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By Matthew Wescott

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Legislation, Rules and Guidelines

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

Matthew Wescott

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the Transparency Rules) were adopted by UNCITRAL on 11 July 2013[1] and came into force on 1 April 2014, but it was 2015 that saw developments that confirmed that the Transparency Rules were gaining acceptance in the arena of investment arbitration, even beyond UNCITRAL, and also indicated how the rules might be applied in practice.

1. Origins and Application

As set out in the corresponding Resolution of the United Nations General Assembly,[2] the Transparency Rules were introduced in recognition of "the need for provisions on transparency in the settlement of … treaty-based investor-State disputes to take account of the public interest".

The UNCITRAL Arbitration Rules[3] were amended by art.1(4) to include the Transparency Rules, which, unless already agreed otherwise by the parties to the Treaty concerned, will apply to investor-state arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a Treaty concluded on or after 1 April 2014[4] and parties are unable to derogate from the Transparency Rules unless permitted to do so by the Treaty itself.[5] Parties to a Treaty concluded before that date may also agree to the application of the Transparency Rules to that Treaty or to a specific arbitration,[6] and, as discussed below, the United Nations has already adopted a Convention which will facilitate the application of the Transparency Rules to treaties concluded before those rules came into force.

Outside of the scope of UNCITRAL, the Transparency Rules may also be used in investor-state arbitrations initiated under other rules (see further the discussion in s.3 of *BSG v Guinea*),[7] or in ad hoc arbitral proceedings.[8]

2. A Brief Summary of the Transparency Rules

Registration

Article 2 of the Transparency Rules provides that once an arbitration has commenced, each of the parties shall communicate a copy of the notice of arbitration to a "repository" established under the Transparency Rules art.8. In practice that repository is the Transparency Registry in Vienna, a division of the UNCITRAL Secretariat which was established on 1 April 2014 for that purpose and which publishes the details of the arbitration on its website.[9]

[1] Official Records of the United Nations General Assembly, 68th Session, Supplement No.17 (A/68/17), Ch.III.
[2] Resolution adopted by the United Nations General Assembly, 68th Plenary Meeting, 16 December 2013 (68/109).
[3] 2010 revision, as adopted in 2013.
[4] Transparency Rules art.1(1).
[5] Transparency Rules art.1(3)(a).
[6] Transparency Rules art.1(2).
[7] *BSG Resources Ltd v Republic of Guinea* ICSID Case No.ARB/14/22.
[8] Transparency Rules art.1(9).
[9] See *http://www.uncitral.org/transparency-registry/registry/index.jspx* [Accessed 24 June 2016].

Publication of documents and oral hearings

Perhaps the most significant operative provisions of the Transparency Rules, and those which constitute the main departure from established arbitral procedure and culture, are contained in arts 3 and 6.

Article 3(1) provides for the publication of documents relevant to the arbitration, including the notice of arbitration and the response, statements of claim and defence and any further written statements or submissions, any written submissions by third parties, transcripts of hearings, and orders, decisions and awards.

Under art.3(1) if a table of exhibits to the statements of claim, expert reports and witness statements has been prepared for the proceedings then that table will also be published, but not the exhibits themselves. A request may also be made to the tribunal under art.3(2) for copies of expert reports and witness statements, but not the exhibits thereto (although art.3(3) allows the tribunal the discretion after consultation with the parties to allow publication of a wider class of documents than those summarised above).

In a further move to open the proceedings up to public scrutiny art.6(1) provides that hearings for the presentation of evidence or oral argument shall be held in public, and by art.6(3) the tribunal is to make the necessary arrangements to facilitate public access, although the tribunal may decline to do so and proceed in private if necessary for logistical reasons.

The Transparency Provisions in arts 3 and 6 are subject to the exceptions in art.7 which seek to: (1) define and protect from publication certain confidential information[10]; and (2) prevent publication where it would jeopardise the integrity of the arbitral process.[11]

Non-parties

After consultation with the parties the tribunal may allow submissions on a matter within the scope of the dispute from a third party who is not a party to the Treaty[12] and submissions on Treaty interpretation from a non-disputing party to the Treaty.[13]

3. Application of the Transparency Rules

The Transparency Rules were apparently applied for the first time in *Iberdrola v Bolivia*.[14] That arbitration had its basis in a bilateral investment Treaty pre-dating 1 April 2014, and therefore compliance with the rules was not mandatory. However the parties agreed to adopt the rules pursuant to art.1(2)(a). The tribunal also exercised its discretion under art.1(3)(b) to adapt the Transparency Rules, in this case naming the Permanent Court of Arbitration as repository pursuant to art.8, rather than the Transparency Registry.

Paragraph 14 of the tribunal's first Procedural Order dated 7 August 2015 simply confirmed that the parties had agreed to apply the Transparency Rules to the arbitration, confirming that documents arising from the arbitration would be published[15] and that the hearings would be public.[16] However, no directions were made in the Order as to the practical implementation of the Transparency Rules and it is to be expected that a further Procedural Order will be issued to that end.

More illuminating is the procedural Order issued by an ICSID tribunal in September 2015 in *BSG v Guinea* which considered whether to apply the Transparency Rules to

[10] Transparency Rules art.7(1), (2) and (3).
[11] Transparency Rules art.7(6).
[12] Transparency Rules art.4.
[13] Transparency Rules art.5.
[14] *Iberdrola SA and Iberdrola Energía SAU v Bolivia* PCA Case No.2015-05, Acta de Constitución.
[15] *Iberdrola SA* PCA Case No.2015-05 Procedural Order para.14.2.
[16] *Iberdrola SA* PCA Case No.2015-05 Procedural Order para.14.3.

non-UNCITRAL proceedings and made directions which provide useful guidance on the practical application of the Rules.[17]

The parties agreed to the application of the Transparency Rules, subject to certain amendments and the tribunal accordingly made an order which in fact broadened somewhat the scope of the Transparency Rules. Furthermore, specific practical directions were made for the application of the Transparency Rules to the arbitral procedure as they related to the publication of documents and public access to hearings.

Of note was the direction[18] that exhibits to the expert reports be published, which goes further than art.3(1) of the Transparency Rules. The tribunal also ordered that legal authorities be made available to the public in the form of lists.

As a safeguard against the risks presented by transparency the Order contained a mechanism by which a party seeking exemption from publication of a document pursuant to art.7 should give notice within 21 days from the filing of a document that it sought protection for confidential or protected information in that document. After consulting the parties, the tribunal would decide whether the information identified was confidential or protected.[19]

The following directions were also made for public access to hearings pursuant to art.6(3) of the Transparency Rules.[20] These are quoted in full as they illustrate the considerations, challenges and solutions to which a public hearing in an international arbitration can give rise:

> "(i) The hearings will be broadcast and made publicly accessible by video link on the ICSID website. An audio-video recording will also be made of hearings. For logistical reasons, physical attendance by third persons at hearings shall be subject to the Tribunal's approval.
>
> (ii) In order to protect potential confidential or protected information, the broadcast will be delayed by 30 minutes (Articles 6(2) and 7(3)(c)).
>
> (iii) At any time during the hearings, a Party may request that a part of the hearing be held in private and that confidential [sic], that the broadcast of the hearing be temporarily suspended or that protected information be excluded from the video transmission. To the extent possible, a Party shall inform the Tribunal before raising topics where confidential or protected information could reasonably be expected to arise. The Tribunal will then consult the Parties. Such consultations shall be held in camera and the transcript shall be marked 'confidential'. After consultation with the Parties, the Tribunal will decide whether to exclude the information in question from the broadcast and the relevant portion of the transcript shall be marked 'confidential'. The transcript made public by the Repository shall redact those portions of the hearing marked 'confidential'.
>
> (iv) The ICSID Secretariat will make the necessary technical arrangements to broadcast the hearings through video link."

In this case ICSID was named as the repository, rather than the Transparency Registry.[21]

4. Future Developments

As can be seen from the *BSG v Guinea* Order, the Transparency Rules provide a useful framework around which individual tribunals may construct appropriate procedures for

[17] *BSG Resources Ltd v Republic of Guinea* ICSID Case No.ARB/14/22 Procedural Order No.2 on Transparency 17 September 2015.
[18] Procedural Order No.2 on Transparency para.12(iii)(1).
[19] Procedural Order No.2 on Transparency paras 15 and 16.
[20] Procedural Order No.2 on Transparency para.14.
[21] Procedural Order No.2 on Transparency para.17.

enhancing openness in arbitration. However once an arbitration is truly under way those procedures will be tested under fire and questions will arise as to the meaning of the Transparency Rules themselves; for example, what is the scope of confidential or protected information under art.2 and in what circumstances would the publication of information jeopardise the integrity of the arbitral process per art.7(6)? How will tribunals balance these considerations with the overarching transparency objectives of the rules? Another question arises as to the financial costs of this commitment to transparency, arising from publication of documents and in particular public access to hearings via the internet and video streaming.

It cannot be known how the Transparency Rules will be applied in other cases or whether they will be widely applied to investment treaties pre-dating 1 April 2014. However, the cases cited above demonstrate that some parties at least are willing to adopt the Transparency Rules, even where not obliged to do so.

It should also be borne in mind that the Transparency Rules are not solely dependent for their adoption on party consent on a case by case basis. On 17 March 2015 the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) was signed by Canada, Finland, France, Germany, Mauritius, Sweden, the UK and the US, and since then a further eight states have joined them as signatories.

The Mauritius Convention provides a mechanism for the application of the Transparency Rules to cases arising under the investment treaties concluded before the rules entered into force.

Furthermore, in another encouraging development, under the Comprehensive Economic and Trade Agreement with Canada, the EU and Canada have agreed to clarify the key provisions, which include total transparency, to the extent that documents will be published, all hearings accessible, and interested parties able to make submissions, which substantively adopts the tenor of the Transparency Rules.