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Comments on the Scope of Application of UNCITRAL's Draft Rules on Transparency in Investor–State Arbitration

Working Group II, February 6–10, 2012

Four years after the United Nations Commission on International Trade Law (UNCITRAL) formally “agreed by consensus on the importance of ensuring transparency in investor–State dispute resolution,” Working Group II, which is responsible for developing the new legal standards implementing that decision, has reached a critical point.

On February 6–10, Working Group II will have its fourth session on the issue of ensuring transparency in investor–State arbitrations. The deliberations in the previous three sessions have resulted in a draft text that contains several proposed new rules that could potentially increase transparency of investor–State arbitrations and give effect to the human right of access to information in this context. However, whether the new rules will have any practical effect, even if integrating adequate levels of transparency, is an open question.

This is because some members of Working Group II have proposed to purposefully limit the application of the new transparency rules so that they will rarely, if ever, apply in practice. There are two main types of limits that have been proposed to narrow the rules’ scope of application. First, some members would limit the applicability of the new transparency rules in disputes arising under *future* treaties through what has been termed the “opt-in” approach. Second, some members would exclude application of the new transparency rules to disputes arising under *existing* treaties.

At this crucial February meeting, Working Group II can and should finally reject any attempts to sideline the new transparency rules. The proposed limits on the rules are not legally necessary, and they have no place in a text that is purportedly being crafted in order to ensure transparency in investor–State dispute settlement.

Issue One: The Working Group can and should adopt the “opt-out” approach to facilitate application of the new transparency rules to disputes arising under future treaties.

The “opt-in/opt-out” debate

The debate on the rules’ application to disputes arising under future treaties is often labeled the “opt-in” versus “opt-out” issue. Both the “opt-in” and “opt-out” approaches allow the treaty Parties to retain the discretion to decide whether to include in their future treaties the

option to arbitrate disputes under the new transparency rules. However, pursuant to the “opt-in” approach, States would need to explicitly state in their future treaties that the UNCITRAL transparency rules apply. This would not often happen because it is common practice for investment treaties to simply refer to ICSID or UNCITRAL arbitration rules, or to the UNCITRAL Rules in effect at the time of the dispute, without further specification. In practical effect, if the “opt-in” approach were adopted, Working Group II’s work on transparency would be largely in vain and would not satisfy the mandate given to it by the Commission.

In contrast, under the “opt-out” approach, a reference to UNCITRAL Rules or a reference to the UNCITRAL Rules in effect at the time of the dispute would include its newly elaborated transparency rules, except where the Parties explicitly state otherwise in the treaty. The default rule being transparency, this would increase transparency in practice while the treaty Parties retain their ability to exclude the new transparency rules.

How to address the "opt-in/opt-out" issue? The Secretariat's Appendix option

As the UNCITRAL Secretariat’s note for the upcoming Working Group meeting in February 2012 explains, for this “opt-out” approach to work, new rules on transparency would need only to “be integrated with the [general] UNCITRAL Arbitration Rules, probably in the form of an appendix to the Arbitration Rules.”¹ The provisions on transparency would then apply alongside other provisions of the UNCITRAL arbitration rules. However, provided they honour their obligation to the human right of access to information, States would still be free to specify in their treaties that they did not want the rules on transparency to apply.

In its note, the Secretariat provides useful language for incorporating the “opt-out” approach. This language is contained in Option 1 of Draft Article 1.

Issue Two: *Working Group II should not prevent the use of new rules on transparency in disputes arising under existing treaties.*

The debate about future disputes under today’s approximately 3,000 investment treaties

Some members of Working Group II have proposed to draft the new rules on transparency so that they will not apply to future disputes arising under existing treaties. This proposal would fatally undermine the relevance of the new UNCITRAL transparency rules, as they would not apply to future disputes arising under the approximately 3,000 existing investment protection treaties. This proposal would also contradict the default rule for application of amendments to arbitration rules.

¹ A/CN.9/WG.II/WP.169, para. 13.

Applying the new transparency rules to the majority of future disputes is legally feasible.

It is not uncommon for procedural rules that govern international arbitrations to change over time; and when they do change, the version of the procedural rules in force when the case is initiated will apply unless the arbitration rules, the applicable treaty or the parties to the dispute state otherwise.² The arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the International Chamber of Commerce, for example, both reflect that principle. The applicability of the new 2010 SCC Rules to the roughly 50 member State Energy Charter Treaty, which refers to the SCC Arbitration Institute, was never questioned.³

The argument that it is legally impermissible to apply the new UNCITRAL transparency rules to future disputes under existing treaties is therefore unfounded. However, as long as they honour their obligation to the human right of access to information, States would still be free to specify in their treaties that they did not want the rules on transparency to apply. In the absence of such declaration or agreement, the new transparency rules would apply unless the treaty manifested the intent to apply a different version of the rules, such as via an express reference to the 1976 UNCITRAL Rules.

How to address the "existing treaties" issue? A simple rule facilitating wide application

The UNCITRAL Secretariat's note prepared for this February session does not provide an adequate variant of draft text for the issue of application to existing treaties. The "existing treaties" issue would, however, be easy to address in a simple rule that would cover application of the new rules to both future and existing treaties. That rule could read:

[Notwithstanding any other provision in the UNCITRAL Arbitration Rules,⁴ the Rules on Transparency shall apply to any arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments ("treaty") after [date of adoption of the Rules on Transparency], unless the treaty provides that the Rules on Transparency do not apply.]

² See, e.g., Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (2007), at pp. 80–81; Black and Veatch Singapore Pte. Ltd. v. Jurong Engineering Ltd. [2004] SGCA 30, 1 SLR 333; China Agribusiness Development Corp. v. Balli Trading [1998] 2 Lloyd's Rep. 76; Bunge SA v. Kruse [1979] 1 Lloyd's Rep. 279; Elizabeth Shackelford. (2003). "Regional Harmonization of Rules in International Commercial Arbitration." *U. PITTS. L. REV.*, 67(4), 897-912.

³ Introductory language in the 2010 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce states:

Under any arbitration agreement referring to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "Arbitration Rules") the parties shall be deemed to have agreed that the following rules, or such amended rules, in force on the date of the commencement of the arbitration ... shall be applied unless otherwise agreed by the parties.

⁴ The phrase "Notwithstanding any other provision in the UNCITRAL Arbitration Rules" is designed to indicate that Article 1(2) of the 2010 UNCITRAL Arbitration Rules does not affect application of the new rules on transparency to disputes under existing treaties.

A treaty solution?

As the Secretariat's note explains, there have been discussions in Working Group II about creating an international convention that would address the issue of applicability to which States could become Party. There are various options for what such a treaty on transparency could require. State Parties could commit, for example, to apply the new rules on transparency in any investor–State dispute arising between one State Party to the treaty and investor(s) of other State Parties.

This convention could be a useful complement to strong and widely applicable UNCITRAL rules on transparency. It is not, however, an effective alternative or substitute.

Conclusion

Working Group II has reached a critical point in its efforts to develop legal standards to ensure transparency in investor–State arbitration. In its fourth session in February 2012 in New York, Working Group II is expected to debate several issues concerning a draft text that has the potential to increase transparency in investor–State arbitrations. In order to make certain that its work is not in vain and satisfies the Commission's mandate, Working Group II should reject attempts to limit the applicability of the new transparency rules. Instead, Working Group II should stay firm to the Commission's mandate and make certain that the new rules have practical effect and ensure transparency in investor–State dispute resolution.