

# Dispute Resolution Hotline

March 28, 2014

## UNCITRAL BRINGS IN NEW TRANSPARENCY RULES WITH EFFECT APRIL 1, 2014 IN TREATY-BASED INVESTOR-STATE ARBITRATION

- The New Rule is a positive development towards ensuring better transparency standards in investment arbitration.
- The New Rules provide for public access to key documents prepared during the course of arbitral proceedings.
- Confidential or protected information has been adequately safeguarded under the exception to the New Rules.

The new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("**New Rules**") is a welcome development and will come into effect on April 1, 2014. The New Rules provide a perfect balance between the public interest in an investor state arbitration, and the interest of the disputing party, in order to ensure fair and efficient resolution of the dispute. The New Rules will make investment arbitration more open to public participation and scrutiny, and will hopefully bring in better transparency in the system.

### APPLICABILITY OF THE RULES

The New Rules will be applicable to all investment arbitrations commenced under the UNCITRAL Arbitration Rules, which is pursuant to a treaty, providing for the protection of investments or investors ("**treaty/BITs**") provided the Treaty is concluded after April 1, 2014. The New Rules will also be available, in investor-state arbitrations, initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings, if the disputing parties agree towards its applicability.<sup>1</sup> In respect to investment arbitration, pursuant to a Treaty concluded before April 1, 2014, the New Rules would apply only if the parties agree to their application.

### HOW THE NEW RULES PROPOSE TO BRING IN TRANSPARENCY

#### Publication of Documents

Under the New Rules, a considerable amount of information is to be made publicly available:

1. **Publication at the commencement of arbitration:** Parties will have to communicate a copy of the notice of arbitration to the repository,<sup>2</sup> and accordingly the repository will release the information on the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made.<sup>3</sup>
2. **Publication of documents:** Notice of arbitration, the response to notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party will have to be made available to the public; further any written submissions by the non-disputing party (or parties) to the treaty and by third persons, transcripts of hearings, where available; and also orders, decisions and awards of the arbitral tribunal will be made available to the public.<sup>4</sup>

Under the New Rules, expert reports and witness statements will ordinarily not be automatically released in the public domain; however, they may be published (excluding exhibits) following a specific request.<sup>5</sup> There will be public access to a table listing all exhibits to the parties submissions, expert reports and witness statements, but not the exhibits themselves. However, the rules do give the Tribunal a broad discretion to order disclosure of such exhibits or any other documents provided to, or issued by, the Tribunal (on consultation with the parties).

3. **Exceptions:** Any disclosure under the New Rules is subject to exceptions, i.e. confidential or protected information.<sup>6</sup> A confidential or protected information consists of *a)* confidential business information; *b)* information that is protected against being made available to the public under the treaty; *c)* information that is protected by laws of the respondent state or in case of any information under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; and *d)* information, the disclosure of which would impede law enforcement. Further, Article 7(5) provides a self-judging exception to protect against disclosure of information that would be contrary to essential security interests. Finally, there is also an exception to the transparency rules that permit the tribunals to restrain or limit disclosure when necessary to protect the "*integrity of the process*".<sup>7</sup>

#### Submission by a third person

In terms of the New Rules, a third person i.e. who is not a disputing party, after taking permission of the Tribunal a) by a concise written statement disclose any connection, direct or indirect, which the third party has with the any disputing party; b) describe the nature of interest that the third party has in the arbitration; and c) provide information on any government, person or organization that has provided to the third person.

#### Submission by a non-disputing party to the dispute

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A non-disputing party to the treaty, subject to the approval of the Tribunal (in consultation with the disputing parties), may invite, submissions on issues of treaty interpretation from a non-disputing party to the treaty.

## Hearings

The hearings are required to be open to the public, except where there is a need to protect confidential information or the integrity of the arbitral process, in which case part of the hearing may be held in private.

## ANALYSIS

Most of the investor-state disputes are commenced within the framework of International Centre for Settlement of Investment Disputes (“**ICSID**”) or UNCITRAL Arbitration Rules. Under the existing ICSID Arbitration Rules, some level of transparency is already available to investors, allowing for interested third parties to intervene in arbitral proceedings, at the discretion of the tribunal<sup>8</sup> and also to attend hearings.<sup>9</sup> Although, ICSID does not publish the award without the consent of the parties, however, the Centre is required to “*promptly*” include in its publication “*excerpts of the legal reasoning*” of the Tribunal.<sup>10</sup>

The New Rules go a step further than ICSID Arbitration Rules, and also provide for public access to key documents prepared during the course of proceedings (including parties’ submissions), except in limited instances where it is paramount to protect confidential or protected information. Further, the definition of confidential or protected information has been kept wide, in order to provide adequate safeguards to this effect.

Going forward, it will be interesting to examine the impact of increased transparency under the New Rules, on the way the parties draft their pleadings, or perhaps to limit the documents they refer to, in order to avoid potential disclosure requests. Additionally, time will reveal whether the increased transparency will have an impact on a parties decision to commence an investor state arbitration, under UNCITRAL Arbitration Rules or in alternative to adopt the New Rules while arbitrating under other institutional rules.

Most of the India related BITs provide for arbitration within the framework of UNCITRAL Arbitration Rules; therefore it will be interesting to see if the parties agree to the application of the New Rules, under India related BITs concluded before April 1, 2014. Also, if ultimately the parties agree, public access to key documents prepared during the course of the arbitral proceedings, will contribute to the development of a new set of jurisprudence under the India related BITs. Finally, with India not being a party to ICSID Convention, the cases decided by ICSID Tribunal is not applicable to investment arbitration involving India, hence the application of New Rules could benefit India in medium to long run.

— **Alipak Banerjee, Prateek Bagaria & Vyapak Desai**  
You can direct your queries or comments to the authors

<sup>1</sup> For details, see Article 1(9) of the New Rules.

<sup>2</sup> Under Article 8 of the New Rules, the repository of published information shall be Secretary –General of the United Nations or an institution named by UNCITRAL.

<sup>3</sup> For details, see Article 2 of the New Rules.

<sup>4</sup> For details, see Article 3 of the New Rules.

<sup>5</sup> For details, ~~see~~ Article 3(3) of the New Rules. Subject to exceptions under Article 7, the Arbitral Tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal. This may include making such documents available at the specified site.

<sup>6</sup> For details, ~~see~~ Article 7 of the New Rules.

<sup>7</sup> A category under Article 7, which is intended to restrain or delay disclosure to cover exceptional circumstances, such as witness intimidation or comparably exceptional circumstances.

<sup>8</sup> For details, ~~see~~ Rule 37 of ICSID Arbitration Rules.

<sup>9</sup> For details, ~~see~~ Rule 32 of ICSID Arbitration Rules.

<sup>10</sup> For details, ~~see~~ Rule 48 of ICSID Arbitration Rules.

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