



World Investment Forum 2014: Investing in Sustainable Development

IIA Conference - 16 October 2014

Mr. Timothy Lemay
Principal Legal Officer
International Trade Law Division (ITLD)
United Nations Office of Legal Affairs (OLA) and Secretary of the United Nations Commission on International Trade Law (UNCITRAL)

By way of introduction to the work of UNCITRAL in the field of transparency: UNCITRAL is the United Nations Commission on *International Trade Law*, an organ of the General Assembly, and the mandate under which it operates directs it to further the harmonization and modernization of international trade law. The UNCITRAL Rules on Transparency and the United Nations convention on transparency were prepared during the sessions of UNCITRAL and its Working Group II on arbitration. Those sessions were attended by representatives of Governments, intergovernmental organizations and NGOs. UNCITRAL has adopted the Rules on Transparency and has finalized a convention on transparency by consensus, and both texts were unanimously approved. This is a unique attribute of these texts and well worth mentioning. There was an average of eighty State delegations attending the sessions, and forty to fifty international organizations observing the process.

Transparency was first mentioned in 2008, when UNCITRAL was revising its Arbitration Rules. One State made a submission in which it stated that "failing to promptly include provisions allowing for enhanced transparency will give the impression that the United Nations approves of a lack of transparency in investor-state arbitration. Such an effective endorsement of secrecy would be contrary to the fundamental principles of good governance and human rights upon which the United Nations is founded." When the revision of the UNCITRAL Arbitration Rules was completed in 2010, the Commission decided work on preparation of a legal standard on transparency

The underlying reasons for preparing a legal standard on transparency are manifold. It is clear that transparency is for the benefit of the public. We see it as also beneficial for States as it promotes good governance, and it may also serve as a means to counter corruption. The overall purpose is to enhance confidence in the system of investor-State arbitration. Noteworthy also is a trend in favour of transparency, in arbitration rules (ICSID revised its Rules in 2006), in case law, in legislation, and in investment treaties.

Drafting of the Rules reflected the concern to balance two interests: that of the public in being informed, and the interest of the parties in having an efficient procedure. The arbitral tribunal is tasked with balancing those interests.

The Rules on transparency are a short text, consisting of only eight articles.

At the commencement of the arbitration, and so before the arbitral tribunal is constituted, the information to be published includes the names of the disputing parties, the economic sector involved and the treaty under which the claim is made. The Rules then provide for publication of documents, and for open hearings, subject to

some exceptions. Publication takes place through an online repository or 'registry' – the UNCITRAL Secretariat maintains the registry, which is already live on the internet at <http://www.uncitral.org/transparency-registry/registry/index.jspx>

Article 7 contains two categories of exceptions: first, confidential or protected information shall not be made public. A determination as to whether information is confidential is to be made by the arbitral tribunal after consultation with the parties. Article 7 contains a definition of "confidential information" which is the very first time that UNCITRAL defines such a concept in the field of arbitration. Another ground for limiting transparency is the need to protect the integrity of the arbitral process. For example, hearings could be closed if there were a risk of threats to witnesses or legal counsel.

The Rules also address the question of submissions made by third parties and by the non-disputing State party to the treaty. These questions are not matters of transparency in themselves. However, it is obviously important to include provisions on *amicus curiae*. There are a number of safeguards regarding those submissions.

The most debated topic under the Rules was their scope of application. We have to differentiate between existing treaties, future treaties, arbitrations under the UNCITRAL Arbitration Rules, and arbitration under other rules.

The Transparency Rules apply to investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to an investment treaty concluded after 1 April 2014 (which is the date of coming into effect of the Rules). Since that date, 19 treaties have been concluded. A few of them already apply the Rules on Transparency. The Rules provide that for existing investment treaties, there should be an agreement of the disputing parties or of the States parties to a treaty.

It was important for the promotion of transparency to avoid that the Rules be seen as having application only in the context of UNCITRAL arbitrations. The Transparency Rules are a stand-alone text, that can also apply in cases under other arbitration rules. That application is of course subject to the parties' agreement. It is noteworthy that some treaties concluded after 1 April 2014 have included provisions on transparency, modelled on the Transparency Rules, that would apply as treaty provisions to all arbitrations.

The next question was how to encourage States to agree on the application of the Rules on Transparency to arbitrations under their **existing** treaties: there are about 2,500 such treaties in force.

First, of course, States may take action through unilateral or bilateral declarations. But to go a step further, UNCITRAL has prepared a **convention** on transparency, which is expected to be adopted by the General Assembly at its current session.

The convention is, again, a short text, because it is a mechanism for applying the Rules on transparency. The convention does not contain provisions on transparency, the substantive provisions are in the Rules. It applies to arbitrations conducted on the basis of investment treaties concluded before April 2014, and provides that the Transparency Rules will apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules in these circumstances:

- if the State of the investor and the respondent State are both parties to the Convention on Transparency (*bilateral or multilateral application*); or
- if only the respondent State is party to the Convention (*unilateral offer of application*).

The convention permits a limited number of reservations. It is possible to exclude its application to a specific investment treaty, a specific set of arbitration rules, or to exclude the possibility of unilaterally applying the Transparency Rules. Any reservation made after the coming into effect of the convention will be effective one year after its deposit. Any withdrawal of reservation will have immediate effect.

What can we expect in the future from these instruments on transparency? First, that transparency enhances confidence in the dispute resolution system which is currently adopted under thousands of treaties. Next, that it modernizes investor-State disputes by permitting the public to be better informed about the process. And finally, these texts show that it is indeed possible to reform this area of practice, so it may be a first step for wider reforms in the field.