New transparency in UNCITRAL arbitrations to boost investor confidence

The United Nations Commission on International Trade Law has taken an important step towards ensuring transparency in investor-state arbitrations conducted under International Investment Agreements providing for the protection of investments or investors. The new transparency rules will take effect on 1 April 2014 and apply if it concerns an investment agreement concluded after that date. The new rules provide an unprecedented level of public accessibility and transparency of the dispute while carefully balancing the interests of the disputing parties. Investors seeking stronger investment protection and far-reaching transparency will benefit from this development.

Certainly, a new global trend on transparency in investor-state arbitration has been set. Public awareness of contraventions by the states involved will offer investors a far higher degree of accountability. Also, investors will be able to properly weigh their risks and assess their position in relation to different states. Thus, for those investors seeking stronger investment protection and transparency, awareness of this development may open important new business opportunities, as they may decide to start investment projects that – due to the financial risks involved – they would not have envisaged without this newly acquired knowledge and gain in confidence.

An investor-state arbitration is a dispute resolution process arising out of an International Investment Agreement: a treaty entered between two or more states aimed at promoting and protecting foreign investment in the respective territories of those states. The new transparency rules do not apply to commercial arbitrations. In the case of UNCITRAL investor-state arbitrations initiated pursuant to a treaty concluded before 1 April 2014, UNCITRAL’s new transparency rules only apply if the parties agree to their application. UNCITRAL is also preparing a convention envisaging the application of the transparency rules to disputes arising under existing investment treaties.

Under the previous versions of the UNCITRAL arbitration rules, disputes between investors and states were often not made public. The new rules introduce a procedural means to ensure that throughout the arbitral proceedings the relevant legal documents and hearings are accessible not only to the parties but also to the public. This allows a broader visibility of the risks that investors may run when investing in a certain state, which, in turn, will prevent excessive contraventions by that state.

Confidentiality is often seen as a key feature of commercial arbitration. Investor-state
disputes, however, involve considerable issues of public interest and taxpayer funds. Transparency and accessibility to the public is therefore fundamental to this type of arbitration, unlike commercial arbitration.

Under the new rules, a substantial amount of information must be made available to the public. This includes the names of the parties, the treaty under which the claim is made, the economic sector involved, as well as various documents produced during the arbitration by the parties. Also, all written submissions provided by third parties and the transcripts of hearings must be publicly accessible. The rule that hearings must be open to the public is also innovative. In view of the protection of the interests of the disputing parties, the rules allow an exception to public accessibility of documents and hearings in the case of confidential information or where the integrity of the arbitral process is at stake.

UNCITRAL will maintain a central repository where all the information and documentation that is made publicly available will be digitally stored.

The new transparency rules are also available for use in investor-state arbitrations initiated under rules other than the UNCITRAL arbitration rules, or in ad hoc proceedings.

The UNCITRAL transparency rules offer far wider public accessibility than the ICSID and the PCA Arbitration Rules as well as the ICC Rules and arbitrations under NAFTA.