Transparency in Investor-State Arbitration

UNCITRAL Rules on Transparency
Mauritius Convention on Transparency

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About UNCITRAL

The core legal body of the United Nations system in the field of international trade law. A legal body with universal membership specializing in commercial law reform worldwide for over 40 years, UNCITRAL’s business is the modernization and harmonization of rules on international business.

Trade means faster growth, higher living standards, and new opportunities through commerce. In order to increase these opportunities worldwide, UNCITRAL is formulating modern, fair, and harmonized rules on commercial transactions. These include:

- Conventions, model laws and rules which are acceptable worldwide
- Legal and legislative guides and recommendations of great practical value
- Updated information on case law and enactments of uniform commercial law
- Technical assistance in law reform projects
- Regional and national seminars on uniform commercial law
The main objectives of the Regional Centre are:

(a) to enhance international trade and development in the Asia-Pacific region by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL;

(b) to provide bilateral and multilateral technical assistance to States with respect to the adoption and uniform interpretation of UNCITRAL texts through workshops and seminars;

(c) to engage in coordination activities with international and regional organizations active in trade law reform projects in the region; and

(d) function as a channel of communication between States in the region and UNCITRAL.
Events

UNCITRAL-RCAP & University of Macau
2015 UNCITRAL Emergence Conference [CALL FOR PAPERS]
Macau, China, 30 November 2015

UNCITRAL-RCAP, Ministry of Justice of Korea, KCAB & ICC
4th Asia Pacific ADR Conference
Seoul, 3-4 November 2015

UNCITRAL-RCAP, IIDAC
Changing Dynamics of International Arbitration in India - Launch of
UNCITRAL National Coordination Committee India
New Delhi, 31 October 2015

UNCITRAL-RCAP, Government of the Hong Kong SAR, China -
Department of Justice, HKIAC
UNCITRAL Asia Pacific Judicial Summit
Hong Kong, China, 26-28 October 2015

Faculty of Law, The University of Hong Kong (UNCITRAL RCAP as
supporting organization)
The Developing World of Arbitration: A Comparative Study of Arbitration
Reform in the Asia Pacific
Hong Kong, China, 27 October 2015

<http://www.uncitral.org/uncitral/tac/rcap.html>
ESCAP-UNCITRAL Capacity Building Workshop on Cross-border Paperless Trade Facilitation: Challenges and Issues for Enabling Environment

Organizers:
United Nations Commission on International Trade Law - Regional Centre for Asia and the Pacific (UNCITRAL - RCAP)
United Nations Economic and Social Commission for Asia and the Pacific (ESCAP)

Date: 31 Mar 2015
Location: Bangkok, Thailand
37. **When investment cases go to international arbitration** they are generally treated as commercial disputes in which public interest considerations, including human rights, play little if any role. Additionally, **arbitration processes are often conducted in strict confidentiality** so that the public in the country facing a claim may not even know of its existence. Where human rights and other public interests are concerned, **transparency should be a governing principle**, without prejudice to legitimate commercial confidentiality.
UNCITRAL **Rules** on Transparency in Treaty-based Investor-State Arbitration

Art 1: Scope of Application

Art 2: Publication of information at the commencement of arbitral proceedings

Art 3: Publication of documents

Art 4: Submission by a third person

Art 5: Submission by a non-disputing Party to the treaty

Art 6: Hearings

Art 7: Exceptions to transparency

Art 8: Repository of published information
What do you have to disclose?

• **Identity of the parties** (Art. 2)

• **Documents**
  - Notice of arbitration/response (Art. 3(1))
  - Written statements/submissions (Art. 3(1))
  - Expert reports/witness statements (upon request) (Art. 3(2))
  - Exhibits (upon the tribunal’s decision) (Art. 3(3))
  - Submissions by third persons (Art. 3(1))
  - Transcripts of hearings (where available) (Art. 3(1))

• **Hearings** (Art. 6)
To whom do you have to disclose?

• “each of the disputing parties shall promptly communicate [...] to the repository.” (Art. 2)

• “the repository shall make available to the public information regarding [...]” (Art. 2)

• “The repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations or an institution named by UNCITRAL.” (Art. 8)
Transparency Registry
(a repository for the publication of information and documents in treaty-based investor-State arbitration)

The Transparency Registry is a central repository for the publication of information and documents in treaty-based investor-State arbitration.

The Transparency Registry has been established under the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (the "Rules on Transparency"), effective as of 1 April 2014. The function of the Transparency Registry is undertaken by the Secretary-General of the United Nations, through the UNCITRAL secretariat.
Welcome

In the years since its establishment, UNCITRAL has been recognized as the core legal body of the United Nations system in the field of international trade law. A legal body with universal membership specializing in commercial law reform worldwide for over 40 years. UNCITRAL's business is the modernization and harmonization of rules on international business.

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What's new at UNCITRAL?
When do you have to disclose?

• Upon receipt of the notice of arbitration (Art. 2)
  • Identity of the parties

• ASAP (Art. 3 (4))
  • documents

More transparent than (most of) the procedure before ordinary courts
Why disclose ASAP?

• Submission by a third person (Art. 4)
  • “the arbitral tribunal may allow [...] third person(s) [...] to file a written submission” (Art. 4(1))

• Submission by a non-disputing Party to the treaty (Art. 5)
  • “The arbitral tribunal shall [...] allow [...] submissions on issues of treaty interpretation from a non-disputing Party to the treaty.” (Art. 5(1))
Any protected information?

• **Exceptions** (Art. 7)

  • Confidential business information
  • Information protected under:
    • the treaty
    • the law of the respondent State
    • any law or rules determined by the arbitral tribunal
  • Information protected under Information the disclosure of which:
    • would impede law enforcement
    • the respondent State considers to be contrary to its essential security interests
    • would jeopardize the integrity of the arbitral process
Under which procedure?

• **UNCITRAL arbitrations**
  • pursuant to a treaty concluded:
    • on or after 1 April 2014 (Art. 1(1))
    • before 1 April 2014, if:
      • the disputing parties agree (Art. 1(2)(a))
      • the parties to the treaty agree (Art. 1(2)(b))

• **non-UNCITRAL arbitrations**, if:
  • the disputing parties agree (Art. 1(9))
  • the parties to the treaty agree (Art. 1(9))
<table>
<thead>
<tr>
<th>Treaty</th>
<th>Signature</th>
<th>Entry into force</th>
<th>Relevant articles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Japan-Ukraine BIT</td>
<td>05/02/2015</td>
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<td>Article 18.4(c)</td>
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<tr>
<td>Agreement between Japan and Ukraine for the Promotion and Protection of Investment</td>
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<td>Japan-Uruguay BIT</td>
<td>26/01/2015</td>
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<td>Article 21.3(c)</td>
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<td>Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment</td>
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<td>Canada-Côte d’Ivoire BIT</td>
<td>30/11/2014</td>
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<td>Article 23.1(c)</td>
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<td>Canada-Côte d’Ivoire Foreign Investment Promotion and Protection Agreement</td>
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<td>Article 30 and 31*</td>
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<tr>
<td>Canada-Mali BIT</td>
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<td>Article 23.1(c)</td>
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<td>Agreement between Canada and Mali for the Promotion and Protection of Investments</td>
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<td>Article 30 and 31*</td>
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<tr>
<td>Canada-Senegal BIT</td>
<td>27/11/2014</td>
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<td>Article 24.1(c)</td>
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<td>Article 31 and 32*</td>
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<td>23/10/2014</td>
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<td>Agreement between Japan and the Republic of Kazakhstan for the Promotion and Protection of Investment</td>
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<tr>
<td>Canada-Republic of Korea FTA</td>
<td>22/09/2014</td>
<td>01/01/2015</td>
<td>Article 8.23:1(c)</td>
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<tr>
<td>Free Trade Agreement between Canada and the Republic of Korea</td>
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<td>Article 8.35 and 8.36*</td>
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</tbody>
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• **non-UNCITRAL arbitrations**, if:
  • the disputing parties agree (Art. 1(9))
  • the parties to the treaty agree (Art. 1(9))
The Rules on Transparency shall apply to **any** investor-State arbitration in which:

- the respondent is a Party to the Convention, and
- the claimant is of a State that is a Party to the Convention (Art. 1(2))

**Exceptions (reservations): Art. 3**
<table>
<thead>
<tr>
<th>State</th>
<th>Notes</th>
<th>Signature</th>
<th>Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession($)</th>
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<tbody>
<tr>
<td>Belgium</td>
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<td>15/09/2015</td>
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<td>Syrian Arab Republic</td>
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<td>United States of America</td>
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Parties: 1

(3 ACTIONS ARE REQUIRED FOR ENTRY INTO FORCE)
Resolution adopted by the General Assembly on 16 December 2013

[on the report of the Sixth Committee (A/68/462)]

Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)

The General Assembly,

Recognizing the need for provisions on transparency in the settlement of such treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

Believing that rules on transparency in treaty-based investor-State arbitration would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance,

3. Recommends the use of the Rules on Transparency in relation to the settlement of investment disputes within the scope of their application as defined in article 1 of the Rules, and invites Member States that have chosen to include the Rules in their treaties to inform the Commission accordingly;
The outcome of the three-year long discussions with in UNCITRAL Working Group II is the highest standard on transparency for investor-state arbitration which has ever been agreed upon in a multilateral context.

[...]

To sum up, the UNCITRAL rules are a giant’s step in promoting transparency in investor-state arbitration and we look forward to seeing them work in practice. In providing a practical mechanism for transparency, the rules will also work towards the achievement of broader goals: the goals of reinforcing the legitimacy of investor-state dispute settlement, of democratic participation, of good governance, accountability, predictability and of upholding the rule of law.