

UNCITRAL ADOPT INVESTMENT DISPUTE TRANSPARENCY RULES

Introduction

On 11th July 2013, the United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL *Rules on Transparency in Treaty-based Investor-State Arbitration* (the “*Transparency Rules*”). The *Transparency Rules* are the fruit of almost three years of negotiation by the UNCITRAL Working Group on Arbitration, and may bring about significant change in the process of international investment arbitration.

Background

Confidentiality has long been one of the principal hallmarks of international arbitration and is normally seen as a major attraction by party-disputants. The logic behind keeping arbitral proceedings private in the case of disputes between non-state actors is clear and, for most, compelling. Where arbitrations involve states, however, that logic is much less clear. Not only do such disputes involve the commitment of considerable taxpayer funds, they frequently raise issues of real public importance. For this reason, pressure has mounted to ensure that investor-state disputes are opened to greater public scrutiny. It is in this context that the *Transparency Rules* have been drafted and adopted.

Summary Overview

The *Transparency Rules* take effect on 1st April 2014 and will apply to all *future* Investment Treaties referring disputes to UNCITRAL rules unless the parties to a treaty agree otherwise (Article 1(1)). To this end a paragraph has been added to the pre-existing UNCITRAL *Arbitration Rules* (as revised in 2010) to make clear their link with the new transparency regime. As such, a revised version of the UNCITRAL *Arbitration Rules* (now dated 2013) will come into force at the same time as the *Transparency Rules*.

At the same time, Article 1(2) of the *Transparency Rules* makes clear that the *Rules* will only apply to *existing* Investment Treaties where parties to a given dispute consent, or where the treaty signatories agree to their application under a particular treaty regime.

Other noteworthy provisions include the following:

- Article 1(3)(b), which permits the arbitral tribunal, upon consultation, to adapt specific provisions in the *Rules* to the circumstances of the case before it, taking into account both the public interest in transparency (Article 1(4)(a)) and the parties’ interest in a fair and efficient resolution of their dispute (Article 1(4)(b)).
- Article 1(7), which provides that the *Transparency Rules* shall prevail when they conflict with other applicable arbitral rules, but not when they conflict with provisions of the treaty under which the arbitration is being conducted.

- Article 1(9), which provides for their use, by agreement, in disputes not initiated under the UNCITRAL *Arbitration Rules*.
- Article 3 (1), which provides that the notice of arbitration, statement of claim, statement of defence, and any further written statements or written submissions by any disputing party, non disputing party to the treaty and third party, as well as tribunal orders, decisions and awards, should be made available to the public.
- Articles 4 and 5, which provide to the tribunal discretion, after consultation, also to allow submissions by third parties (Article 4) and by non-disputing parties (Article 5) to the treaty under which the arbitration is being conducted.
- Article 6, which provides that hearings for the presentation of evidence or for oral argument should be in public.
- Article 7, which allows for exceptions to the transparency requirements, including the right of the parties to withdraw from proceedings entirely documents ordered by the tribunal to be made public (Article 7 (4)), and the right of a respondent state to refuse disclosure of information which it considers to be contrary to its essential security interests (Article 7 (5)).

Overall, the new *Transparency Rules* are said to “constitute a robust, innovative set of procedural rules that will make arbitrations involving a state, initiated under an investment treaty, accessible to the public” (UNCITRAL Press Release 12th July 2013).

Concluding Observations

The *Transparency Rules* do, indeed, offer a potentially forceful framework for the realisation of greater openness in the conduct of investor-state disputes. They go well beyond the transparency amendments to the ICSID Rules, adopted in 2006, which permitted interested third parties to attend hearings (Rule 32) and intervene in arbitral proceedings at a tribunal’s discretion (Rule 37). Crucial in realising that potential, however, will be the frequency with which use is made by states of the opt-out provisions clearly included in the *Transparency Rules*.

6th August 2013