The UNCITRAL Rules on Transparency in Investor-State Treaty-based Arbitration

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In July 2013 the United Nations Commission on International Trade Law (UNCITRAL) adopted the Rules on Transparency in Investor-State Arbitration.

The Rules shall enter into force on 1st April 2014 and apply to all investor-state disputes initiated under UNCITRAL Arbitration Rules pursuant to international investment agreements concluded prior to or after this date.

At the outset it should be noted that the range of potentially applicable rules in international investment arbitration today is extremely wide and provides the parties with a lot of room to tailor their procedure in accordance with their specific needs. Consequently, they also make it possible for the parties to limit or constrain transparency in the dispute between them. This triggers the concerns of not having a proper mechanism to safeguard transparency. To that end, the UNCITRAL Working Group II (Arbitration and Conciliation) adopted two approaches when drafting the Rules: one would be the possibility for States to offer to arbitrate disputes under those arbitration rules that *require* transparency (which has so far only been a theoretical possibility) and the other, the option for States to conclude a new treaty which would supplement or replace the already existing investment treaties and require arbitration pursuant to rules requiring transparency. The first approach is reflected in the newly adopted Transparency Rules, whilst the second will possibly result in the adoption of the Transparency Convention, the second reading of which took place two weeks ago in New York at the 60th UNCITRAL session.

Main Features

The New Transparency Rules have become an integral part of the UNCITRAL Arbitration Rules, but they are also made available as a stand-alone instrument for application in disputes that are governed by other arbitral rules. The main aim of the Rules is to make proceedings transparent. In that respect, the provisions

mandating disclosure and openness (Articles 2, 3, 6 and 7) and those that govern participation by non-disputing parties (Articles 4 and 5) appear to be the most important features of the Rules.

Access to Documents

As soon as the arbitral proceedings commence, i.e., once there is evidence respondent has received the notice of arbitration (which itself is subject to automatic mandatory disclosure), a basic set of facts will be disclosed: names of the parties, economic sector involved and the underlying treaty (Art.2). The Rules further distinguish between the mandatory automatic disclosure that certain documents are subject to (all statements and submissions by the disputing parties and non-disputing State parties or third persons; transcripts of hearings; and orders, decisions and awards of the arbitral tribunal); mandatory disclosure on request of any person (witness statements and expert reports), and the disclosure of other documents (such as exhibits) which depend on the exercise of the particular tribunal's discretion (Article 3). To balance the Transparency Rules' provisions on disclosure, Article 7 specifies that disclosure is subject to exceptions for confidential or protected information. It further lists four categories of such information. Whether and what information will fall under the exceptions will be an issue to be decided on a case-by-case basis. Tribunals are also permitted to restrain or limit disclosure when necessary to protect the "integrity of the process", which is only intended to *restrain* or *delay* disclosure in exceptional circumstances.

Amicus Curiae and Submissions from non-disputing Parties

In line with standard practices by tribunals, the Transparency Rules now expressly affirm the authority of investment tribunals to accept submissions from *amicus curiae*, while incorporating detailed rules and guidelines under Article 4. This however concerns "written submissions" and does not address other forms of participation, such as statements at hearings. The Transparency Rules also require that tribunals accept submissions on issues of treaty interpretation from non-disputing State parties to the relevant treaty, provided that the submission does not "disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party" (Article 5). In addition to this, the tribunal may accept submissions on other matters relevant to the dispute from non-disputing State parties to the underlying treaty.

Open hearings

The most noteworthy feature of the Transparency Rules is contained in Article 6 and concerns the openness of the hearings. The tribunal is granted authority to determine how to make hearings open, including the option of facilitating public access through online tools. The disputing parties—alone or together—**cannot veto** open hearings. There are, however, three limitations to this: (1) protection of confidential information; (2) protection of the "integrity of the arbitral process"; and (3) logistical reasons.

Significance of the Rules and Open Questions

In what seems to be a great struggle to achieve full transparency for investor–State treaty-based arbitration, the UNCITRAL Transparency Rules represent a huge and important contribution, by making openness a rule rather than an exception and shifting the presumption of confidentiality, much more suitable for commercial arbitration, towards transparency. It seems that the Rules should in the first place bring some advantage to investors by enabling them to assess the risk to their investments in different host States to a more accurate extent, as their application would introduce more consistency and more cohesion, which is something that international investment arbitration still lacks. On the other hand, there is also a fear of the so-called "re-politicisation" of the investor-State disputes as well as the possibility that the investors would rather have their disputes resolved in private. It remains to be seen how this would affect the attractiveness of the UNCITRAL Rules.

Further, granting the right of public access to hearings and documents is important for the institutions' perceived legitimacy. By having more consistent decisions and therefore forming more consistent reasoning in arbitral awards, the whole arbitration system would ensure legal certainty, promotion of effective democratic participation, good governance, accountability, predictability and the rule of law which investors and host States would consequently benefit from. This is of the utmost importance when vital public concerns are involved such as environmental issues or human rights. Under previous versions of the UNCITRAL Arbitration Rules, disputes between investors and States were often not made public, even where vital public concerns were involved or illegal or corrupt business practices were uncovered. In other settings, this level of transparency may also be used as a "scare technique" and a means to extract a settlement from

another party.

In relation to this, it will be exciting to see some practical developments, more precisely: the potential change in the way parties draft their pleadings as a consequence of the higher level transparency imposed on them, or the limitation concerning the number or types of documents parties may submit and refer to, resulting from the intention to avoid potential disclosure requests.

In terms of the applicability of the Rules, it should be noted that even though they apply automatically to claims brought under a treaty concluded after 1st April 2014, parties will still have the possibility to opt out from transparency provisions. It will be interesting to see what the outcome of discussions on the Transparency Convention draft will be, since the impact of the Transparency Rules still largely hinges on the political outcome. It is also not certain what kind of an impact this will have on the attractiveness of investment arbitration under UNCITRAL Arbitration Rules and on arbitration under treaties which contain a reference to UNCITRAL Transparency Rules as opposed to those initiated under contracts that contain no such disclosure requirements.

It is further submitted that the Rules leave less room for the abuse of proceedings by reducing the scope of procedural arguments surrounding access to documents. Indeed, by providing a detailed list of documents subject to disclosure, the Transparency Rules will undoubtedly diminish the possibility for such arguments. Nevertheless, the Rules still leave open the likelihood for such discussion in relation to witness statements, expert reports and exhibits, as these are not to be automatically disclosed. Needless to say, when there is discretionary power of tribunals to restrict disclosure in order to protect confidential or protected documents and the integrity of the arbitral process the potential abuse of such powers is often an issue. In any case, it remains to be seen how frequently and in what circumstances the tribunals will exercise this power.

Therefore, the UNCITRAL Arbitration Rules represent a big step in the direction of increasing transparency. Their biggest achievement seems to be the shift in the underlying presumption toward openness, whereas in other terms they do not seem to introduce much novelty compared to some other international investment arbitration rules. The question that is yet to be answered in the future is if by balancing the public interest and the principle of confidentiality in arbitration we have gone one step too far and have let the former prevail over the latter to a too

great an extent.