

# The UNCITRAL Rules on Transparency as a tool against institutional corruption

by Nikolaos I Theodorakis

## 1. INTRODUCTION

Corruption remains one of the largest challenges for the international community. The nature and scope of corruption varies, yet it harms the financial interests of states, institutions, and corporations universally. It stalls international development, hampers trade, jeopardises human rights, and reduces public finances. In the EU alone, the estimated costs incurred by corruption amount to €120 billion per year, or otherwise 1 per cent of the EU GDP and only a little less than the annual budget of the EU.

Incidents of corruption are even more frequent in issues of foreign direct investment, particularly when the investment is directed from a developed to a developing country. In fact, it is not unlikely that a multinational corporation wanting to invest in a particular country resorts to bribery or other forms of facilitation payments to ensure preferential treatment in securing the tender contract. Incidents of corruption might complicate things even further in case a dispute arises between the parties. Depending on the dispute resolution clause, corporations or states might initiate arbitral proceedings asking for relief.

The core thesis of this paper is that transparency will enjoy a leading role in investor-state dispute settlement in the forthcoming years. In particular, it will act as the spearhead against institutional corruption since all the documents and discussions can be made available to the broader public. Scrutinising every part of the arbitral process will render corporations and states more vigilant towards any illicit behavior. Granting open access, save for exceptions, to the documents relevant to the arbitral procedure increases transparency, and subsequently minimises the danger of an incident of corruption arising.

The paper will, therefore, discuss the nexus between transparency and institutional corruption through the lenses of investment arbitration. The new path that the UNCITRAL Transparency Rules pave is inviting a long debate as to whether

this effort will yield the aspired fruits of increased accountability and openness. In doing so, we will discuss how these notions interconnect, how transparency can be key to effective arbitral proceedings in the future, and what is the way forward.

## 2. BACKGROUND TO UNCITRAL RULES ON TRANSPARENCY AND THE UN CONVENTION ON TRANSPARENCY

In 2008, UNCITRAL mandated its Working Group II to undertake work related to transparency in ISDS since it consensually agreed “on the importance of ensuring transparency in investor-state dispute resolution” (See Report of UNCITRAL on the work of its 41st session, UN document A/63/17 (2008), para 314). The Government of Canada took the lead in advocating for such a development since it supported the proposition that a failure to endorse the need for transparency in ISDS in UNCITRAL’s procedural rules would be “contrary to fundamental principles of good governance and human rights upon which the United Nations is founded.” (See also Report of UNCITRAL on the work of its 41st session, UN document A/CN.9/662 (2008)). Special Representative Ruggie also made a statement in support of the initiative, emphasising that transparency lies at the foundation of what the UN and other authoritative entities promulgate as precepts of good governance (See Statement to the UNCITRAL Commission, 41st session, UNHQ, New York, USA, June 16–July 3, 2008, (“2008 Ruggie Statement“)).

Pursuant to this call, the Working Group II started working on these tasks two years later, in 2010. The work culminated in two primary texts, these being:

- the adoption of the rules on transparency in treaty-based investor-state arbitration, which came into effect on 1 April 2014 (the Rules); and,
- the convention on transparency that was finalised by the Commission in July 2014 (the Convention).

The rules overall provide a transparent procedural regime under which investment treaty arbitrations are followed. They might work in investor-state arbitrations initiated under UNCITRAL Arbitration Rules, including other institutional arbitration rules or in ad hoc proceedings.

In particular, the rules include: (i) provisions on the publication of documents, (ii) open hearings, (iii) and the possibility for the public and non-disputing treaty parties to make submissions. The rules further assist with robust safeguards to protect the dissemination of confidential information and safeguard the smooth arbitral process.

In 2011 Professor John Ruggie, then Special Representative of the UN Secretary-General on Business and Human Rights, delivered a statement to the UNCITRAL Working Group on Arbitration and Conciliation (Working Group II) which described how the work he had carried out in his business and human rights mandate could inform UNCITRAL's discussions relating to ISDS. Special Representative John Ruggie framed the nature of investment treaty disputes in less prosaic terms:

*These are not issues of purely private transaction and consequence. Therefore, they cannot be conducted through an entirely private process if good governance is to have any meaning in practice (see Statement to the UNCITRAL Working Group II (Arbitration and Conciliation), 54th session, UNHQ, New York, USA, February 7, 2011, (“2011 Ruggie Statement”).*

Professor Ruggie advocated in favour of an expansive approach to transparency since “adequate transparency in such arbitration processes where human rights are concerned is essential if societies are to be aware of proceedings that may affect the public interest and therefore their own welfare.”

The work of UNCITRAL to promote transparency in investor-state arbitrations is not just described as the consequence of certain years of negotiation among Member States and UN observers, but rather belongs to a broader zeitgeist.

In particular, the trend of greater openness is evident not only in investor-state dispute settlement, but also in treaty negotiations. For example, the on-going European Union's TTIP negotiations are holding public consultations that relate to key investment protections and further compare to ISDS issues in the negotiations. The TTIP is the most openly negotiated treaty so far, and its rounds of negotiations are publicly available. This new era of transparency appears to have a momentum against corruption, existing through the newly enforced transparency convention.

Further, the International Centre for Settlement of Investment Disputes (ICSID) amended its procedural rules in 2006 to include, among other changes, provisions that increase

transparency in its proceedings (ICSID Convention, Regulation and Rules, ICSID/15 (April 2006)). They may consider further amendments regarding the rules, mimicking the UNCITRAL's work in transparency.

Recently, the European and Inter-American Courts of Human Rights have construed the right to freedom of expression, as that being inclusive of the right to receive information in certain circumstances (see eg *Claude Reyes et al v Chile*, Inter-American Court of Human Rights (September 19, 2006); *Társaság v Hungary*, European Court of Human Rights, 37374/05 (April 14, 2009)). Transparency exists in recent model bilateral investment treaties and free trade agreements that have further promoted transparency both in ISDS and in investment practices (see eg 2012 US Model BIT; 2009 Australia-Chile FTA).

In 2011, the UN Human Rights introduced a set of Guiding Principles on Business and Human Rights (UNGPs). The rationale behind that is to assist governments, businesses and other actors to better manage the business and human rights challenges they face. They revolve around three main premises:

- the duty of states to protect against human rights abuses within their territory and/or jurisdiction, including by businesses;
- the corporate responsibility that relates to the respect of human rights; and,
- the need to create more effective access to remedies for the individuals that have suffered from abuse.

Both the Guiding Principles and the UNCITRAL's work on transparency relate to the mutual espousal of procedural and legal transparency, as well as their practical approach to achieving the said aim.

### 3. THE NEW UNCITRAL RULES ON TRANSPARENCY

On July 10, 2014, the United Nations Commission on International Trade Law (UNCITRAL) approved the draft Convention on Transparency in Treaty-based Investor-State Arbitration (draft Convention) at its 47th session in New York. The rules in the Treaty-based Investor-State Arbitration adopted by the relevant Commission in 2013 provide a procedural framework to make information available to the public in investment arbitration cases that arise under relevant investment treaties. The new Convention forwards a level of transparency that is unprecedented in international arbitration. With the new rules, ISDS will be more transparent than most domestic courts.

The complementing press release mentioned that “the purpose of the convention on transparency is to provide a

mechanism for the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to arbitration cases arising under almost 3,000 investment treaties concluded before April 1, 2014.”

The Rules on Transparency are overall a set of procedural rules that will make treaty-based investor-state arbitrations open and accessible to the public. The rules have the purpose of increasing transparency between investors and States since such cases are often of public interest, involving taxpayers' money and disputes on natural resources or environmental issues. The Transparency Registry (repository) is a central, online source that publishes all information that can be made public under the rules.

The rules that came into effect on April 1, 2014 for investment treaties concluded for rules on or after that date, and the rules apply if included in the treaties. As for treaties concluded before 1 April 2014, the rules can apply if parties to the treaties or parties to the disputes agree on their application. The rules must apply following inclusion in an investment treaty, and the parties cannot derogate from them unless the investment treaty permits them to do so. Hence the Rules on Transparency apply to existing treaties for states amending the existing investment treaties to allow their use. That being said, states will probably wish to avoid such an option since it would overcomplicate the international economic relations currently concluded with their trade allies.

Prior to the newly enforced Rules on Transparency, no arbitration rules used in investor-state arbitration had mandated transparency throughout the arbitral process. Indeed, most arbitration rules referred to in investment treaties are (except for provisions requiring both disputing parties' consent to open hearings) regularly silent on the issue of transparency, neither mandating confidentiality nor requiring disclosure.

As was previously developed in the case law section, the link between investment treaty arbitration, transparency and human rights is quite palpable. In fact, disputes that involve an investor and a state jeopardise the public interest, as well as the state budget. For example, a dispute might arise from an agreement that relates to environmental issues, access to water, public health and indigenous people's rights.

Issues of accountability and corruption can emerge from such a situation. Thus the provisions of transparency in investor-state dispute settlement promote public awareness and participation in disputes that relate to issues of public importance. The state is held accountable both under its international law obligations that stem from the investment treaty, and to the broader public interest or human rights issues.

Through allowing free and open access to all the documents that relate to a certain case, the benefits are multiple:

- i) (citizens become aware of the merits and the particulars of the case;
- ii) any interested party can contribute to the case with relevant information;
- iii) every document is put under strict scrutiny, which maximises the exposure to public control;
- iv) transparency increases the accountability of every interested party;
- v) the openness acts as a deterrent for any party that considers any unlawful activity in an investment; and,
- vi) it will affect the perception corruptions index in a way that citizens will trust their countries more.

#### 4. THE UNITED NATIONS CONVENTION ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (NEW YORK, 2014)

During the UNCITRAL discussions, a point of the debate was whether the new rules should apply to the several investment treaties already in force. Particular countries including Argentina, Australia, Canada, Mexico, Norway, South Africa and the US favoured universal application. The Commission decided to create a convention that governed the application of the Transparency Rules regarding disputes that arise under existing treaties.

Addressing, hence, the *lacuna* in the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration before April 1, 2014, the UN General Assembly adopted on December 10, 2014 the Mauritius Convention on Transparency.

By becoming parties to the Mauritius Convention on Transparency, states and regional economic integration organisations agreed to apply the Rules on Transparency to arbitrations arising under their existing investment treaties, whether on a bilateral or unilateral basis. The Convention contains reservations that allow parties to exclude from the scope of the Convention certain investment treaties, certain sets of arbitration rules, or the unilateral application.

Together with the Rules on Transparency and the Transparency Registry, the Convention contributes to the enhancement of transparency in treaty-based investor-state arbitration. The Convention is an efficient and flexible mechanism for recording such agreement.

The Transparency Convention has been open for signature in Port Louis, Mauritius, and from that point onwards at the United Nations Headquarters in New York, from March 17, 2015 in the most significant step towards their implementation.

The “Mauritius Convention on Transparency” will enter into force six months after the deposit of the third instrument of ratification, acceptance, approval or accession.

## 5. WHAT IS MADE PUBLIC UNDER THE TRANSPARENCY RULES?

The Rules make public information and documents available in the arbitration process. Nonetheless, certain safeguards do apply, which include the protection of confidential information.

Pursuant to the “notice of arbitration” stage of the proceedings, the following information is published:

- the name of the disputing parties;
- the economic sector involved; and
- the investment treaty under which the claim is being made.

Equally, each published case will include the following:

- i) the notice of arbitration;
- ii) response to the notice of arbitration;
- iii) the statement of claim;
- iv) the statement of defence;
- v) further written statements or written submissions by a disputing party;
- vi) table listing all exhibits to those documents;
- vii) any written submissions by the non-disputing treaty party/parties and by third parties;
- viii) transcripts of hearings, where available; and,
- ix) other decisions and awards of the arbitral tribunal.

Expert reports and witness statements are published upon request by the arbitral tribunal and are subject to confidentiality provisions in the rules. Hearings will also be open, subject to certain safeguards for the protection of confidential information or the integrity of the arbitral process.

Third parties (*amicus curiae*) and non-disputing treaty parties can, under circumstances, also make submissions.

This is not to suggest however that the rules on transparency do not protect confidential information. In particular, under the rules, arrangements will be made to prevent any confidential or protected information from being made available to the public. Further safeguards in the rules ensure that submissions do not disrupt or unduly burden the arbitral proceedings, or equally unfairly prejudice any disputing party.

These rules are overall a significant step towards openness throughout the arbitral proceedings, and the subsequent increased transparency.

These new rules demonstrate a sophisticated mixture of careful negotiations and widely approved templates that can serve as a model on how to conduct investor-state arbitrations transparently. The model is consistent with the broader worldwide trend that recognises the importance of transparency.

In particular, transparency is seen as a facilitator towards effective democratic participation, good governance, accountability, predictability and the rule of law (*Delivering Justice: Programme of action to strengthen the rule of law at the national and international levels*, Report of the Secretary-General, A/66/749, (2012)).

## 6. STRUCTURE OF THE RULES ON TRANSPARENCY

In terms of the structure of the rules, they include one article that relates to the scope and manner of application of those provisions (Art 1); three articles that mandate disclosure and openness (Arts 2, 3, and 6); two governing participation by non-disputing parties (Arts 4 and 5); one setting forth exception from the disclosure requirements (Art 7); and one regarding management of disclosure through a particular repository (Art 8).

UNCITRAL firstly debated on whether the rules would only be guidelines, a stand-alone instrument, or an integral part of the UNCITRAL Arbitration Rules. It determined that they would be (i) a part and parcel of the UNCITRAL Arbitration Rules and, (ii) available as a stand-alone instrument for application in disputed governed by other arbitral rules. In order to accomplish the goal of incorporating the Rules on Transparency as an integral part of UNCITRAL arbitrations, UNCITRAL amended its 2010 general arbitration rules by a new paragraph (4) in Article 1 of the said rules.

### 6.1. Article 1 – Scope of application

The Rules on Transparency will apply on a default basis to UNCITRAL investor-state arbitrations conducted under investment treaties concluded after the new rules came into effect on April 1, 2014. State parties can amend this default rule and “opt out” for future treaties. Towards this direction, there needs to be an explicit exclusion of the application of the UNCITRAL Rules on Transparency or, instead, that the “UNCITRAL Arbitration Rules, as adopted in 1976” will apply. In UNCITRAL arbitrations that were concluded prior to April 1, 2014, the Rules on Transparency may not apply unless states or disputing parties explicitly then opt for the new rules.

The Rules on Transparency can also be used with

arbitrations under other arbitral rules. During the negotiations, various arbitral institutions, including the Permanent Court of Arbitration (PCA) and the International Centre for Settlement of Investment Disputes (ICSID) confirmed that the Rules on Transparency could apply to proceedings that were conducted under their rules of procedure.

Certain provisions in the Rules on Transparency required the tribunal to exercise discretion. In those cases, the rules dictated that a tribunal should take into account:

- the public interest and,
- the disputing parties' interest in a fair and efficient resolution of their dispute.

The Rules on Transparency also address the tribunal's authority to allow or require transparency in UNCITRAL arbitrations without using the Rules on Transparency, and aim to provide any potential presumption against transparency. Certain transparency already exists under the general UNCITRAL Arbitration Rules (2010 or 1976) and it is in no way intended to be reduced through a non-application of the Rules on Transparency. The limits also refer to the ability of States to evade the application of the Rules on Transparency where these apply.

As for the legal hierarchy, the Rules on Transparency overpower conflicting provisions in applicable arbitration rules (Art 1(1) of UNCITRAL Arbitration Rules 1976, 2010, 2013). In case of conflict with the provisions of the relevant treaty, the treaty provisions prevail. The principle that the arbitration rules cannot prevail over mandatory laws also applies.

The UNCITRAL rules for dispute resolution do not apply to BITs that require the use of other arbitration rules (such as the ICSID rules), nor other types of arbitrations that are subject to the UNCITRAL commercial rules. It follows that whether the rules will apply at all to an investor-state arbitration under UNCITRAL rules will depend upon when the BIT was executed.

### 6.2. Article 2 – Publication of information at the commencement of arbitral proceedings

Article 2 provides for speedy disclosure of particular sets of facts if there is evidence that the respondent has received notice of arbitration. This information will not require the exercise of subjective judgment or discretion by the repository, whereas, in some cases, the disputing parties do not necessarily consensually agree on whether or not the Rules on Transparency apply. Article 2 requires that each disputing party and the repository take action before a tribunal in order to resolve the disputes regarding the issue. The notice of arbitration will also be subject to automatic mandatory disclosure in line with Article 3, yet only after the constitution of the tribunal.

### 6.3. Article 3 – Publication of documents

Article 3 provides for disclosure of documents that are submitted to, or issued by, the tribunal along three categories:

- an extensive set of documents submitted to or issued by the tribunal during the proceedings is to be mandatorily and automatically disclosed;
- documents, such as witness statements and expert reports, are to be mandatorily disclosed once any person requests their disclosure from the tribunal;
- other documents, including exhibits, may be published by an order of the tribunal depending on the exercise of its discretion.

In cases where disclosure is mandatory, the tribunal must send the required information “as soon as possible” pursuant to steps being taken to restrict disclosure of information deemed protected or confidential. The repository will then publish the information on the website.

With the commencement of the arbitral proceedings, usually marked with evidence that the respondent has received notice of arbitration, a set of facts is disclosed:

- the names of the parties;
- economic sector involved and the underlying treaty.

In an effort to balance the provisions of disclosure, Article 7 provides that disclosure is subject to exceptions for confidential or protected information.

### 6.4. Article 4 – Submission by a third person

The Rules on Transparency affirm the authority of investment tribunals to accept submissions from *amici curiae* while incorporating detailed rules and guidelines. This recognition of authority concerns “written submission” and does not address other forms of participation in statements and hearings. Tribunals can, in certain instances, permit other forms of participation such as statements at hearings. Tribunals may allow other forms of participation relevant to their discretionary authority under Article 15 of the 1976 UNCITRAL Arbitration Rules and Article 17 of the 2010 and 2013 UNCITRAL Arbitration Rules.

The Transparency Rules overall affirm the authority of investment tribunals to accept submissions from *amici curiae*, while they incorporate detailed rules and guidelines found in Article 4. The rules further require that tribunals accept submissions on issues of treaty interpretation from non-disputing state parties to the relevant treaty, provided that the submission does not address other forms of participation, such as statements at hearings.

### 6.5. Article 5 – Submission by a non-disputing party to the treaty

The Rules on Transparency recognise that tribunals may accept submissions on issues of treaty interpretation from the non-disputing state parties to the relevant treaty, provided that the submissions does not “disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.”

They also authorise tribunals to invite submissions (both written and not) from non-disputing state parties on issues relevant to treaty interpretation under the same conditions. The tribunal can accept submissions on other matters that are relevant to the dispute from non-disputing state parties to the underlying treaty.

The Transparency Rules further require that tribunals accept submissions on issues of treaty interpretation from non-disputing (Art 5). Additionally, the tribunal may accept submissions that are relevant to dispute from non-disputing state parties.

### 6.6. Article 6 – Hearings

The Rules on Transparency establish open hearings, subject to three limitations:

- i) for the purposes of protecting confidential information;
- ii) in order to protect the integrity of the arbitral process; and,
- iii) for logistical reasons.

Interestingly enough, the disputing parties cannot veto open hearings even if they consensually agree to that. The tribunal maintains the authority to decide on the ways to make hearings open, and may choose to facilitate public access through, inter alia, online tools. The third exception, logistical reasons, shall only apply narrowly in individual cases, and the provision must not be abused.

### 6.7. Article 7 – Exceptions to transparency

The Rules on Transparency recognise certain limitations to transparency, mostly due to the exceptions for confidential or protected information. The categories that constitute exception to transparency are:

*Confidential or Protected information:* This includes confidential business information, information protected against being made public under the treaty or under the law of the respondent state, or any other applicable laws, where it would be contrary to the essential security interests of the respondent state, and finally, information of the disclosure, which would impede law enforcement;

*The integrity of the arbitral process:* Where making information available to the public could hamper the collection of evidence, result in the intimidation of witnesses, counsels or members of the tribunal.

In fact, Article 7(2) includes four potentially overlapping categories that classify as confidential or protected. The reasons behind whether and what information could fall under these exceptions are decided on a case-by-case basis depending on the nature of the information and the applicable law.

Article 7(5) recognises for the individual respondent states a self-judging exception to protect itself against the disclosure of information it might consider to be contrary to its essential security interests. There is also an exception regarding the transparency rules permitting tribunals to limit disclosure when necessary in order to protect the “integrity of the process”. This integrity forms a category that is only intended to restrain or delay disclosure to cover exceptional circumstances (eg witness intimidation or comparably exceptional circumstances).

### 6.8. Article 8 – Repository of the published information

This Article regulates the repository of published information, reflecting that UNCITRAL shall act as the repository authority. When the Rules on Transparency were adopted, it was unclear whether UNCITRAL would have adequate resources to play this role. If, after April 1, 2014, UNCITRAL cannot serve as the repository, the Permanent Court of Arbitration will handle this function instead.

UNCITRAL’s adoption of the Rules on Transparency represents crucial progress in the everlasting efforts to increase the transparency of treaty-based investor-state arbitrations under the UNCITRAL Arbitration Rules. This development ensures a real change since both UNCITRAL and the states ought to take a number of additional steps in order for the arbitration transparency dream to come true.

## 7. SIGNIFICANCE OF THE RULES ON TRANSPARENCY

In a great struggle towards full transparency for investor-state treaty-based arbitration, the Rules constitute a significant contribution. By making openness the norm, they infuse the mentality of transparency and accountability throughout the entire arbitral proceeding.

However, this will also have a positive effect on investors since it enables the investors to assess the risk of their investments in different host states to a more accurate extent. Their application would, in this regard, introduce more consistency and cohesion.

On the other hand, efforts like the ones discussed could potentially backfire if investors feel more protected to pursue

resolving the case individually. In particular, investors might want to solve disputes in public, which would be enabled only from a successful implementation of the upcoming UNCITRAL Rules.

Further, granting the right of public access to hearings and documents is essential for the institutions' perceived legitimacy. Consistent decisions form a more reliable reasoning in arbitral awards since the entire system would ensure:

- legal certainty;
- promotion of effective democratic participation;
- good governance;
- accountability;
- predictability; and,
- the rule of law.

This relates to environmental issues or human rights. Previous versions of the UNCITRAL Arbitration Rules demonstrate that disputes between investors and states were often not made public, even with significant public concerns. A related challenge will be the potential change in how parties draft their pleadings for higher transparency, or the limitation as for the number of types of documents that parties submit, as a result of the intention to avoid potential disclosure requests.

Another point relates to the impact of the Transparency Rules to other Convention texts, like the ICSID's. Will the UNCITRAL rules create a stream of transparency that the others will carefully follow or will this eagerness for transparency lead to the isolation of the UNCITRAL rules? Corporations might be incentivised to enforce one of the other conventions to avoid any element of transparency. This is not to suggest that companies would engage in a criminal act *per se*, but rather that they prefer confidentiality to exposure of all the relevant documents.

The rules also leave less room for the abuse of proceedings through reducing the scope of procedural arguments that surround access to documents. Providing a list of documents that would be subject to disclosure leads to rules that will undoubtedly diminish the possibility of these arguments. The rules reduce the possibility for these arguments, yet the rules do not exclude the likelihood for this discussion pertaining to witness statements, expert reports and exhibits. The biggest contribution of the new Transparency Rules is the underlying presumption toward openness, whereas they do not appear to introduce innovative nor hardly acceptable terms.

## 8. ARBITRATION AND TRANSPARENCY: THE STATUS QUO PRIOR TO THE RULES ON TRANSPARENCY

The confidential character of international arbitration cancels the possibility of the public having access to information during the arbitral proceedings and, at times, the award itself. This subsection will focus on confidentiality provisions in the new UNCITRAL Rules on Transparency in comparison to the ICSID and the ICC rules.

Vis-à-vis international and national processes in other fora, arbitration is rather non-transparent by its structure alone. Confidentiality is undoubtedly one of the elements that parties find attractive when opting for arbitration. There is information parties often choose not to disclose to the public for a variety of reasons, the reputation of a company being the chief among them. Subsequently, the public is unable to follow proceedings, and awards themselves are often unpublished, or published partially as a digest. In addition, third parties seldom find ways to partake in arbitral proceedings. Among the arbitral proceedings, the ICSID has demonstrated its commitment to transparency, albeit this does not denote its absolute openness to the public. The ICSID amended both its Arbitration and the ICSID Additional Facility Arbitration Rules in 2006 in order to increase the transparency of proceedings. Current provisions include that:

- i) members of the public can attend oral hearings in an ICSID arbitration except if one of the parties object;
- ii) ICSID tribunals can, upon relevant consultation with other parties, allow submissions from third parties; and
- iii) ICSID can publish the award if both parties consent to its publication.

Transparency in the ICSID context overall requires a consensus of the parties involved in the arbitration process. In any case, ICSID always publishes excerpts of the legal reasoning of the awards.

It is likely that arbitral proceedings under the new UNCITRAL Rules of Transparency will be the leader in the sphere of openness to public, and transparency itself. It is noteworthy in this regard to comparatively witness the shift from UNCITRAL's present procedural rules to the new transparency ones.

Until recently, the UNCITRAL proceedings provided no information to the public about the existence of a procedure, unlike the ICSID whereby the administrative and financial regulations require the Secretary-General to publish the registration of requests for arbitration. Moreover, the ICC and the ICSID tribunals alike are closed to the public, despite certain exceptions. These exceptions include, for example, the ICSID tribunal permitting the public to sit during the entirety or a part of the proceedings, provided neither of the parties to the hearing objects. The ICC arbitral proceedings, on the other hand, provide in their respective rules that the proceedings

are closed, unless the parties expressly demand that a part or the entirety of the procedure be made available to the public. Notwithstanding these exceptions, arbitral proceedings *talis qualis* remain closed to the admission of the public.

When it comes to the publishing of arbitral awards, the ICSID awards are published at times, albeit not necessarily in their entirety, yet the ICC awards remain more often than not unpublished. In respect to ICSID awards, the consent of the parties is a prerequisite for their publication. When the arbitral proceedings involve allegations of bribery or corruption, it is not unlikely that the parties in such proceedings opt to have both the hearings and the award confidential and consequently not available to the public. Nonetheless, there are various cases where the parties have consented to the publication of awards addressing corruption or bribery claims. The publication of the ICSID awards does not aim at public awareness of the facts or legal reasoning of a particular proceeding, but rather, as stated in regulation 22 of the ICSID Administrative and Financial Regulations, aims at furthering the development of international law in relation to investments.

The ICSID tribunals indeed abide by the regulation mentioned above. In light of advancing international investment law, the tribunal still publishes parts of its legal reasoning from an award even when lacking the parties' consent. However, the excerpts containing the tribunal's legal reasoning do not reveal the facts of the case aligned with the parties' lack of consent. An example of this is *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, where the tribunal's publication of its legal reasoning appears rather abridged and jumbled, in addition to the tardiness of the award's public availability.

In any event, when the parties consent to the publishing of an award, the hearings are often confidential, resulting in the public's limited awareness of the facts or counsels' legal arguments. Instead, the summary contained in the award is all that the public may access.

The ICC Arbitration Rules are more constrained in comparison to the ICSID Regulations, as they do not even mention the publication of awards. Rather, the ICC Arbitration Rules provide in Article 34 that in respect to the awards, only copies may be delivered and that they shall be made available on request and at any time to the parties but to no one else. There is a paucity of available ICC awards, as the overall tendency is for the awards to be unpublished due to the confidentiality. However, when the ICC does publish the awards, it does so in a digest form, summarising the award and leaving the parties' names anonymous. Lacking the factual background and the corporate or state nature of the parties disrupts the whole context that could benefit public awareness. This disruption is especially true in awards pertaining to corruption and bribery claims since comprehending the award and the case *in toto* is hardly made easy to the public. As a consequence, the

ICC awards are of little to no significance in the fight against corruption.

The confidentiality present in arbitral proceedings conflicts with the public interest in having the corruption allegations known. ICSID's recent effort to permit third-party participation has done little to smoothen this conflict. However, according to Article 37 of the ICSID Arbitration Rules and Article 41 of Additional Facility Rules, the tribunal may allow the filing of written submissions by persons or entities that are not a party to the dispute, the so-called "non-disputing parties". The latter occurs after the tribunal's consultation with the parties to the dispute. In considering a written submission filed by the non-disputing party, the tribunal must assess whether such a submission would assist with the factual or legal issues in the proceeding. The submission must address a matter within the scope of the dispute thus remaining in boundaries of the tribunal's *ratione materiae* jurisdiction. Finally, the non-disputing party must prove its significant interest in the proceeding. The written submission of the non-disputing party must not, however disrupt the proceeding or unduly burden or unfairly prejudice either party.

The UNCITRAL Arbitration Rules do not explicitly provide for third-party written submissions. However, pursuant to Article 17 of the Rules, the tribunal "may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case." This provision leaves enough room for interpretation, including the possibility to allow third-party submissions, provided that the tribunal considers it appropriate.

Third-party submissions in ICSID and UNCITRAL arbitral proceedings could thus allow entities and organisations dedicated to anti-corruption to partake in the proceedings and benefit the tribunal with their expert opinion. Proving corruption is highly labyrinthine, as the evidence required is often inadequate or lacking. Anti-corruption entities and organisations could not assist in this regard either. What they could do nonetheless is assist the tribunal in respect to its legal reasoning; this does not equate to more transparency about the proceedings, which might very well still be closed to public admission. Arbitral proceedings remain reasonably confidential and allowing for third-party submissions is merely touching the tip of the iceberg for public awareness and transparency.

In consequence, the new UNCITRAL Transparency Rules might initiate a new era of openness in arbitral proceedings. The new UNCITRAL rules appear to have a greater level of transparency than is currently present in arbitral proceedings under the ICSID rules. As per Articles 2, 3 and 6 of the UNCITRAL Arbitration Rules, the proceedings are open to public admission, publication of some information on an existing dispute is required, and both the award and the

pleadings are public. Nevertheless, proceedings may be held in private for the protection of confidential information and the integrity of the arbitration. The new UNCITRAL Transparency Rules mark a shift towards transparency as a rule, rather than transparency as an option. The future will attest to the veracity of such a change with the number of disputes held under the UNCITRAL Arbitration Rules.

## 9. DISCUSSION

The majority of investor-state disputes lie within the rules of ICSID or UNCITRAL Arbitration Rules. The ICSID Arbitration Rules already recognise a certain level of transparency to investors, allowing for interested third parties to intervene in arbitral proceedings, at the discretion of the tribunal and attend the relevant hearings. Currently, the ICSID does not publish the award without the consent of the parties, yet the centre is required to “promptly” include in its publication “excerpts of the legal reasoning” of the tribunal.

The New UNCITRAL Rules on Transparency aspire to break the grounds and enforce transparency throughout, setting the new golden standard of openness. As will be discussed below, this might backfire since the parties involved may want to avoid applying transparency rules, which will necessarily deter them from choosing the UNCITRAL rules. However, this step aims at revolutionising the arbitral process, involving the civil society, increasing public scrutiny and, ultimately, diminishing institutional corruption.

The new rules therefore provide for public access to key documents prepared during the course of proceedings, except in limited instances where it is of paramount importance to safeguard confidential or protected information. In that respect, the definition of confidential or protected information is purposefully vague so that it provides adequate safeguards in the future.

Time will tell whether the new rules will significantly increase transparency, the way the parties draft their pleadings, or how to limit the documents they refer to in order to avoid potential disclosure requests. Time will also reveal whether the increased level of transparency will have any impact on a party’s decision to initiate an investor-state arbitration under UNCITRAL Arbitration Rules or whether it would opt for other institutional rules.

The bet for UNCITRAL is to reinvent the way arbitral procedures work towards transparency and openness. It is not currently the leading forum to resolve disputes since the majority of parties opt for the ICSID rules. This bold move will, therefore, clarify its position in the future as well its ability to influence arbitral practice. A concrete test that will indicate the success of the new rules will be in India’s reaction to them, since most of its BITs provide for arbitration within

the framework of UNCITRAL Arbitration Rules. For example, if the parties agree to set their BITs concluded prior to April 1, 2014 under the aegis of transparency, public access to key documents will contribute to the development of a new set of jurisprudence pertinent to India’s BITs. Lastly, and since India is not a party to the ICSID Convention, the cases decided by the ICSID are not applicable to investment arbitration in India, hence the application of new rules might prove to be most beneficial in the long run.

## 10. THE IMPORTANCE OF THE NEW TRANSPARENCY RULES IN THE FIGHT AGAINST INSTITUTIONAL CORRUPTION

The word transparency is an etymological transplantation of the Greek word “διαφάνεια” (δια+φανομαι) which stands for a clean surface, observable in both sides by everyone. The historical roots of transparency can be traced to the Athenian democracy where every public procurement contract was available to citizens in a detailed form. Marble columns were engraved to include the call for proposals, the chosen contractor, the deadline for executing the contract, a detailed budget allocation and provisional penalties in case of delayed or deficient delivery. Amongst numerous examples, one can find the Amphiaros temple in Oropos, the Port of Zea and the Epidauros Dome. This method deterred the misappropriation of funds, increased transparency and included citizens in public life. Many centuries later, the use of transparency as a tool to prevent and detect institutional corruption is still a pressing and essential issue to analyse.

On the anti-corruption front, part of the value of transparency lies in the potential to create global cooperation among those interested in detecting incidents of corruption. Transparency is assumed to reduce institutional corruption in two main ways. First, it is expected to increase the rate of detection of institutional corruption, ie, to increase the proportion of all corruption cases detected. Second, it is supposed to deter institutional corruption so that fewer cases of corruption occur.

The benefits that emerge via increased accountability, as manifested through the new Rules on Transparency, can, therefore, be significant and comprise four main pillars:

- i) transparency;
- ii) domestic and international development;
- iii) accountability; and
- iv) democratic inclusion.

Transparency safeguards the right of citizens to be informed about the actions of their government, to observe the process of finding contractual partners for various projects and eventually

efficiently allocating public funds. A considerable part of transparency incidents relate to the interim process, from drafting a plan to assigning its execution to particular actors. Facilitation payments, preferential treatment and questionable outbidding procedures are only a few ways to misappropriate money. Transparency in investment arbitration can decisively contribute to the fight against institutional corruption through the prompt and all-encompassing information distribution to all the parties involved and interested in any governmental activity.

Domestic and international development relates to the financial and societal benefits that occur via the widespread enforcement of transparency in international arbitration. Governments can save billions of dollars through this transparent process since every person is a potential investigator of a corrupt activity or an erroneous budgetary calculation. Thus, a simple cost-benefits analysis is enough to support the further penetration of openness in the global policy agenda. The positive externalities that arise relate to the obvious financial savings but also to the consequent development of infrastructure and the distribution of this money towards social benefits. Further, the gains can translate into the creation of innovative businesses, start-up companies and new services, which altogether amount to a revolution in knowledge and societal progress. Overall this leads to improved efficiency and effectiveness of government services and greater impact of policies.

The third major pillar is accountability since potential perpetrators, breach of trust and violations of law are not going to remain unnoticed and consequently unpunished. The fight against impunity is a pressing request from local and international communities that report vast losses even up to 5 per cent of global GDP from corrupt activities that stall development, and consequently undermine the rule of law. The feeling that these violations will no longer be kept secret but will be under strict scrutiny and can, therefore, be discovered by anyone, sends a strong, concrete message to those eager to surpass the law. Enforcing transparency in arbitral procedures may significantly boost accountability and convey a sense of fairness and order to the majority of the society.

Lastly, democratic inclusion is crucial since people can participate in good governance in a practical way, affecting future investment decisions the states will make. Every single person can be a transparency investigator in arbitration proceedings irrespective of his or her expertise. They can

probe into different contracts, combine and analyse data and ultimately reach fruitful findings. Since the state's resources against corruption are scarce vis-à-vis investigative bodies and international cooperation, inverting the process of scrutiny and offering ultimate transparency to citizens offers an alternative. At the end of the day, this is the very essence of democracy, to inform and incentivise society to be actively involved in matters that affect its entirety, investment agreements included.

## 11. CONCLUSION

Corruption in international arbitration has sparked the debate among the scholarly world and the practitioners alike. Consequently, the role that the tribunals play in anti-corruption efforts has been widely discussed as a stepping-stone for the future eradication of corruption through the publishing of awards as a means of strengthening public awareness. The well-established fact of the evidentiary difficulty in proving corruption lessens the tribunals' role as they can seldom uphold corruption allegations.

Notwithstanding the parties' arguments on allegations of corruption, arbitral tribunals are sometimes deterred from deciding on these allegations. The intrinsic difficulty, together with substantial financial resources attributed towards substantiating a corruption allegation, render it extremely challenging for the tribunal to rule on a matter of corruption.

What is more, the relative scarcity of transparency in arbitral proceedings halts the power of the tribunal to contribute more meaningfully to anti-corruption efforts. In comparison to national jurisdictions, apt to assume a more decisive role in furthering the public awareness of corruption allegations, international arbitration is a field ab ovo allowing for less public admission. As a consequence, the lack of transparency in international arbitration, coupled with the inherent evidentiary difficulty for the parties to substantiate corruption allegations, confines the role that the tribunals could otherwise play – and perhaps still might under the new UNCITRAL rules.

**Dr Nikolaos I Theodorakis**

*Lecturer and Fellow, University of Oxford*