Speech to the EU Parliament (INTA-EP)

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Introduction (EU Parliament recent discussion)

On 28 May 2015, your Committee (the European Parliament Committee on International Trade (INTA)) proposed "a permanent solution for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearing and which includes an appellate mechanism, where consistency of the judicial decisions is ensured and the jurisdictions of the courts of the EU and of the Member States is respected" and stated that "in the medium term, a public International Investment Court could be the most appropriate means to address investment disputes. "

More recently, on 18 June 2015, the European Commission requested 5 member States (Austria, Netherlands, Romania, Slovakia and Sweden) to terminate their intra-EU BITs.

Recent debate about the investment legal framework, particularly over the value and legitimacy of investor-State dispute settlement is not only a phenomenon confined to Europe but one to be considered worldwide. This may be the result of a steady increase in the number of investment agreements and the recent surge in investor-State disputes.

Moreover, an increasing number of States are reviewing their model investment agreements and recent agreements are being concluded with novel provisions aimed at rebalancing the rights and obligations between States and investors, as well as ensuring coherence with other public policy objectives, for example, inclusive growth and sustainable development. There is also a gradual shift from bilateral treaty making to regional treaty making, including through mega-regional agreements (for example, the Comprehensive Trade and Economic Agreement (CETA) between the EU and Canada, the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP)). These agreements could have systemic implications for the investment regime: they could either contribute to the consolidation of the existing treaty landscape or create further inconsistencies through overlap with existing investment agreements.

UNCITRAL and its work on Transparency

As you may well know, UNCITRAL is a commission established by the United Nations General Assembly with a mandate to harmonize and modernize the law governing international trade, considered from the perspective and at the level of the individual participants in international trade transactions. As such, UNCITRAL is known worldwide for establishing modern legal rules regulating international commerce in a neutral and balanced manner, and assisting States and other relevant stakeholders with the understanding, enactment, implementation and interpretation of those standards.

Particularly in the field of arbitration, UNCITRAL has made significant contribution to developing and promoting international standards. The near-universal adhesion to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is just one example. The success of the New York Convention and its increased use are a tribute to the role of arbitration as a peaceful means of settling international disputes, as are the numerous enactments of arbitration legislation based on the UNCITRAL Model Law on International Commercial Arbitration (*1985, updated in 2006*), and the extensive use of the UNCITRAL Arbitration Rules (*1976 and revised in 2010*). UNCITRAL continues to work diligently in the field of dispute resolution and today I would like to brief you on UNCITRAL's recent work on transparency, which sprouted from the long experience gained by UNCITRAL in that field.

One of the concerns expressed about investment arbitration was that the relevant procedures and the resulting decisions were kept fully confidential, even when the dispute involved matters of public interest. Over recent years, this has raised significant concerns, which your Committee also has shared.

In that context, UNCITRAL commenced work on transparency in investment arbitration in October 2010 and after three years, in 2013; the Transparency Rules (*UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*) were adopted. The Transparency Rules represent a fundamental change from the status quo of investment arbitrations often conducted behind closed doors and hidden from the public view, even when the issues that are raised gather much attention from the public and the media. Without going into much detail, the Rules when they apply, provide a procedural regime that gives the public, as a matter of course, broad access to a broad range of documents in a dispute. The Rules also provide for open hearings and a qualified right for third parties to make submissions. However, they also include robust safeguards for the protection of confidential information. Most importantly, they intend to balance the public interest in receiving information and the individual interest of disputing parties in obtaining a fair and efficient resolution of their dispute.

Upon adoption of the Rules on Transparency, which apply, in principle, to investment agreements concluded after its adoption, UNCITRAL began to prepare a convention, which would provide States and regional economic integration organizations that wished to make the Rules on Transparency

applicable to their existing investment treaties, an efficient mechanism to do so. As a result, on 10 December 2014, the UN General Assembly adopted the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Convention"). The reference to regional economic integration organizations in the Convention was included particularly with the EU in mind.

As a result, the Convention supplements existing investment treaties with respect to transparency-related obligations. By becoming a Party to the Convention, a State or a regional economic integration organization expresses its consent to apply the Rules on Transparency to investor-State arbitration initiated pursuant to an existing investment treaty. The Convention also provides flexibility to Parties to formulate reservations, thereby excluding from the application of the Convention any specific investment treaty identified by the Parties or a specific set of arbitration rules other than the UNCITRAL Arbitration Rules.

The Convention opened for signature in Port Louis, Mauritius, on 17 March 2015, and thereafter at the United Nations Headquarters in New York. To date, the Convention has 1 State Party (Mauritius) and 10 signatories, including a number of European States (Finland, France, Germany, Italy, Sweden, Switzerland, the United Kingdom) as well as Canada and the United States.

The Rules on Transparency foresee the Secretary-General of the United Nations performing the function of repository of published information (article 8 of the Rules on Transparency). Accordingly, information will be published via the UNCITRAL website (the Transparency Registry). The EU has expressed its willingness to support financially the establishment and operation of the Transparency Registry. The Commission has expressed its gratitude for such contribution.

The UNCITRAL standards on transparency - the Rules on Transparency, the Convention and the Transparency Registry - are the recent results of a multilateral endeavour to reform investment arbitration. They take into the account both the public interest in such arbitration and the interest of the parties to resolve disputes in a fair and efficient manner. They further contribute to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes. Overall, it is expected that the UNCITRAL standards on transparency will significantly contribute to enhancing transparency in investor-State dispute resolution regime.

The UNCITRAL standards on transparency should be understood in the context of foreign direct investment as a tool for the sustainable growth. By making public information on disputes arising from such investments, they contribute to building confidence in the existing international investment framework. Further, they constitute an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such. The UNCITRAL standards on transparency aim at enhancing the public understanding of the investment arbitration process and increase or restore its overall credibility.

Possible reforms in investment regime

What I would like to emphasize today is that the work done by UNCITRAL to increase transparency in investor-State arbitration could pave the way towards better responding to calls for other reforms in this area, and contribute to the modernization of the overall investment regime.

One must remember that there are currently more than 3,000 investment treaties in existence. Around 61% of the known investor-State disputes are conducted at the International Centre for the Settlement of Investment Disputes (ICSID) established under the auspices of the World Bank. As an alternative, the New York Convention offers a mechanism to enforce awards resulting from non-ICSID arbitration.

Any reform effort must take into account such an existing framework and be designed with the broader picture in mind. Moreover, it is not something that the European Union or its members States can tackle in isolation. A solution might be easier to reach within the EU, but without the agreement of the major partners of the Union, the cake would be half-baked.

In considering a possible expansion of the Transparency Convention approach, one should consider the relation between an instrument/mechanism like the Convention and the issues at stake. The Transparency Convention touched upon an issue that is procedural in nature, and not often referred to in existing investment agreements, because the trend in favour of transparency in arbitral proceedings is a relatively recent one. Such characteristics made it easier to embark on the preparation of the Convention. Whether the approach embodied in the Convention could be expanded to cover procedural matters already contemplated in existing investment agreements and more broadly to cover more substantive issues would need to be carefully examined.

Considering the complexities in the investment regime structure as well as the recent public attention to these issues, the most important element would be the political willingness of the parties involved to reach consensus on the substance of a revised framework. Only when elements of a political background are in place (as was the case when the Transparency Rules were prepared), can a mechanism similar to the Transparency Convention be envisaged.

Let's take for example, proposals to create an appeal mechanism or an investment court. There could be various ways to implement such a reform. One could be including relevant provisions in any of the new investment or free trade agreements. However, this would have almost no impact on investment arbitration initiated under the comparatively large number of existing investment agreements. Another way might to be to establish a separate institution tasked with those responsibilities or possibly utilizing the existing ICSID mechanism. In any case, it will take much time and effort to reach an agreement on the substance (whether there is indeed the need for such additional mechanism) and the appropriate approach. In the meantime, the existing system will remain in place and possibly require improvement.

What might be more problematic is that there currently exists no multilateral forum for such overarching discussion. Current discussions about challenges and opportunities are scattered among numerous international and regional organizations and they touch upon a wide range of issues in a very general manner.

Any concrete reform process would require a neutral forum (such as a United Nations body) where States, regional economic integration organizations like the EU, as well as arbitration institutions including, for example, ICSID, the Permanent Court of Arbitration (PCA), the International Chamber of Commerce (ICC) and other stakeholders (academics, practitioners, NGOs.) can get together to exchange their views. This would be a first step, and I believe this is where UNCITRAL can contribute to the process as evidenced from its work in transparency.

Thank you very much for your attention.