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UNCITRAL Colloquium on Micro-Finance
Transparency and Dispute Settlement for Micro-Entrepreneurship

Remarks of Daniel Magraw
CIEL & Johns Hopkins University

At its 45th session, in paragraph 124, the Commission identified the need for work on “fair, rapid, transparent and inexpensive” dispute resolution. I will briefly examine why transparency is essential in dispute settlement, the tensions that may be encountered in providing it, considerations in applying transparency, and a possible role for UNCITRAL.

At the outset, it is useful to distinguish transparency in the context of dispute settlement from transparency regarding substantive obligations. Substantive transparency is also essential to create an enabling environment for micro-entrepreneurship and serves some of the same values as does transparency with respect to dispute settlement; but the respective analyses of advantages and disadvantages differ. Substantive transparency is addressed elsewhere in the colloquium.

It is also helpful at the outset to emphasize the close relationship between transparency and public participation. The critically important benefits of public participation cannot be realized if the public is not informed and cannot decide whether and, if so, how to participate, i.e., if processes, bodies and outcomes are not transparent. There is also a close relationship between transparency and accountability, which is addressed below.

Values Served by Transparency: Why Is Transparency Essential?

I will briefly discuss five inter-related types of values served by transparency. These are: Human Rights; Access; Fairness; Effectiveness; and Assessment.

Human Rights

Transparency involves the disclosure of information, i.e., transparency involves providing access to information, either proactively or in response to a request. It is now recognized that there is a human right to access to information, as a necessary corollary to the human right to participate in decision-making. This is clear from the decisions of international human rights tribunals such as *Claude Reyes v. Chile* (Inter-Am. Ct. H.R. (ser.C) No. 151 (Sept. 19, 2006)) and *Társaság a Szabadságjogokért v. Hungary* (App. No. 37374/05, Eur. Ct. H.R.

(Apr. 14, 2009)), and from the definitive General Comment No. 34 of the United Nations Human Rights Committee (CCPR/C/GC (Sept. 2011)).

National and sub-national governments must honor the human right to access to information in their dispute settlement practices, just as they must honor this and other human rights in their other activities. This is also the case with UNCITRAL. The United Nations Charter is absolutely clear that the protection of human rights is fundamental to the United Nations and its bodies, including UNCITRAL: the need to protect human rights is expressly provided in both the Preamble and Article 1 of the Charter.

The need to protect the human right to access to information accordingly provides a fundamental requirement when considering transparency with respect to dispute settlement. General Comment No. 34 describes the content of the obligation as follows:

To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failures to respond to requests. (para. 19; footnotes omitted)

General Comment No. 34 also makes clear in paragraphs 21-36 that any exceptions to transparency, e.g., protection of confidential business information or State secrets, need to be very narrowly drawn.

Although these prescriptions do not answer all questions about the details of what types of transparency are required, they form the starting point for the provision and possible exceptions to transparency, both generally and with respect to dispute settlement.

Access

There is a massive access to justice gap in the world, with approximately four billion people without adequate access to justice. The same situation applies with respect to micro-entrepreneurs: either adequate and (including with respect to accessibility) dispute settlement mechanisms do not exist or they are not sufficiently known.

Where adequate dispute settlement mechanisms do not exist, they should be created and their existence publicized, particularly to micro-entrepreneurs. Where adequate dispute settlement mechanisms do exist but are under-utilized, their existence should be similarly publicized. In both instances, the relevant procedures should also be publicized so that micro-entrepreneurs can utilize them more effectively.

This process involves not only transparency in the usual sense, but also outreach to educate the public, and in particular micro-entrepreneurs. This outreach exceeds even the proactive transparency referred to by the Human Rights Committee, above.

Fairness and Accuracy

Transparency (and attendant public participation) typically improves both (1) fairness of process and results and (2) the perception of fairness in several ways, summarized briefly below.

Transparency can increase the accuracy of decisions by increasing the likelihood that relevant information, perspectives and legal arguments are made available to the dispute settlement mechanism and thus can be taken into account.

Judges, litigants, and others involved in dispute settlement are likely to perform better if they know that the process and outcome are transparent and thus that their actions are subject to public scrutiny.

Transparency tends to decrease corruption, which we know is a significant problem in many countries' dispute settlement systems. This follows the maxim: "Sunshine disinfects."

Similarly, transparency can decrease the effect of power disparities in dispute settlement.

In addition, and for essentially the reasons just given, if the design of new dispute settlement mechanisms and the monitoring and reform of existing mechanisms occur in a transparent manner with meaningful opportunity for public participation, the dispute settlement mechanisms are likely to be fairer in both operation and result.

Finally, transparency can demystify processes and bodies and thus increase the perception of fairness. In contrast, secrecy breeds the suspicion that something unfair or otherwise unsavory is being concealed. We saw this effect with the World Trade Organization appellate mechanism. This effect also leads to an increase in credibility, legitimacy and effectiveness, the fourth value to which I now turn.

Effectiveness, Credibility and Legitimacy

Transparency in creating, monitoring and reforming dispute settlement mechanisms will lead to greater public awareness and acceptance, thus increasing the credibility and effectiveness of the mechanism. This accords with the political maxim: “If you want people present at landing, they must be present at take-off.”

Transparency can also lead to an increase in the implementation of decisions by dispute settlement mechanisms, and to greater enforcement if voluntary compliance with those decisions does not occur. This is partly because transparency can have a “name and shame” effect, and can even be used deliberately in that respect. Transparency can also lead to greater implementation of decisions and thus effectiveness because it leads to greater credibility for the reasons described above. This is an example of the inter-relationships between the different values served by transparency.

Assessment

It is important to be able to evaluate the prevalence, vitality and effects of micro-entrepreneurship, because it is obviously important to society, both economically and socially. Indeed, virtually all the background materials prepared for this colloquium and some of the panelists have called for more analysis and evaluation. Evaluation requires data, however, and there is a palpable data gap regarding most if not all aspects of micro-entrepreneurship.

The most efficient way – perhaps the only way – to obtain accurate data about micro-entrepreneurship is through transparency, including transparency in dispute settlement. Transparency in dispute settlement is thus necessary to allow systemic analyses not only of micro-entrepreneurship-related dispute settlement itself, but also of other aspects of micro-entrepreneurship.

Tensions with Transparency: What Difficulties Might Arise in Applying Transparency?

Transparency results in decreased confidentiality, which can lead to two types of concerns. First, confidentiality has been traditionally associated with arbitration and other forms of dispute settlement. This should be taken into account by looking at the specific functional value(s) served by confidentiality in that context, bearing in mind throughout the human right to access to information. Second, and related to the first, there are some forms of information that legitimately should be kept confidential. The type most likely to arise in micro-entrepreneurship-related cases is confidential business information (CBI). This need not raise a problem because there are established means of protecting CBI (as well as State secrets and sensitive personal information) which can be utilized when the situation demands.

Methods for achieving transparency can require resources. Care must be taken, therefore, to adopt methodologies that minimize administrative costs while still achieving the desired level of transparency.

Finally, as indicated above, transparency can lead to increased accountability, which in turn can lead to anxiety and aversion to transparency. We know that governments and officials typically do not like to be held accountable; but this is a political problem, not a policy one. Indeed, from a policy perspective, increased accountability is to be desired and should reinforce, not stand in the way of, transparency.

Realizing Transparency

The points made above apply equally to traditional judicial dispute settlement and to various forms of alternative dispute resolution (ADR). What transparency is appropriate in a particular circumstance, however, requires a nuanced analysis of the particular aspect of dispute settlement under consideration in light of the values served.

For example, whether transparency is appropriate with respect to settlement negotiations or discussions with a mediator or conciliator (such as those used in Colombia) requires an analysis of how transparency would interfere with types of communications and give-and-take typical of such processes. The outcome of that analysis could be quite different than the parallel analysis of whether to make final court or arbitral decisions public.

Possible Role for UNCITRAL

If UNCITRAL undertakes to produce an instrument regarding micro-entrepreneurship, and in particular micro-entrepreneurship-related dispute settlement, transparency should be examined and included in a straightforward and robust manner.

Conclusion

Transparency is essential for dispute settlement, as a basic component of an enabling environment for micro-entrepreneurship. This is true for reasons of access, fairness and accuracy, effectiveness, credibility and legitimacy; and systemic assessability; and to protect the human right to access to information. Tensions can arise with respect to confidentiality and administrative costs, but these can be addressed. The precise form transparency should take is context-dependent; but the fundamental starting point should be transparency, with only narrowly drawn exceptions, so as to respect the human right to access to information and achieve the benefits of transparency.

Finally, as an overall matter, transparency is essential not only to environmental protection, but also to economic and social development. Transparency is equally important in the specific context of dispute settlement. We should embrace transparency, not ignore or flee from it.