Kluwer Arbitration Blog

Seeking to Ensure Transparency: UNCITRAL Working Group II's Work on Transparency in Treaty-Based Investor State-Arbitration

Neale Bergman (US Department of State) · Tuesday, June 19th, 2012

On March 11, 2001, *The New York Times* published an article entitled "Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say." It began, ominously: "Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed." Over the ensuing decade, while NAFTA Chapter Eleven arbitrations (and a number of other investor-State arbitrations) have become remarkably more transparent, investor-State arbitrations brought under many other treaties have not. Now, however, a Working Group of the United Nations Commission on International Trade Law ("UNCITRAL") is developing procedural rules on transparency for treaty-based investor-State arbitration, providing an important opportunity to promote transparency in investment arbitration.

Background

The NAFTA, as drafted, does not expressly provide for fully transparent investor-State arbitration proceedings. Nevertheless, the United States, Canada, and Mexico have taken a number of steps to enhance transparency in Chapter Eleven arbitrations. In July 2001, the NAFTA Free Trade Commission ("FTC") issued Notes of Interpretation of Certain Chapter Eleven Provisions, whereby the NAFTA Parties agreed "to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal," subject to the redaction of confidential or otherwise protected information. In October 2003, the NAFTA FTC issued a Statement on Non-Disputing Party Participation, which recommended specific guidelines to be adopted by Chapter Eleven tribunals when considering proposed *amicus curiae* submissions. At that time, the United States also issued a Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations, which declared that the United States "will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven disputes to which it is a party be open to the public, except to ensure the protection of confidential information."

Building on the NAFTA experience, the 2004 U.S. Model BIT included high transparency standards through provisions requiring the publication of documents and open hearings, subject to the non-disclosure of protected information (Article 29), and providing tribunals with the authority to accept and consider *amicus curiae* submissions (Article 28(3)). These provisions have been included in subsequent U.S. BITs and recent investment chapters of FTAs, including for example the U.S.-Rwanda BIT and the Dominican Republic – Central America – United States FTA. Much more recently, the United States reaffirmed and strengthened its commitment to transparency in

arbitration, retaining these provisions without change in the newly-released 2012 Model BIT and adding provisions requiring *inter alia* the Parties to consult periodically on transparency practices (Article 11(1)) and to ensure that there are transparency procedures in any future appellate mechanism similar to those provided in Article 29 for the arbitral proceedings (Article 28(10)).

Important transparency developments in investor-State arbitration have not been limited to the United States and its treaty partners. For example, the Australia-Chile FTA, which entered into force in March 2009, requires the publication of documents and open hearings, subject to the non-disclosure of protected information (Article 10.22), and provides tribunals with the authority to accept and consider *amicus curiae* submissions (Article 10.20(2)). As another example, the E.U. Commission's July 2010 Communication Paper, entitled "Towards a Comprehensive European International Investment Policy" (COM(2010)343 final), states that the E.U. should ensure transparent investor-State dispute settlement, including publication of documents, open hearings, and *amicus curiae* submissions.

Working Group II and the Draft Rules on Transparency

As a testament to the growing worldwide interest in promoting transparency in investor-State arbitration, the UNCITRAL Commission decided in 2008, as recorded in its 41st session report (available here), to instruct Working Group II on Arbitration and Conciliation to address transparency in this particular type of arbitration "as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules." As to the scope and form of the work, the Commission "agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution" and that the Working Group should be left "broad discretion" to fulfill its mandate.

Work on transparency in investor-State arbitration began in earnest with the submission of comments from governments in the lead-up to the Working Group's first session in October 2010. Since then, the Working Group has met twice a year, having now held four sessions on this topic. The Working Group has been developing draft rules on transparency specifically for treaty-based investor-State arbitration, the latest version of which (see the UNCITRAL Secretariat's Working Paper A/CN.9/169 and its Addendum 1) will be subject to further consideration by the Working Group at its next session in the fall of 2012. The Working Paper and related materials from the Working Group are available here.

The draft rules cover publication of information regarding the commencement of arbitral proceedings (draft Article 2), publication of documents (draft Article 3), publication of arbitral awards (draft Article 4), *amicus curiae* submissions (draft Article 5), non-disputing Party submissions (draft Article 6), open hearings (draft Article 7), and exceptions to transparency, such as for the protection of confidential business information (draft Article 8). There is also a draft Article concerning the mechanism for making information available to the public, which could include the creation of a registry to serve that function (draft Article 9, option 1) or a procedure for selecting an arbitral institution to serve that function (draft Article 9, option 2). At this point, the draft rules show great potential for constituting a meaningful and significant development in transparency for investor-State arbitration.

As recorded in Addendum 1 of Working Paper 166, in conjunction with developing these rules, the Working Group is also considering a number of creative solutions for providing for and promoting their application. These solutions include a recommendation by UNCITRAL "urging States to

apply" the rules (described at paragraphs 12 to 14), a possible international convention whereby States "would express consent or agree to apply" the rules (paragraphs 15 to 19), and certain other possible actions by States (paragraphs 20 to 23).

The Issue of Applicability

At the Working Group's most recent session, draft Article 1(1) dominated much of the debate. It concerns the applicability of the rules on transparency under future and existing investment treaties and agreements that contain provisions on the protection of an investor and its right to resort to investor-State arbitration ("investment treaties"). Due to the sizeable number of investment treaties already in force, applicability of the rules on transparency under existing treaties is one of the most important issues facing the Working Group. Indeed, in the words of the UNCITRAL Commission, as recorded in its 44th session report (available here), "the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with great practical interest, taking account of the high number of treaties already concluded." The Commission "also reiterated its commitment expressed at its forty-first session, in 2008, regarding the importance of ensuring transparency in investor-State arbitration."

The Working Group's most recent report from its February 2012 session, available here, provides an extensive record of the many views expressed on the issue of applicability. During the session, as recorded in paragraph 33 of the report, a revised draft Article 1(1) was proposed:

> Subject to applicable international law rules on treaty interpretation:
>
> (1) These Rules shall apply to investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors ("treaty") when (a) the Parties to the treaty have agreed to their application; or (b) the disputing parties have agreed to their application.
>
> (2) In particular, in a treaty concluded after [date of adoption of the Rules on Transparency], a reference in the treaty to the UNCITRAL Arbitration Rules shall be presumed to include the Rules on Transparency, unless the Parties to the treaty have agreed otherwise, such as through a reference to a particular version of the UNCITRAL Arbitration Rules that does not include the Rules on Transparency.

This revised draft was used as the basis for further discussion. With respect to existing investment treaties, the Working Group considered whether the revised draft above should include language to limit the application of the rules on transparency to future treaties and prevent what the Working Group has referred to as "dynamic interpretation" of an existing treaty. In this regard, the Working Group discussed whether an existing investment treaty offering arbitration under the "most up-to-date version of the UNCITRAL Arbitration Rules," such as treaties providing for application "of the version of the UNCITRAL Arbitration Rules as in effect at the date of commencement of the arbitration" or of the "UNCITRAL Arbitration Rules" without any reference to a particular version, could be interpreted "dynamically" to allow for the rules on transparency to be applied (paragraphs 19 to 23, 42).

As stated in paragraph 54 of the report, the majority view on applicability, which is subject to further consideration and additional drafting, was summarized as follows. First, for future treaties,

the majority view was that "a reference to the UNCITRAL Arbitration Rules would [presumptively] include a reference to the rules on transparency unless the States Parties agreed otherwise, which they would be able to do by choosing an earlier version of the UNCITRAL Arbitration Rules (i.e. the 2010 Rules)." Second, for existing investment treaties, the majority view was that "the rules on transparency would only apply where the parties had expressly consented thereto, with wording being used to make it clear that there could be no dynamic interpretation of existing investment treaties which would make the transparency rules applicable to them." However, the report also notes that a number of delegations did not agree with the majority view on application under existing treaties, and the issue remains unresolved.

Notably, the Working Group faced a similar issue of applicability during its work culminating in the revised 2010 Arbitration Rules, which could serve as a solution now. In that instance, as reflected in Article 1(2) of those Rules, the Working Group agreed that an arbitration agreement concluded after the effective date of the 2010 Arbitration Rules "shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules." With respect to an arbitration agreement concluded by accepting an offer to arbitrate made before the effective date (e.g., in an investment treaty that entered into force before the effective date of the 2010 Arbitration Rules), the Working Group agreed "[t]hat presumption does not apply," with no additional limitation on application of the 2010 Rules. Following a similar approach now would allow the Working Group to move forward in a manner consistent with the Commission's mandate by allowing for application of the new transparency rules under certain existing investment treaties where such application is in accordance with the intent of the Parties.

Conclusion

UNCITRAL's work on transparency represents an important opportunity to support greater transparency in treaty-based investor-State arbitration through the United Nations' principal organ for promoting the use of international arbitration to resolve disputes. As mentioned above, the Working Group is discussing a number of potential solutions for promoting use of the rules on transparency. Nevertheless, even with those solutions, the inclusion of language in draft Article 1 that seeks to limit application of the rules on transparency under existing treaties – a matter best left to States Parties to each treaty – would seem to run contrary to the Working Group's mandate to not just promote transparency but to *ensure* it.

The author, Neale H. Bergman, is an Attorney-Adviser in the United States Department of State, Office of the Legal Adviser, Office of International Claims and Investment Disputes (L/CID). The views in this article are expressed by the author solely in his personal capacity and do not necessarily represent those of the U.S. Government.

This entry was posted on Tuesday, June 19th, 2012 at 5:19 pm and is filed under NAFTA, Suggestions to improve transparency and access to usable data, Transparency in investment arbitrations
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.