



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW



Ensuring Transparency in Investor-State Dispute Resolution under UNCITRAL Arbitration Rules

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At its last session in October 2010, this Working Group began its task of implementing the United Nations Commission on International Trade Law (UNCITRAL) Commission's decision "on the importance of ensuring transparency in investor-state dispute resolution."¹ This decision and the Working Group's current work recognizes that investor-state arbitrations are different from purely commercial arbitrations between two private parties and have a unique need to be made more transparent.

As the UNCITRAL Secretariat identified in its note of December 9, 2010, the Working Group's undertaking can be divided into three categories of issues that must be resolved: (1) what form(s) the work product on transparency will take; (2) when and how new standards on transparency will apply; and (3) what content will be included. Recognizing that decisions in each of these fundamental areas will determine whether and to what extent the Working Group complies with its mandate from Commission, CIEL and IISD have prepared this brief note summarizing their positions on preferred ways forward.

Form: Development of Rules on Transparency that will be Applicable in Investor-State Disputes

As the secretariat indicated in its note, there are various non-exclusive forms the Working Group's work can take. These include the development of rules on transparency in investor-state arbitration, guidelines, model statements of principle, model clauses for inclusion in investment treaties, and international conventions.

Among those options, the optimal form for ensuring compliance with the Commission's mandate to the Working Group is the development of rules on transparency in investor-state arbitration to be integrated into the UNCITRAL arbitration rules whether as an annex or otherwise. This approach, which received significant support from delegations at the Working Group meeting in Vienna, should be central for a number of reasons:

¹ Report of the United Nations Commission on International Trade Law, Forty-first session, June 16-July 3, 2008, para. 314.

- **First, it is necessary:** As currently drafted, the 1976 and the 2010 UNCITRAL arbitration rules – which were primarily designed to govern general commercial arbitrations between private parties – fail to further and, in some cases, even inhibit revelation of information regarding investor-state arbitrations. Among their major problems is that they allow either disputing party to block the other disputing party’s desire to publish the award. Similarly, one disputing party can veto the other party’s desire to hold open hearings. Furthermore, the rules provide no system or mechanism for making the existence of disputes public. Revising or supplementing the rules with provisions on transparency is vital for clearing these hurdles to adequate disclosure.
- **Second, it is efficient:** The rules are silent on a number of issues relating to transparency, including how to deal with participation by potential amicus curiae and disclosure of various types of documents submitted to or issued by tribunals. Absent a clear, uniform approach to these issues set forth in the rules, disputing parties, arbitrators handling the cases, and interested non-parties are left to deal with them on a case-by-case basis, giving rise to elevated transaction costs, and possible delays and friction between the parties.
- **Third, it draws on the expertise of the Working Group:** The Working Group just completed the exercise of revising the general arbitration rules and is therefore familiar with the many procedural issues involved in international arbitration and well-prepared to address the more limited issue of transparency in investor-state arbitration. Additionally, the experience of a number of delegations representing countries and institutions that have taken steps to increase transparency in investor-state arbitration can enrich this process and help develop rules that provide for greater openness in a fair, reasonable, and efficient manner.
- **Fourth, it is consistent with the work of UNCITRAL and the United Nations more generally to promote the rule of law and the observation of human rights:** The need for greater openness of investor-State arbitrations stems from the fact that, as explained by the UN Secretary General’s Special Representative on Business and Human Rights in his February 2008 statement to this Working Group, “transparency where human rights and other state responsibilities are concerned ... lies at the very foundation of what the United Nations and other authoritative entities have been promulgating as the precepts of good governance.” Further, according to the Preamble and Article 1 of the UN Charter, human rights are fundamental to the United Nations; and UNCITRAL rules must not interfere with, and should facilitate, states in respecting the human right to access to information as it applies in the context of investor-state arbitration. The UNCITRAL Commission has recognized that, through its work in international trade law and in connection with its status as a UN body, it has an essential role to play in advancing good governance and promoting the rule of law at the national and international levels.² Making transparency an integral part of the applicable UN arbitration rules will do more to further these transparency and good governance efforts than non-binding guidelines, statements of principle and model clauses.

² See, e.g., Report of the United Nations Commission on International Trade Law on the work of its forty-third session, Report of the Sixth Committee, November 8, 2010, pp. 3-4.

- **Fifth, it is consistent with the mandate of UNCITRAL to promote greater harmonization of law:** When the UN General Assembly established UNCITRAL, it gave it the mandate to promote “the progressive harmonization and unification of the law of international trade.”³ And, as the UNCITRAL Commission has noted, one way of furthering that mandate is to routinely collect and publish decisions and awards interpreting and applying relevant legal texts.⁴ Under the current UNCITRAL arbitration rules, however, disclosure of decisions and awards in investor-state arbitrations is random and incomplete, and consequently exacerbates uncertainties regarding the meaning of standard investment treaty provisions. Developing a systematic or routine approach to publication of non-confidential aspects of decisions and awards rendered in investor-state disputes would bring the work of UNCITRAL better in line with its intended purpose.
- **Sixth, it is a familiar practice:** The various sets of rules governing international arbitrations are occasionally amended. The default rule governing the applicability of such amendments is that, provided the changes are procedural and not substantive, the version of the rules in effect on the date on which the arbitration was commenced will govern.⁵ Reflecting that principle, in each of the three versions of the arbitration rules produced by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) that have been produced by the SCC since 1999, there has been an associated note (not a separate article in the rules) indicating that the changes will immediately apply to “any arbitration commenced on or after” the date on which the rules were adopted.⁶ Notably, the SCC arbitration rules, like the UNCITRAL arbitration rules, apply in general commercial as well as treaty-based investor-state disputes. Amendments to the SCC rules therefore raise the same issues of consent and applicability as have been discussed in the Working Group regarding possible amendments to the UNCITRAL arbitration rules. Practice in the SCC illustrates that amendments to arbitral rules can apply to disputes arising under existing treaties.⁷

Applicability: Wide Applicability to Existing and Future Treaties

There are currently 2750 bilateral investment treaties (BITs) in force. While the number is growing, with an additional 82 treaties concluded in 2009, this represents only a growth of 3 per cent that year. If the Working Group were to limit application of new rules on transparency

³ General Assembly Resolution 2205 (XXI), 1497th plenary meeting, December 17, 1966.

⁴ See Case Law on UNCITRAL Texts (CLOUT): User Guide, A/CN.9/SER.C/GUIDE/I/Rev.2, June 2, 2010.

⁵ See, e.g., Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (2007), pp. 80-81 (discussing applicability of amended arbitration rules).

⁶ See SCC Arbitration Rules (1999), “Effectiveness,” at p. 14; SCC Arbitration Rules (2007), “Entry into Force,” at p. 24; SCC Arbitration Rules (2010), at p. 2, available at <http://www.sccinstitute.com>.

⁷ Application of the 2006 amendments to the ICSID Additional Facility Rules to disputes arising under the Energy Charter Treaty also illustrates how modifications of procedural rules can apply to existing treaties. See, e.g., *Europe Cement Investment & Trade v. Republic of Turkey*, ICSID Case No. ARB(AF)/02/2, Award, Aug. 13, 2009, para. 11 (noting agreement that the Additional Facility “Rules in effect on 10 April 2006 would apply”); *Cementownia ‘Nowa Huta’ S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, Sept. 17, 2007, para. 32 (noting that “it was agreed that the Arbitration (Additional Facility) Rules in effect as of April 10, 2006 apply to the proceedings”).

to future treaties only, it would therefore be promoting transparency solely in name, not in substance. To truly strive to ensure transparency in investor-state dispute settlement, it is crucial for the Working Group to attempt to achieve the maximum possible application of the rules to investor-state disputes arising under *existing*, as well as *future* treaties.

Whether specific language in existing bilateral investment treaties will permit or require arbitration disputes to be resolved in accordance with a particular version of the UNCITRAL arbitration rules (e.g., the 1976 version or a potential 2012 version with provisions on transparency incorporated) is a matter that the Working Group does not have the authority to definitively resolve. The Working Group can and should, however, ensure that it does not unnecessarily restrict the application of rules on transparency that it may draft. In particular, the Working Group should make clear that Article 1(2) of the 2010 UNCITRAL Rules, which arguably establishes a presumption that those amended rules do not apply to disputes arising under existing investor-state treaties, does not limit application of new provisions on transparency. Additionally, the Working Group should ensure that the new transparency provisions are the default rules that will apply in disputes arising under future treaties referring to the UNCITRAL arbitration rules. It should not sideline its work on the new provisions on transparency by including in them language that would require states to specifically “opt into” transparency in their future treaties in order for the transparency provisions to become applicable.

Content: Key Elements and Proposed Text

As noted above, the best way to ensure transparency is through express rules contained in an annex to the generic UNCITRAL arbitration rules. The annex would be an integral part of the UNCITRAL arbitration rules, but would be applicable to investor-state disputes only.

We propose the inclusion of the following key elements of transparency in such an annex. Draft legal text incorporating these elements is set out at the end of this paper for ease of reference:

- 1. Public access to information**, subject to the redaction of privileged or protected information:
 - **The fact that an investor-state arbitration under UNCITRAL Rules has been initiated:** Since this phase precedes the constitution of the tribunal, the claimant and respondent would be responsible for sending a copy of the notice of arbitration and the subsequent response to the dedicated contact point for posting.
 - **Any information relating to the composition of the arbitral tribunal, including challenge decisions:** The tribunal, once constituted, would inform the dedicated contact point of its constitution and composition, and dispatch to the same any document relating to a challenge to one or more of its members.
 - **Documents issued by and submitted to the tribunal, including awards, decisions and orders, as well as pleadings, memorials, briefs, minutes and transcripts:** The tribunal would dispatch copies of all documents issued by or submitted to it to the dedicated

contact point for posting. This would be done as the documents are received or issued, as opposed to at the end of the proceedings. Information posted should include orders or other communications setting the schedule of the arbitration.

2. Hearings in investor-state arbitrations should be open to the public

- This can be in person, via closed-circuit broadcast or web casting.
- Proprietary or privileged information deserving confidential treatment can be excluded from public observation.

3. Amicus curiae submissions:

- Non-disputing states, members of the public, and other entities with a significant interest in the arbitration should have the opportunity to provide input to an investor-state tribunal.
- They should have the opportunity to petition the investor-state tribunal for permission to file an amicus curiae brief. If it grants such a petition, the tribunal may impose conditions to reduce delay or cost, such as with respect to timing and length.

Proposed Legal Annex for UNCITRAL Rules

Annex I⁸

1. Scope

Notwithstanding any provision in the UNCITRAL Arbitration Rules, for an arbitration commenced against a state pursuant to the terms of a treaty, the provisions of this Annex shall apply.

2. Public notice of arbitration

Promptly upon communicating a notice of arbitration to the respondent, the claimant shall forward a copy of the notice of arbitration to the UNCITRAL secretariat [or other designated institution], which shall post the notice of arbitration on its website without delay. Promptly upon communicating a response to the notice of arbitration, the respondent shall forward a copy of the response to the UNCITRAL secretariat [or other designated institution], which shall post the response on its website without delay.

3. Publication of arbitral documents

The arbitral tribunal shall promptly dispatch a copy of the documents received or issued by the tribunal to the UNCITRAL secretariat [or other designated institution], subject to redaction of confidential business information and information which is privileged or otherwise protected from disclosure under applicable law. The UNCITRAL secretariat [or other designated institution] shall post all such documents on its website without delay, including:

- a. documents confirming the composition of the arbitral tribunal or seeking to challenge any of its members;

⁸ The text included in this annex is drawn from language in existing investment agreements, including the US-CAFTA-DR, United States-Korea FTA, and the Investment Agreement for the COMESA Common Investment Area.

- b. orders, awards, and decisions of the arbitral tribunal or appointing authority;
- c. notices of any settlement agreement entered after the notice of arbitration has been issued;
- d. pleadings, memorials and briefs submitted to the arbitral tribunal by a disputing party and any written submissions submitted pursuant to the treaty or the UNCITRAL Arbitration Rules; and
- e. minutes, transcripts or webcasts of hearings of the arbitral tribunal, where available.

4. Public hearings

Hearings shall be open to the public. The arbitral tribunal shall determine, in consultation with the disputing parties, appropriate logistical arrangements. Any disputing party that intends to use information that is privileged or otherwise protected from disclosure under applicable law shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

5. Amicus curiae

- a. The arbitral tribunal may allow a natural or legal person that is not a party to the dispute (a “non-party”) to file a written amicus curiae submission with the tribunal. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:
 - i. the non-party submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the proceeding by bringing a particular perspective, knowledge or insight;
 - ii. the non-party submission would address matters within the scope of the dispute;
 - iii. the non-party has a significant interest in the arbitration; and
 - iv. there is a public interest in the subject-matter of the arbitration.
- b. The arbitral tribunal shall ensure that the non-party submission not disrupt the proceeding or unduly burden or unfairly prejudice the disputing parties, and that the disputing parties are given an opportunity to present their observations on the non-party submission.
- c. The non-party’s submission shall be provided in the language of the arbitration, and shall identify the non-party and any government, person, entity or organization that has provided, or will provide, any financial or other assistance in preparing the submission.