Junji Nakagawa (ed.), *Transparency in International Trade and Investment Dispute Settlement*, USA and Canada, Routledge, 2013, 221 pp., ISBN 9780415528733, £100.00 (hardback) and ISBN 9780203077260, £66.28 (e-book)
doi:10.1017/S0922156514000338

At its fifty-eighth session held in February 2013, the United Nations Commission on International Trade Law (UNCITRAL) Working Group finalized draft rules on the legal standard of transparency in investor–state arbitration[1]. This development, along with the statements of the North American Free Trade Agreement Free Trade Commission[2] and the amendments to the investor–state arbitration rules of the World Bank's International Centre for Settlement of Investment Disputes (ICSID) from 2006[3], indicate that the ice of confidentiality in investment arbitration proceedings is slowly yet inevitably melting under the pressure from those advocating for greater transparency. In the meantime, the practice of the WTO Appellate Body with regard to accepting *amicus curiae* briefs[4] and the heated debates during the most recent dispute settlement understanding review negotiations[5] speak of similar trends in WTO dispute settlement.

Within this context, it is not surprising that the transparency reform in investment and trade dispute settlement has occupied a firm place in the spotlight of academic, political, and practitioners' discussions. Yet in the discordance of voices and opinions of the NGOs, governments and international organizations, scholars and arbitration lawyers, debating on the need for the enhancement of transparency, the necessity of defining the nature and scope of transparency is often overlooked. It has been high time for a comprehensive and coherent study addressing transparency per se and directions of the ongoing reform.

The book *Transparency in International Trade and Investment Dispute Settlement*, which resulted from an international joint research project organized by Professor Junji Nakagawa and with funding from the Japan Society for the Promotion of Science, seems to have the ambition of being such a study. What is transparency?

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1 United Nations Commission on International Trade Law (UNCITRAL) Report of Working Group II (Arbitration and Conciliation) on the work of its 58th session, 4–8 February 2013, New York, UN GA A/CN.9/765, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V13/808/19/PDF/V1380819.pdf?OpenElement>.

2 NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, para. 1a; NAFTA Free Trade Commission Statements on New Transparency Measures (Statement on Non-Disputing Party Participation), 7 October 2003; NAFTA Free Trade Commission, Joint Statement, 'A Decade of Achievement', 16 July 2004, available at <http://www.sice.oas.org/tpd/nafta/nafta_e.asp>.

3 See Rule 37 and Rule 32(2) of International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (April 2006), available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF.htm>.

4 See, e.g., Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, at. 108; Appellate Body Report, United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AD/R, adopted 7 June 2000, at. 42; Communication from the Appellate Body, European Communities – Measures Affecting Asbestos and Products Containing Asbestos, WT/DS135/9, 8 November 2000, at 2.

5 ICTSD reporting, 'Dispute Settlement: US Proposal On Dispute Transparency Gets Cool Reception From WTO Members', WTO Reporter, 11 September 2002; 'Dispute Settlement: Developing Countries Outline Priorities For Reform Of WTO Dispute Procedure', 12 September 2002; WTO Special Session of the Dispute Settlement Body, Report by the Chairman, JPB (08)/81, 18 July 2008.

What kind of rights does it provide to different stakeholders and what limitations should it have? Are there alternatives to enhanced transparency? What obstacles can the transparency reform face in the process of its implementation? Junji Nakagawa and Daniel Magraw pose these questions in the introductory chapter (p. 7), seemingly expecting them to be tackled in six chapters presented in the book.

The authors analyse recent trends in transparency enhancement and argue that, despite significant structural and functional differences in trade and investment dispute settlement procedures, the public interest character of both trade and investment disputes causes an equal need for greater transparency. This gives legitimate grounds to the discussion of transparency as an emerging cross-regime value, which will have different interpretation, application, extent, and limits according to the features of each procedure. Thus, the project presents itself as being even more ambitious, as it declares a unique cross-regime approach to the issue of transparency, aiming to trace commonalities and differences between the reforms in the investment arbitration and trade dispute settlement.

Junji Nakagawa certainly deserves credit for righteously pointing out that transparency reforms in these procedures are driven by the same causes. However, in the course of reading, one cannot but gain an impression that either the challenge of addressing transparency from a cross-regime perspective has not been met, or the quality of the research project has suffered from such a broad approach. The reader's attention will have to swap from the chapters dedicated solely to the trade dispute settlement by Yuka Fukanaga and Chin Leng Lim, to those by Federico Ortino and Peter Lallas, who focused on investor–state arbitration. On the other hand, only the quite specific study of webcasting by Sofia Plagakis, and the discussion of a conflict between confidentiality and transparency by Florentino Feliciano (with the latter dedicating more attention to investment arbitration) combine and compare the issue of transparency in investment and trade dispute settlement. The de facto lack of a declared cross-regime analysis may be somewhat disappointing. Yet the method of placing a collection of essays discussing separately investment arbitration and trade dispute settlement within the same book seems to be working on some subconscious level, since the links, similarities, and differences between transparency reforms in these procedures nevertheless become apparent to a thoughtful reader.

In considering the range of issues discussed in the papers presented in the book, it is worth having a closer look at the ideas of each author. Florentino Feliciano argues that the tension between confidentiality and transparency, two competing values of international economic dispute settlement, requires accommodating and adjusting conflicting interests and policy consideration on a case-by-case basis (pp. 19–25). However, in the case of investor–state arbitration, the sovereign duties of a state party to its own people should clearly override its duty of confidentiality in arbitral proceedings. Accordingly, in his view, confidentiality may be of 'declining utility' (p. 24), while the scope of transparency will continue to expand with particular importance given to law enforcement as a universal exception to confidentiality (pp. 20–21, 25). Within the WTO dispute settlement context, the need for development of a coherent system of international trade law with consistent case law serves as a strong impetus for increasing transparency (pp. 23, 25).

Yuka Fukanaga does not deny the general merits of enhanced transparency. Yet she doubts that submission of *amicus curiae* briefs to the WTO Dispute Settlement Body (DSB) is the most appropriate and efficient way to accommodate citizens' interests. First, this mechanism does not ensure full representation of an existing spectrum of citizens' concerns. Second, it can seriously affect states' ability to resolve the dispute effectively (pp. 37–8). Instead she suggests that governments should communicate with their people at the domestic stages of the dispute settlement process and take into account their non-economic interests when dealing with complaints against the foreign governments during the WTO proceedings and while implementing the recommendations of the DSB. Yuka Fukanaga concludes that, although the importance of transparency at the level of interaction between the government and citizens is often overlooked, the accommodation of people's concerns at the domestic stage is potentially more efficient and beneficial for the citizens than ensuring their ability to submit *amicus curiae* briefs to the WTO dispute settlement proceedings (pp. 38–41). This refreshing approach seems slightly too idealistic. Since not all governments practice domestic consultations with citizens[6], the WTO dispute settlement proceedings become the only venue for the people of such states to voice their interests.

Chin Leng Lim challenges the idea of transparency being a global trend in international trade dispute settlement with his study of regional trade agreements in East Asia. First, he tries to refute each of the major pro-transparency arguments. The author disagrees with a popular belief that the WTO dispute settlement is becoming a court of law that requires an open and transparent procedure. In fact, the WTO system still contains elements of diplomatic negotiations, which call for confidentiality and flexibility. Transparency is not even a tendency in the WTO, but rather a policy advocated by a few members. Although transparency may indeed reflect democratic ideals, the author suggests that for East Asian nations, trade and commercial gains have more weight than democratic policy justifications (pp. 53–8). In his view, transparency is not likely to resolve the WTO legitimacy crisis, as the crisis is connected with the (allegedly) unfair nature of policy and decision-making in the WTO, not with the fact that 'people are ignorant about what is does' (p. 59). He then examines closely the treaty behavior of East Asian nations and observes a tendency towards closed dispute settlement under agreements within the region (pp. 61–9). While classical inter-state diplomatic interaction is preferred by the East Asian nations, they will agree to more transparent procedures out of pragmatic considerations when their transatlantic partners view such arrangements as more attractive (pp. 70–3). Although the author criticizes fiercely all cultural explanations of the East Asian treaty behavior, he, unfortunately, does not provide us with his own clear view of the reasons behind it. Yet, by discussing such regional differences, Chin Leng Lim manages to demonstrate significant limitations of the popular views of the transparency reform being a response to the global call for democracy, legitimacy, and legal certainty in trade dispute settlement.

6 *UNCTAD Transparency*, UNCTAD Series on Issues in International Investment Agreements (2004), at 36–7.

https://doi.org/10.1017/S0922156514000338 Published online by Cambridge University Press

Sofia Plagakis presents a rare study of webcasting in international economic dispute settlement. The author highlights the most successful practices of the use of webcasting technology in different domestic jurisdictions and by various international non-economic courts and tribunals (pp. 98–104). This experience serves to illustrate that, despite traditional judges' distrust towards cameras and media in courts, webcasting has gained acceptance as a great tool for enhanced transparency in international and domestic judicial institutions (pp. 93–8). The advantages of webcasting, including increased transparency, public accessibility and awareness, time and cost savings, more accurate reporting, and the possibility of content review, override potential drawbacks such as financial costs, quality concerns, protecting private information, and content manipulation (pp. 104–8). Moreover, the practice of webcasting disputes under Dominican Republic – Central America Free Trade Agreement demonstrated that webcasting does not disrupt or impair the investment arbitration proceedings (p. 111). Sofia Plagakis argues for the introduction of mandatory webcasting in all investor–state and trade dispute settlement proceedings with accommodations to protect business confidentiality and other sensitive information (pp. 111–12).

Federico Ortino addresses another dimension of procedural transparency. His research focuses on the transparency of investment awards, mainly looking at their public availability (external transparency) and at the clarity of legal reasoning of investment tribunals (internal transparency). The author presents the results of his comparative study of existing arbitration rules in a systemic, even schematic manner, illustrating how the scope of rights and obligations of different proceedings' participants differs across five arbitration regimes (pp. 120–7). As most institutions have been created for commercial arbitration, the duty of confidentiality (involving a prohibition to publish awards) seems to prevail in existing regimes, thus reinforcing the emphasis on mere dispute settlement purposes of arbitration and private interests of the disputing parties. At the same time, since the investor–state arbitration has clear implications on the coherency of international investment law and on the interests of a range of stakeholders, there is a growing stance recognizing the need to publish investment awards (pp. 135–6).

Federico Ortino then raises an important issue about the clarity of investment awards. Although it is an open question whether a tribunal's legal duty to state reasons for its decision encompasses a duty 'to provide clear, coherent, accurate and cogent reasons' (p. 137), the author relies on the recent ICSID annulment practice to make a slightly far-fetched proposition that lack of clarity in tribunal's reasoning may constitute a ground for annulment (p. 138). Despite the fact that the abuse of precedents (incorrect interpretation and application of preceding legal findings) (pp. 140–4), lack of internal consistency (self-contradiction in treaty interpretation) (pp. 144–7) and minimalism (lack of justification) (pp. 147–9) are not uncommon in the arbitral practice, this issue has previously been comparably rarely discussed. The author deserves special credit for highlighting, analysing, and developing a typology for the failures of investment tribunals to provide clear reasoning in their decisions, yet the examples he uses to illustrate these failures are arguably not very persuasive.

In the last chapter, Peter Lallas discusses the problem that nearly 3,000 existing investment agreements do not provide any mechanisms for protection of the needs and concerns of people locally affected by international investment. The author makes an excursus into the history of international investment activities and norm-creation in order to demonstrate the roots of the existing problems in the current governing system (pp. 163–74). He shows present-day international investment law as utterly one-sided, as it provides foreign investors with strong instruments to hold governments accountable, yet fails to establish grounds for their liability and to foresee an avenue for locally-affected people to voice their concerns, when not taken into consideration by their governments (pp. 176–83). The author argues that giving affected people the tools tohold foreign investors accountable under international law could significantly minimize the adverse impacts of foreign investment, such as environmental damage, disruption of indigenous communities' lifestyle, and human rights abuse. First, the international investment treaties should include norms that would not only envisage investors' rights, but also their responsibilities. Second, it is high time to develop international legal mechanisms directly accessible for affected non-state actors, perhaps, following the examples of existing international bottom-up accountability mechanisms, such as the World Bank Inspection Panel, the public submission procedure under the North American Agreement on Environmental Cooperation, and the compliance procedure under the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (pp. 189–93). The World Bank and OECD instruments may be success stories in practice, but these models are very unlikely to work with foreign investment activities. What one should be focusing on is not mere calls for enhanced transparency and public participation, but designing a mechanism that will ensure protection of the affected people, and yet will not put foreign investors at a disadvantage vis-à-vis their domestic competitors. The case presented by Peter Lallas would be much stronger if the author dared to present his own vision of an international mechanism of investors' accountability.

On the one hand, it is questionable whether the book succeeds in providing coherent and comprehensive answers to the questions formulated in the introductory chapter. The scholars approach transparency from very different angles and focus on a range of different issues, and a short overall conclusion would definitely help a reader form a bigger picture from the puzzle of expressed ideas. On the other hand, this book gives sense of the complex, multifaceted, and fluid nature of transparency. The extent and mechanism of transparency will be defined in the context of the legal regime and regional environment. Each mechanism of transparency deserves separate consideration, as webcasting and *amicus curiae* briefs will have different implications on the dispute settlement process. Moreover, different stakeholders are entitled to different scopes of transparency.

The research project should be granted the highest praise for the quality and originality of the essays it collects. Fresh angles, rarely discussed topics, and interesting ideas are definitely the book's strongest virtues. A timely and valuable contribution to the lively debates on the topic, *Transparency in International Trade and Investment Dispute Settlement* isan excellent read for those willing to develop

https://doi.org/10.1017/S0922156514000338 Published online by Cambridge University Press

a multi-dimensional understanding of the transparency reform in international economic dispute settlement.

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https://doi.org/10.1017/S0922156514000338 Published online by Cambridge University Press