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International Experience of Applying Transparency Rules in Arbitration Processes Between Investors and States

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Abstract: Following modern worldwide trend of transparency, the United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which were incorporated in UNCITRAL Arbitration Rules. The Convention on Transparency (the Mauritius Convention) adopted later was an attempt to resolve the situation with treaties, which were concluded prior to April 1, 2014. As soon as few previous studies covered this issue, the research is aimed to assess the extent to which the Rules on Transparency are applicable and inevitable. By way of qualitative analysis of documents covering the transparency issue in investor-state treaties and arbitration was revealed that like the treaties concluded after April 1, 2014, which were automatically covered by the scope of application, the treaties made prior to that date were dropped out of the Rules on Transparency and the parties thereto have to express an explicit will to apply the Rules on Transparency. The Mauritius Convention designated to resolve this problem still requires a member state to join the Convention to make the Rules applicable to all treaties with such member state. On the other hand, both discussed documents provide the parties with options to avoid transparency in arbitration. Thus, despite increasing mandatory transparency in national legislations, the transparency of investor-state arbitration proceedings remains the matter of a good will of the parties. This study provides the foundation for stakeholders to conduct investor-state agreements as well as arbitration processes in line with transparency. The issue of transparency in investor-state agreements and arbitration processes in different countries can be illustrated in the following studies based on this study.

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1 Introduction

The issue of transparency is urgent in the investor-state arbitration. The most controversial is the lack of full legitimacy of the arbitration practice due to the "one-off" nature of the tribunals, whose decisions affect the interests of citizens and states. Rules of transparency create the conditions for the proceedings to be accessible to stakeholders and allow them to participate or control the progress of the proceedings. The initiative for transparency of investment arbitration was primarily a response to opinions in society against investment arbitration, based on the fact that public interests cannot be protected in a private manner. The rules of transparency include procedural provisions that make investment arbitration more open to the public and thus the key feature of investment arbitration is significantly transformed. That feature was about confidentiality, which made the arbitration attractive in cases that involved taxpayer money.

The practical aspect of implementing transparency in the arbitration process remains controversial and lacks a universal mechanism. The authors have decided to consider the decisions of arbitration courts. Namely, the decisions that were made under the UNCITRAL Arbitration Rules (Overview of the status of UNCITRAL Conventions and Model Laws, 2019; UNCITRAL Arbitration Rules, 2013; United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 2014). The decisions of the arbitral tribunal may be published only with the consent of both parties to the proceedings, in accordance with the UNCITRAL Arbitration Rules. Namely, in accordance with Article 32 (open hearings), 37 (statements of

third parties), and 48 (publication of decisions) of the Arbitration Rules. There are as well Arbitration Rules of International Centre for Settlement of Investment Disputes (ICSID) as of 1976, 2006, and 2010 (part 5 of article 32 and part 5 of article 34, respectively). Before the decision is published, both the plaintiff and the respondent state must provide their consent. The latter is according to UNCITRAL Arbitration Rules. However, Article 3 of the Rules on Transparency states that the consent of both parties is no longer required, and decisions are published by default. That is, regardless of the desire of both or one of the parties to keep the decision secret. In addition, not only the final decision on the merits of the case, but also any other decision, order, or ruling of the arbitral tribunal, as well as written submissions by the parties, must be published. The aforesaid – according to the Rules on Transparency (Article 3).

The provision of the Transparency Rules caused a particular disagreement among practitioners in the field of arbitration. Namely, the provision, according to which all hearings are held in open mode by default (Euler & Gehring, 2018). However, a closed hearing can still be held if there is a need to protect confidential information or if the integrity of the arbitration process can be violated by the participation of third parties. However, the arbitral tribunal should actively promote open access to hearings (Article 6) in the absence of such circumstances. If these changes are forced to be introduced, the transparency of investment arbitrations (conducted under the UNCITRAL Arbitration Rules) will be significantly and tangibly affected. The concept of confidentiality of investment arbitrations is completely changed by the rules on transparency. That is, the initially carefully protected process is now made entirely public.

In accordance with Article 2 of the Mauritius Convention (UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2019), the UNCITRAL Rules on Transparency will apply even to disputes that are not brought under the UNCITRAL Arbitration Rules. This expands the scope of the Mauritius Convention to investment disputes under:

- International Court of Arbitration under the auspices of the International Chamber of Commerce (ICC);
- Federal Customs Service of Russia (FCSR);
- International Centre for Settlement of Investment Disputes (ICSID);
- other arbitration courts.

Article 1 of the Mauritius Convention clearly states that transparency rules also apply to agreements that have been concluded before April 1, 2014. The said expands the scope of transparency in investment arbitration. While the UNCITRAL rules on transparency were applicable only to disputes arising from treaties that entered into force after April 1, 2014.

However, there is a widely formulated exception to Article 7 that covers all of the above. According to which "confidential or protected information" will not be available to the public. Another limitation is that the Convention does not apply to all arbitration proceedings between the state and the investor. Instead, the Convention applies only to arbitration based on the Treaty, excluding from the scope of its application cases where the instrument of consent is legislation or a treaty.

Nowadays, investment arbitration *de facto* has become a quasi-administrative arbitration, which reviews regulatory measures of the host state. The issue of transparency in the arbitration process today is of high value for international legal practice and needs a detailed study in accordance with the latest regulatory changes and court decisions. The latter will make it possible to bring greater clarity to the functioning of the existing regulatory mechanism.

2 Literature Review

Prosperity and economic development significantly depend on foreign investment. Foreign investment gives developing countries the opportunity to improve country's infrastructure and advance local industries (Franck, 2005). National laws protect foreign investment. There are as well such instruments as special committees and commercial courts to consider foreign investors' appeals regarding their investments, property, and so on (Newcombe & Paradell, 2009). At the same time, the widespread use of international investment agreements creates the need to establish a generally accepted protection mechanism (Al-Louzi, 2013; Shestak, Volevodz, & Alizade, 2019; Veresha, 2018). States conclude international investment agreements for the protection of international investment and ensuring clear and impartial cooperation with investors (Houde, 2006). International investment treaties are governed by the Vienna Convention on the Law of Treaties (Vienna Convention) (1969), which is recognized as a customary international law (Borek & Aust, 2001).

Disagreements and disputes are inevitable part of international commercial relations caused by lots of factors like difference in commercial and legal expectations, understanding of contract terms, rights, and obligations of the parties, cultural approaches, political issues, and geographic factors (Dorskii, Pavlenko, Shutikova, Zubanova, & Pashentsev, 2017). As soon as national legislation systems sometimes have significant differences, the parties to international treaty seek to include a clause concerning dispute resolution and arbitration that will comply with each party's interests (Born, 2009). The provision on arbitration in an international treaty provides for the selection of arbitration for settlement of disputes.

The parties to the agreement might seek for arbitration to settle the dispute regarding a matter falling within this agreement's scope. In this case, arbitration is referred to as "treaty arbitration," since the agreement has been concluded on the basis of an international convention (Friedland, 2007).

The practice of arbitration based on bilateral investment treaties (BITs), multilateral treaties, or national legislation is when a state (that accepts the investment) makes an offer to consider the dispute in arbitration within the framework of a BIT (that has been concluded with a state of which an investor is a citizen). However, when it comes to commercial arbitration, it is usually based on a contract previously concluded by the parties to the dispute (Mohan, Aziz & Singh, 2019). While the arbitration method in question does not include a direct contractual relationship between the state and a foreign investor and, therefore, there is no consent. The consent of the state to a dispute consideration in arbitration is expressed in an international agreement to which a foreign investor is not a party. Such consent is given anonymously and addressed to an unlimited circle of foreign investors. However, the investor has the right to accept this offer later, possibly even after a few years (Shirlow & Caron, 2020). The arbitration agreement, so to speak, is two consents given at different times. As for the state, its consent is contained in the international treaty itself. The investor accepts the proposal to refer the dispute to arbitration when such an investor addresses the state or the arbitration center. Consequently, the consent of the investor is always given after a dispute has arisen with the state.

The state's consent to arbitration is not applicable to any claim brought by any foreign investor. The claim should be closely linked to the investment agreement containing an offer to submit the dispute to arbitration. An investor is required to have citizenship of a second state party to an international treaty (ratione personae criterion) (Ishikawa, 2014). In other words, the arbitration offer is addressed exclusively to foreign investors – citizens of the second state – a party to the relevant BIT. It must be ensured that the transactions made by the investor are an "investment," that is, fall under the scope of the treaty (ratione materiae criterion). An international agreement must be valid at the time of the alleged damage to the investor (ratione temporis criterion). Moreover, when considering a case on the merits, the claim is usually required to be based on a violation of the BIT's provisions by the state (that receives investment) (Tsindeliani, 2015). Investment arbitration based on an international agreement is significantly different from commercial arbitration.

Confidentiality is a feature of international arbitration in general (i.e., in comparison with court litigation), but investment dispute settlement has already been treated differently (e.g., excerpts of ICSID awards were published under the ICSID Convention). At the same time, even when the confidentiality of arbitration

is detailed in the agreement, a particular national court may disregard this confidentiality to certain extent or even totally due to the public policy and transparency legislation in this country (Ajibo, 2015). The issue of confidentiality is also covered by the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, where corresponding clauses relate to awards' confidentiality, but not the general obligation of confidentiality concerning the information that is used during arbitration (UNCITRAL Arbitration Rules, 2013). Arbitration though being a closed and private process cannot be considered confidential as long as the arbitration information is a subject to publicity (Schmitz, 2005). Confidentiality is not expressly provided for as a principle of arbitration proceedings in international sources of arbitration law, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the UNCITRAL Model Law on International Commercial Arbitration (1985), and the European Convention on International Commercial Arbitration (1961). Confidentiality is also not expressly provided for in national arbitration laws (Stanivukovic, 2018). Therefore, the arbitration documents, hearings, and other arbitration information may be published through various means of publication, for instance via the Internet. The latter approach is expressed by the term "transparency in arbitration", which refers to the provision of information on arbitration for interested parties, while "public access" is a wider term meaning the right of all citizens to access the proceedings and information (Rogers, 2006). To achieve the principle of transparency in contractual arbitration, the UN Commission has decided to apply the method of dissemination. The Transparency Registry has been established for treaty-based arbitration cases that might be accessed by the interested parties (Transparency Registry, 2019).

If the investment agreements have been concluded prior to April 1, 2014, they are out of the scope of the application thereof, according to the Transparency Rules. The United Nations Convention on Transparency in Investor-State Arbitration (the Mauritius Convention on Transparency) has been adopted by the UN General Assembly. The purpose for the latter is to provide a single mechanism for changing such investment agreements in terms of transparency. The date of Convention's adoption is December 10, 2014 (United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 2014).

Previous studies concentrated, inter alia, on the issue of making the arbitration more private. Namely, the problem of confidentiality (and its scope) in commercial arbitration was covered (Bagner, 2001; Brown, 2000; Gu, 2012; Reuben, 2005; Schmitz, 2005; Yu, 2012). The issues of both transparency and confidentiality in commercial arbitration were investigated in other studies (Buys, 2003; Issawi, 2015; Khalifa, 2014; Reinisch & Knahr, 2007). Rogers (2006) studied solely the issues related to transparency. Among the newest studies conducted after the

adoption of Transparency Rules, Shallow (2016) explained how the Transparency Rules as well as the UN Convention on Transparency changed the international settlement of investment disputes, along with their relation to other international law systems. Nkongho and Nyitioseh (2018) investigated confidentiality and transparency under the Organization for the Harmonization of African Business Law (OHADA) in conjunction to the Rules. These authors investigated confidentiality in international arbitration and paid certain attention to transparency but they did not explore the Rules on Transparency and Mauritius Convention, which had been adopted at the time of the research. Garimella (2017), while investigating the confidentiality in arbitration, paid no attention to transparency-related documents. Baizeau and Richard (2016) investigated the issues of confidentiality in international arbitration with no attention to transparency and relevant documents. The same goes to the research of Bernet and Gottlieb (2016), which was limited to confidential and restricted data in the award. Perumal and Ramamurthy (2018) investigated the Rules on Transparency and Mauritius Convention in more detail among other relevant international instruments, and also paid attention to the international treaties, to which those documents could be applied. Generally, studies on publicity and confidentiality in international arbitration more closely investigated Article 1 of Transparency Rules and issues related to applicability thereof.

The novelty of this study lies in a synthesis of issues of investment arbitration, where both theory and practice are presented, as well as attention is paid to the features of arbitration processes, the strengths and weaknesses of existing experience of investment arbitration. The research is sought to accomplish the following objectives:

- distinguishing investment treaties, which are governed by these rules, as well as treaties, which are out of scope of application;
- studying the extent to which the transparency provided for by the Rules on Transparency and the Convention on Transparency is inevitable for the parties to treaty arbitration.

To reach the aim and accomplish the tasks of the study, an analysis has been conducted of legal acts to identify the dual nature of arbitration regulation processes. Patterns and features in the existing judicial practice of international disputes have been determined as well. The following documents and resources have been analyzed in course of the research:

- Vienna Convention on the Law of Treaties (1969);
- United Nations Convention on the Use of Electronic Communications in International Contracts (2005);
- UNCITRAL Arbitration Rules (2013);

- UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration;
- United Nations Convention on Transparency in Treaty-based Investor-State Arbitration;
- Official Records of the General Assembly and the United Nations Commission on International Trade Law Working Group II (Arbitration and Conciliation);
- The caseload of the International Centre for Settlement of Investment Disputes;
- Overview of the status of UNCITRAL Conventions and Model Laws;
- Transparency Registry.

3 Impact of the Transparency Rules on the Regulatory Mechanism of International Trade

The Rules on Transparency comprise eight articles, the Article I deals with the extent of application of the rules to agreements concluded before and after rules' entry into force, the discretionary power of the court of arbitration to exercise them and the rules applicable in case of disagreement between these rules and other appropriate provisions. Article II specifies time of publication of notice of arbitration. Article III states the documents that have to be published and made available to the public. Article IV describes how hearings are to be conducted, the procedures and conditions for accepting submissions from third parties, which are not related to the dispute or treaty. Article V deals with the appeals of parties that are not related to the agreement. Article VI describes how hearings are to be conducted, that is, the conditions when the hearings might be held publicly (with indication of the broadcasting methods) or in a closed (private) manner. In Article VII, documents and information excluded from the scope of transparency are specified. Repository of published information is identified in Article VIII (United Nations Commission on International Trade Law Working Group II (54), 2019).

Article I, paragraph 1, of the Rules on Transparency provides the following:

1. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall apply to investor-state arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty") concluded on or after April 1, 2014 unless the Parties to the treaty have agreed otherwise (United Nations Commission on International Trade Law Working Group II (54), 2019).

The scope of these rules is limited to one kind of arbitration only: the arbitration established between an investor and a State under a treaty relating to or containing

investment or investor protection clauses. The rules concern dispute settlement in terms of agreements concluded on or after April 1, 2014.

3.1 Agreements Concluded After the Rules on Transparency Entered into Force

The UNCITRAL Committee has adopted the provision that the transparency rules should apply unless the parties have agreed to exclude them along with the treaty relating to the investment and arbitration according to UNCITRAL Arbitration Rules.

Therefore, it is believed that the parties have implicitly agreed to exercise the transparency rules unless they sign the treaty, which excludes those rules' application.

After those rules entered into force, they were integrated in the UNCITRAL Arbitration Rules and are considered to be a constituent part thereof. The parties are to apply the UNCITRAL Arbitration Rules in a treaty relating to investment, including the Rules on Transparency, which are an extension of Arbitration Rules. As soon as the Rules on Transparency integrated in UNCITRAL Arbitration Rules on the effective date of the Rules, no State party to the treaty is able to prove the contrary, even in case when such a party is not willing to apply such Rules on Transparency.

3.2 Treaties Concluded Before the Rules on Transparency Entered into Force

Article 1, para 2 of Transparency Rules states that: "In Investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before April 1, 2014, these Rules shall apply only when:

a. The parties to an arbitration (the "disputing parties") agree to their application in respect of that arbitration; or
b. The Parties to the treaty or, in the case of a multilateral treaty, the claimant State and the respondent State, have agreed after April 1, 2014 to their application" (United Nations Commission on International Trade Law Working Group II (54), 2019).

A proposal was made during the 53 and 54 sessions of the Working Group to adopt the Convention on Transparency in Treaty-based Investor-State Arbitration, through which states could agree to apply rules on transparency to investment

treaties concluded prior to April 1, 2014. It was stated during 55 Working Group session that the Convention should be seriously considered as the most appropriate means of accomplishing the task of promoting transparency in treaty-based investor-State arbitration (United Nations Commission on International Trade Law Working Group II (55), 2019).

In fact, the proposal was adopted, and the Transparency Convention was adopted on December 10, 2014 and came into force on October, 2017 (New York, 2014).

The Convention comprises 11 articles. Articles 1 and 2 deal with the scope of application of transparency rules toward investment agreements concluded prior to April 1, 2014. The Articles 3 and 4 deal with the reservations regarding non-application of rules on transparency that parties to certain investment agreements may initiate. These articles also indicate the time of such reservation's formulation and the manner in which it can be withdrawn.

Article 5 defines the scope of application of transparency rules or reservations made by states in arbitration cases. Articles 6 and 7 deal with the depositary of the Convention, its signature, and questions relating to ratification, acceptance, and accession. Articles 9, 10, and 11 deal with entry into force, amendment, and withdrawal, respectively.

The problem of nonapplicability of Transparency Rules to investment agreements concluded prior to April 1, 2014, was resolved by the Transparency Convention. The latter obliged the States to apply transparency rules to investment agreements concluded prior to April 1, 2014. To avoid the amendment of each treaty, there is no need for States parties to that Convention to amend each investment treaty to make it dependent on transparency rules (Kaufmann-Kohler & Potestà, 2016; Vienna Convention, 1969). To make the Transparency Rules applicable to those treaties, the parties to those treaties must join the Transparency Convention. As of July 4, 2019, only two countries (Canada and Cameroon) have ratified and five countries (Australia, Belgium, Benin, Bolivia, and Congo) have signed the convention according to UNCITRAL Conventions and Model Laws issued by the UNCITRAL (2019).

In pursuant to paragraph 1 of Art 2 of the Transparency Convention, the Transparency Rules are to be applied to treaties concluded before April 1, 2014 in two conditions:

i. the respondent is a party to the transparency convention and has not made a reservation under clause (a) or (b) of Article 3, paragraph 1, and
ii. the claimant should be from a State Party that has not made a reservation under Art 3, paragraph 1, clause a.

Article II, paragraph 2 of the Convention authorized the application of transparency rules to an existing arbitration case when the defendant in the arbitration

case was a party to the convention on transparency and did not make a reservation under article 3, paragraph 1, even if the claimant was not a party to the transparency convention. The latter might agree to apply transparency rules whether or not the arbitration case is subject to the UNCITRAL Arbitration Rules (Issawi, 2015).

Article III of the Convention stipulates: "1. A Party may declare that:

a. it shall not apply this Convention to Investor-State arbitration under a specific investment treaty, identified by title and name of the contracting parties to that investment treaty;
b. Article 2 (1) and (2) shall not apply to Investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules, and in which it is a respondent…"

The UNCITRAL also resorted to a solution manifested in the conclusion of the United Nations Convention on the Use of Electronic Communications in International Contracts (2007). This Convention came as a solution to the removal of legal problems in international conventions against the use of electronic means. Including solutions to electronic problems in international conventions, such as the problem of proof of electronic transactions, electronic certification, and electronic signatures. This Convention determines the time and place of electronic correspondence and other issues. UNCITRAL also called on States to join the Convention, to apply the provisions of the conventions concluded by the States before the development of electronic means.

The treaty-based arbitration cases are published in Transparency Registry, with open access for the interested parties. There are 11 cases in the Registry that are provided by four countries: Canada (eight cases), Bolivia (one case), Guinea (one case), and Mauritius (one case) (Transparency Registry, 2019). These treaty-based arbitration cases make only 3.6% out of 309 cases registered by the International Centre for Settlement of Investment Disputes from 2013 till June 30, 2019 (ICSID case load – statistics issue 2019-2, 2019).

4 The Ambiguous Nature of the Effects of Arbitration Transparency

Today, a significant amount of cases deviate from public courts to mainly closed ones, where issues of transparency arise (Pislevik, 2018). The network of investment treaties comprises thousands of agreements, the provisions of which are usually highly customized due to the investment and economic interests of the states' parties to a treaty. The amendment of all those treaties can turn into a

cumbrous and time-consuming process. Thus, Rules on Transparency and Convention on Transparency have been adopted to change the treaties simultaneously and in an ordered manner (Bravo, 2018).

The Transparency Rules automatically apply to all treaties concluded between the member states on or after April 1, 2014, unless the parties have expressly "opted out" of the treaty (Perumal & Ramamurthy, 2018). Thus, it is considered that the states parties to the treaty have agreed to apply transparency rules, unless they agree to exclude their application. However, it is not clear in which cases the application of the rules may be excluded if the Parties agree upon it. It is also uncertain whether this agreement could be considered legal (Buys, 2003).

The Rules on Arbitration apply to treaties that have been concluded after April 1, 2014. On the other hand, despite the fact that such Rules should apply to subsequent treaties (concluded after April 1, 2014), the states can still exclude these Rules' application (Stanivukovic, 2018). The Transparency Convention was designed to resolve the issue with treaties concluded before April 1, 2014. The Convention includes voluntary procedure of its signing and ratification. It allows a party not to apply Transparency Rules to dispute resolution procedure if such a procedure uses certain arbitration rules or methods different from the UNCITRAL arbitration rules. In addition, the Convention also allows a party to exclude unilateral offers to investors (on application of Transparency Rules) during dispute resolution procedure (Bravo, 2018).

It shall be noted that option to exclude application of Transparency Rules in arbitration (which is provided for by the Rules on Transparency and the Convention on Transparency) violates the right of the general public. While the public should not be deprived of the right to achieve information on a dispute relating to an investment treaty. The purpose of the Transparency Rules and the Convention on Transparency is to benefit the investing party, state, and the general public (Laverde, 2011).

Another issue is the investor's right to exclude the application of transparency rules. It is possible that one of the parties to the arbitration is an individual investor, not a state, who stands for the exclusion of the application of transparency rules in the dispute subject to arbitration. These issues are not clearly regulated by the Rules (Bravo, 2018).

The unwillingness of states to participate in the Mauritius Convention is of relevance, considering the pressing issue of confidentiality. Thus, Convention can be considered an important tool when it comes to resolving investment disputes of states. First, it might be assumed that states do not wish to deal with taxpayers' indignation, as arbitration is expensive and the amount of compensation to the other party might be high. There are image and reputation risks as well, the issues with the legality of capital and a wide range of interests of stakeholders that should

be equally considered. All the latter complicate the process of conflict resolution. The latter can be considered the cause for the lack of widespread practice of open-access cases.

International law recognizes the right to appeal to arbitration, even if some states do not provide for the domestic arbitration procedure. In practice, even arbitration clauses are considered an effective mechanism. Notwithstanding that they refer only to the right of the parties to appeal to arbitration in the event of a dispute.

When resolving disputes between a state and an investor in arbitration, a transition from confidentiality toward transparency is necessary. This will contribute to an improvement of arbitration practice, a uniform application of international treaties' provisions in this area, which will undoubtedly give a positive effect for both an investor and a state that accepts the investment. An investor will have the opportunity to study arbitration practice and decide on the appropriateness of initiating an arbitration against a state, a respondent state will be able to more reasonably defend its position based on the analysis of earlier arbitration decisions. Such transparency requires the timely publication of statements and decisions during arbitral proceedings on disputes between investors and states, as well as holding public hearings, subject to the nondisclosure of protected information. It also involves the participation of third parties. However, the application of transparency principle may affect the public interests of the state receiving the investment. In this regard, the principle of transparency should not apply to confidential information. As a general rule, hearings are public. However, if it is necessary to protect confidential information, the arbitral tribunal takes measures to ensure that part of the hearings in which confidential information will be used is held behind closed doors. After consultation with the parties to the dispute, the arbitral tribunal shall determine the confidential or protected nature of the information. The arbitral tribunal may determine that the information should not be excluded from the document or that the disclosure of this document should not be prevented. In this case, the party to the dispute or the third party that submitted such a document is allowed to withdraw the entire document or part of it from the arbitration report.

In addition, amicus curiae plays an important role in an arbitration process. The connection between amicus curiae and the principle of transparency can be described in two aspects:

– The ability of third parties not involved in the dispute to attend the hearings or to monitor their conduct, to participate indirectly in the consideration of the dispute by making submissions and to have open access to the case file;

– According to the theoretical basis of the Transparency Rules, the principle of transparency implies the publication of opinions of third parties and parties to an international treaty not participating in the case.

The Philip Morris v. Uruguay case (2010) concerned Uruguayan antismoking measures (implemented under the World Health Organization Framework Convention on Tobacco Control (WHO FCTC)). The dispute was settled by arbitration (as provided by an investment treaty). In this case, notes submitted by amicus curiae had a significant impact on arbitral award. The dispute raised the following questions:

– the extent to which states retain the right to regulate in the interest of health care;
– the ability of large multinational corporations to reduce regulation through claims under investment contracts;
– the legitimacy of arbitration under investment contracts in a broader sense.

The amicus curiae was represented by WHO through the Secretariat of the WHO FCTC and the Pan American Health Organization (PAHO). The latter, as the WHO Regional Office for the Americas, also has a separate legal status. A summary of the WHO FCTC Secretariat describes the evidence base underlying the measures, including evidence of the risks associated with tobacco use and evidence of the impact of tobacco packaging and labeling measures. The summary also describes the practice of States and international documents relevant to the dispute, including the WHO FCTC. However, the organization did not demonstrate a position on how the dispute could be resolved, and did not provide legal arguments regarding the interpretation of bilateral investment agreements. The PAHO summary contained information related to tobacco control in the United States and Uruguay, and directly supported Uruguay's actions. The tribunal relied on amicus summaries on a number of points in establishing the facts. This included the use of amicus summaries as evidence in assessing the validity of measures and the use of summaries in relation to the WHO FCTC as a fundamental evidence base. The notable influence of representations may be partly related to the amici identity and their functions in accordance with international law. However, the reports did not contain legal arguments, but contained factual materials that were uniquely prepared for presentation.

The experience of this case may mean that intergovernmental organizations can play a significant role in arbitration under investment contracts. Nongovernmental organizations and think tanks, such as, for example, the International Institute for Sustainable Development and the Center for International Environmental Law, have initiated the submission of amicus summaries. Given latter, it

can be said that intergovernmental organizations may also play an educational role that will help the tribunals understand the potential systemic consequences of their decisions and reasoning. They can also contribute to coherence in the international system and to the solution of some problems related to the impact of investment treaties on the regulatory law.

The wording of an international treaty has a significant impact on the decision-making process when resolving a specific dispute. This emphasizes the importance of a balanced and thorough drafting of treaties and the need to get rid of ambiguity resulting from unclearly worded provisions. A feature of international investment law remains that it does not have uniform rules – neither substantive, nor procedural, it also does not provide for a single body for the resolution of investment disputes. As a result, there is an unpredictability in the application and interpretation of international investment law. Legal relations in the context of international commercial arbitration are an institution of transnational law. Namely, the totality of the norms of national and international law that govern homogeneous relations in enforcing decisions of international commercial arbitration. Therefore, it is very important to ensure proper transparency of the process, which will contribute to improving the image of Mauritius Convention signatories as pro-arbitration jurisdictions, and, accordingly, will increase the level of investment and international trade.

5 Conclusion

It is relevant to divide investment treaties into those within the scope of application of the Rules on Transparency and those out of such scope. The latter are agreements that have been concluded before April 1, 2014, and the parties have special explicit will to apply the Rules in arbitration proceedings. On the other hand, the Rules on Transparency apply to the agreements concluded after April 1, 2014 and a special explicit will of the parties is needed to avoid such application. The Convention on Transparency should resolve the problem of Transparency Rules application. However, a member state should ratify the Convention for the Transparency Rules to be automatically applied to all the investment agreements of this member state. At the same time, Transparency Rules still do not apply to most treaties concluded before April 1, 2014. This is due to the fact that there are not much member states that have ratified the Convention.

The parties to investor-state treaties are provided with the option to avoid transparency in arbitration, according to the Transparency Rules and the Convention on Transparency. Despite the fact that transparency is mandatory in national

legislations, the transparency of investor-state arbitration proceedings is still optional for the parties.

More and more countries should ratify the Convention on Transparency and the Transparency Rules. The importance of transparency for all spheres of life should be promoted and advocated among experts, governmental representatives, other stakeholders, and the public. Along with the Convention on Transparency, states should be stimulated to apply the Rules on Transparency to the investment treaties as well.

This study's results provide the foundation for governmental and nongovernmental experts from different countries to establish recommendations, implement decisions, and so on that will be aimed at transparency in investor-state agreements as well as during arbitration procedures. The following studies might be conducted on the basis of this study's results concerning the issues of transparency in investor-state agreements and arbitration procedures in different countries and regions.

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