

Submission to Working Group II on International Arbitration

Vienna October 1–5, 2012

Comments on Draft Articles 1, 3, 7 and 8

Two years ago, Working Group II launched work on its mandate from the Commission to draft a legal standard to ensure transparency in investor-State arbitration.¹ Now, during this October 2012 Working Group session, it will be reviewing a set of draft proposed rules on the issue. Those draft rules, which are set forth in Working Paper 169 (WP.169)² and Working Paper 172 (WP.172),³ address the scope of application of the new rules on transparency, the content of proposed disclosure requirements, and exceptions from those requirements.

Although many aspects of the rules represent notable progress toward the goal of ensuring transparency in investor-State arbitration, certain issues remain that threaten to undermine the ultimate effectiveness of the new transparency rules. This paper highlights those issues and proposes changes to some of the draft rules in order to keep those rules in close alignment with the Commission's mandate.

The draft rules covered in this note are draft articles 1 (scope of application), 3 (publication of documents), 7 (hearings) and 8 (exceptions).

Draft Article 1. Scope of application

1. These Rules shall apply to investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors (“treaty”)* when the Parties to the treaty [or all parties to the arbitration (the “disputing parties”)] have agreed to their application. If a treaty [concluded prior to or after the date of adoption/effective date of the Rules on Transparency] refers to the UNCITRAL Arbitration Rules, that reference means the version of the UNCITRAL Arbitration Rules that incorporates these Rules on Transparency if the treaty, as interpreted in accordance with international law, reflects the treaty Parties’ agreement to the application of that version of the UNCITRAL Arbitration Rules. The Parties may also at any time agree, after

¹ Report of the United Nations Commission on International Trade Law, 41st session (June 16–July 3, 2008), Gen. Ass. 63rd session, supp. No. 17, A/63/17, para. 314.

² A/CN.9/WG.II/WP.169 (Dec. 13, 2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V11/880/46/PDF/V1188046.pdf?OpenElement>.

³ A/CN.9/WG.II/WP.172 (Aug. 2, 2012), available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V12/552/47/PDF/V1255247.pdf?OpenElement>.

~~[date of adoption/effective date of the Rules on Transparency], to apply these Rules on Transparency under a treaty [concluded prior to or after that date]. In a treaty concluded after [date of coming into effect of the Rules on Transparency], a reference in the treaty to the UNCITRAL Arbitration Rules shall be presumed to incorporate the Rules on Transparency, unless the Parties to the treaty have agreed otherwise, such as through a reference to a particular version of the UNCITRAL Arbitration Rules [that does not refer to the Rules on Transparency].~~

Explanation:

This edit to draft article 1(1) is based on the proposal made in WP.174 by the Governments of Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States.⁴ The approach proposed in WP.174 by those Governments is crucial because it facilitates application of the new rules on transparency to disputes under existing treaties. It does not, however, impose on the treaty parties such application. The language suggested here slightly modifies the proposal made in WP.174 in order to clarify that the same principle—i.e., the principle that the treaty will govern the issue of whether the transparency rules apply—also applies to disputes arising under future treaties.

2. In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty, (a) the [disputing parties] [the parties to that arbitration (the “disputing parties”)] may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty; (b) in the application of the Rules on Transparency, the arbitral tribunal shall have the power, beside its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision to the particular circumstances of the case if this is necessary to achieve the transparency objectives of these Rules in a practical manner.
3. Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is any conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail.
4. Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.
5. Where these Rules provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account, (a) the public interest in transparency in treat-based investor-State arbitration and in the particular arbitral proceedings and (b) the disputing parties’ interest in a fair and efficient resolution of their dispute.

⁴ A/CN.9/WG.II/WP.174 (Aug, 2, 2012), available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V12/552/41/PDF/V1255241.pdf?OpenElement>

Draft Article 3. Publication of documents

1. Subject to the exceptions set out in article 8, the following documents shall be made available to the public: the notice of arbitration; the response to the notice of arbitration; the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; [a table listing all exhibits to the aforesaid documents] [exhibits]; witness statements and expert reports; any written submissions by the non-disputing Party(ies) to the treaty and by third persons; transcripts of hearings, where available; and orders and decisions of an appointing authority and the arbitral tribunal, including separate statements and dissenting opinions.

Explanation:

The additions to draft article 3(1) seek to clarify the scope of mandatory disclosure, and to ensure that decisions of appointing authorities, if any, will also be disclosed.

2. Subject to the exceptions set out in article 8, the arbitral tribunal may, on its own initiative or upon request from a disputing party or from any person that is not a disputing party, decide to order publication of any other documents provided to, or issued by, the arbitral tribunal. The said decision shall be taken in the exercise of the tribunal's discretion after consultation with the disputing parties.

~~3. Subject to the exceptions set out in article 8, a person that is not a disputing party may request access to any other documents provided to, or issued by, the arbitral tribunal, and the arbitral tribunal shall, in the exercise of its discretion and after consultation with the disputing parties, decide whether and how to grant such access.~~

~~3.-(4) The documents made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 9 as they become available and, if applicable, in a redacted form in accordance with article 8. The documents made available [to the public] [to the person requesting access to them] pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 9 as they become available and, if applicable, in a redacted form in accordance with article 8. The repository shall make the documents available in a timely manner, in the form and in the language in which it receives them.~~

Explanation:

The changes made to draft article 3(2), 3(3), and 3(4) are based on the issue raised in paragraph 32 of WP 169. If a disclosure is made, it should be made to the general public, as opposed to through a bilateral or other privately made disclosure.

Draft Article 7. Hearings

1. Subject to article 7, paragraphs 2 and 3, hearings shall be public, ~~unless otherwise decided by the arbitral tribunal, after consultation with the disputing parties.~~

Explanation:

This edit to draft article 7(1) makes open hearings the rule, rather than a principle subject to veto by the tribunal.

2. Where there is a need to protect [confidential or sensitive] information or the integrity of the arbitral process pursuant to article 8, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.

3. The arbitral tribunal may make logistical arrangements to facilitate the public's right of access to hearings (including, where appropriate, by organizing attendance through video links or such other means as it deems appropriate) and may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this is or becomes necessary for logistical reasons.

4. Where a hearing has been closed to the public in order to protect the integrity of the process pursuant to article 7, paragraph 2, or for logistical reasons under article 7, paragraph 3, transcripts of the hearings shall be prepared, and all aspects of those transcripts that are not protected from disclosure pursuant to article 8 shall be made available to the public in accordance with article 3(1). The repository referred to under article 9 shall publish transcripts of hearings in the form and in the language in which it receives them from the arbitral tribunal.

Explanation:

Proposed article 7(4) seeks to balance the potential need to close the hearing with the interest in transparency.

Draft Article 8. Exceptions to transparency

[Confidential or sensitive] [Protected] information

1. [Confidential or sensitive] [Protected] information, as defined in paragraph 2 below and as identified pursuant paragraphs 3 to 9 below, shall not be ~~made available to the public or to non-disputing Parties~~ subject to mandatory disclosure under articles 3, 4 and 7.

Explanation:

Draft article 8(1) is modified to clarify that article 8 on exceptions only applies to and shapes the rules that refer to draft article 8. These are the rules on mandatory disclosure that are set forth in rules 3, 4 and 7. The revisions also aim to prevent the mandatory disclosure regime from impeding legitimate voluntary disclosure in cases, for example, when a disputing party decides to waive a claim of confidentiality during or after the dispute.

2. [Confidential or sensitive] [Protected] information consists of:

(a) Confidential business information*; or

~~(b) Information which is protected against being made available to the public under the treaty;~~

~~(c) Information which is privileged or otherwise protected against being made available to the public under applicable law. ~~the law of a disputing party or any other law or rules determined to be applicable to the disclosure of such information by the arbitral tribunal.~~~~

Explanation:

An asterisk is added to former draft article 8(2)(a) as a placeholder for clarification of the phrase “confidential business information.” It is not clear that “confidential business information” protects or should be interpreted to protect anything that is not covered under former draft article 8(2)(c), which addresses information protected under applicable law. We would therefore suggest deleting the phrase “confidential business information” and leaving applicable law as the sole governing standard. However, if “confidential business information” is included, explanatory text in a footnote to the rules could help reduce uncertainty regarding the meaning of the phrase. Such text could state that “confidential business information” is information that (1) includes trade secrets, or financial, commercial, scientific or technical information that has not been disclosed to the public and is treated consistently in a confidential manner; and (2) if disclosed, could result in material financial loss to, or could reasonably be expected to prejudice the competitive position of, the holder of the information.

Former draft article (8)(2)(b) is deleted because it is incorporated in former draft article 8(2)(c).

Language in former draft article 8(2)(c) is deleted for two reasons:

- *To clarify the relationship between it and draft article 8, paragraphs (3) through (6). As currently proposed, paragraphs (3) through (6) make the parties, non-disputing Parties and third persons initially responsible for identifying what aspects of their own submissions should be protected from disclosure. Former draft Article 8(2)(c), however, arguably suggests that such designations would depend on a preliminary determination*

by the tribunal of what is the applicable law or rule governing the definition of “protected” or “confidential or sensitive” information.

- *The phrase “law of a disputing party or any other law or rules” is unclear, broad and may be inconsistent with conflict of law rules as it could suggest that, irrespective of what conflict of law analysis would provide, the law of both the home State and host State would apply, along with any other law or rule.*

3. When a document other than an order or decision of the arbitral tribunal is to be made available to the public pursuant to article 3, paragraph 1, the disputing party, non-disputing Party or third person who submits the document shall, at the time of submission of the document, ~~indicate whether~~ clearly identify any it contends that the document contains information which it contends is [is of a confidential or sensitive nature] [must be protected from publication], submit a statement explaining the basis for that contention, and provide a and shall, promptly or within the time set by the arbitral tribunal, submit a redacted version of the document that does not contain the said information.

Explanation:

These changes are added to provide for a presumption of transparency and to better ensure that, when making submissions, there is some obligation to justify claims that the information in them is “confidential or sensitive” or “protected.”

4. When a document ~~other than an order or decision of the arbitral tribunal~~ is to be made available to the public pursuant to a decision of the arbitral tribunal under article 3, paragraphs ~~2 and 3~~, the disputing party, non-disputing Party or third person who has submitted the document shall, within 30 days of the tribunal’s decision that the document is to be made available to the public, indicate whether it contends that the document contains [confidential or sensitive] [protected] information which [is of a confidential or sensitive nature] [must be protected from publication] and explain the basis for its contention. [As soon as practicable] [Within the time set by the tribunal] it shall also and submit a redacted version of the document that does not contain the said information.

Explanation:

These changes are added to provide for a presumption of transparency and to better ensure that, when making submissions, there is some obligation to justify claims that the information in them is “confidential or sensitive” or “protected.” The changes also allow flexibility in terms of timing for redactions, as the documents covered by this category may include exhibits, which could be potentially voluminous.

5. Where a redaction is proposed under paragraph 3 or 4 above, any disputing party other than the person who submitted the document in question may object to the proposed redaction and/or propose that the document be redacted differently. Any such objection or counter-proposal shall be made within 30 days of receipt of the proposed redacted document.

6. When an order, decision or award of the arbitral tribunal is to be made available to the public pursuant to article 3, paragraph 1 and article 4, the tribunal shall give all disputing parties an opportunity to make submissions as to the extent to which the document contains [confidential or sensitive] [protected] information. information which [is of a confidential or sensitive nature] [must be protected from publication] and to propose redaction of the document to prevent the publication of the said information. Any such submission shall be made within 15 days of receipt of the order, decision or award, and shall clearly identify the information contended to be [confidential or sensitive] [protected], explain the basis for that contention, and provide a redacted version of the relevant order, decision, or award.

Explanation:

These changes, like those above, are added to provide for a presumption of transparency and to require justification for claims that information is “confidential or sensitive” or “protected.” The changes also insert a time limit for requesting that information be withheld from disclosure.

~~7. The arbitral tribunal shall rule on all questions relating to the proposed redaction of documents under paragraphs 3 to 6 above, and shall determine, in the exercise of its discretion, the extent to which any information contained in documents which are to be made available to the public, should be redacted.~~

7. After receiving proposed redactions or objections thereto submitted in accordance with article 8, paragraphs 3 to 6, the arbitral tribunal shall promptly rule on those proposals or objections by determining whether the information claimed to be [confidential or sensitive] [protected] meets the criteria of article 8, paragraph 2.

Explanation:

These changes seek to address questions that the current draft leaves open regarding how to determine whether information has been appropriately designated as “protected” or “confidential or sensitive.” Draft article 8(2)(c) in WP.169 suggests that the arbitral tribunal has the power to decide the issue, and should find that the information is shielded from disclosure under the transparency rules if it is “protected against being made available to the public under the law of a disputing party or any other law or rules determined to be applicable to the disclosure of such information by the arbitral tribunal.” Draft article (8)(7), in contrast, appears to call for a different, and

less disciplined approach, stating that the tribunal “shall determine, in the exercise of its discretion, the extent to which any information contained in documents which are to be made available to the public, should be redacted.” It is unclear why, if draft article 8(2) attempts to identify legal standards by which to determine whether information is “protected” or “confidential or sensitive,” the text would also include draft article 8(7), which seems to eviscerate Article 8(2)’s standards by injecting broad discretionary authority for the tribunal to judge requests for withholding and redaction. These changes here thus seek to remove that broad discretion and emphasize that claims that information should or should not be protected are to be resolved pursuant to applicable law.

8. If the arbitral tribunal determines that information should not be redacted from a document pursuant to paragraphs 3 to 5 above, the disputing party, non-disputing Party or third person that submitted the document may, within 30 days of the arbitral tribunal’s determination (i) withdraw all or part of the document containing such information from the arbitral proceedings [with the effect that it shall no longer be entitled to rely on such information for any purpose in the arbitral proceedings], or (ii) resubmit the document in a form which complies with the tribunal’s determination.

9. Any disputing party that intends to use information which it contends to be [confidential or sensitive] [protected] information in a hearing shall so advise the arbitral tribunal. The arbitral tribunal shall, after consultation with the disputing parties, decide whether that information is [of a confidential or sensitive nature] [shall be protected] and shall make arrangements to prevent any [confidential or sensitive] [protected] information from becoming public in accordance with article 7, paragraph 2.

Integrity of the arbitral process

10. Information shall not be made available to the public pursuant to articles 2 to 7 where the information, if made available to the public, would jeopardize the integrity of the arbitral process as determined pursuant to paragraph 11 below.

11. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication poses a manifest risk of serious harm to ~~it would jeopardise the integrity of~~ the arbitral process (a) because it could hamper the collection or production of evidence, or (b) because it could lead to the intimidation of witnesses, lawyers acting for disputing parties, or members of the arbitral tribunal, or (c) in comparably exceptional circumstances. Measures should be narrowly tailored to address the relevant risk that has been identified and should be removed when no longer necessary.

Explanation:

The alternative language “poses a manifest risk of serious harm to” and the additional sentence at the end of draft article 8(1) aim to further emphasize that the “integrity of the process” exception is a narrow exception.