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New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps

LISE JOHNSON AND NATHALIE BERNASCONI-OSTERWALDER – September 18, 2013

In July 2013, the United Nations Commission on International Trade Law (UNCITRAL) adopted a package of rules aiming to ensure transparency in investor-State arbitration (the "Rules on Transparency"), ratifying the work done by delegations to UNCITRAL—comprised of 55 Member States, additional observer States and observer organizations—over the course of nearly three years of negotiations. [1]
Under previous versions of the UNCITRAL Arbitration Rules, disputes between investors and States were often not made public, even where important public policies were involved or illegal or corrupt business practices were uncovered. In contrast, the new rules, which will officially come into effect on April 1, 2014, provide for a significant degree of openness throughout the arbitral proceedings.

With the adoption of the new rules, there is now a carefully negotiated and widely approved template that can serve as a model for how to conduct investor-State arbitrations transparently. This model reflects and is consistent with broader worldwide trends recognizing the importance of transparency as a tool for promoting and ensuring effective democratic participation, good governance, accountability, predictability and the rule of law.[2]

The status quo prior to the Rules on Transparency
Prior to the Rules on Transparency, no arbitration rules used in investor-State arbitration had mandated transparency throughout the arbitral process. Indeed, most arbitration rules referred to in investment treaties are (with the exception of rules requiring both disputing parties' consent to open hearings) essentially silent on the matter of transparency, neither mandating confidentiality nor requiring disclosure.

Yet, all arbitral rules allow the disputing parties and the tribunal significant latitude to determine—individually or through agreement—the degree of openness of the proceedings. The new Rules on Transparency thus represent not a complete upending of the approach to transparency in arbitration, but, instead, a shift in the underlying presumption toward openness, rather than privacy, in treaty-based investor-State arbitrations. Importantly, the new rules also set up a process and institutional framework to ensure that transparency is clearly and consistently put into practice.

New UNCITRAL arbitration rules on transparency
The new rules ensure transparency from the beginning to the end of treaty-based investor-State arbitrations to which they apply. They contain one article that governs the scope and manner of application of those provisions (Article 1); three articles mandating disclosure and openness (Articles 2, 3, and 6); two governing participation by non-disputing parties (Articles 4 and 5); one setting forth exceptions from the disclosure requirements (Article 7); and one regarding management of disclosure through a specific repository (Article 8).

After significant debate over the form of the new Rules on Transparency (e.g., whether they would even be rules or merely guidelines, a stand-alone instrument or an integral part of the UNCITRAL Arbitration Rules), UNCITRAL determined that its output would be rules that would both be (a) part and parcel of the UNCITRAL Arbitration Rules and (b) available as a stand-alone instrument for application in disputes governed by other arbitral rules. To effectively and clearly accomplish the goal of incorporating the Rules on Transparency as an integral part of UNCITRAL arbitrations, UNCITRAL amended its 2010 general arbitration rules by inserting a new paragraph (4) in Article 1 of those rules. Article 1(4) of the new 2013 UNCITRAL Arbitration Rules expressly states that the rules include the Rules on Transparency when the underlying dispute is based on an investment treaty.

Article 1 – Scope of application
The new Rules on Transparency will apply on a default basis to UNCITRAL investor-State arbitrations conducted under investment treaties concluded after the new rules come into effect on April 1, 2014. However, the State parties to the underlying treaty can agree to modify that default rule of application and "opt out" for (future) treaties, for example, by expressly excluding application of the UNCITRAL Rules on Transparency or stating that the "UNCITRAL Arbitration Rules, as adopted in 1976" will apply. In UNCITRAL arbitrations brought under treaties concluded prior to April 1, 2014, the Rules on Transparency will not apply unless States or disputing parties expressly "opt into" the new rules.

The Rules on Transparency also make explicit what is otherwise implicit: that the new rules may be used in connection with arbitrations under other arbitral rules. During the negotiations, various arbitral institutions, including the Permanent Court of Arbitration (PCA) and the International Centre for Settlement of Investment Disputes (ICSID), confirmed that the Rules on Transparency could apply to proceedings conducted under their respective rules.[3]
Some of the provisions in the Rules on Transparency call for the tribunal to exercise discretion. In those cases the rules expressly dictate that a tribunal shall take into account, firstly, the public interest—both in investor-State arbitration generally and in the particular dispute—and, secondly, the disputing parties' interest in a "fair and efficient" resolution of their dispute.

The Rules on Transparency also address a tribunal's authority to allow or require transparency in UNCITRAL arbitrations *not* using the Rules on Transparency, and aim to counter any potential presumption *against* transparency. The levels of transparency already permitted by the general UNCITRAL Arbitration Rules (2010 or 1976) are in no way intended to be reduced by any non-application of the Rules on Transparency. The drafters also

inserted limits on the ability of States to evade application of the Rules on Transparency where they do apply.
As regards their placement in the legal hierarchy, the Rules on Transparency trump conflicting provisions in applicable arbitration rules (e.g., Art. 1(1) of UNCITRAL Arbitration Rules 1976, 2010, and 2013). However, in case of conflict with provisions in the applicable treaty, the treaty provisions will prevail. The principle that the arbitration rules cannot prevail over mandatory laws is also reflected.[4]

Article 2 – Publication of information at the commencement of arbitral proceedings
The compromise reached in Article 2 requires prompt disclosure of a basic set of facts (which will not require exercise of subjective judgment or discretion by the repository) once there is evidence that the respondent has received notice of the arbitration. In some cases, the disputing parties may disagree about whether or not the Rules on Transparency apply. Nonetheless, Article 2 requires each disputing party and the repository to take action before a tribunal is in place to resolve any disputes regarding that issue. The notice of arbitration itself will be subject to automatic mandatory disclosure pursuant to Article 3 (below), but only after constitution of the tribunal.

Article 3 – Publication of documents
Article 3 provides for disclosure of documents submitted to or issued by the tribunal along three categories: (1) a wide set of documents submitted to or issued by the tribunal during the proceedings is to be *mandatorily* and *automatically* disclosed (including 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); (2) documents such as witness statements and expert reports are to be *mandatorily* disclosed once any person requests their disclosure from the tribunal; and (3) other documents such as exhibits may be ordered to be published by the tribunal depending on the exercise of its discretion.
Where disclosure is mandatory, the tribunal must send the information to the repository "as soon as possible" after steps have been taken to restrict disclosure of information deemed protected or confidential.[5] The repository is then to publish the information on its website.

Article 4 – Submission by a third person
In line with previous practice by tribunals, the Rules on Transparency expressly affirm the authority of investment tribunals to accept submissions from so-called *amicus curiae* (friend of the court), while incorporating detailed rules and guidelines. This express grant or acknowledgement of authority concerns "written submissions" and does not address other forms of participation, such as statements at hearings. Tribunals, however, may be able to permit other forms of participation pursuant to their discretionary authority under Article 15 of the 1976 UNCITRAL Arbitration Rules and Article 17 of the 2010 and 2013 UNCITRAL Arbitration Rules.

Article 5 – Submission by a non-disputing party to the treaty
The Rules on Transparency *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." They further expressly authorize tribunals to invite submissions (not only "written submissions") from non-disputing State parties on matters of treaty interpretation under the same conditions. The tribunal also has authority to accept submissions on other matters relevant to the dispute from non-disputing State parties to the underlying treaty.

Article 6 – Hearings

A notable departure from other arbitration rules is that the Rules on Transparency require hearings to be open, subject to three limitations: (1) to protect confidential information; (2) to protect the "integrity of the arbitral process"; and (3) for logistical reasons. The disputing parties—alone or together—cannot veto open hearings. The article explicitly gives the tribunal authority to determine how to make hearings open, and contemplates that the tribunal may decide to facilitate public access through online tools. It also allows the tribunal limited authority to close the hearings for logistical reasons, while ensuring that this power will only be narrowly applied and not abused.[6]

Article 7 – Exceptions to transparency

To balance the Rules on Transparency's provisions on disclosure, the rules also specify that disclosure is subject to exceptions for confidential or protected information. Article 7(2) lists four potentially overlapping categories of information that are confidential or protected. Whether and what information will fall under the exceptions will be an issue to be decided on a case-by-case basis based on the nature of the information and the applicable law. Further, Article 7(5) provides respondent States a self-judging exception to protect against disclosure of information that they "consider" would be contrary to their essential security interests. Finally, there is also an exception to the transparency rules that permits tribunals to restrain or limit disclosure when necessary to protect the "integrity of the process," a narrow category that is only intended to restrain or delay disclosure to cover exceptional circumstances, such as witness intimidation or comparably exceptional circumstances.

Article 8 – Repository of the published information

This article reflects the unanimous decision by UNCITRAL that the repository should be UNCITRAL itself. At the time of adoption of the Rules on Transparency, however, it was not known whether UNCITRAL would have the resources available to play this role. If, come April 1, 2014, UNCITRAL is unable to serve as the repository, the PCA will take over that function. Such delegation of that function to the PCA, however, is intended to be temporary: the function will be transferred to UNCITRAL if and when UNCITRAL is ready for the task.

UNCITRAL's efforts in context and next steps

UNCITRAL's aim of "ensuring transparency in investor–State arbitration"[7] is complex. In their investment treaties, most States offer investors the option to take disputes arising under the treaties to international arbitration and to select from a menu of options which procedural rules will actually apply. The options may include the arbitration rules of UNCITRAL, ICSID or ICSID's Additional Facility, the International Chamber of Commerce (ICC) or the Stockholm Chamber of Commerce (SCC).

Even though the UNCITRAL arbitration rules now require transparency, the investor would be free to choose another alternative proposed in the treaty. Moreover, pursuant to a

provision inserted in Article 1(2) of the Rules on Transparency, those rules will not by default apply to any UNCITRAL arbitrations arising under existing investment treaties.

Thus, although UNCITRAL's adoption of the Rules on Transparency represents crucial progress in the long-running efforts to increase transparency of treaty-based investor-State arbitrations under the UNCITRAL arbitration rules, in order to ensure real change, UNCITRAL and States need to take a number of additional steps.

Offers of consent, interpretive statements, treaty amendment and adoption of a transparency convention

Through unilateral offers of consent to apply the Rules on Transparency, States could enable and encourage application to disputes governed by UNCITRAL and other rules, irrespective of the date on which the underlying investment treaty was concluded.[8] The other possibility is to issue unilateral or joint interpretative statements manifesting such consent. While these options have yet to be discussed in much detail in UNCITRAL sessions, they represent viable and seemingly simple mechanisms for facilitating broad use of the Rules on Transparency.

Another option to enable the Rules on Transparency to apply to existing and future treaties is for States to amend their existing investment treaties to expressly allow, if not require, their use. Yet, renegotiation of treaties is an option that many States will likely wish to avoid, as it could complicate their international economic relations with their trading partners.

An easier approach is for States to sign onto a new treaty—i.e., a transparency convention. Pursuant to Article 30 of the Vienna Convention on the Law of Treaties (VCLT), such a treaty could supplement or supersede provisions in investment treaties between transparency convention parties. Promisingly, UNCITRAL has mandated continued work on a transparency convention in order to facilitate application of the Rules on Transparency to disputes arising under treaties concluded prior to the rules' effective date, including arbitrations under rules other than the UNCITRAL Arbitration Rules. A draft text of this convention has been prepared by the UNCITRAL Secretariat, but has not yet been openly debated in UNCITRAL sessions. That will happen when UNCITRAL's Working Group II begins work focused on the transparency convention this fall.

Conclusion

Five years after officially recognizing the public interest in treaty-based investor-State arbitrations, and three years after beginning negotiations on a legal standard to ensure openness of those proceedings, UNCITRAL has adopted a set of Rules on Transparency providing for increased disclosure of information generated from the initiation through the termination of the disputes. By incorporating those rules as an integral part of the UNCITRAL Arbitration Rules as amended in 2013, UNCITRAL has also taken an important policy decision reflecting the UN body's commitment to make transparency, rather than confidentiality, the default rule for investor-State disputes.

However, UNCITRAL has not yet completed its task. In order to truly achieve the goal of ensuring transparency in investor-State dispute settlement, it must now take additional

steps to facilitate application of the Rules on Transparency to disputes initiated under both existing and future treaties. If done right, the new UN Rules on Transparency will have a reach beyond disputes conducted under UNCITRAL Arbitration Rules to apply to all investor-State disputes.

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[1] The UNCITRAL Rules on Transparency in Treaty-based Investor- State Arbitration (Pre-release publication – 30 July 2013) are available at http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf.

[2] *Delivering Justice: Programme of action to strengthen the rule of law at the national and international levels*, Report of the Secretary-General (2012), A/66/749.

[3] Notably, the Commission rejected the idea that the carve-out in Article 1(2), which limits the Rules on Transparency's applicability to disputes brought under treaties adopted after the Rules on Transparency's entry into force, could be extended to non-UNCITRAL arbitrations.

[4] If, however, the Rules on Transparency are incorporated in a convention on transparency, as is discussed below in Part IV, then domestic law would have to be brought into conformity with the convention.

[5] In contrast, the tribunal has more flexibility regarding the means of disclosure of requested exhibits or other documents.

[6] Transcripts are subject to a different rule in Article 3. Thus, if all or part of a hearing is closed for any of the three permissible reasons identified in Article 6, non-confidential aspects of the transcript of that hearing (if prepared) will nevertheless be disclosed in accordance with Articles 3 and 7.

[7] Report of the United Nations Commission on International Trade Law, 41st session (June 16–July 3, 2008), Gen. Ass. 63rd session, supp. no. 17, A/63/17, para. 314; Report of the United Nations Commission on International Trade Law, 45th session (June 25-July 6, 2012), Gen. Ass. 66th session, supp. no. 17, A/67/17, para. 200; Report of the United Nations Commission on International Trade Law, 45th session (June 25-July 6, 2012), Gen. Ass. 67th session, supp. no. 17, A/67/17, para. 69.

[8] The North American Free Trade Agreement (NAFTA) parties used this approach in 2003 to provide for open hearings.