Kluwer Arbitration Blog

The Consistency of the UNCITRAL Rules on Transparency with the Transparency Policy of Some Latin American Countries

Luis Miguel Velarde Saffer (Lalive) · Friday, May 16th, 2014

and Felipe González Arrieta

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (hereinafter "the Rules") came into force in April 1, 2014. The Rules were adopted at the forty-sixth session of the United Nations Commission on International Trade Law, held on July 2013, and are the result of a 3-year period effort by the Working Group II (Arbitration and Conciliation). Ensuring transparency was considered a priority for the Commission given the public interest involved in investor-State arbitration and the aim to establish a harmonized legal framework for a fair and efficient settlement of investment disputes, the increase of accountability and the promotion of good governance.

In this piece, after explaining key aspects of the Rules to create context,the authors will contrast its transparency policy to that shown by some Latin American countries.

I. The Rules

1.1. Scope of Application

The Rules have created what is commonly labeled as an "opt-out system". Whenever an investor resorts to investor-State arbitration under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors concluded on or after April 1 2014, the Rules will apply *unless the parties to the relevant Treaty have agreed otherwise*.

However, the scope of application of the Rules goes further, having also created what is commonly labeled as an "opt-in system". According to Article 1.2, in arbitrations initiated under the UNCITRAL Arbitration Rules and pursuant to a treaty concluded before April 1 2014, the Rules will apply when (i) the parties to the arbitration so agree;or, (ii) when the States parties to the Treaty agree to such application, therefore modifying the original Treaty.

Finally, Article 1.9 of the Rules provide that they may be used in investor-State arbitrations initiated under other rules or even in ad-hoc proceedings.

1.2. The standards

Throughout the arbitration proceeding, the Rules set three different standards regarding *documentation*.The first standard is the most aggressive one and relates to the written documents prepared and/or delivered by the parties, the arbitral tribunal and even non-disputing parties and third persons. These documents must be made public as soon as possible.

The second and third standards are more lenient. The second one relates to expert reports and witness statements, providing the Rules that they shall be made public only if someone requests so to the tribunal. The third standard relates to exhibits and other documents not covered by the first and second standards, providing the Rules that the tribunal will have discretion to decide, *proprio motu* or upon any person's request, whether or not, and how, if it is the case, to make then public.

Under the Rules, *hearings* are made fully public. Article 6 provides that hearings for the presentation of evidence and for oral argument shall be public, unless when confidential information needs to be protected or where logistical reasons so mandate. Regarding the first exception, only the part of the hearing requiring protection will be held in private. As to the second exception, it is hard to understand its rationale as video links are supposed to be always available.

The Rules also contain provisions on submissions by third persons and by non-disputing Parties to the particular treaty. In principle, the arbitral tribunal has discretion to either allow or reject these submissions, but in doing so the tribunal shall consider the submitting person's interest in the arbitration and whether such submission would assist the tribunal. Tribunals should have special care when deciding whether to allow or not submissions by non-disputing Parties, as they should not be tantamount to diplomatic protection. An exception to the tribunal's discretion can be found in Article 5(1) of the Rules, which provides that the tribunal *shall* accept non-disputing Parties submissions on the interpretation of the relevant Treaty as long as it does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudices any disputing party.

All of the standards are subject to the protection of confidential information and to the safeguard of the proceedings integrity. States are not required to disclose information that may put at risk its essential security interests.

II. The case of Peru

To date, Peru's policy on transparency in investment arbitration is unclear. This lack of clarity exists because (i) Peru has shown a *pro-transparency* attitude in some cases and a *low-transparency* attitude in others; and, (ii) when a *pro-transparency* attitude has been shown, its scope has varied notably.

2.1. Free Trade Agreements ("FTAs") recently executed by Peru

FTAs recently executed by Peru show a *pro-transparency* policy. They (i) make arbitral hearings and arbitral documentation public; and, (ii) authorize third-party submissions *(amicus curiae* or *non-disputing parties*) as long as the arbitral tribunal deems it appropriate. This *pro-transparency* policy is explicit in paragraphs 10.20 (3) and 10.21 of the USA-Peru FTA, executed on April 6 2006 (in force as of February 1, 2009); in paragraphs 12.21 (2) and 12.22 of the FTA executed by Peru with Panama on May 25 2011 (in force as of May 1, 2012), with Costa Rica on May 26 2011 (in force as of mid-2103) and with Guatemala on December 6 2011 (to enter into force soon); in paragraphs 11.20 (3) and 11.21 of the Peru-Chile FTA, executed on August 22 2006 (in force as of March 1, 2009); and in paragraphs 835 and 836 of the Peru-Canada FTA, executed on May 29 2008 (in force as of August 1, 2009).

However, other FTAs executed by Peru show a *low-transparency* level. The Peru-Mexico FTA, executed on April 6 2011 (in force as of February 1, 2012), does not contemplate the possibility of third party submissions and does not grant third parties the right to attend arbitral hearings or access arbitral documentation. On the contrary, it only provides that parties *may* disclose information and that the award will be published unless parties agree to the contrary (Art. 11.31 (4)).

In the opposite extreme, contemplating a *zero-transparency* policy, we have the Peru-Venezuela FTA, executed on January 7 2012 (in force as of August 1, 2013). This agreement does not contemplate the possibility of third-party submissions and expressly rejects the publicity of hearings and of arbitral documentation (Art. 8 (4)).

Finally, with very few exceptions, such as the BIT executed by Peru with Colombia, a *low* or *zero-transparency* policy is seen in all the BITs executed by Peru. Normally, in these agreements, no provisions on the transparency of arbitration proceedings can be found.

2.2. Peru's investment arbitration proceedings

The country's policy on transparency does not become clearer when its recent investment arbitration proceedings are reviewed.

On one hand, there is a clear rejection to the transparency of arbitral documentation. This can be seen in the following ICSID proceedings, all of them relatively recent ones: ARB/10/17, ARB/06/13, ARB/12/5, ARB/11/9 y ARB/10/2.

Notwithstanding the foregoing, in the majority of cases Peru has accepted the publication of awards[1)]. This has occurred in 4 of the 5 cases mentioned above. The only case in which the award has not been published, after almost 1 year of the proceeding's conclusion, is ARB/10/2.

The only exception to this practice, where total transparency exists, is the ICSID case UNCT/13/1. This *pro-transparency* is explained, however, because the arbitration is governed by the Peru-USA FTA. USA's policy on transparency is well known to all.

III. The case of Colombia

Regarding Colombia's policy on transparency, it is possible to find (i) a *zero-transparency* policy in most BITs and FTAs executed by Colombia with European and Asian countries, with few exceptions evidencing only a *low-transparency* policy; and, (ii) a *pro-transparency* policy, very similar to that set forth in the Rules, in FTAs executed by Colombia with American countries[2)] and one BIT recently renegotiated with a Latin American country. An exception to this pro-transparency policy is seen in the FTA executed by Colombia with Mexico.

Regarding (i), most of the BITs executed by Colombia evidence a *zero-transparency* policy. Among them we count the BIT executed with Spain on March 2005 (in force as of September 2007), with Switzerland on May 2006 (in force as of October 2009), with China on November 2008 (in force as of July 2012), with India on March 2009 (in force as of July 2012), and with the United Kingdom on March 2010. All these were executed a relatively short time ago and can be considered newer generation BITs. The same policy exists in the FTA executed by Colombia with the European Free Trade Association – EFTA on November 2008 (in force as of July 2011), with

the Republic of South Korea on November 2013, and with Israel on October 2013. All these BITs and FTAs have no provision whatsoever on transparency.

In the same realm, although, in contrast to the previous cases, having some provisions on transparency, we find the FTA executed by Colombia with Mexico on June 1994 (in force as of January 1995) and the BIT executed by Colombia with Japan on September 2011. Their transparency provisions only concern submissions by a non-disputing Party to the treaty (Annex 17-16 Rule 8 of the FTA with Mexico) and that Party's possibility to request documents from the proceedings(Art. 32 of the BIT with Japan). The only additional provision on disclosure of arbitral documentation concerns awards, whose publication, however, requires the consent of the parties (Annex 17-16 Rule 14 of the FTA with Mexico).

On the opposite side of the spectrum, evidencing a *pro-transparency* policy, we have all the FTAs executed by Colombia with American countries. Among them we find that executed with Chile on November 2006 (in force as of May 2009), with Canada on November 2008 (in force as of August 2011), with the so-called North Triangle (Guatemala, El Salvador and Honduras) on August 2007 (in force as of March 2010[3)]), with the United States on November 2006 (in force as of May 2012), with Costa Rica on May 2013 and with Panama on September 2013. The same *pro-transparency* policy exists in the BIT executed by Colombia with Peru on December 2007 (in force as of December 2010), which, however,is notably different from the other BITs executed by Colombia.

The FTAs and the BIT mentioned above provide for a very high standard of transparency, which is comparable to that found in the Rules. Even in some cases those agreements' *pro-transparency* provisions go beyond the Rules, such as when they provide non-disputing Parties to the treaty with the right to access the exhibits.

IV. Brief comment

To date, Peru's policy on transparency is unclear. Although *many* of its recently executed FTAs adopt a *pro-transparency* policy, the arbitration proceedings in which the country has been recently involved suggest the adoption of a *low-transparency* policy. It is unlikely that, in all these *low-transparency* ICSID cases, the investor has been the one opposing to the publicity. In any event, a reasonable doubt exists and needs to be clarified.

With respect to Colombia's policy the result is not different. While a *pro-transparency* policy exists in the FTAs executed with American countries, the opposite standard is shown in the FTAs recently executed with European and Asian countries. A *low-transparency* policy seems also to exist in almost all of the BITs executed by Colombia, both recent and not. The reasons for these differences are not clear, although they may be explained both by the level of integration and the countries with whom the negotiation is made. As Colombia's model BIT is currently been revised, it may be a good opportunity to clarify the country's transparency policy and unify it. The future investment arbitration practice of the country, which has not had any case yet, should also help clarifying the picture.

Given the *pro-transparency* policy of the Rules and its broad scope of application, countries' transparency policy should become clearer in light of the terms of their future BIT and FTA agreements. *Will they submit their disputes to ICSID or UNCITRAL? Is this consistent with their pre-existent BITs and FTAs? If their arbitration agreements are governed by UNCITRAL Arbitration Rules, will they exclude the application of the Rules or modify them?*

Having a clear policy on transparency in investment arbitration is fundamental. Although there is still some resistance and fears, it is clear, in the authors' opinion, that transparency in investment arbitration is necessary and beneficial for the legitimacy and effectiveness of the system. UNCITRAL has already created such a system, and a great responsibility now rests on the shoulders of the arbitrators, who must use the discretion the Rules grant them wisely and carefully in order not to harm the arbitral process or the rights of the parties.

Luis Miguel Velarde Saffer *is a lawyer who graduated with honors from the Pontificia Universidad Catolica del Peru. He obtained his LL.M. from Harvard Law School (2013) and is currently a Visiting Research Fellow at the British Institute for International and Comparative Law (BIICL). Luis may be reached at lvelardesaffer@llm13.law.harvard.edu.* ***Felipe González Arrieta*** *is a lawyer who graduated with honors from Pontificia Universidad Javeriana. He obtained his LL.M. in International Business Regulation, Arbitration and Litigation from New York University School of Law. Felipe may be reached at fga224@nyu.edu.*

References

?1 As stated beforehand, under ICSID Arbitration Rules, publication of awards requires agreement of the parties (Art. 48 (4)).

?2 Reference to American countries includes North American, Central American and South American countries.

?3 Although this FTA has three different dates of entry into force, which depend on the country, as of March 2010 it was fully in force for all contracting parties.

This entry was posted on Friday, May 16th, 2014 at 7:04 am and is filed under Colombia, Free Trade Agreements, ICSID Convention, Peru, UNCITRAL Rules on Transparency
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.