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UNCITRAL Unveils New Transparency Rules – Blazing a Trail Towards Transparency in Investor-State Arbitration?

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On 11 July 2013, the United Nations Commission on International Trade Law ("UNCITRAL") adopted new Rules on Transparency in Treaty-based Investor-State Arbitration (the "Transparency Rules"), which will come into effect from 1 April 2014.

The new rules provide for public access to documents generated during treaty-based investor-state arbitrations (but not commercial arbitrations) brought under the UNCITRAL Arbitration Rules, as well as public access to hearings of such disputes and the ability for third parties to make submissions, subject to certain exceptions.

The introduction of the UNCITRAL Transparency Rules could materially change the nature of the dispute resolution process under BITs or other investment treaties which provide for UNCITRAL arbitration, making it more open to public participation and scrutiny. But how much difference will the Transparency Rules really make in practice?

What information will be made public under the new Transparency Rules?
Under the new Transparency Rules, a considerable amount of information is to be made publicly available. This includes not only the names of disputing parties, the economic sector involved and the treaty under which the claim is made but also various documents created by the parties during the arbitration. The notice of arbitration, response to notice of arbitration, statement of claim, statement of defence, any further written submissions, any written submissions provided by third parties or non-disputing parties to the relevant treaty and transcripts of hearings (which are required to be open to the public, except where there is a need to protect confidential information or the integrity of the arbitral process, in which case part of the hearing may be held in private), will all be stored electronically in a single central repository, maintained by UNCITRAL. The repository will also contain the orders, decisions and awards of the Tribunal.

Whilst expert reports and witness statements will not automatically be released, they may be published (excluding exhibits) following a specific request. There will be public access to any table of exhibits to the parties' submissions, expert reports and witness statements, but not the exhibits themselves. However, the rules do give the Tribunal a broad discretion to order disclosure of such exhibits or any other documents provided to, or issued by, the Tribunal (on consultation with the parties).

Submissions from third parties

In addition to granting public access to arbitral documents and hearings, arbitral tribunals may also allow submissions regarding matters within the scope of the dispute from (1) non-disputing parties to a treaty and (2) third persons who are not a disputing party nor a non-disputing party to the treaty, after consultation with the disputing parties, who are also to be given a reasonable opportunity to comment on any such submissions.

Will disclosure always be required?

Importantly, the Transparency Rules give arbitral tribunals discretion to keep some documents confidential and there are two key exceptions to transparency:

- ***Confidential or protected information***: including confidential business information, information protected against being made public under the treaty or under the law of the respondent state, or any other applicable laws, where it would be contrary to the essential security interests of a respondent state, and information the disclosure of which would impede law enforcement;
- ***Integrity of the arbitral process***: where making information available to the public could hamper the collection of evidence, result in the intimidation of witnesses/counsel or members of the Tribunal.

How does this compare with other rules which apply in investor-state disputes?

The majority of investor-state disputes are still determined within the framework of ICSID or UNCITRAL arbitration. Some level of transparency is already available to investors using the ICSID Rules, and many saw the amendment of the ICSID Rules in 2006 as a step in the right direction towards transparency, allowing for interested third parties to intervene in arbitral proceedings at the discretion of the tribunal and to attend hearings, although not automatically to see documents created as part of the proceedings.

Similar to the ICSID Rules, the PCA Arbitration Rules published in 2012 provide some concessions to transparency: awards may be published (but only with consent of the parties), and hearings are to be in private, unless the parties agree otherwise. However, there are no specific provisions in the PCA Arbitration Rules expressly allowing for third party submissions (as in the ICSID Arbitration Rules / UNCITRAL Transparency Rules), and the rules are also silent on third party access to documents (other than the award).

The UNCITRAL Transparency Rules go a step further than ICSID and the PCA Rules, and also provide for public access to key documents prepared during the course of proceedings (including parties' submissions), except in certain situations where restriction is necessary to protect confidential or protected information or to preserve the integrity of the arbitral process. Many have argued that the benefits of amicus submissions could be far greater if the third parties were allowed access to the documentation relevant to the dispute, and this has been one difficulty in the approach taken by ICSID. Of course, even without such transparency rules, documents from investor-state arbitrations often make their way into the public domain on a more ad-hoc basis.

The ICC is also currently promoting its rules for the settlement of disputes involving states and state entities, and the revised 2012 ICC Rules make specific provision in this regard. However, there are no provisions in the 2012 ICC Rules allowing for third party submissions, or for publication of the award or other documents. Guidance in the ICC's accompanying report (States, State Entities and ICC Arbitration) recommends that the parties may wish to provide for confidentiality, or alternatively to provide for greater transparency (for example, providing that the award, proceedings or submissions are to be made public). The ICC Rules therefore leave matters

in the hands of the parties, or failing agreement, to the Tribunal for determination in accordance with any applicable laws.

It is NAFTA arbitration which has probably achieved highest level of transparency to date (as noted by the Tribunal when considering these issues in the Biwater Gauff claim) – such that memorials, procedural orders and other decisions, as well as awards, are made public on a routine basis. Many new BITs also expressly address transparency in the arbitral process, and allow open hearings, public access to case documents and third party participation in proceedings. Both the US and Canada have included transparency provisions in their model BITs and the pro-transparency position of these states was also influential in the development of the UNCITRAL Transparency Rules. It may be that the greatest push towards transparency will come from the users of the arbitral system, rather than the institutions who facilitate the process.

A leap towards transparency, or just the next step along the path?

Undoubtedly for those seeking full transparency for investor-state treaty-based arbitrations the UNCITRAL Transparency Rules are a step in the right direction. In particular, it will be interesting whether they take on a broader application, and (as envisaged by Article 1(9)) are adopted by parties in respect of claims under other arbitral rules or in ad hoc arbitration proceedings – perhaps moving towards a common standard in the field of investment treaty arbitration.

On a more practical level, it will also be interesting to see whether this increased transparency has any impact on the way that the parties draft their pleadings, or perhaps to limit the documents they refer to, in order to avoid potential disclosure requests. It also remains to be seen whether the increased publicity will have an impact on a party's decision whether to pursue an investment claim under a treaty (where the Transparency Rules apply) or under contract, where there will be no such disclosure requirements.

However, there are still uncertainties regarding the application of the rules. Although they will apply automatically to claims brought under a treaty which was concluded after 1 April 2014, parties will still have the option to opt out. In addition, it is also unclear how the new rules will apply to claims based on existing treaties – in this situation the rules only apply if the parties agree or if the state parties to the relevant treaty have agreed (after 1 April 2014) to their application – effectively requiring an 'opt-in' to the transparency provisions.

In providing a clear list of disclosable documents, the Transparency Rules will no doubt reduce the scope for procedural arguments surrounding access to documents. However, the new rules still leave open the possibility for such debate in relation to witness statements, expert reports and exhibits, which are not automatically disclosable – and of course in relation to the Tribunal's exercise of its discretion to restrict disclosure to protect confidential or protected documents and the integrity of the arbitral process. Even when the new rules come into force, such skirmishes are likely to continue as parties use all means available to win these high stakes disputes.

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