Overview

A. Introduction
1. The UN Convention on Transparency in Treaty-Based Investor-State Arbitration (the Transparency Convention) was opened for signature today (March 17, 2015) in Port Louis, Mauritius. The Transparency Convention, which was adopted by the UN General Assembly on December 10, 2014, is a significant component of the reforms that have been made to the arbitral processes for resolving investor-state disputes to ensure greater transparency and accessibility to the public.

2. This advisory provides an overview of the transparency requirements applicable in investor-state arbitrations under the major arbitral procedures used for such disputes. It begins with an outline of UNCITRAL’s Rules on Transparency in Treaty-Based Investor-state Arbitration (the UNCITRAL Transparency Rules), before setting out the framework for identifying when they will apply in Ad Hoc UNCITRAL Arbitration. Thereafter, the transparency rules applicable to arbitration at ICSID (both under the ICSID Convention and at the ICSID Additional Facility) will be set out.

3. For a general overview of these arbitral forums and the key differences between them, see our previous advisory. These advisories are part of our Investor-State Arbitration Advisory Series, which outlines key aspects of the investor-state arbitral process and the rights and defences that are frequently raised in this context.

B. The UNCITRAL Transparency Rules
4. The UNCITRAL Transparency Rules came into effect on April 1, 2014. They comprise a self-contained set of procedural rules that provide for transparency and accessibility to the public of investor-state arbitrations pursuant to investment treaties. The UNCITRAL Transparency Rules can apply to investor-state arbitration before any arbitral forum. As will be seen below, in certain circumstances, their application is automatic; in others, their application is dependent on the agreement of the state parties to the investment treaty or of the disputing parties in the arbitration.

5. When applicable, the UNCITRAL Transparency Rules require that:
   5.1 Upon commencement of arbitral proceedings, basic information about the dispute be made public through UNCITRAL’s Transparency Registry;
   5.2 The written submissions of the disputing parties and, if applicable, third parties (including the non-disputing state) be made publicly available. In certain circumstances, expert reports, witness statements and exhibits may also be made publicly available;
   5.3 Tribunals may, following consultation with the disputing parties, permit submissions from third parties. The tribunal is only obliged to allow such a submission when the non-disputing state party to the treaty giving rise to the dispute chooses to make a submission on an issue of treaty interpretation;
   5.4 The oral hearings can be attended by members of the public and any transcripts of those hearings be made publicly available; and
The orders, decisions and awards of the tribunal are made publicly available. However, the Rules do contain exceptions to these requirements in relation to confidential and protected information and an exception that enables the tribunal to protect the integrity of the arbitral process.

C. Ad Hoc UNCITRAL Arbitration

6. With Ad Hoc UNCITRAL Arbitration pursuant to an investment treaty, the applicability of the UNCITRAL Transparency Rules depends on when that treaty was concluded. (Generally, a bilateral treaty is concluded when it is signed by both states.)

(i) Investment Treaty Concluded on or after April 1, 2014

7. With Ad Hoc UNCITRAL Arbitration conducted pursuant to an investment treaty that was concluded on or after April 1, 2014, the UNCITRAL Transparency Rules apply automatically. The exceptions to this automatic application are: (i) where the state parties to the relevant investment treaty have excluded the application of those Rules; or (ii) the disputing parties in the arbitration agree to dis-apply those Rules and the relevant investment treaty permits such agreement.

(ii) Investment Treaty Concluded before April 1, 2014

8. With Ad Hoc UNCITRAL Arbitration conducted pursuant to an investment treaty that was concluded before April 1, 2014, the UNCITRAL Transparency Rules only apply if: the disputing parties in the arbitration agree (First Option); or if the state parties to the relevant investment treaty agreed to the application of the Rules after April 1, 2014 (Second Option).

9. The Transparency Convention provides a simple (non-exclusive) multilateral mechanism to allow states to provide the necessary agreement referred to in the previous paragraph. However, it only applies to arbitration under an investment treaty concluded before April 1, 2014. The Convention provides the necessary agreement in the following ways:

9.1 First, where both the respondent state in the arbitration and the claimant investor’s home state are both parties to the Transparency Convention, the UNCITRAL Transparency Rules will apply to the arbitration (subject to any applicable exceptions – see para 10 below). By so providing, the Transparency Convention provides the subsequent agreement in the Second Option above.

9.2 Second, where the respondent state in the arbitration is a party to the Transparency Convention and the claimant investor itself agrees, the UNCITRAL Transparency Rules will apply to the arbitration (subject to any applicable exceptions – see para 10 below). By so providing, the Transparency Convention facilitates the agreement of the disputing parties in the First Option above. However, the Convention specifically allows state parties to it to contract out of this provision.

10. It should be noted that the Transparency Convention contains a system for allowing its state parties to avoid the application of the above provisions in certain instances. One has already been discussed (see para 9.2 above). There are two further major exceptions. First, state parties to the Convention can designate that any arbitration conducted under specific investment treaties will not automatically be bound by the UNCITRAL Transparency Rules. Second, state parties to the Convention can designate that any arbitration conducted pursuant to specific arbitral rules (aside from the UNCITRAL Arbitration Rules) will not automatically be bound by the UNCITRAL Transparency Rules.

11. It should also be noted that the Transparency Convention only mandates the use of the UNCITRAL Transparency Rules in relation to arbitrations commenced after the Convention enters into force for the state(s) concerned. They will only apply before that date if either the arbitration is an Ad Hoc UNCITRAL Arbitration and the relevant investment treaty was concluded on or after April 1, 2014 or if there has been an agreement to employ the Rules outside of the Convention’s framework.

D. Arbitration at ICSID (i) The Transparency Rules at ICSID

12. Like with UNCITRAL, the rules applicable to arbitration under both the ICSID Convention and at the ICSID Additional Facility have been amended to increase the transparency of proceedings. Following those reforms, the rules applicable at ICSID now include the following provisions:

12.1 Except where one of the parties object, the oral hearings in an ICSID arbitration can be attended by members of the public;
12.2 ICSID tribunals may, following consultation with the parties, permit submissions from third parties; and

12.3 With both parties’ consent, any award may be published by ICSID.

13. Thus, whereas transparency rules will often apply automatically in Ad Hoc UNCITRAL Arbitrations, such rules will generally only apply to arbitrations at ICSID with the disputing parties’ consent. The exceptions to this are that: (i) ICSID tribunals may permit third party submissions without the disputing parties’ consent so long as they were consulted; and (ii) ICSID is required in all cases to publish excerpts of the legal reasoning of awards. (It should also be noted that there have been indications that further transparency reforms at ICSID may come in the near future.)

(ii) The UNCITRAL Transparency Rules

14. The UNCITRAL Transparency Rules do not apply automatically to arbitrations under the ICSID Convention and at the ICSID Additional Facility. However, it is possible for states or disputing parties to agree to apply them in such proceedings. In particular, the state parties to an investment treaty could agree (either within the treaty or in a subsequent agreement) that the UNCITRAL Transparency Rules would apply to arbitrations under that treaty, or the disputing parties in the arbitration could agree to apply those Rules. Where the investment treaty giving rise to the arbitration at ICSID was concluded before April 1, 2014, the Transparency Convention (see paras 9 to 11 above) provides one option for such agreements to be made.