

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

On 1 April 2014, the new "UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration" (the Rules) came into effect (a copy of the Rules can be found [here](#)).

The Rules are intended to address concerns raised (principally by Non-Governmental Organisations (or NGOs)) regarding the lack of transparency in treaty-based arbitration proceedings involving States. In this sense, the Rules are consistent with a trend towards greater transparency in investor-State arbitration, which has already seen developments towards transparency made by ICSID, the PCA and NAFTA.

On their face, the calls for greater transparency and public access inherently conflict with the notion of confidentiality in arbitral proceedings. The Rules attempt, therefore, to strike a balance between these two competing considerations. In short, they allow members of the public access to documents and hearings in UNCITRAL arbitrations, as well as granting them the opportunity to make submissions in certain circumstances, but allow for exceptions to be made to protect confidential information.

The following briefing summarises the key features of the Rules and considers the likely impact of the Rules on future UNCITRAL proceedings.

Key Features of the Rules

Scope of Application

Article 1 of the Rules determines the scope of their application. The Rules only apply automatically to UNCITRAL arbitrations initiated pursuant to treaties concluded on or after 1 April 2014 (unless the parties to the treaty have agreed otherwise) (Article 1(1)).

In respect of UNCITRAL arbitrations commenced under treaties concluded before 1 April 2014, the Rules will only apply if the parties to the arbitration agree, or if the parties to the relevant treaty have agreed to their application (Article 1(2)).

Where a treaty provides for the application of the Rules, or the parties to that treaty have otherwise agreed to their application, the parties to any UNCITRAL arbitration arising out of the treaty cannot derogate from them, unless the treaty permits such derogation (Article 1(3)).

The Rules are primarily intended for use in UNCITRAL arbitrations and a new Article 1(4), also effective from 1 April 2014, expressly incorporates the Rules into the UNCITRAL Arbitration Rules. However, the Rules are available for use in investor-State arbitration initiated under any other rules or in ad hoc proceedings if the parties

thereto agree (Article 1(9)). The Rules supplement and, in the case of conflict, override any other applicable arbitration rules (Article 1(7)).

The attempt by the Rules to strike a balance between transparency and the considerations of a party (or parties) that prefers confidentiality is most clearly seen in Article 1(4), which provides that, where an arbitral tribunal is entitled to exercise discretion, it must take into account both the public interest in transparency and the disputing parties' interests in a fair and efficient resolution of their dispute.

Rules on Transparency

1. Access to Documents

Article 3 sets out the documents that are to be made available to the public in proceedings subject to the Rules. These are:

- All written statements and submissions by a disputing party or any third party to the proceedings;
- A table listing all exhibits to the written statements and submissions and to expert reports and witness statements (if such table has been prepared for the proceedings);
- Transcripts of hearings (where available); and
- Orders, decisions and awards of the arbitral tribunal (Article 3(1)).

In addition:

- Expert reports and witness statements shall be made available, upon request by any person to the Tribunal (Article 3(2)); and
- The parties' exhibits and any other documents not caught by Articles 3(1) and 3(2) may be made available at the discretion of the tribunal (Article 3(3)).

The repository of published documents is to be the Secretary General of the UN, or any institution named by UNCITRAL (Article 8).

2. Access to Hearings

Article 6 provides that, subject to certain exceptions related to confidentiality (see below) and logistics, hearings shall be held in public.

3. Exceptions

The above provisions of the Rules granting public access to documents and hearings are subject to exceptions, designed to protect confidential information and the integrity of the arbitral process.

Article 7 of the Rules provides a wide range of exceptions, designed to ensure that "confidential or protected information" is not made available to the public. The scope of such "confidential or protected information" is potentially broad and includes:

- confidential business information;
- information protected against public disclosure by the law of a State;
- information protected against disclosure under a treaty; and
- any information, the disclosure of which would be contrary to essential security interests.

It remains to be seen how the provisions of Article 7 will be interpreted by arbitral tribunals, but the scope of the definition of "confidential or protected information" is such that, at least in some cases, it may have a material impact on the effect of the Rules on proceedings.

Third Party Submissions

Finally, Articles 4 and 5 of the Rules provide for submissions to be made by third parties to any treaty-dispute, as follows:

- Article 5 provides for submissions on issues of treaty interpretation by a non-disputing party to the relevant treaty; and
- Article 4 provides for submissions, at the tribunal's discretion, on any matter within the scope of the dispute by third parties (i.e. anyone who is not a party to the dispute or a party to the relevant treaty).

In all cases, the tribunal's decision as to whether to allow such submissions must take into account the need to avoid submissions that would disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

Conclusion

As set out above, absent specific agreement (either of the parties to any treaty-dispute or of the parties to a treaty concluded before 1 April 2014), the Rules will apply only to treaties concluded on or after 1 April 2014 (and, even then, only if the parties to the treaty do not agree to exclude the Rules). As a consequence, it is possible that the Rules will see themselves applied relatively infrequently in the short term.

Nonetheless, given the public criticism from some NGOs that would likely follow, it is hard to imagine many States agreeing to opt out of the Rules in treaties entered into after 1 April 2014. It is therefore likely that most new treaties will allow for the application of the Rules.

It remains to be seen to what extent parties to existing treaties will be willing to agree that the Rules should apply to arbitrations under such treaties. We understand that work is underway on a draft 'Convention on Transparency,' which will provide for the application of the Rules to existing treaties entered into by any signatory States. As and when such a Convention comes into force, it can again be expected that public pressure will lead to a number of States agreeing to its terms, which should extend the application of the Rules.

Similarly, it remains to be seen to what extent parties to arbitrations, to which the Rules would not otherwise apply, will agree to their application. This is particularly the case given the additional costs (to be borne by the disputing parties) that the Rules might generate. It is likely, at least with regard to investor parties, that agreement to the Rules will only be forthcoming if parties perceive some tactical benefit from their application (for example, the ability to use any publicity to apply pressure on the relevant State). It is also possible that some investors will elect to bring claims under non-UNCITRAL rules (if the UNCITRAL Rules are avoidable), if they want to avoid the effect of the Rules.

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