

# Client Update

## United Nations General Assembly Adopts Convention on Transparency in Treaty-Based Investor-State Arbitration

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On December 10, 2014, the United Nations General Assembly adopted the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (the “Convention”).<sup>1</sup> The adoption of the Convention comes in the midst of a long debate about the proper balance among States’ desire to attract foreign investment, their obligation to protect the public interests of citizens and the environment, and the allocation of public funds.

The primary purpose of the Convention is to extend the application of the United Nations Commission on International Trade Law (“UNCITRAL”) Rules on Transparency in Investor-State Arbitration (the “Transparency Rules”),<sup>2</sup> which came into effect on April 1, 2014.

On their own terms, the Transparency Rules already apply to Investor-State Arbitrations conducted under the UNCITRAL Arbitration Rules brought under an investment treaty which was either (i) concluded on or after April 1, 2014; or (ii) concluded before April 1, 2014 and where either the parties to the dispute or the relevant contracting States to the treaty<sup>3</sup> have agreed that the Transparency Rules apply. The Transparency Rules are optionally available for use in non-UNCITRAL Investor-State Arbitrations.

The Convention expands the application of the Transparency Rules to investor-State arbitrations initiated pursuant to investment treaties concluded before April 1, 2014, irrespective of the applicable arbitration rules. Thus, rather than having to renegotiate individually a multitude of existing treaties, State parties can indicate their consent to the application of the Transparency Rules in

<sup>1</sup> [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/69/17](http://www.un.org/ga/search/view_doc.asp?symbol=A/69/17) (The text of the Convention is appended to the UNCITRAL Report as Annex I.)

<sup>2</sup> [http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency.html)

<sup>3</sup> In the case of multilateral treaties where the state of the claimant and the respondent State have so agreed.

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arbitrations brought under those treaties by signing the Convention. The Transparency Rules will apply to such arbitrations if the respondent State is a party to the Convention and either (i) the claimant investor is from a State that is party to the Convention, or (ii) the claimant investor agrees to application of the rules.

A State party to the Convention may make a reservation excluding the application of the Transparency Rules in relation to investor-State arbitrations (i) initiated under specific, identified investment treaties; or (ii) conducted under arbitration rules other than the UNCITRAL Arbitration Rules and in which it is a respondent. A State party may also exclude application of the Transparency Rules through consent of the investor claimant, as described in the prior paragraph.

As we explained in a previous article announcing UNCITRAL's adoption of the Transparency Rules (see September 2013 issue of our Arbitration Quarterly),<sup>4</sup> reflecting the public interest involved in investment arbitrations, the Transparency Rules introduced innovative provisions aimed at increasing "public access to information and documents concerning arbitration proceedings, as well as [providing] greater opportunity for non-parties to participate" in the proceedings.

Specifically, the Transparency Rules provide for the publication of information at the commencement of the proceedings (such as the names of the parties, the economic sector involved and the relevant treaty under which the claim is being made) and the publication of key documents in the arbitration (including, for example, the pleadings, transcripts of hearings and orders, decisions and awards of the Tribunal). Furthermore, the Transparency Rules *prima facie* provide for public hearings, thus allowing public access to hearings for the presentation of evidence or for oral arguments.

The Transparency Rules also codify a procedure to allow *amicus curiae* participation, which certain tribunals have permitted in the past either by exercising their general powers granted under the relevant arbitration rules or instrument (e.g., Article 15(1) of the UNCITRAL Arbitration Rules or Article 44 of the ICSID Convention) or where specifically provided (e.g., Rule 37(2) of the ICSID Arbitration Rules 2006). The Transparency Rules also permit submissions by non-disputing States party to the treaty and specify that the tribunal shall admit any such submissions on issues of treaty interpretation.

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<sup>4</sup> <http://www.debevoise.com/insights/publications/2013/09/arbitration-quarterly>

These progressive and innovative provisions, however, are not limitless. The Transparency Rules include important exceptions that protect confidential or protected information, and aim to protect the integrity of the arbitral process.

The adoption of the Convention signifies that the Transparency Rules could potentially apply to disputes arising out of the estimated 3,000 bilateral and multilateral treaties concluded before April 1, 2014 and currently in force. However, the Convention will only apply to those arbitrations commenced after the Convention enters into force (or subsequently takes effect for the relevant parties). Moreover, the Convention does not affect investor-State arbitrations initiated pursuant to a contract. Importantly, the Convention specifies that a claimant cannot invoke a most favored nation clause in a treaty to apply, or to avoid the application of, the Transparency Rules under the Convention.

The Convention will be opened for signature on March 17, 2015, at a signing ceremony to be held in Port Louis, Mauritius, and it will enter into force six months after the date of deposit of the third ratification instrument. There is also a six-month delay before the Convention will bind a State party that ratifies the Convention after its entry into force.

On December 10, 2014, the United Nations General Assembly also designated a Transparency Registry, in which UNCITRAL will make available to the public the information on investor-State arbitrations specified by the Transparency Rules (found at <http://www.uncitral.org/transparency-registry/registry/index.jsp>).

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Please do not hesitate to contact us with any questions.