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A Step toward Greater Transparency: The UN Transparency Convention

Esmé Shirlow (Associate Editor) (Australian National University) · Monday, March 30th, 2015

On 17 March 2015, the UN Convention on Transparency in Treaty-Based Investor-State Arbitration was opened for signature. So far, nine countries have signed the treaty (among them, Canada, France, Germany, the United Kingdom and the United States). The Convention will enter into force six months after the first three instruments of ratification have been deposited by any of the States which have signed the Convention (Article 9(2)). This post briefly considers how the Convention operates, its notable features, and possible implications should States show a willingness to ratify it.

Operation of the Convention

The Convention is designed to provide additional scope for the application of the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration. The Rules came into effect on 1 April 2014, and are incorporated into the 2013 UNCITRAL Arbitration Rules by Article 1(4) of those Rules. The Transparency Rules provide for increased transparency in investor-State proceedings conducted under the UNCITRAL Arbitration Rules. They provide, *inter alia*, for publication by a central repository of basic information about filed cases; public release of key documents, including the tribunal's decisions, and the statements of claim and defence; participation of non-disputing third parties in certain circumstances; and open hearings.

Subject to certain exceptions, the Rules apply automatically – but only to UNCITRAL arbitrations which are filed under treaties concluded after 1 April 2014. For UNCITRAL arbitrations instituted under pre-April 2014 investment treaties, the Rules only apply if the parties to the dispute or the treaty parties themselves agree to their application. The Transparency Convention provides a mechanism by which States can express such agreement to the application of the Rules.

Once the Convention enters into force, it will operate to constitute consent by the States party to it for the Transparency Rules to be applied in proceedings (whether or not conducted under the UNICTRAL Rules) brought under pre-April 2014 investment treaties to which they are party. In subscribing to the Convention, States can elect to expressly exclude from coverage any proceedings brought under specified treaties and/or those conducted in accordance with particular arbitral rules (other than the UNCITRAL Rules).

Notable Features of the Convention

The Convention has two particularly interesting textual features that bear emphasis.

First, Article 2(5) governs the interaction between the Transparency Rules and most-favoured nation ("MFN") provisions in investment treaties. It provides that:

> The Parties to this Convention agree that a claimant may not invoke a most favored nation provision to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention.

The *travaux preparatoires* to the Convention clarify that this provision should not be taken to imply that the parties to the Convention have taken a view as to the applicability or otherwise of MFN provisions to procedural matters more generally. Whilst it usefully clarifies the interaction between the Rules and MFN clauses, the provision only applies where both the home and host States in the relevant dispute are party also to the Convention; in other cases the position is less clear (see Articles 30(3) and 30(4) of the Vienna Convention).

Second, the Convention does not specifically address the effect of the Rules on otherwise applicable domestic law (for example, at the seat of arbitration). The implications of this textual silence will depend upon the view that is taken as to role of the Convention in altering the relationship between the Rules and mandatory provisions of domestic law. The Working Group appears to have considered that the Rules would prevail over inconsistent domestic law, noting at its 58th session that:

> It was recalled that the Working Group had expressed unanimous support for the proposal that it was not permissible for a State to adopt in its investment treaties the rules on transparency and then to use its domestic laws to undermine the spirit of those rules. The Working Group unanimously reaffirmed that view.

As Lise Johnson discusses in more detail in a helpful annotated guide to the Convention, the actual status of the Rules remains somewhat unclear. It is possible that the Convention might even be construed to allow the Rules to override domestic laws which provide for more transparent procedures than those envisaged in the Rules (to the extent of any inconsistency).

Possible Implications of the Convention

Both the Rules and the Convention address the "public interest in transparency in treaty based investor-State arbitration" (Article 1(4), Rules). In so doing, they are responsive to a key criticism that has been levelled against investor State arbitration since its inception: that investment tribunals frequently decide matters of public importance behind closed doors. The Convention extends the reach of the Rules and – assuming it is widely adopted – has the potential to have a significant effect on approaches to transparency in future investor-State arbitral proceedings. The Convention also has the potential to affect the investor-State system more generally.

As noted in a previous post, for example, the lack of generally applicable requirements for the reporting of basic information about investor-State claims (including the very existence of such claims) has, to-date, significantly hampered the capacity to monitor and collect statistics as to the

features of non-ICSID arbitrations. By providing for the publication of basic data about filed cases, the Rules and Convention may make it more possible in the future to accurately identify both the number and types of claims being brought against States under investment treaties. By improving information flows, increased transparency could also play a role in informing public discussions of investor-State arbitration and, potentially, (for better or worse!) perceptions as to its viability as a means of dispute settlement.

The increased publication of arbitral decisions and awards may also influence arbitral reasoning and encourage coalescence around particular interpretations of applicable treaty norms. Indeed, it is often observed that the development of a system of precedent (or, at least, something like it) depends to a significant degree upon ease of access to past decisions. With improved prospects for the release of decisions into the public domain, it might be expected that improvements in systemic coherence and predictability will be (very) incrementally achieved.

Finally, as Stephan Schill notes:

> While many comprehensive multilateral reforms are slow to progress, the Mauritius Convention has relatively quickly resulted in a consented text by focusing on a clearly defined and narrow, but no less important issue. Its exclusive focus on a single issue (transparency and third-party participation) prevented cross-deals with other issues on the reform agenda and helped to streamline negotiations.

In this respect, the Convention can be welcomed as a means by which other rules or procedures applicable in investor-State arbitration might in the future be revised.

It is difficult to predict how popular the Convention will be or how the Rules will be interpreted and applied in arbitral proceedings. Regardless of uptake, the Convention may nevertheless be welcomed as at least a small step toward greater transparency: only time will tell whether it may precipitate a giant leap forward for investment arbitration.

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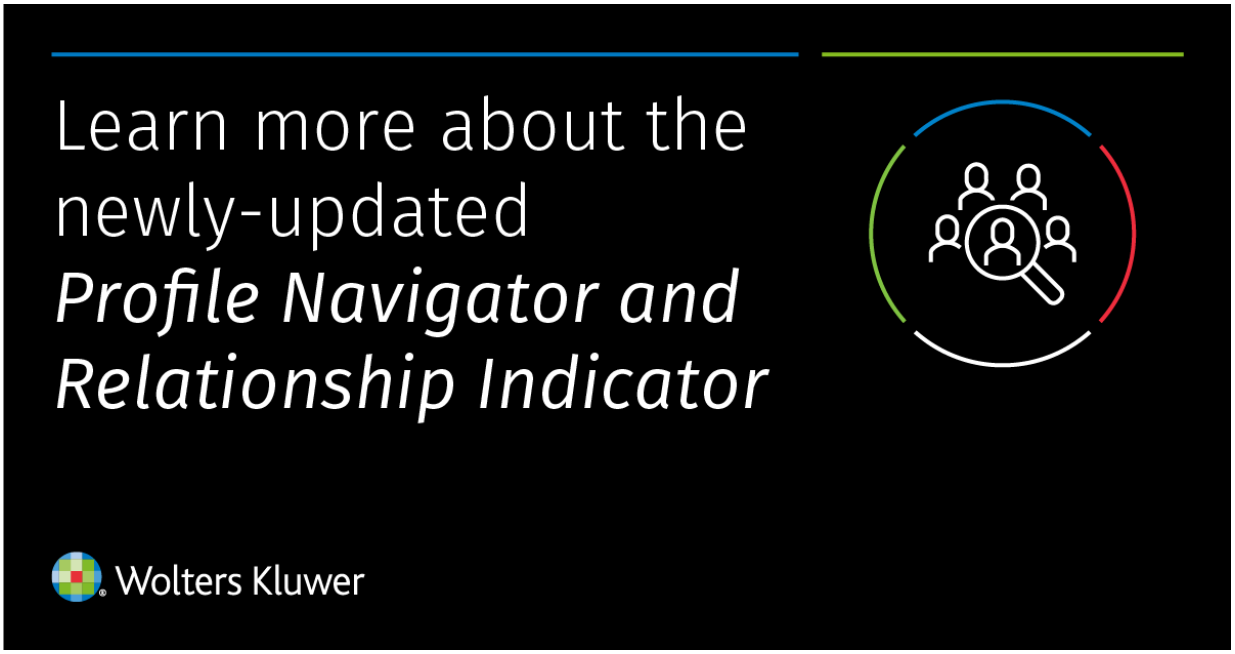

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