2.2.1 Public availability of the information on existence of disputes;

When an arbitration case gets officially registered, the tribunal or relevant institution normally has the obligation to publish the facts that there exists an arbitral proceeding to the public. Most of time, this publicity does contain much details about the facts and proceedings, except for the name of disputing parties, the investment treaty involved, and so on, especially when the case is still pending. This publicity is important for the public to know about the existence of disputes and to keep track of it, and for the arbitration academia, it is also important for academic exchanges or other education or academic purposes. Sometimes, the involved company itself also has the duty to disclose as required by relevant laws, as financial disclosures sometimes are already an important source of information about international arbitration cases.[11]

2.2.2.2 Information about arbitration proceedings.

Publication here refers to activities of rendering information generated throughout arbitral proceedings available or accessible to the public. It is the core virtue of procedural transparency so that it could be understood as transparency requirement in its narrowest sense. Publication as transparency is important for any decision-making body in pursuit of good governance and justice. As distinguished with public access as individual procedural rights, publication of information (public availability of information) has become more and more a precondition of legitimacy of a system, because it aims to monitor the adjudicator, and offer an opportunity for the public to critique their process. (WTO, ICSID)

While in traditional international commercial arbitration field, publication was not important at all, since normally commercial arbitration is considered as private dispute settlement mechanism, and to be conducted in a confidential way with all its relevant information available only to the disputing parties or other closed limited arbitration participants.

2.2.3 Disclosure

Disclosure serves as an obligation to have substantive information reach to the recipients so that they could make strategic choices. Therefore, unlike publication of information, it mainly serves insiders of arbitration, not to satisfy outsiders or more general public's interests and concerns. The most notable disclosure obligation under arbitration is the one undertaken by arbitrators to disclose his personal information about any facts or circumstances which may affect his/her impartiality or independence to the institutions and

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[10] Catherine A. Rogers, 'Transparency in International Commercial Arbitration', (2006) 54 Kansas Law Review 1301.
[11] Ibid.

parties.[12]

In the Rules, the disclosure duty also reflects in where third person submission should include information of connection the third party has with disputing party.

In general discourse, arbitrators and other arbitration practitioners all tend to honor confidentiality as crucial feature of proceedings of commercial arbitration, and the confidentiality not only refers to the requirements that keep the arbitration closed to small circle of its participants, but also to requirements that keep parties inaccessible from certain information during the ongoing proceedings. (In practice, some written record of oral hearing of trial is not even available to parties until the award is rendered; besides, how arbitrator discuss and consider about the case's facts and reasons, to some extent, are confidential to parties as well.)

Therefore, whether it is necessary to disclose all information about the process of arbitration to parties for them to make strategic choices, or keep certain degrees of opacity on the specific decision-making process of the tribunal, just like the way conducted in the court of law, is a question worth discussing. While since it is beyond normal understanding of procedural transparency, this chapter will not dwell upon this issue.

2.3 Comparison with Articles of SIAC IA Rules

Singapore Investment Arbitration Rules are a set of arbitration rules for "the conduct of international investment arbitration", containing articles on transparency and confidentiality, issued by Singapore International Arbitration Centre, a leading regional international arbitration institution. It declares in its introduction that the Rules have been developed with "a view towards the issues unique to international investment arbitration". While as one could immediately find its pro-confidentiality stand on proceeding matters in arbitration by simply checking the specific articles on confidentiality and publication.[13] Apparently, procedural transparency seems not to be what SIAC recognized as one of the unique issues of the broad investment arbitration.

Despite its obvious differences in nature of institutions (one is an UN body with mandate to promote harmonization and modernization of international trade law, the other is a regional arbitration institute), there is something common to them, which also constitutes the foundation of this comparison: both rules contain specially designed procedural rules on transparency for investment arbitration to be more visible and available to the public, and both stand for certain degrees of breakthrough in its own perspective.

The SIAC transparency rules (in broad sense) include: a. third party submission: Non-disputing Contracting Party and Non-disputing Party; b. publication of limited information on proceedings (including nationality of the parties, the identity and nationality of the members of the Tribunal, the treaty, statute or other instrument, and information about

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[12] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014, Article 4.2(b). Except for explicit rules, there are also guidelines for international arbitrators to disclose, such as IBA Guidelines on Conflicts of Interests for International Arbitrators. For more analysis on the guidelines, see Catherine A. Rogers and Idil Tumer, 'Arbitrator Challenges: Too many or not enough?' in Arthur W. Rovine (ed.) *Contemporary Issues in International Arbitration and* Mediation (Brill | Nijhoff 2015).

[13] SIAC Investment Arbitration Rules (2017), Articles 37 & 38.

the date of commencement and whether the proceedings are ongoing or have been terminated.) and redacted excerpts of reasoning and decisions on challenges to arbitrators.

In contrast to UNCITRAL Transparency Rules, apart from what has been set out in Article 38.2, all other information relating to the proceedings and the award arising from the proceedings should be treated as confidential in SIAC IA Rules. Other confidential duties including pleadings, evidence and all other materials and documents produced in the proceedings, and discussions and deliberations of the tribunal. Besides, unlike UNCITRAL Rules, all meetings and hearings under SIAC IA Rules must be in private, and "recordings, transcripts, or documents used in relation to the arbitral proceedings shall remain confidential".[14]

SIAC IA Rules, unlike UNCITRAL Rules, uphold the confidential essence of arbitration, despite it shows some degree of support for the procedural transparency. But it is simple to understand this approach. For one thing, it is a regional arbitration institution; for another, these rules are designed for investment related disputes in a broad sense, not restricted to investor-state arbitration or even treaty-based investor-state arbitration.[15] It applies to both commercial arbitration, which may arise based on contract between investor and enterprises of host states, or host state itself, and investment arbitrations (in its narrow understanding). Thus, it is improper to lift the standard to the highest to make that purely private commercial dispute highly transparent to the public eyes. Therefore, these rules make a compromise on this issue of transparency and reserve both confidentiality and transparency rules for prospective investment arbitration cases.

2.4 Findings

From previous observations, it could be found that the differences behind the contents of the transparency requirements could be attributed to the differences of scope of application of such rules and requirements. Since UNCITRAL Rules were specifically made for a certain type of investment arbitration, it could lift the standards of transparency up to the highest and fullest point and turn procedural transparency into a principle. While since SIAC Rules try to be as inclusive as possible so that it could be adapted into a wide range of types of arbitration, it has a relatively low standard on transparency. Therefore, confidentiality has still been held as a fundamental principle, not an exception.

The connotation and materials of transparency and confidentiality vary in different contexts. So just to discuss them in a general sense does not help us to understand this myth of transparency. Procedural transparency has a bunch of different meanings, including public access, publication of information, and disclosure of information; each set of rules may set different levels of bars on these standards based on its own consideration.

Even in commercial arbitration, where confidentiality is the key feature, it also boasts of its transparency procedures and rules, although it uses this word to signify the openness and fairness of its management or operation mechanism, and never attempt to show

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[14] Ibid Article 21.4.

[15] The concept of Investment Arbitration is very unconcise, as it does not distinguish treaty-based arbitration from contract-based investor-State arbitration and does not distinguish from investment-related commercial arbitration, which leads to confusion and misuse of standards in discussion on transparency issues.

that the proceedings of individual cases will be open and accessible to people or organizations other than the parties.

Finally, besides the contention between transparency and confidentiality, there is also a tense between transparency and conductivity and efficiency. For instance, in the reasoning of *Biwater Gauff v. Tanzania* case,[16] the tribunal weighed two competing interests: the need for transparency, and the need to protect procedural integrity of the arbitration. The tribunal stated "there is no provision imposing a general duty of confidentiality in ICSID arbitration, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources."[17] The consideration and balance of other different kinds of values in arbitration should be considered and struck as well.

III TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION (ISDS): ANSWERS TO THREE BASIC QUESTIONS

3.1 Transparency for Whom?

There have been a lot of discussion on why transparency is needed or the advantages of it,[18] but it is still unclear to many on the question of for whom it must have.

International Investment Arbitration, in contrast with commercial arbitration, is a very uncertain and inaccurate concept, as it could both mean the investor-state arbitration conducted under international investment agreements in its narrowest sense or could be understood to include all kinds of investment-related arbitrations. If the second meaning is taken, it would be much more complicated as it blurs the boundary of the traditional division of commercial and investment arbitration, which is exactly the SIAC's approach to compose deliberatively its relevant articles on transparency and disclosure.

If emphasis on confidentiality in investment arbitration is to maintain attraction to its potential users, investors and states, then promotion of transparency in international investment arbitration tries to draw the pendulum to be closer to the center. It serves as a tool, not a paramount target or highlight of features in investment arbitration.

Therefore, transparency, as a general element, should be emphasized where public interest gets involved, mostly when state is a disputing party.[19] And transparency as a procedural principle should be stressed in treaty based investor-State Arbitration only, as it is investment protection treaties that have rendered states (as representatives of the general public) undertake the risk of high costs input into the arbitration and potential compensation imposed by the tribunal.

3.2 The More the Better?

As above mentioned, transparency requirement does not mandate that all relevant case information should be disclosed and whole process of proceedings must be open to

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[16] ICSID Case No. ARB/05/22, Procedural Order No.3, 29 September 2006.

[17] See Christina Knahr and August Reinisch, 'Transparency versus Confidentiality in International Investment Arbitration-The *Biwater Gauff* Compromise', (2007) 6 The Law and Practice of International Courts and Tribunals 97.

[18] Ibid 110; See also J. Delany, D. B. Magraw, 'Procedural Transparency', in P Muchlinski, F Ortino and C Schreuer (eds), *The Oxford handbook of International Investment Law* (Oxford University Press 2008) 761-762.

[19] Knahr and Reinisch (n 17) 111.

public. Here comes the question, will it be preferable to have more transparency in investment arbitration, as the Working Group explained that the provisions did not intend to ensure to impose a 'ceiling' on levels of transparency?

The answer could be negative, due to the following reasons: first, the Rules contains limitation on either the degree and contents of publication of information or documents, and the way these publications will be conducted. This is because inappropriate and unduly publication of all relevant information, such as the exhibits of parties may lead to adverse influence to the integrity of proceedings; Second, due to transparency duty, such as opening hearings require tribunal to make logistical arrangements and other kinds of expenditures to facilitate this kind of public access, it actually impose an extra substantial burden on tribunals to consider feasibility in view of its own ability and resources. Thirdly, the Rules also contain exceptions to transparency, which is related to confidential or protected information. These exceptions, by no means, would diminish even if the transparency requirements enlarge by themselves.

Actually, as foregoing paragraphs have mentioned, transparency as a tool to protect public interest in investment arbitration shall not be uplifted to be a paramount goal, as transparency itself is and should not be seen as the goal in investment arbitration, so is confidentiality in commercial arbitration, although the latter is usually seen as an inherent characteristic. Both transparency and confidentiality should be treated as of instrumental character in arbitration mechanism as they serve to justice, efficiency, reliability and other values and objects of dispute settlement mechanism and represent a broad range of stakeholders' interests during and after the proceedings.

3.3 Transparency versus Confidentiality?

In commercial arbitration, confidentiality is thought of as an important advantage and one of the hallmarks to protect the interests (privacy) of both parties and their reputation.[20] Traditionally, confidentiality signifies the *ad hoc* essence of international arbitration which aims to resolve "individualized disputes between individual parties and only those parties."[21] Even in today's most commercial arbitration practices, this advantage contributes a large part of consideration when businessmen decide to choose arbitration over lawsuit to resolve disputes. In commercial arbitration, confidentiality is still the dominant principle to be followed and valued.

Despite the fact that transparency and openness needs have been raised largely and taken as reform solution because of public interest concern arising from investor-state arbitration cases. It does not mean that transparency is only an issue facing investment arbitration. Since state or state entity or instrumentality can be the disputing party in commercial arbitration, public interest concern could arise in such state-involved cases, especially when matters or measures under determination relate to agriculture, state's oil, gas and other natural resources, or telecommunications get involved in cases. Commercial arbitration confronts the tension between transparency and confidentiality as well and there

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[20] Ibid 109.

[21] Yas Banifatemi, 'Mapping the Future of Investment Treaty Arbitration as A System of Law', in *Proceedings of the 103rd Annual ASIL Meeting* (American Society of International Law, 2010).

are even argument that the principle of confidentiality should not be considered as *lege lata.*[22] In practice of national courts, the idea that arbitration is *per se* confidential or the assumption that confidentiality is the inherent nature and feature of all arbitration had been questioned as early as in 1990s. Unlike in academics, there was no general or unified recognition of duty of confidentiality in many arbitration practices.

On the other hand, secrecy has its values in investment arbitration, as it could serve as a means of obtaining flexibility in arbitration, and thus makes investors and host states better to work out settlements. Secrecy could also be essential to the efficiency of international institutions.[23] Therefore, as confidentiality in commercial arbitration should not be regarded as an absolute correctness or nature to persist in or sustain, transparency in investor-state arbitration, in a general sense, should not be understood and fostered as a force of pursuit to disclose all kinds of information related to specific proceedings to everyone. Neither confidentiality nor transparency is the goal of arbitration, the integrity of proceedings, and the perfect resolution of disputes to satisfy interests of parties, are what each individual case should seek for. The interests behind confidentiality largely belong to those of disputing parties, while the interests of transparency are more beneficial to many other participants or stakeholders of the whole system, such as arbitrators, scholars, the general public, or the group would be influenced by the potential award.

Therefore, transparency and confidentiality are not two rival and competing values exclusively to each other at all, they could co-exist in arbitration sometimes. The promotion of one, does not necessarily lead to downplaying and diminishing the other.

IV IMPLICATIONS FOR CHINA'S INVESTMENT ARBITRATION PRACTICE

In contrast to other developing countries, due to different reasons, China has been less frequently involved in investment arbitration cases, although it has signed plenty of BITs and FTAs containing investor- state arbitration and China has joined ICSID convention as early as in 1993.

As an important player, China plays both roles of source and destination of trans-border investment flows. In the face of encouraging internal capital to move out and foreign investment to continue pouring in, in order to respond to ISDS reform and transparency innovation, China has to take measures to engage in this momentum of transparency in different arenas and aspects, at different levels, to protect its own nationals and foreign investors' interests and encourage its arbitral institutions to take a share in the global market of international investment arbitration. This following part will discuss several issues about China and its nationals (including institutions) on the transparency rules and requirements.

4.1 Should China Join the Mauritius Convention on Transparency?

Although Rules on Transparency is the first comprehensive regulation on transparency requirements, its applicability limits the role it could play, as the Rules effective

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[22] Jan Paulsson, Nigel Rawding, 'The Trouble with Confidentiality', [1994] 5(1) ICC Bulletin 48.

[23] Emilie M. Hafner-Burton, Zachary C. Steinert-threlkeld, and David G. Victor, 'Predictability Versus Flexibility' (2016) 68(3) World Politics 413 <https://www.cambridge.org/core/journals/world-politics> accessed 1 October 2018.

as of 1 April 2014 only have mandatory effects on arbitrations initiated under UNCITRAL Arbitration Rules pursuant to investment treaty concluded on or after that particular date.[24] In order to broaden the scope of applicability of the Rules, the Mauritius Convention has been drafted so as to overcome the hurdle imposed by Article 1(2) and cover arbitrations to treaties concluded before 1 April 2014, which is of the great number already in force, and also to any investor-State arbitration (not only limited to those initiated under UNCITRAL Arbitration Rules). Moreover, the Convention has designed the mechanism of "unilateral offer of application", which means as long as a state joined the Convention and has not made any reservation, it will offer the application of the Rules unilaterally, and the claimant, whether or not from a state that has also joined the Convention and has not made reservation, could accept the use of Rules on Transparency.[25] The Convention does not require specific form for investor to agree to application of the Rules. Normally claimant could indicate in its notice of arbitration that it accepts the offer of application, or it could express agreement in written or orally during a procedural conference.[26]

At the time of this writing, there has been 23 countries that have signed the Convention, among them 5 have rectified it. Considering China's ever-growing role in international investment, it is high time to consider joining the Convention.

Although the convention aims to supplement existing investment treaties with obligations of transparency in investor-state arbitration, it also leaves the party flexibility to formulate reservations. Therefore Chinese government, if not ready to fully embrace this transparency test, could utilize this reservation mechanism sufficiently to limit the application of the UNCITRAL Rules on Transparency to selected investment treaties where China has been a party (via declaration in the form of a negative list), or just limit it to arbitrations under the UNCITRAL Arbitration Rules.

China's stance of active engagement into this transparency reform would be helpful to its foreign investment activities under the Belt and Road initiative, where China playing as the regional important investor could establish a good model for the relevant countries, as the use of Rules on transparency could be seen as efforts and attempt to balance both public interests of host state and interests of the dispute parties and also to resolve dispute in a fair and efficient manner.

4.2 Transparency Clauses in China-related Investment Treaties and Its Inspiration to Belt and Road Initiative

In first two generations of BITs China has contracted, transparency or such requirements and provisions are rarely mentioned, let alone a single clause would be specially designed on Transparency. While more recent IIAs, either BIT or FTAs, have seen a shift to a detailed stipulation on issues of proceeding transparency or confidentiality. In China-Canada BIT (2012) and China-Australia FTA (2015), provisions on third party participation and

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[24] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014, Article 1(1).
[25] Ibid Article 2.
[26] Lise Johnson, 'The Mauritius Convention on Transparency: Comments on the treaty and its role in increasing transparency of investor-State arbitration', *CCSI Policy Paper 7* (Columbia Center on Sustainable Investment, 2014) <http://ssrn.com/abstract=2848333> accessed 1 October 2018.

public access to hearings and documents have been found.[27]

The wordings used in both treaties are also more in details. From the perspective of intensity, the requirement of transparency is more comprehensive and stronger than ICSID Rules for Arbitration and less intense than that of UNCITRAL Rules. It recognizes great decision power on contracting states (as host state) to decide the existence of public interest, so as to enlarge the scope of transparency requirement.

Among the 60 or so countries along or around the Silk Road Economic Belt and 21st Century Maritime Silk Road, economic development level, investment environment and legal system vary immensely between one and another. So, it is impossible to uniform the conduct of arbitration proceeding and its transparency requirements at the same level. Apart from Asia Infrastructure Investment Bank (AIIB) and Silk Road Fund, there is yet any multi-lateral treaty or institutional mechanism to be established, let alone a uniformed dispute solution center.

The more practical way for Chinese government or for governments of other states is to re-negotiate with each country on BITs or other types of IIAs containing the ISDS dispute settlement provisions and re-set the ISDS dispute settlement and adjust transparency requirements to each individual state's specific circumstances. For states which are members of Washington Convention, and traditionally willing to choose the ICSID arbitration mechanism or UNCITRAL Rules or other investment treaty arbitration rules to settle dispute, the tradition should be respected.

In order to add more flexibility to it, relevant belt and road states could write transparency requirements according to their own needs and practical conditions. When there is a conflict between the transparency requirements set in the Rules on Transparency and those in investment treaties, the provisions of treaties should prevail. This way it will leave the authority to decide on transparency degree to the hands of treaty parties, instead of the tribunal via its discretionary power pursuant to understanding of relevant transparency rules, or foreign investors through selection of different ISDS mechanisms and arbitration rules.

4.3 Chinese Arbitral Institutions' Engagement in Investment Arbitration and Its Transparency Requirement

In investment agreements concluded between China and other states[28], there are normally four types of claims (in the form of IS arbitration) for investors to choose, a. to submit a claim under the ICISD Convention and the ICSID Rules of Procedure for Arbitration Proceedings; b. Under the ICSID additional facility Rules; c. Under the UNCITRAL Arbitration Rules; d. if both claimant and respondent agree, submit a claim to any other arbitration institution or under any other arbitration rules.

According to these provisions, ICSID as a special investment dispute settlement mechanism, is not the only option for investors to utilize. Although known cases involving Chinese investors or Chinese governments are all ICSID cases, it does not exclude the possibility that other institutions rules or *ad hoc* arbitration rules could be adopted for

[27] China-Canada BIT (2012) Article 27, 28 and 29; see also China-Australia BIT (2015), Article 9.17.

[28] There are in total 145 China-related BITs and 23 treaties with investment provisions, available at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu> accessed 1 October 2018.

proceedings guidelines, as long as both parties to the dispute agree. As an economy of top amounts of inbound and outgoing investment, in order to protect Chinese overseas investors and its own public interests, China needs to take actions to improve its arbitration-related legal system, so as to take a fair share in the market of investment arbitration services.

For Chinese arbitral institutions to be capable of administrating investment treaty arbitration, under current legal circumstances, it faces a few obstacles. Firstly, there is lack of legislation support. The Arbitration law of the PRC, limiting its application scope into contractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organizations that are equal subjects, is a law for commercial arbitration and non-*ad hoc* arbitration. While for investor-state treaty arbitration to be conducted in China, especially under Chinese institutions' administration, there must be clear legal authorization that Chinese institution could accept cases of such nature. Second problem is about enforcement. Although Convention on the Settlement of Investment Disputes between States and Nationals of Other States (known as Washington Convention) has set out regulations on recognition and enforcement of the Award in its Chapter IV Section 6, and has made clear that arbitration under ICSID is completely a self-autonomous system in terms of recognition and enforcement, free from national courts' supervision and review. However, in order to make sure the ICSID award to be really enforced within Chinese territory, it has made relevant arrangements in domestic legislation, while in over 20 years after its accession into the Convention, it has not made such arrangements. Likewise, for an award rendered under possible Chinese arbitration rules, their recognition and enforcement, in the absence of special regulations on operations under Chinese law, could also face difficulties. To make sure Chinese institution qualified under Chinese law to accept investment arbitration, except for aforesaid obstacles, there are also trust problem to investors, especially for foreign investors to trust and be willing to submit claims to Chinese arbitral institutions.

As the author has noticed, despite these barriers and difficulties, there are several attempts among Chinese institutions, and two leading arbitration institutions have made innovations in this field. The Shenzhen Court of International Arbitration issued its updated 2016 Arbitration Rules, and guidelines for the administration of arbitration under the UNCITRAL Arbitration Rules, at the end of last year, and with these new rules, it proclaimed that it could accept arbitration cases related to disputes between states and nationals of other states.

In September 2017, CIETAC also issued its Arbitration Rules for international investment dispute and claims to be the first international investment arbitration rules in China. Different from SCIA's way, CIETAC's new investment rules has absorbed many advanced experience and practice in this field, with increased transparency as its highlights. Except for slight difference in the terminology of types of documents, CIETAC's new Investment Arbitration Rules almost absorbed all transparency provisions in UNCITRAL Rules on Transparency, including publication of various kinds of written documents generated throughout the proceedings; submission by a non-disputing party to the treaty and by a third person; public hearing as the principle.

Both SCIA guidelines and CIETAC's Arbitration Rules have made Hong Kong the defaulted Place of Arbitration. While the difference lies in that in SCIA mode, it uses

UNCITRAL Arbitration Rules (2013) to apply transparency rules, while in CIETAC case, the institution itself has made a special arbitration rules with transparency provisions. In both Modes, transparency requirement would render the arbitration proceedings and its outcome more reliable for participants, more traceable for the public, so that the seeds of distrust and doubt to the legitimacy would not be buried at the first step.

Another difference lies in the concept of investment dispute (or arbitration), in the Jurisdiction Clause of SCIA 2016 Rules, it provides, it accepts arbitration cases related to investment disputes between states and nationals of other states, but it didn't explain the investment disputes further, so it leaves uncertainty on the potential types of investment arbitration that could be brought into the institution. In contrast, Article 2 of CIETAC's Investment Arbitration Rules provides, it accepts investment disputes between investor and states, initiated based on treaty, contracts, laws and other documents. This has enlarged the scope of investment arbitration and includes other kinds of investment-related arbitration subject to its jurisdiction.

To build a comprehensive Center or Court for international arbitration in China is a hot topic in recent years. The conception of Arbitration Center has its realistic purpose, which is to provide a sound legal protection for Chinese business to go out and go global.[29] For countries along and around the Belt and Road, it is also necessary to build up a comprehensive and international dispute settlement institution, to offer an extra option other than the traditional existing dispute settlement institutions for investors to choose.

Since there is no multi-lateral treaty mechanism, and only a network of FTA and BIT among different countries, a uniformed institution would help to reach a relatively common understanding or interpretation when those treaty provisions are applied in relevant cases. When conducting investor-state arbitration, depending on the applicability of a treaty or the broad scope of investment arbitration, relevant transparency requirement could be enforced. However, a minimum standard of transparency should be satisfied in this unified mechanism, which could include third-party submission, publication of case existence information or other basic case-related information, and publication of awards, subject to redaction of confidential information.

V CONCLUSION

Legal phrases and terms were created to enhance the efficiency of dispute resolution, however, words or expressions with multiple meanings or bearing similar but different contents can beget misunderstanding and disregard context and function. Transparency in investment arbitration is just such an example. To say procedural transparency should be held as a principle in investment arbitration tells only part of the story. The issue is not about whether certain kind of arbitration should be more transparent or stay private. What matters is

[29] Although theoretically, over 240 existing Chinese arbitral institutions all could accept international commercial disputes, as well as investor-state arbitration, in the same way as CIETAC and SIAC did, the problem is that Chinese institutions are generally less attractive to potential clients of arbitration. According to research of China Council for the Promotion of International Trade, there is a saying of 'three 90%' with regards to Chinese arbitration practice: 90% of Chinese enterprises would choose arbitration to solve the disputes arising from foreign economic exchanges, and 90% of these cases are brought to foreign arbitral institutions, and among those submitted to foreign institutions, 90% has lost the cases.

what constitutes the specific content of transparency, in what kind of context transparency has been stressed, who should decide what kind of transparency, and where those transparency requirements are regulated. As shown in this chapter, this quasi-principle of transparency owns a chameleon-like quality that changes its colors according to different arbitration rules and investment treaties.

Transparency, as an issue, has been emphasized and remedied in the reform of investor-State arbitration. The UNCITRAL Transparency Rules, along with UN Mauritius Convention on Transparency, as the first attempt to codify standards of procedural transparency in institutional documents, has been made as response to the questioning on the procedural issues of investment arbitration. As the provisions of Rules and other relevant arbitration rules have shown, transparency requirements at least include three groups of elements: public access to hearings and documents; publication of information about arbitration and its proceedings; and duty of disclosure. Each one has its special contents. The comparison with articles of Investment Arbitration Rules of Singapore International Arbitration Center, which under the title of Investment Arbitration, sticks to the confidential essence of arbitration, shows that the connotation and contents of transparency or confidentiality vary in different contexts. These differences could be attributed to the different scopes of applicability of such arbitration rules.

Like transparency, the undefined use of the concept “investment arbitration” also leads to confusion and semantic promiscuity. Distinguishing from being a general procedural element, when transparency is lifted as the principle, it should be stressed in treaty-based investor-State Arbitration only. Transparency as a tool to protect public interest in investment arbitration should not be uplifted to be a paramount goal. Both transparency and confidentiality should be treated as of instrumental character, as they are designed to satisfy different kinds of interests. And the two could co-exist in different kinds of arbitration. The promotion of one, does not necessarily lead to downplaying and diminishing the other.

When it comes to China’s investment arbitration and transparency practice, China’s stance of active engagement into this transparency reform will be helpful to its overseas investment activities under the Belt and Road initiative. In addition to consideration of joining the Mauritius Convention, China should re-negotiate with each country on BITs or other types of IIAs containing the ISDS dispute settlement provisions, and as one part of the massive task, to adjust transparency requirements so as to adapt to each individual state’s specific circumstances. As for Chinese arbitral institutions, both SCIA and CIETAC have set examples of different attempts to grasp a share of global market of investment arbitration and participation of this transparency reform. The idea of setting up a center or court for international arbitration to serve especially for the Belt and Road has its realistic purpose, for such a multi-lateral institutional network to be perfected, a minimum standard of transparency should be satisfied in its rules and regulations, which could broadly include the content of third-party submission, publication of case existence information or other basic case-related information, and publication of awards, subject to redaction of confidential information.