

THE ROLE OF THE UNCITRAL RULES ON TRANSPARENCY IN ENFORCING SOCIETAL CONTROL OVER INVESTMENT TREATIES

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Abstract

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In order to improve the transparency principle in the arbitral process of the investment treaties, and to enable the public to know how the arbitration case proceeds, the United Nations Commission on International Trade Law (UNCITRAL), adopted, at its 46th session (8–26th of July 2013), the UNCITRAL Rules on Transparency in Treaty-Based Investor-State (UNCITRAL, 2014). This raises an important question about the extent to which these rules contribute to strengthening public oversight over arbitration processes. The study assesses these rules through the analytical method, by analyzing those rules, and clarifying the extent of their contribution to expanding the scope of public control over arbitration processes. The study shows that the basic principle in determining confidential or protected information that is withheld from the public and excluded from transparency is the consent of the treaty parties. Whenever the treaty parties agree to consider certain information as confidential, it is considered so and it may not be made available to the public. The study recommends expanding the scope of transparency by granting the arbitral tribunal the right to decide, after consulting with the arbitrating parties, that certain documents or information are confidential or protected.

Keywords: Arbitration, Treaty-Based Arbitration, Investment Treaties, Transparency Rules, UNCITRAL, International Commercial Arbitration

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1. INTRODUCTION

An international investment treaty is an international agreement adopted to protect investors so that such a treaty usually includes a provision relating to the settlement of disputes between the host country and the investor which provides for the selection of arbitration rules to settle disputes. If a dispute arises between the parties to that treaty regarding one of the issues that fall within its scope and resorted to arbitration to settle that dispute, in this case, arbitration is called “treaty-based arbitration”, as it arose on

the basis of an international convention. However, this arbitration may confidentially take place, that only certain persons may know it, or publicly, to be made available to the public, such as publishing arbitration notes and responses, hearings, arbitration awards, and other exhibits, through various means, such as the internet. This latter method is expressed in the term transparency in arbitration (Loken, 2013).

The term “transparency” has different definitions, as a synonym for “accountability” or “openness” (Rogers, 2005). It is the right to know, by disseminating information, making it available to

the public, and making room for access to it. The term may refer to the availability of public access to information about the activities of persons and entities engaged in investor-state arbitrations as well as their capacities in creating such norms that apply to the conflict. Transparency may also be considered an element of applicable norms themselves (The United Nations Commission on International Trade Law [UNCITRAL], 2016).

The Rules use the term “transparency”, it is used in a clear sense to indicate the extent to which individual proceedings and the documents produced in those proceedings are publicly available (“procedural transparency”) (UNCITRAL, 2016).

Transparency in treaty-based arbitration aims mainly to facilitate public monitoring of the arbitration process (Rogers, 2005) and would result in creating a fair and effective legal framework for the settlement of international investment disputes, enhancing transparency and accountability and promoting good governance (UNCITRAL, 2010a).

In order to benefit from the advantages achieved by transparency in treaty-based arbitration, such as public oversight of the progress of arbitration process and issues related to investment and public funds, and to expedite the resolution and success of arbitration cases (Issawi, 2015), the UNCITRAL entrusted Working Group II (Arbitration and Conciliation) in the 43rd Session (New York, 21st of June–9th of July 2010), preparing a legal standard on transparency in treaty-based investor-state arbitration (UNCITRAL, 2016). Delegations of 60 member states of UNCITRAL, observed states and observers of United Nations (UN) agencies and non-governmental organizations (NGOs) are included in the working group.

The working group (WG) had a range of options regarding the viable form of the legal standard on transparency. Among the form, there was the preparation of a model statement of principle that includes substantive rules on transparency and contains a provision whereby a state can confirm that these rules would be applied or offered for application in the event of arbitration of a dispute with an investor under a specific investment treaty. States could implement this statement of principles by adopting a joint or unilateral declaration, and thus could constitute one possible solution for applying transparency rules to existing treaties. The second option is to develop model clauses to be included in the provisions of investment treaties related to the settlement of disputes, and states declare their readiness to adopt them to enhance transparency in arbitration. Model clauses may be written in such a way as to include an investor’s binding obligation to arbitrate under transparency provisions or an offer to that effect. The third option was to formulate guidelines for states to consider when negotiating investment treaties, for arbitral tribunals when deciding such issues, for arbitration parties and other parties with a legitimate interest in the award. This guideline may be applied in arbitration under existing or future treaties if the parties to the arbitration agree to apply it.

However, the option that was supported at the end of the discussions, is that the legal standard on transparency in treaty-based arbitration comes as separate stand-alone legal rules. The WG adopted

this form at its 46th Session (Vienna, 8–26th of July 2013) the UNCITRAL rules on transparency in treaty-based arbitration between investors and states (“Transparency Rules”), along with the UNCITRAL Arbitration Rules (with the new Article (4), paragraph (4), as approved in 2013).

The UNCITRAL rules consist of 8 articles. Article (1) deals with the scope of application of these rules to treaties concluded before and after their entry into force, and the discretionary power of the arbitral tribunal in their application, and indicates the applicable rules in the event of a conflict between the rules and other applicable provisions.

Article (2) specifies the time of publication of information relating to the arbitration. Article (3) mentions the documents that should be publicly available. Article (4) specifies the procedures and conditions for accepting memoranda submitted by a third party who is not a party to the litigation or the treaty, and Article (5) deals with the submission of memoranda by a non-disputing party to the treaty. Article (6) stipulates that hearings shall be held in public, clarifies the methods of broadcasting, and determines the cases in which such hearings can be held in private. Article (7) clarifies the documents and information that are excluded from the scope of transparency. Article (8) specifies the depository of the published information.

Therefore, the main purpose of the present study was to analyze Articles (2), (3), and (7) of those rules. These articles determine the objective domain of the transparency principle in treaty-based arbitration. This was done to answer the following research questions:

RQ1: What are the documents that concern the principle of transparency, and what are the exceptions from the domain of transparency?

RQ2: To what extent has UNCITRAL helped determine the objective domain of transparency principle in treaty-based arbitration and in improving that transparency?

RQ3: What is the role of UNCITRAL rules in relation to reinforcing the social monitoring of investment treaties?

Thus, the main objectives of the present study have become clear. They included issues that were not considered by previous studies, and that should be discussed and analyzed in a similar manner. These objectives can be summarized as delineating the secret documents of treaty-based arbitration lawsuits, which the civil public is not allowed to have access to. The respective party that regards documents as secret for the civil public has been also discussed. Last, this study evaluated the UNCITRAL rules regarding transparency in reinforcing the social monitoring of investment treaties.

Obviously, these objectives are important as they uncover the degree to which those rules contribute to facilitating the public monitoring of the judgement procedure as well as the issues related to investment and public capital. Moreover, arbitration issues will, as a result, be speeded up and successful.

The structure of this paper is as follows. Section 1 discusses the topic background, the research importance, and the objectives. The literature review in Section 2 discusses the most important recent

findings which dealt with the studied issue. Section 3 presents the method adopted by the study to achieve the study goals, as well as evidence employed to this end. Section 4 elaborated on the findings reached by the research and discussed the results accurately and in more detail in order to cast light on this topic, and to indicate the weaknesses and strengths of the legal rules under study. In Section 5, the findings have been summarized, the implications of those results, recommendations have been given, answering the main questions of the study, and future studies based on these results.

2. LITERATURE REVIEW

Khalifa (2014), in a study on the secrecy and transparency of international arbitration, showed while secrecy is the general rule in international commercial arbitration, it is not so in international investment arbitration. Instead, transparency and delineation of arbitration-related information are predominant in this kind. Transparency is the right to understand, and requires the dissemination, provision, and access of information for all. The term “transparency” is paired with “delineation” to refer roughly to one meaning: provision of information for any respective party. This aim is being pursued by international efforts where Organisation for Economic Co-operation and Development (OECD) has been established.

The above study mentioned a few reasons for adopting transparency in investment arbitration. For one, transparency achieves public good. In fact, giving information about arbitration procedures and judgements would achieve a few benefits for other arbitrators and judges, and would allow them to make a distinction between similar cases. It would also benefit lawyers who are concerned with arbitration issues and would help them realize how to solve conflicts and use these solutions in future cases. Furthermore, transparency would gain the confidence of beneficiaries. Put differently, the dissemination of judgements does show the real benefits of arbitration and gives an idea about the legal judgements applied in arbitration. Moreover, it protects foreign investments from political pressures that may be exerted by other countries. Therefore, investors will be encouraged to invest their capital, for they are assured they will not be treated unfairly in such a transparent, just investment arbitration.

The aforesaid study showed the components of investment arbitration transparency: publicizing of arbitration procedures, dissemination of documents, publicizing of hearings, and dissemination of judgements. Results showed the rule of investment arbitration transparency is not an absolute rule. Rather, secrecy is permitted in some arbitration procedures if the information concerns commercial secrets if the information was protected by law, if dissemination of information could inflict damage on the security of one of the state parties involved, and if dissemination of information could inflict damage on the arbitration. Findings also showed there is a need for an international decision to oblige the state, through a provision in the internal legislations of the state, to disseminate commercial arbitration judgements, for this would accrue

numerous benefits. So far, however, this issue has been decided based on the wills of the conflicting parties (Khalifa, 2014).

Issawi (2015) elaborated on the principle of secrecy in investment arbitration. It was revealed that secrecy has long been of central importance in international investment arbitration. Secrecy, moreover, is a factor attracting foreign investment. However, secrecy happened to deteriorate with the accelerating magnificence of transparency, dissemination, and publicizing. Results also showed that transparency plays a more significant role in international commercial arbitration, especially for countries that host investment and that work on improving their reputation by openness to civil society. Still, the principle of secrecy should not be dismissed as arbitration will lose its significance should there be complete transparency (Issawi, 2015).

Qwaider and Asma (2018), in a study on the international commercial arbitration challenges, with a focus on guarantees of secrecy and prerequisites of transparency, found it difficult for investment arbitration to strike a balance between these two dimensions. For this difficulty, multiple factors were found. For one, secrecy in commercial arbitration is such an ingrained custom that cannot be eliminated easily. Moreover, one factor that makes the transparency principle outdo the secrecy principle is the absence, contradiction, or vagueness of definitions of commercial secrets in various legislations. Reaching a precise definition, with clear and internationally agreed criteria, of commercial secrets is the only way for the secrecy principle in commercial arbitration to regain balance (Qwaider & Asma, 2018).

In commercial arbitration, Stanivukovic (2018) pointed out that secrecy is currently not the primary aspect. In fact, transparency has been receiving growing attention in investment arbitration over the past two decades. Attempts to pass transparency rules for arbitration have been made by numerous parties, including various arbitration institutes, arbitrators, states, the public, and non-governmental institutes. Those rules have improved transparency in arbitration by publicizing a great deal of information, including names of conflicting parties, names of arbitrators, and hearings of testimonies (Stanivukovic, 2018).

Nkongho (2018), in a study on the secrecy and transparency of arbitration procedures in The Organization for the Harmonization of Business Law in Africa (OHADA), made an attempt to monitor the practical application of secrecy and transparency in arbitration procedures. To this end, Nkongho (2018) made a painstaking analysis of each of the concepts, in an attempt to show the balance between secrecy and transparency and to investigate the procedural characteristics of transparency and those of secrecy. The study, finally, suggested considering precise legal provisions that elaborate on all issues related to secrecy and transparency. This should be done to ensure the accuracy of arbitration, and its functionality to address conflicts (Nkongho, 2018).

In a study on the prerequisites of secrecy and transparency in investment arbitration, Perumal and Ramamurthy (2018) performed an analysis of how various investment arbitration parties have been dealing with transparency and secrecy issues over the years. The authors showed that transparency is

one of the primary basis for governance and companies. Moreover, it is of paramount importance for the country that hosts investment to disseminate all the legal rules and bonds that have an impact on investment. The study concluded that it is difficult to strike a balance between the prerequisites of secrecy and transparency since there is an inharmoniousness between investment arbitration issues and prerequisites of public good (Perumal & Ramamurthy, 2018).

Furthermore, Mohan et al. (2019), in a study on transparency in international commercial arbitration in Asian countries, found that the attempts made by UNISTRAL to increase transparency in international commercial arbitration have had a significant role in making international parties agree on the necessity of transparency in international commercial arbitration. Moreover, these efforts have changed the approach of Asian countries towards the transparency of arbitration, for they used to be against transparency (Mohan et al., 2019).

Shirlow and Caron (2020), in their study, investigated the different forms of transparency. The authors found the majority of international agreements have not taken into account the problem of transparency in commercial arbitration. Still, some agreements have been modified subsequently to include some aspects of transparency. The study also investigated the development of transparency in international bonds. It was finally concluded that transparency in international commercial arbitration differs for different beneficiaries and for different goals. Transparency has been incorporated in international commercial arbitration procedures in order to make a distinction between investment conflicts, to further make this arbitration under inspection, and to increase its legitimacy (Shirlow & Caron, 2020).

There are other studies, such as that of Baizeau and Richard (2016), which investigated the problem of secrecy in arbitration, and that of Bernet and Gottlieb (2016), which discussed the secret information that restricts the arbitration's decision. Each of these two studies investigated the problem of secrecy in arbitration and performed an analysis of issues related to secrecy, however, no attempt was made by them to investigate the problem of transparency in arbitration (Baizeau & Richard, 2016; Bernet & Gottlieb, 2016).

Having presented the previous studies, it has become obvious that the present study is innovative, original, important, and different compared to others. Put another way, previous studies either incorporated general issues on commercial attribution and treaty-based attribution, or general issues on the transparency and secrecy of arbitration procedures, such as the concept of transparency, the concept of secrecy, the history thereof, etc. This study, however, incorporated an innovative topic not investigated nor deeply analyzed by another study; it concerned the specification of the party which determines whether a certain document is secret and shall not be exposed to individuals in society. Furthermore, this study evaluated the role of UNCITRAL rules regarding transparency in reinforcing the social monitoring of investment treaties. Undoubtedly, these issues are innovative and were not discussed

in detail before. Therefore, this study plays a significant role in increasing the public monitoring of governments' performance regarding arbitration and foreign investment.

3. RESEARCH METHODOLOGY

The study is based on an analysis of the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (the "Mauritius Convention on Transparency") and UNCITRAL Rules on Transparency (in particular, Articles (2), (3), (7) of those rules). Using the method of structural and functional assessment, the study analyzed the legislative regulation of the UNCITRAL rules on transparency, considering the prospects for its improvement. This method is aimed at identifying the structural elements that make up the system of legislative regulation under consideration. In particular, the study examines such issues as documents that are subject to the principle of transparency and the exceptions to transparency in order to reach the objective of the study, and specify the scope of the control granted to the public in the supervision of arbitration operations.

To achieve the main objectives of this article, the following international instruments will be analyzed:

- The arbitration rules established by UNCITRAL.
- International conventions related to treaties.
- Treaties adopted by the UNCITRAL.
- The internal regulations of some international arbitration centers.
- -The special documents of the second group of the United Nations Committee with the following numbers: (A/CN.9/760), (A/CN.9/WG.II/WP.162), (A/65/17), (A/CN.9/717), (A/CN.9/WG.II/WP.159/Add.3), and (A/CN.9/WG.II/WP.169).

4. RESULTS AND DISCUSSION

4.1. Documents that are subject to the principle of transparency

The UNCITRAL transparency rules dealt with documents that are subject to the principle of transparency and differentiate in this regard between published documents and documents viewed without publishing; the published documents are divided into two categories: documents published automatically without a request, and documents published only upon a request. Also, the rules dealt with the time of publication of the documents that are published automatically.

4.1.1. The date of publication of the documents

The rules of transparency dealt with the issue of the time to start publishing documents, the party obliged to publish, and the party to whom the documents are to be published, Article (2) stipulated that:

"Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under Article 8. Upon receipt of the notice of arbitration from the respondent, or upon receipt

of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made" (UNCITRAL, 2014).

According to Article (8) of the rules, the entity responsible for publishing the documents is the Secretary-General of the United Nations or any institution designated by the UNCITRAL. The entity is responsible for publishing the documents from the date of receipt of the notice of arbitration by the respondent, or from the time that entity receives the notice of arbitration and sends it to the respondent. The timing of the publication is based on the fact that the arbitration proceedings commence in accordance with the UNCITRAL rules from the time of receipt of the notice of arbitration by the respondent (UNCITRAL, 2013).

Accordingly, the depositary is obligated to expeditiously make documents and information publicly available in advance of the formation of the arbitral tribunal. The information that is published at this time is general information in accordance with the text of the aforementioned Article (2), as it is limited to the names of the disputing parties and the relevant economic sector as well as the treaty under which the case is heard (Kelly-Slatten, 2016). However, this information does not include all the information contained in the notice of arbitration received by the respondent.

Notice of arbitration includes compulsory and non-compulsory information. According to paragraph (3) of Article (3) of the UNCITRAL Arbitration Rules, the notice of arbitration shall include mandatory data, for example, parties' names and contact details, the invoked arbitration agreement, any contract or other legal instrument arising out of or relating to the dispute or, in the absence of such contract or instrument, a brief description of the claim and a statement of the amount involved, if any; a proposal as to the number of arbitrators, language, and place of arbitration, if the parties have not previously agreed thereon. However, in this early stage of publication, not all notice of arbitration information is published, but publication is limited to specific information, as the rest of the notice information is completed at another stage of publication as we will explain later (Potesta & Kaufmann-Kohler, 2016).

4.1.2. The documents that are made available to the public

Paragraphs (1) and (2) of Article (3) of the UNCITRAL Transparency Rules are devoted to the documents that are automatically published to the public, and documents that are not published only upon request. Regarding the documents that are published automatically, paragraph (1) stipulated that:

"Subject to Article 7, 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 defiance and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and

witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal" (UNCITRAL, 2014).

Paragraph (2) dealt with documents published upon request, which stipulated that:

"Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal" (UNCITRAL, 2014).

The reading of those articles comes out with several notes, as follows.

Firstly, the documents that are made available to the public, mentioned in paragraph (1) of Article (3) are mandatory, the arbitration tribunal or the disputing parties do not have the right to refrain from publishing any of these documents in cases other than those excluded from publication under Article (7), which we will explain later.

It is not permissible for the disputing parties to agree not to commit to publishing those documents, as mentioned in Article (1\3\ a) which states that the disputing parties are not entitled to breach these rules, whether by agreement or otherwise unless the treaty allows it. It is worth noting in this regard, that this rule is contrary to what is being practiced by international arbitration institutions and centers specializing in investment cases that take place between investors and states, which are not published arbitration documents or records, except after the parties agree to publish.

For example, the International Center for the Settlement of Investment Disputes (ICSID) does not publish arbitral awards, minutes and records of proceedings, or other documents submitted by the disputing parties to the arbitral tribunal unless it obtains the consent of these parties to the publication, as described in paragraph (2) of Article (22) of the Administrative and Financial Regulations.

Secondly, paragraph (1) of Article (3) of the UNCITRAL Transparency Rules stated that certain documents shall be publicly available while withholding some of the information contained therein within the scope permitted by Article (7) to delete it. These documents are the follows:

A. The notice of arbitration, and the response to it: The notice of arbitration must be published with all of its mandatory and optional information, which were defined by paragraphs (3) and (4) of Article (3) of the UNCITRAL Arbitration Rules as amended for the year 2013, and publish the response to the notice of arbitration sent by the respondent with all his mandatory and optional statements, which were specified by paragraphs (1) and (2) of Article (4) of the aforementioned UNCITRAL rules.

B. Statement of claim, statement of defense, and any further written statements or written submissions by any disputing party: The statement of claim shall be published in all its mandatory information mentioned in paragraph (2) of Article (20) of the UNCITRAL Arbitration Rules as revised in 2010. The statement shall include parties' names and contact details, a statement of the facts supporting the claim, the points at issue, the relief or remedy

sought; the legal grounds or arguments supporting the claim. Paragraph (3) added that a copy of any contract or other legal instrument out of or in connection with the dispute that arises and of the arbitration agreement shall be annexed to the statement of claim. Paragraph (4) stipulated that the statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant or contain references to them. Also, the statement of defense or response to the claim containing the respondent's response to what was stated in the claim should be made available to the public, as far as possible, and be accompanied by all documents and other evidence relied upon by the respondent or contain references to them. In addition to the statements of claim and the statement of defense, any other submissions or written statements submitted by the disputing parties with all their contents should be made available to the public.

C. Any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons: In addition to the written submissions by the parties to the dispute, the submission that the arbitral tribunal has authorized to be submitted by the non-disputing Party (or Parties) to the treaty and by third persons, shall be made available to the public with all of their mandatory information mentioned in paragraph (4) of Article (4) of the UNCITRAL Transparency Rules of 2014. As well as other written submissions from a party to the treaty that is the subject of the dispute, but a non-disputing party, such as a submission relating to the interpretation of an article of the treaty. In all cases, as long as the arbitral tribunal agreed, after consulting the parties, to accept a statement of claim submitted in the case, whether by third parties or by a non-disputing party, this submission is considered part of the claim and is covered by the automatic publication.

D. Orders, decisions, and awards of the arbitral tribunal: Among the documents that are automatically published are all the orders, decisions, and awards of the arbitral tribunal, such as the interim measures of maintaining or restore the status quo pending the determination of the dispute; provide a means of preserving assets, evidence, and material that may be relevant to the resolution of the dispute.

In this regard, a party has made a proposal to give the arbitral tribunal the discretion to delay publication of the award when other proceedings are pending and in which that party is involved and that relate to similar factual or legal issues, in order to avoid affecting the outcome of those other proceedings. This proposal was not supported, because such a ruling would unnecessarily delay the publication of many arbitral awards, given the similarity of the factual and legal issues raised in the various procedures (UNCITRAL, 2012).

Thirdly, paragraph (1) of Article (3) of UNCITRAL Transparency Rules stated that certain documents shall not be publicly available, but rather it is sufficient to publish the table listing all exhibits if such table is intended for the arbitral proceedings, which are: expert reports and witness statements, any written submissions presented as evidence in the case, but not the exhibits themselves. However, this table is being made separately available to

the public, while expert reports and witness statements shall be made publicly available at anyone's request to the arbitral tribunal as we will explain later.

Fourthly, as mentioned above, paragraph (2) of Article (3) decided that expert reports and witness statements are not made available to the public automatically, but upon a request by any person to the arbitral tribunal. However, the paragraph did not specify those persons, or the time limit for submitting the request, which indicates that any person, whether or not a party to the dispute or the treaty, may submit a request to the arbitral tribunal at any time, whether during the arbitration proceedings or after the arbitral award is issued, discloses his/her desire to make these documents available to the public, then these documents are released to the public.

With this regard, it was stated in the justification for this "automatic" production of the exhibits themselves under Article 3(1) would be cumbersome and useless, given the potentially huge number of documents, plus it might require a lot of redaction (McDavitt, 2013), particularly for the parties from developing and fewer resources countries. Therefore, it was decided to delete the mechanism of automatic publishing of such exhibits from paragraph (1) of Article (3) and replace it with the need to submit a request from anyone to make these exhibits available to the public as articulated in paragraph (2) of this article (UNCITRAL, 2012).

4.1.3. The documents that are viewed without being made available to the public

The UNCITRAL rules of transparency differentiated between documents that are published and documents that are viewed without being published. As previously mentioned, there are documents that are published automatically and documents that are published only upon request, and documents that are not published, but can only be viewed.

Article (3/3) of the UNCITRAL rules of transparency stipulates that subject to Article (7), the arbitral tribunal may decide whether and how documents are available and any other documents submitted or issued by the arbitral tribunal that do not fall within paragraphs (1) or (2) above. The tribunal may decide that whether on its own initiative or at the request of any person and after consultation with the disputing parties.

It is clear from the abovementioned text that the documents that are viewed without being published are any documents submitted on the basis that they are evidence of the case, or any document submitted to or issued by the arbitral tribunal and not excluded from publication in accordance with Article (7), and not among the documents that it is published automatically or that is published upon request, which we have previously explained in the foregoing, such as the exhibits that were presented in the case on the basis that it is evidence. However, the automatically published is the table in which these documents are listed, but the documents themselves are not published, but they can be viewed.

As for the method of access to the documents and the party that allows access, the previous paragraph sets the authorized authority to decide on

the request submitted by any person for the purpose of viewing a document that is allowed to be viewed, by the arbitral tribunal after consultations the disputing parties. The tribunal is the authority that decides to allow access to that document or refuse the request, after consulting in this matter only with the disputing parties, but not with the parties to the treaty that is the subject of the dispute. In this regard, the consultation and exchange of views focus on the extent of the permissibility of viewing the documents and submissions required to be viewed, and not fall within the documents that are withheld to the public.

In relation to that, the authority of the arbitral tribunal is discretionary, as it is not obligated to accept and authorize the request for access to the document. Even though the document to be viewed is made available to the public, it may decide to accept or reject it after consulting with the parties in dispute and investigating a request.

With regard to the method of reviewing, the arbitral tribunal may, after consulting the disputing parties, decide the appropriate method to achieve this matter. However, it is not obligated by a specific method of access. The arbitral tribunal may specify this matter in the decision of accepting the request for viewing, or after this decision if there is a requirement. For example, it may decide that the view takes place on a specified site, or that the submissions and documents that have been approved to be viewed are copied and shipped or sent to the concerned party.

Regarding the scope of access in terms of persons, it is clear from paragraphs (3) and (5) of Article (3) of the UNCITRAL Transparency Rules, that access is determined for specific persons, so it is not permissible for any person or the public. These specified persons are the party or parties that submitted the request for access, and their request was approved. Thus, it becomes clear that the issue of accessing specific information or document differs from the issue of making this information available to the public. As we explained before, this latter includes the public as a whole not only specified persons.

To conclude, it is worth saying that the automatic publishing of documents and their publishing based on a request is done for the public as a whole while access to a specific document is limited to a certain group of persons.

4.2. Exceptions to transparency

If publicity is one of the most fundamental guarantees of the ordinary judicial system, then the matter is the opposite for arbitration, where confidentiality is considered one of the most important advantages of this type of private judiciary. The implementation of the principle of transparency in relation to international commercial arbitration means putting an end to relations in the field of international trade (Naji, 1994; Rashid, 1984; Shafiq, 1997; Wali, 2007).

The objective of the principle of confidentiality, as one of the main procedural principles of arbitration, is the protection of the secrets of trade parties and preserve the reputation of commercial institutions. Also, this principle has particular significance in the field of arbitration between

investors and states, because cases in this field mostly include matters related to public order and the national interests of the state in which the investment is made (UNCITRAL, 2010).

Accordingly, when the UNCITRAL established rules for transparency in arbitration related to potential disputes between the state and a foreign investor, it gave importance to the need to maintain a balance between public and private interests. (UNCITRAL, 2010). Accordingly, the UNCITRAL did not eliminate the principle of confidentiality and the principle of transparency completely, but rather maintains a balance between the two principles in order to maintain a balance between public interests. The most important of which is to make some arbitral proceedings available to the public, and private interests, especially the necessity to preserve the integrity of the arbitration, including the protection of confidential information (Shirlow, 2016).

So, the study finds some rules of transparency allocated the documents that should be available to the public, in contrast, in other rules, the documents that remain within the confidentiality, stipulated in Article (7) of the rules of transparency, which is divided into two categories, the first is documents that are not published in order to preserve confidential and protected information, and the second is documents that are not published to protect the arbitral proceedings.

4.2.1. Confidential or protected information

Paragraph (1) of Article (7) of the UNCITRAL rules of transparency ruled that confidential and protected information should not be publicly available, paragraph (2) defined what is that information, while paragraphs (3) and (4) clarified arrangements for identifying this information and how should be protected, which it will be discussed as follows.

Firstly, what is confidential and protected information: According to paragraph (2) of Article (7), confidential or protected information includes confidential business information; information that the treaty prevented from being made publicly available; information that should not be made public under the law of the respondent state, or under any law or rules determined by the arbitral tribunal concerned; information that hinders law enforcement if disclosed.

The above text clarifies to the arbitral tribunal the scope of confidential or protected information, which is determined as follows:

A. Confidential business information: There is no definition and illustrative examples for the term "confidential business information" in the UNCITRAL rules of transparency. The matter was left to the arbitral tribunal to decide, after consulting the disputing parties, whether the information is considered confidential or protected, in case the parties to the treaty do not agree upon that. Thus, if one of the disputing parties requests the arbitral tribunal to the arbitral tribunal to withhold business information as it is confidential, then the tribunal has the authority to decide, after consulting with the disputing parties, whether or not such information is considered confidential.

B. Protecting information from being publicly available under the treaty: UNCITRAL rules of transparency give way to the will of the parties to the treaty to decide whether or not the information

is considered confidential and sensitive or not. If parties to the treaty agree that certain information may not be available to the public, this information is withheld, and the public is not permitted to view it.

Article (7\2\B) of UNCITRAL Rules of Transparency clarifies the authority of the arbitral tribunal to consider the information confidential or sensitive. According to this clause, the basis is the agreement of the parties to the treaty, so when those parties agree to consider certain information confidential, it is counted as such, and it is not permissible to make it available to the public. But, if they do not agree, or an agreement has been reached but there has been a dispute about the fact that information is included in the information agreed upon as being confidential information, in these two cases the authority of the arbitral tribunal emerges. The tribunal is to decide after consulting the disputing parties whether this information is considered confidential or not in the event that there is no agreement on the treaty or decides to consider it falls within the scope of information agreed to be classified as confidential, and so on. However, the basis is the agreement of the parties to the treaty while the exception, in certain cases, is that the arbitral tribunal has the power to decide the case.

C. Protected information under the applicable law or the law of the respondent State: The UNCITRAL Rules of Transparency consider that conflict may arise with regard to the disclosure of information, between the arbitral tribunal's decision to disclose specific information and the applicable law or the law of the defendant's state that requires not to disclose that information. In this case, the transparency rules decide to apply either the applicable law or the law of the respondent's state, depending on the circumstances.

The matter envisioned in this assumption is that the law of the respondent's state protects certain information and considers it confidential information, or that the applicable law to the issue of disclosure, protects certain information and prevents it from being made available to the public. In this assumption, the rules of transparency decide to respect those laws or consider such information confidential and protected, and they may not be made available to the public (UNCITRAL, 2012).

D. Disclosed information that obstructs law enforcement: Nothing in the UNCITRAL Rules of Transparency requires a party or a state to make the information publicly available, which means that disclosure may hinder law enforcement or be against the public interest or the basic security interests of that state. And, as we have already mentioned, the decision of withholding that information is up to the arbitral tribunal after consulting the disputing parties.

Secondly, *arrangements for determining confidential or protected information:* The UNCITRAL Rules of Transparency in paragraphs (3) and (4) of Article (7) indicated the mechanisms that must be followed by the parties to prevent certain information from being made available to the public. Paragraph (3) stipulated that the arbitral tribunal, after consulting with the disputing parties, shall determine the necessary arrangements that prevent any confidential or protected information from becoming publicly available. For this purpose, it may specify a period of time within which the disputing

party, the non-disputing party to the treaty, or the third party must provide notice that it aims to protect certain documents. In this case, the arbitral tribunal may take measures for prompt designation and redaction of the particular confidential or protected information.

In this regard, if the arbitral case requires holding hearings, such as hearing the statements of one of the parties, a witness or an expert, and as it is known that providing the public with access to the hearings is one of the fundamental issues for resolving disputes transparently (Delaney & Magraw, 2008), except that in certain cases the arbitral tribunal may decide, after consultation with the disputing parties, if one of these sessions or a part thereof is protected or secret, the arbitral tribunal in this assumption may hold that session or one of its parts closed.

The UNCITRAL Transparency Rules further decided that the manner to decide that certain information is confidential or protected and may not be available to the public, refer to the arbitral tribunal, which decides, after consulting with the disputing parties.

But what if one of the parties submitted a request to withhold a specific document, and the arbitral tribunal rejects this request and authorize the availability of this document to the public? The question raised in this regard is whether that document would be available or that party could withdraw it from the arbitration proceedings record.

The answer depends on whether the inclusion of that document into the record of the arbitral proceedings was made voluntarily by this party or not. If that document was introduced voluntarily and the arbitral tribunal decided to be available to the public, the party may withdraw it from the record entirely or partly. But if the submission was involuntarily, then, in this case, it is not permissible to withdraw it from the record, and it is available to the public.

4.2.2. Integrity of the arbitral process

In addition to the documents and information that shall not be made publicly available as they are confidential and protected, the UNCITRAL Rules of Transparency in paragraph (6) of Article (7) prohibit making certain information available, in order to preserve the integrity of the arbitral process. As term used in that paragraph is "to preserve the integrity of the arbitral process" loose and may be widely interpreted, which undermines transparency, and sometimes limits it, the rules in Article (7/7) indicate the meaning of this term and the authority of the arbitral tribunal in this regard, as will be explained below:

Preserving the integrity of the arbitral process

It is worth noting that Working Group II of the UNCITRAL discussed the meaning of the term "integrity of arbitration proceedings" and concluded that the term would need to be redefined precisely, as well as exceptional cases of transparency because broad definitions are not helpful in this case (UNCITRAL, 2011a).

In this regard, it should be noted that the protection of the parties to the proceedings, their lawyers, witnesses, and the arbitral tribunal from intimidation and physical threats are among the most important conditions for the integrity of the arbitration process. Also, the disruption of hearings by the audience is among the cases that fall in this category. There are other examples of issues outside the arbitration proceedings, such as the politicization of proceedings and the manipulation or falsification of facts by the mass media (UNCITRAL, 2011a).

The Working Group also expressed its concern about the nature and scope of that category that can represent potential exceptions to transparency (UNCITRAL, 2011b), as it is overly broad and vague and may limit transparency significantly. Therefore, any exception to transparency to protect the integrity of the arbitration process should be carefully worded. It is therefore preferable that such exceptions be limited to those relating to protection against intimidation or a physical threat to persons participating in the arbitral proceedings. For example, expressions such as “risk of aggravation of the dispute” or “rendering the resolution of the dispute difficult or impossible” are too broad and open to many interpretations (UNCITRAL, 2011b).

The discussion concluded in this matter, to include the provision for restricting or delaying the publication of some information in specific cases, in order to reduce the cases of exclusion from transparency, (UNCITRAL, 2011b). Those cases were stipulated in Article (7/7) of the rules, to include any situation that may impede the collection or presentation of evidence, or lead to intimidation of witnesses, lawyers acting on behalf of the disputing parties, members of the arbitral tribunal, or in similar exceptional circumstances.

Accordingly, it may be said that it is allowed to restrict or postpone the publication of some information so as to preserve the integrity of the arbitral process whenever it results in the publication, impeding the collection or production of evidence or preventing its presentation or leading to terrorizing the parties to the arbitral process such as witnesses, lawyers acting for disputing parties, or members of the arbitral tribunal, or in the event of any exceptional circumstances similar to these cases.

The power of the arbitral tribunal to decide the exception

Paragraph (7/7) of the UNCITRAL rules states that the arbitral tribunal may restrict or delay the publication of information if such publication would jeopardize the integrity of the arbitration process. The tribunal concerned can undertake this measure either on its own initiative or at the request of a disputing party, after consulting with the disputing parties whenever possible.

It is clear from the above text, that the arbitral tribunal has a wide discretionary power to decide on this matter, and that this power is limited to restricting or delaying the publication of information, and not preventing its publication. The tribunal may delay the publication in the cases mentioned earlier, provided that such information is published after the cause of the delay has disappeared, such

as the threat that was being exercised on the parties to the arbitration case, or the reasons that hindered the collection or production of evidence.

It is also clear that the arbitral tribunal exercises that power on its own initiative or at the request of a disputing party. And it is not unique in the decision to restrain or delay publication, or in the necessary arrangements for that. Rather, it exercises that power after consulting with the disputing parties whenever possible in practice.

5. CONCLUSION

The study concluded with a set of results and recommendations, which are as follows:

One of the new issues that came out of the UNCITRAL Rules of Transparency is enhancing the principle of obliging the disputing parties to publish certain documents that should be published in accordance with these rules. The matter was not used on a large scale before the emergence of the rules, as the study has shown above that most international arbitration centers were not following this approach, such as the ICSID, which does not publish documents, records, or arbitration awards only after the consent of the disputing parties. Also, there is a small number of international agreements binding the disputing parties to publish some documents, compared to the number of agreements that subject to the transparency rules and obliged to publish certain information. This indicates, beyond any doubt, that the UNCITRAL Rules of Transparency have succeeded in enhancing the principle of mandatory publication of certain information relating to treaty arbitration.

The UNCITRAL Rules of Transparency are obligated to start the publication from the time the arbitration notice is received by the defendant, but this is early timing. According to this rule, the publication must begin before the arbitral tribunal is formed, and this is something that may cause injuries to the parties in the assumption that the arbitral process does not start, as if a notice is sent in the arbitration, and this notice and the subject of the dispute are published between the disputing parties, but the arbitration does not continue due to the settlement of the dispute or any other reason. Likewise, early publication may eliminate the chances of a dispute between the parties is settled amicably.

The UNCITRAL Rules of Transparency differentiate between documents that are published and documents that are viewed without being published. There are documents that are published automatically and documents that are not published only upon the request, as well as documents that are not published but can be viewed only. Regarding the scope of access in terms of persons, the rules set out in paragraphs (3) and (5) of Article (3), that access is determined by specific persons, so it is not permissible for any person or the public. These persons are the party or parties that submitted the request for access and their request was approved by the arbitral tribunal, so access is not permitted to other persons. Thus, it becomes clear that the issue of access to information or a specific document differs from the issue of the publication. The latter includes all persons, and the automatic publication of documents is made for all audiences,

and publishing is based on a request that is also made for all people. As for viewing a specific document that does not include all persons, it is restricted to a specific category of persons.

In this regard, it is believed that it is advisable to determine the right of the view to all the people and not to the person who requested to view the information. This proposal is due to two reasons:

First: The documents and submissions that the arbitral tribunal may agree or authorize to view are those not excluded from being made publicly available according to Article (7), and as long as they are such and it is permissible to be viewed, so it is worth not to limit access to it to a specific person, but make it available to the public, as other documents are being made.

Second: It is not fair that access to a specific document is permitted for a specific person and it is forbidden for another to the same document, as long as any person exercised his right in accordance with paragraph (3/3) and submitted a request to view a specific document, which the arbitral tribunal agreed to his request and allowed him to view the required document since that document was not excluded under Article (7), it is difficult to refuse a request submitted by another person to view the document itself.

The study shows that the basic principle in determining confidential or protected information that is withheld from the public and excluded from transparency is the consent of the parties to the treaty. Whenever the parties to the treaty agree to consider certain information confidential, it is considered so and it may not be made available to the public. It became clear too, that the arbitral tribunal's authority to consider information as confidential is confined to the limits of other information that is not agreed to be classified as such by the parties to the treaty. Thus, it can be said that it is the treaty parties that determine the scope of transparency. They decide, at first, that certain information is withheld from the public and excluded from the scope of transparency, and the arbitral tribunal has no authority to make that information available to the public, even if it considers that this information is not confidential, so its authority is limited to this matter, in deciding that information is confidential in the event that the parties to the treaty do not agree to consider it as such, or in the event of a dispute over the consideration of that information, it is included in the information agreed upon as confidential information.

With this regard, and in order to broaden the scope of transparency, the study considers giving the arbitral tribunal the power to decide on the consideration of certain information that may be withheld from the general public, even if there is an agreement to prevent it from being made available. the arbitral tribunal decides after consulting with the disputing parties, to prevent the availability of some information to the public.

Withholding information according to the provision of Article (7(2)d) on the pretext that making certain information available to the public leads to obstructing law enforcement, undermining or narrowing the scope of transparency, for two reasons: 1) that the term "obstructing law enforcement" is broad and non-specific, which

entails to invoke it in order to prevent the availability of some information, and thus will lead to limit the scope of transparency on the pretext that making that information publicly available will lead to obstruction of law enforcement; 2) that the text on withholding information based on this matter is unnecessary if the UNCITRAL Rules of Transparency permit withholding information according to the applicable law of the party required to provide information. A state that considers certain information confidential or sensitive through its internal laws can grant it protection and considers its confidential information, and accordingly, the party or country that should make certain information publicly available can request that it be withheld the information, based on the fact that its national law gives it the protection, therefore, there is no need to request withholding because the availability of this information will hinder the enforcement of the law, so it is not reasonable for the law of that state to allow the publication of information that hinders its enforcement.

The aforementioned results would give a response to the main question raised at the beginning of the study: What is the degree to which public monitoring influences the arbitration procedures as well as the governments' operation regarding investment issues? Findings showed this domain is narrow and not as wide as hoped to be. The chief reason behind this may be that UNCITRAL Rules for Transparency have imposed several conditions that narrowed down the domain of monitoring to low levels.

Findings, which showed the main disturbances in those rules, also pointed to the importance of the present study. Those disturbances were revealed to be of paramount importance for civil societal enterprises, which aim at increasing the levels of monitoring on government operations in the sphere of foreign investment and in treaty-based arbitration issues. This study, plus, can be a basis for many future studies that have to do with monitoring the performance of governments on foreign investment issues as well as treaty-based arbitration. Such studies include those investigating the reasons behind reduced foreign investment, those concerning the analysis and evaluation of UNCITRAL rules in arbitration, as well as those incorporating treaty-based arbitration issues.

Numerous limitations have been faced by this study. Perhaps of paramount importance was the difficulty to collect sufficient information on secret documents in practice. In other words, the goal of this study was to delineate the role of UNISTRAL rules in enhancing the public's monitoring of arbitration procedures. To achieve this goal as best as possible, it is necessary to show the content, quantity, and importance of documents that are regarded as secret and that therefore are banned from the public. This should have been done to clearly show the amount of transparency achieved as a result of those rules. However, given that those documents are secret and cannot be accessed by the public, it was not easy to have an access to them. This, therefore, was an important limitation in this study.

This is also true of the legal literature and practical cases. In other words, legal studies, indeed, including the present study, may not achieve their

ultimate goal without an accurate, deep analysis of the legal literature. Given that this literature was not available for this study, it can also be regarded as another limitation faced by the study.

Needless to say, among the limitations facing any study is the scarcity of previous studies investigating the same topic. This is also a truth of the present study. That is, although many studies investigated the problem of secrecy and transparency in arbitration, those studies nevertheless did not incorporate the exact topic of this study. They, for example, did not incorporate the documents that

adhere to the principle of transparency as per UNISTRAL Transparency Rules. Nor did they incorporate the exemptions of transparency principle, such as the secret and protected information.

The lack of relevant previous studies does form a difficulty and limitation. Put differently, no previous studies were there upon which to base the present study. Therefore, this study was to premise its content on the basics and to serve as a basis for future studies investigating the same topic.

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