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### New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps

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# **New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps**

**August 2013**

## New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps\*

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\* Prepared by Lise Johnson (principal author) and Nathalie Bernasconi-Osterwalder with input and comments from Marcos Orellana, Lisa Sachs, Daniel Magraw and Howard Mann.

*The United Nations Commission on International Trade Law (UNCITRAL), ...*

*[R]ecognizing the need for provisions on transparency in the settlement of Treaty-based investor-State disputes to take account of the public interest involved in such arbitrations, ...*

*Bearing in mind that the UNCITRAL Arbitration Rules are widely used for the settlement of treaty-based investor-State disputes, ...*

*Noting that the preparation of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration was the subject of due deliberation in UNCITRAL and that they benefitted from extensive consultations with Governments and interested intergovernmental and international non-governmental organizations, ...*

*Believing that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, ...*

1. *Adopts the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ...; [and]*

4. *Recommends the use of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ... in relation to the settlement of investment disputes....*

UNCITRAL, Draft decision adopting the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the UNCITRAL Arbitration Rules.<sup>1</sup>

## **I. Introduction**

In July 2013, the United Nations Commission on International Trade Law (UNCITRAL) adopted a package of rules aiming to ensure transparency in investor-State arbitration (the “Rules on Transparency”), ratifying the work done by delegations to UNCITRAL—comprised of 55 Member States, additional observer States and observer organizations—over the course of nearly three years of negotiations. These new Rules on Transparency, which will officially come into effect on April 1, 2014, provide for a significant degree of openness throughout the arbitral proceedings

With UNCITRAL’s official recognition and recurring affirmation of the “importance of ensuring transparency” in treaty-based investor-State dispute resolution,<sup>2</sup> and its development and adoption

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<sup>1</sup> UNCITRAL, 46th session (July 8-26, 2013), A/CN.9/XLVI/CRP.3 (July 9, 2013) (as modified in negotiations).

<sup>2</sup> Report of the United Nations Commission on International Trade Law, 41st session (June 16–July 3, 2008), Gen. Ass. 63rd session, supp. no. 17, A/63/17, para. 314; Report of the United Nations Commission on International Trade Law, 44th session (June 27–July 8, 2011), Gen. Ass. 66th session, supp. no. 17, A/67/17, para. 200; Report of the United Nations Commission on International Trade Law, 45th session (June 25–July 6, 2012), Gen. Ass. 67th session, supp. no. 17, A/67/17, para. 69.

of these new rules operationalizing that policy stance, there is now a carefully negotiated and widely approved template that can serve as a model for how to conduct investor-State arbitrations. This model reflects and is consistent with broader worldwide trends recognizing the importance of transparency as a tool for promoting and ensuring effective democratic participation, good governance, accountability, predictability and the rule of law.<sup>3</sup>

Under previous versions of the UNCITRAL Arbitration Rules, disputes between investors and States were often not made public, even where important public policies were involved or illegal or corrupt business practices were uncovered. The new Rules on Transparency now replace the previous UN-sanctioned standard, which regularly enabled investor-State disputes to be kept out of the public view.

The new Rules on Transparency will apply on a default basis to UNCITRAL arbitrations conducted under treaties concluded after the new rules come into effect on April 1, 2014. Unfortunately, however, the previous standard will still apply in UNCITRAL arbitrations brought under treaties concluded before that date unless States or disputing parties expressly “opt into” the new rules. To facilitate that “opt in” process, UNCITRAL has decided that its next steps must include drafting a convention that will provide States an “efficient mechanism” for applying the Rules on Transparency to existing treaties, and will begin work on that mandate in the fall of 2013.<sup>4</sup>

In order to highlight the significance of these developments and encourage use of the new Rules on Transparency, this note first provides an overview of transparency in investor-State arbitration prior to adoption of the rules, describes what the new rules require and then discusses options for promoting use of the rules in future disputes.

## **II. Investor-State Arbitration and Transparency: Background**

### ***A. UNCITRAL’s Efforts in Context***

In their investment treaties, most States offer investors the option to take disputes arising under the treaties to international arbitration in accordance with specified procedural rules. States commonly offer investors a menu of rules to choose from, which may include the UNCITRAL Arbitration Rules, the Rules of Procedure for Arbitration of the International Centre for Settlement of Investment Disputes (ICSID) or ICSID’s Additional Facility,<sup>5</sup> the arbitration rules

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<sup>3</sup> *Delivering Justice: Programme of action to strengthen the rule of law at the national and international levels*, Report of the Secretary-General (2012), A/66/749.

<sup>4</sup> Draft report of the United Nations Commission on International Trade Law, 46th session (July 8–July 9, 2013), A/CN.4/XLVI/CRP.1/Add.3, paras. 28-35.

<sup>5</sup> Pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), ICSID only has jurisdiction over disputes between nationals of one Contracting State and another Contracting State. ICSID, however, also has an Additional Facility that can administer certain arbitrations that would otherwise be excluded from the scope of ICSID jurisdiction, such as arbitrations when only one disputing party is a national of a Contracting State or a Contracting State. These disputes are not governed by the ICSID Convention and the standard ICSID Arbitration Rules, but are governed by a separate set of rules, the ICSID Additional Facility Rules. The ICSID Additional Facility Rules are very similar to the standard ICSID Arbitration Rules for disputes also falling under the ICSID Convention.

of the International Chamber of Commerce (ICC) or other arbitration rules such as the arbitration rules of the Stockholm Chamber of Commerce (SCC). Some treaties widen their menus further by saying that, in the context of a particular dispute, the investor and the respondent State may agree to develop their own rules on a purely ad hoc basis, or to modify the provisions of the UNCITRAL, ICC or other existing arbitration rules.

From the menu of options set forth by the States in their treaties, investors have the ability to determine which set of rules will actually apply. In some cases, depending on the language of the treaty, applicable rules and relevant domestic law, the investor and respondent State may be able to agree to modify or supplement all or some of the rules selected; and the tribunal also generally has the power to determine procedural issues not addressed in the rules or settled by the parties.

This system has made UNCITRAL's aim of "ensuring transparency in investor-State arbitration"<sup>6</sup> complex. The reasons for this are twofold. First, because an investor can choose among different sets of arbitration rules, even if one set of rules provided for disclosure of information relating to the proceedings, the investor would be free to choose another alternative proposed in the treaty. The second issue is that, even if the applicable set of rules were to call for or permit transparency, disputing parties generally have the power to modify them or apply them in a way that restricts disclosure. As a consequence, there are only three approaches through which transparency of investor-State disputes can be "ensur[ed]." The first is for States to include provisions directly in their investment treaties, making transparency obligatory. A small but diverse and growing number of countries from around the world use this first approach.<sup>7</sup> The second is for States to *only* offer to arbitrate disputes under arbitration rules that require transparency. Until the adoption of the Rules on Transparency, that approach was only a theoretical option, as no set of arbitration rules mandated transparency throughout the arbitration proceedings.<sup>8</sup> The third option is for States to conclude a new treaty to supplement or supplant existing investment treaties and require arbitration pursuant to rules requiring transparency. Now that it has concluded its work on the text of the Rules on Transparency, UNCITRAL is beginning work on that convention.

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<sup>6</sup> Report of the United Nations Commission on International Trade Law, 41st session (June 16–July 3, 2008), Gen. Ass. 63rd session, supp. no. 17, A/63/17, para. 314; Report of the United Nations Commission on International Trade Law, 45th session (June 25–July 6, 2012), Gen. Ass. 66th session, supp. no. 17, A/67/17, para. 200; Report of the United Nations Commission on International Trade Law, 45th session (June 25–July 6, 2012), Gen. Ass. 67th session, supp. no. 17, A/67/17, para. 69.

<sup>7</sup> For a survey of the provisions on transparency, see Nathalie Bernasconi-Osterwalder & Lise Johnson, *Transparency in the dispute settlement process: Country best practices* (IISD & CIEL, 2011), available at <http://www.iisd.org/publications/pub.aspx?id=1529>; see also Lise Johnson & Lisa Sachs, Trends in international investment agreements, in *Yearbook on international investment law and policy* 2011–2012. (Oxford University Press forthcoming 2013) (noting the range of States that included transparency provisions in their treaties concluded in 2011 and 2012).

<sup>8</sup> Even if one option in the menu were to provide for this level of transparency, the investor could then opt for a set of arbitration rules that did not similarly require disclosure. The investor may do this in an attempt to specifically avoid being subject to the Rules on Transparency, or in response to other concerns not related to issues of public disclosure.

## ***B. Arbitration and Transparency – The Status Quo Prior to the Rules on Transparency***

Prior to the Rules on Transparency, no arbitration rules used in investor-State arbitration had mandated transparency throughout the arbitral process. Yet that does not mean that confidentiality has been *required* in arbitration, much less the specific breed of arbitration that is treaty-based investor-State arbitration. In order to understand the significance of UNCITRAL’s new Rules on Transparency, it is useful to review how the various sets of procedural rules governing international arbitrations, which include the rules developed by ICSID, UNCITRAL, the ICC and the SCC, have been treating issues of confidentiality and transparency.

The ICSID Arbitration Rules are the only arbitration rules established exclusively for disputes arising between investors and States<sup>9</sup> and in recognition of the fact that resolution of these disputes implicates matters of international law relating to the treatment of investments.<sup>10</sup> Even though their Arbitration Rules rely heavily on arbitral rules established for commercial disputes, the ICSID system nevertheless distinguishes itself in various ways from other mechanisms, including in relation to its approach to transparency. In particular, ICSID’s financial and administrative regulations require the ICSID Secretary-General to publish information about

all significant data concerning the institution, conduct and disposition of each proceeding, including in particular the method of constitution and the membership of each . . . Tribunal and Committee. On the Arbitration Register he shall also enter, with respect to each award, all significant data concerning any request for the supplementation, rectification, interpretation, revision or annulment of the award, and any stay of enforcement.<sup>11</sup>

ICSID’s administrative and financial regulations also require the Secretary-General to publish awards if both disputing parties consent to publication. In cases when both parties do not consent to publication of the award, the ICSID Arbitration Rules require ICSID to “promptly include in its publications excerpts of the legal reasoning of the Tribunal.”<sup>12</sup>

Apart from the ICSID Arbitration Rules, the rules used in investor-State arbitrations, including the UNCITRAL Arbitration Rules, have largely been crafted to apply to commercial disputes between private parties. It is therefore not surprising that the drafters of these arbitration rules did not incorporate provisions that require transparency, facilitate the development of international law or that otherwise attempt to take into account public rights and interests raised or touched on by the disputes.

Indeed, most arbitration rules referred to in investment treaties are essentially silent on the matter of transparency, neither mandating confidentiality nor requiring disclosure. The rules allow the disputing parties significant latitude to determine—individually or through agreement—the degree of openness of the proceedings. Restrictions on disclosure, where they are present, are

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<sup>9</sup> See, ICSID Convention, Art. 25(1).

<sup>10</sup> ICSID Administrative and Financial Regulations, Regulation 22 (If both parties to a proceeding consent to the publication of: “. . . (b) arbitral awards; or (c) the minutes and other records of proceedings, the Secretary-General shall arrange for the publication thereof, *in an appropriate form with a view to furthering the development of international law in relation to investments*” [emphasis added]).

<sup>11</sup> ICSID Administrative and Financial Regulations, Regulation 23; see also *id.*, Regulation 22.

<sup>12</sup> ICSID Arbitration Rules, Rule 48(4); Additional Facility Rules, Art. 53(3).

primarily directed at the arbitrators and arbitral institutions, not the parties themselves.<sup>13</sup> As a consequence, arbitrations conducted under these rules can, to a large extent, be transparent if at least one party so desires, and the tribunal does not explicitly require confidentiality.

Nothing in the SCC, ICC, ICSID or UNCITRAL (1976 or 2010) arbitration rules, for example, prevents either party to the dispute from unilaterally disclosing information regarding the initiation and core of the case. Those rules do not preclude either disputing party from releasing the notice of arbitration, pleadings, or briefs.<sup>14</sup> Thus, there are a number of these documents generated at the commencement and during the course of the proceedings that are available in the public domain.

The rules of the SCC, ICC and ICSID do not expressly prevent either disputing party unilaterally disclosing orders, decisions and final awards issued by the tribunal.<sup>15</sup> On this issue, the UNCITRAL Arbitration Rules have long stood out as being more restrictive than the others. Article 32(5) of the 1976 UNCITRAL Arbitration Rules provides that “[t]he award may be made public only with the consent of both parties.” Pursuant to this provision, a State must seek and obtain approval from the investor to publish an award, and vice versa. The 2010 UNCITRAL Arbitration Rules are slightly more open. They state in Article 34(5) that “[a]n award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.” Yet, like the 1976 UNCITRAL Arbitration Rules, the 2010 rules generally require both disputing parties to consent to disclosure of awards.

Treatment of hearings is the one aspect of investor–State arbitrations where the various sets of arbitral rules can all generally be said to have actively restricted public access. The rules of ICSID, UNCITRAL (1976 & 2010), the ICC and the SCC all require the consent of both disputing parties for hearings to be open to those not involved in the proceedings.<sup>16</sup> Other than by mutual consent, hearings in treaty-based investor–State disputes will only be open when required by the underlying treaty.

Therefore, with the exception of the rather frequently used restrictions on access to hearings, and the UNCITRAL Arbitration Rules’ restrictions on disclosure of awards, rules used in investor–State arbitrations have not excluded the possibility of public access to information and, at least in the case of the ICSID Arbitration Rules, have required a certain amount of disclosure. The new Rules on Transparency thus represent not a complete upending of the approach to transparency in arbitration, but, instead, a shift in the underlying presumption toward openness, rather than privacy, in treaty-based investor-State arbitrations. Importantly, the new rules also set up a process and institutional framework to ensure that transparency is clearly and consistently put into practice.

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<sup>13</sup> See, e.g., Rules of Arbitration of the International Chamber of Commerce, in force as from January 1, 2012 (“ICC Arbitration Rules”), Article 34(2) (“Additional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.”).

<sup>14</sup> Provisions on confidentiality, where present, generally governed the tribunals’ authority to disclose information or require confidentiality. See, e.g., ICC Arbitration Rules, Article 22(3) (“*Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings ... and may take measures for protecting trade secrets and confidential information.*” There is no default rule of confidentiality).

<sup>15</sup> An exception to this is that the arbitration rules of the ICC state that decisions regarding arbitrator challenges “shall not be communicated.” ICC Arbitration Rules, Article 11(4).

<sup>16</sup> See ICSID Arbitration Rules, Rule 32(2); ICSID Additional Facility Rules, Article 39(2); ICC Arbitration Rules, Article 26(3); SCC Arbitration Rules, Article 27(3).



### III. New UNCITRAL Arbitration Rules on Transparency

The new Rules on Transparency ensure transparency in treaty-based investor-State arbitration from the beginning to the end of a dispute. Article 1 of the Rules on Transparency governs the scope and manner of application of those provisions. Article 1 of the general UNCITRAL Arbitration Rules have also been amended to expressly indicate that they incorporate the Rules on Transparency. Then, in terms of content, the Rules on Transparency contain three articles mandating disclosure and openness (Articles 2, 3, and 6); two governing participation by non-disputing parties (Articles 4 and 5); one setting forth exceptions from the disclosure requirements (Article 7); and one regarding management of disclosure through a specific repository (Article 8). This section examines those articles in more detail, beginning with the rules on the scope and method of application, and then turning to the provisions on openness, disclosure, exceptions and the repository. It sets forth the text of the rules,<sup>17</sup> then adds commentary based on public records of the negotiations at the Working Group and Commission sessions where the Rules on Transparency were drafted.

#### A. *The Applicability and Application of the Rules on Transparency*

#### UNCITRAL Arbitration Rules (Article 1, paragraph 4, as adopted in 2013)

##### **Text**

*4. For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”), subject to article 1 of the Rules on Transparency.*

##### **Comments**

After significant debate over the form of the new Rules on Transparency (e.g., whether they would even be rules or merely guidelines, a stand-alone instrument or an integral part of the UNCITRAL Arbitration Rules), UNCITRAL determined that its output would be rules that would both be (a) part and parcel of the UNCITRAL Arbitration Rules and (b) available as a stand-alone instrument for application in disputes governed by other arbitral rules.

To effectively and clearly accomplish the goal of incorporating the Rules on Transparency as an integral part of UNCITRAL arbitrations, UNCITRAL amended its 2010 general arbitration rules by inserting the new paragraph 1(4), quoted above. That amendment expressly signals to users of the UNCITRAL Arbitration Rules that, for treaty-based investor-State arbitrations, those general rules now include the Rules on Transparency.

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<sup>17</sup> The text included here may vary slightly from the final adopted version, as this note was prepared prior to issuance of the official rules.

In addition, the Rules on Transparency specify in Article 1(9) that they are also eligible for widespread adoption by investors, States and arbitral institutions to complement investor-State processes conducted under arbitral rules other than UNCITRAL Arbitration Rules.

## **UNCITRAL Rules on Transparency: Article 1 – Scope of Application**

### **Text**

#### **Applicability of the Rules**

*1. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”) 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”)<sup>1</sup> concluded on or after 1<sup>st</sup> April 2014 unless the Parties to the treaty<sup>2</sup> have agreed otherwise.*

*2. In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1<sup>st</sup> April 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 State of the claimant and the respondent State, have agreed after 1<sup>st</sup> April 2014 to their application.*

#### **Application of the Rules**

*3. In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty:*

*(a) the disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty;*

*(b) the arbitral tribunal shall have the power, beside its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case, after consultation with the disputing parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.*

#### **Discretion and Authority of the Arbitral Tribunal**

*4. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:*

*(a) the public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and*

*(b) the disputing parties’ interest in a fair and efficient resolution of their dispute.*

5. *These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons.*

6. *In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.*

#### **Applicable Instrument in Case of Conflict**

7. *Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.*

8. *Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.*

#### **Application in non-UNCITRAL Arbitrations**

9. *These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules, or in ad hoc proceedings.*

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<sup>1</sup> *For the purpose of the Rules on Transparency, a “treaty” shall be understood broadly as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty.*

<sup>2</sup> *For the purpose of the Rules on Transparency, any reference to a “Party to the treaty” or a “State” includes, for example, a regional economic integration organization where it is a Party to the treaty.*

#### **Comments**

Article 1 governs the scope and method of application of the Rules on Transparency to investor-State disputes, which are now an integral part of the UNCITRAL Arbitration Rules as revised in 2013.

#### **Applicability**

Article 1(1) establishes the default rule that for (a) investor-State disputes (b) that arise under investment treaties (c) concluded *after* the Rules on Transparency come into effect *and* (d) that are being resolved under the UNCITRAL Arbitration Rules, the transparency rules will apply. When each of these four conditions is satisfied, a reference to “UNCITRAL Arbitration Rules” in the underlying treaty will also include the Rules on Transparency. However, the State parties to

the underlying treaty can agree to modify that default rule of application provided by Article 1(1). They may do this, for example, by expressly excluding application of the UNCITRAL Rules on Transparency or stating that the “UNCITRAL Arbitration Rules, as adopted in 1976” will apply. This thus creates an “opt-out” approach for future treaties under which a reference to the UNCITRAL Arbitration Rules will bring in the transparency rules unless the State parties agree otherwise.

Notably, UNCITRAL chose April 1, 2014 as the effective date of the Rules on Transparency. This was done in order to give UNCITRAL time to secure necessary resources and develop the capabilities in order to serve as the repository. If an investment treaty is concluded after adoption of the Rules on Transparency in July 2013, but before their coming into force in April 2014, the Rules on Transparency will *not* be included by default in UNCITRAL arbitrations. States that will be concluding treaties before April 1, 2014 and that wish to incorporate the Rules on Transparency as a default basis in those treaties will thus have to be careful to make that intent clear, and can do so by incorporating appropriate language in their treaties. If they do not do so, and as discussed below, the Rules on Transparency will only apply to UNCITRAL arbitrations if additional steps are subsequently taken by the disputing parties or the State parties to the treaty.

This restriction on presumptive application of the Rules on Transparency is due to Article 1(2). Article 1(2) addresses whether and when the Rules on Transparency will apply to UNCITRAL arbitrations arising under investment treaties concluded prior to April 1, 2014, the date of the rules’ entry into force. For such disputes, the Rules on Transparency will only apply if (a) the disputing parties agree at any time to apply the rules or (b) the relevant State parties to the investment treaty agree, after April 1, 2014, to the rules’ application.

Regarding the first option, in order for the disputing parties to agree to the Rules on Transparency’s application, the underlying treaty will have to give the disputing parties that freedom to adopt the rules. It may do so directly by specifically allowing the disputing parties to choose, amend or complement arbitration rules, or indirectly by referring to a set of arbitration rules that similarly allow the disputing parties to modify the applicable rules.

With respect to the second option (agreement by the State parties to apply the rules), the relevant State parties will have to manifest consent to application of the transparency rules *after* the Rules on Transparency’s entry into force April 1, 2014.

Notably, Article 1(2) is silent on the type of “agreement” that would be required for States to manifest their consent. This was designed to provide for significant flexibility, enabling the States to agree through treaty, joint statements, unilateral manifestations of consent or other methods for establishing agreement.

The footnotes to Article 1 provide further clarification on issues of application: The first footnote indicates that the Rules on Transparency are designed to apply to investment treaty arbitrations only, and that there will therefore be no automatic application of the Rules on Transparency to purely commercial disputes arising under contracts concluded before or after the Rules’ entry into force (even if the dispute is between an investor and a State). The second footnote then clarifies that the reference to a “State” or a treaty “Party” would include, for example, the European Union and Hong Kong.

One open issue regarding the scope of application is whether treaties that were initially concluded before but renewed upon their expiry and after the Rules on Transparency’s effective date would fall under Article 1(1) or Article 1(2). One might contend that, if a treaty were to enter into force

for another term after the Rules on Transparency have come into effect, a reference to the UNCITRAL Arbitration Rules in that renewed treaty should be deemed to incorporate the Rules on Transparency as the States presumptively had notice of those transparency rules and could have “opted out” of them at the time of termination/renewal, if they chose.

### **Application of the Rules on Transparency**

Article 1(3) addresses derogation from and modification of the Rules on Transparency. Article 1(3)(a) restricts the ability of the disputing parties to agree to derogate from the Rules on Transparency. This provision was driven by considerations that both the home State and general public have interests in transparency that would be undermined by allowing the disputing parties to avoid the disclosure requirements imposed by the Rules on Transparency.

While Article 1(3)(a) locks disputing parties into the Rules on Transparency, Article 1(3)(b) provides some flexibility to the tribunal when applying the rules. It gives tribunals the freedom to deviate from their requirements if practically necessary, but specifies that any changes should be to further, not counter, the aim of promoting transparency.

### **Tribunal Discretion and Authority**

Some of the provisions in the Rules on Transparency call for the tribunal to exercise discretion. In those contexts, Article 1(4) provides guidance on how such discretion should be exercised. It notes that two categories of considerations are to be taken into account. The first category includes two separate factors—the public interest in investor-State arbitration generally and the public interest in the particular dispute. The second category relates to the disputing parties’ interest in a “fair and efficient” resolution of their dispute.

Article 1(5) then addresses a tribunal’s authority to allow or require transparency in UNCITRAL arbitrations *not* using the Rules on Transparency, and aims to counter any potential presumption *against* transparency that might have otherwise been interpreted to arise from the Article 1(2) exclusion. Article 1(5) instructs that in UNCITRAL arbitrations where the Rules on Transparency do not apply, such fact should not be interpreted as signaling that the proceedings should be closed, or that less weight should be accorded to the importance of promoting transparency in the investor-State arbitration. Thus, the levels of transparency already permitted by the general UNCITRAL Arbitration Rules (2010 or 1976) are in no way intended to be reduced by any non-application of the Rules on Transparency.

Article 1(6) limits the ability of States to evade application of the Rules on Transparency when they do apply. It was inserted by the drafters as part of a compromise package, designed to serve as a counterweight to some of the exceptions in Article 7 giving respondent States a measure of latitude to invoke their own law as a basis for avoiding disclosure. (Those exceptions are discussed further in the section on Article 7).

### **Hierarchy of Rules**

Articles 1(7) and 1(8) address the placement of the Rules on Transparency in the legal hierarchy. Pursuant to Article 1(7), the Rules on Transparency trump conflicting provisions in applicable arbitration rules. For example, even if the generally applicable arbitration rules permit the disputing parties to agree to modify the rules governing the dispute (e.g., through Art. 1(1) of UNCITRAL Arbitration Rules 1976, 2010, and 2013), the Rules on Transparency will prevail and

prevent modification. However, in case of conflict with provisions in the applicable treaty, the treaty provisions will prevail.

Article 1(8) reflects the principle that the arbitration rules cannot prevail over mandatory laws. (If, however, the Rules on Transparency are incorporated in a convention on transparency, as is discussed below in Part IV, then domestic law would have to be brought into conformity with the convention).

### **Application in Non-UNCITRAL Arbitrations**

As noted above, the final provision in Article 1 (Article 1(9)) makes explicit what is otherwise implicit: that the Rules on Transparency may be used in connection with arbitrations under other arbitral rules. During the negotiations, various arbitral institutions, including the Permanent Court of Arbitration (PCA) and ICSID, confirmed that the Rules on Transparency could apply to proceedings conducted under their respective rules. Notably, the Commission rejected the idea that the carve-out in Article 1(2), which limits the Rules on Transparency's applicability to disputes brought under treaties adopted after the Rules on Transparency's entry into force, could be extended to non-UNCITRAL arbitrations.

### ***B. The Rules on Transparency – Form and Content***

#### **Article 2 – Publication of Information at the Commencement of Arbitral Proceedings**

##### ***Text***

*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.*

##### ***Comments***

Article 2 provides for prompt and mandatory disclosure of the fact that an arbitration has been launched. When a claimant sends a notice of arbitration to a respondent State formally commencing the proceedings, each disputing party has the obligation to transmit that notice to the repository. Once the repository has evidence that the respondent has been sent or has received the notice of arbitration, it is to “promptly” disclose specific basic facts about the dispute: the name of the disputing parties, the relevant economic sector and the treaty under which the claim is being made.

In the discussions regarding disclosure of information about commencement, some delegations raised concerns that if publication of the actual notice of arbitration were required before the tribunal was constituted, there would be no authority in place to address potential issues relating to protected or confidential information that should be shielded from disclosure. Yet other concerns were raised that if disclosure of the notice of arbitration had to wait until constitution of the arbitral tribunal, there could be a lengthy delay between the time at which the notice of arbitration was sent/received and the disclosure of the existence of the dispute. Further, if no

tribunal were ever constituted (e.g., if the case settled before the arbitrators were all appointed), the existence of the dispute could remain unknown.

The compromise reached requires prompt disclosure of a basic set of facts (which will not require exercise of subjective judgment or discretion by the repository) once there is evidence that the respondent has received notice of the arbitration. The notice of arbitration itself will be subject to automatic mandatory disclosure pursuant to Article 3, but only after constitution of the tribunal.

In some cases, the disputing parties may disagree about whether or not the Rules on Transparency apply. Article 2, however, requires disputing parties and the repository to take action before a tribunal is in place to resolve any disputes regarding that issue. In those cases, rather than application of the Rules on Transparency being suspended pending the tribunal's decision on the matter, application of the Rules on Transparency will continue. When adopting that approach, the drafters reasoned that the amount and type of information released under Article 2 would not have significant consequences or risk confidential information becoming public.

Notably, the decision not to require making the notice of arbitration public promptly and to limit disclosure to a basic set of information is a departure from a number of treaty provisions on transparency in investor-State arbitration,<sup>18</sup> as well as from several delegations' policies that call for prompt disclosure of the notice. Nevertheless, this should not hinder States' continued early disclosures of notices of arbitration: In the event that a treaty requires such disclosure, it would be mandatory; and in cases where treaties are silent, the disputing parties presumably could, as they can under the 1976 and 2010 UNCITRAL Arbitration Rules, continue to unilaterally or jointly decide to *voluntarily* release the notice of arbitration.<sup>19</sup>

### **Article 3 – Publication of Documents**

#### **Text**

*1. 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 defence 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(ies) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.*

*2. 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.*

*3. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling*

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<sup>18</sup> See Bernasconi-Osterwalder & Johnson, *supra* n.7, at pp. 3–4 (citing treaties that require prompt disclosure of notices of arbitration).

<sup>19</sup> Consistent with the idea of ensuring transparency in treaty-based investor-State arbitration, the issue of voluntary disclosures going beyond the rules appears to be generally left untouched in the Rules on Transparency.

*within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified site.*

*4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under article 7. The documents to be made available pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in a redacted form in accordance with article 7. The repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.*

*5. A person granted access to documents under paragraph 3 shall bear any administrative costs of making those documents available to that person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the repository.*

## **Comments**

Article 3 provides for disclosure of documents submitted to or issued by the tribunal. It establishes three categories of documents: (1) documents that are to be *mandatorily* and *automatically* disclosed, (2) documents that are to be *mandatorily* disclosed once any person requests their disclosure from the tribunal and (3) documents for which the tribunal has discretion regarding whether or not to order disclosure.

While most treaties are silent on confidentiality or transparency of disputes, some do set out extensive disclosure requirements that go beyond what is required by the Article 3 and other elements of the Rules on Transparency.<sup>20</sup> In order to prevent the UNCITRAL Rules on Transparency from limiting transparency, Article 1(7) of the rules expressly notes that any broader disclosure requirements in the governing treaty will prevail in the event of any inconsistency between that treaty and the Rules on Transparency.

Article 3(1) addresses the first category of documents, which consists of a wide set of documents submitted to or issued by the tribunal during the proceedings, including all statements and submissions by the disputing parties and non-disputing State parties or third persons; transcripts of hearings; and orders, decisions and awards of the arbitral tribunal.

Importantly, the Working Group decided that transcripts of hearings are to be treated separately from hearings. Thus, if a hearing is closed for any reason set forth in Article 6, the aspects of transcripts that are not confidential or protected will be disclosed under Article 3(1).

The second category of documents is covered by Article 3(2). It includes witness statements and expert reports. There were concerns raised by some members of UNCITRAL that requiring disclosure of these two types of documents would create issues regarding the protection of expert work product and guarding against witness or expert intimidation. Other delegations, however, emphasized that such documents could be key to understanding the issues and arguments in, and outcomes of, disputes, and therefore should be subject to mandatory disclosure requirements. In an attempt to balance those considerations, UNCITRAL adopted an approach that would except

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<sup>20</sup> See Bernasconi-Osterwalder & Johnson, *supra* n.7, at pp. 5–7.



expert reports and witness statements from *automatic* disclosure under Article 3(1), but would nevertheless require their disclosure pursuant to Article 3(2) *if* those documents were requested *while the tribunal were still extant*. Once a request for an expert report or witness statement is made, the document will be made publicly available via the repository, as opposed to being selectively disclosed to the individual or entity requesting the information.

Article 3(3) governs the third category of information—documents that the tribunal may, depending on the exercise of its discretion, order to be published. Many delegations felt that mandatory disclosure of all exhibits could be unduly burdensome, and that the burdens of such disclosure may not, as a general rule, be outweighed by the public interest in such information. Delegations thus decided not to mandate automatic disclosure of exhibits or other documents not covered by Article 3(1) or 3(2), but to expressly give the tribunal the authority to order disclosure of that information upon its own motion or if requested by a non-party to the dispute. When deciding whether to order disclosure, the tribunal is to be guided by Article 1(4) relating to the public interest on the one hand and the efficiency of the process on the other.

Article 3(4) lays out the process for publication of information and protection of confidential information. Where disclosure is mandatory (i.e., information covered by paragraphs 2 and 3), the tribunal must send the information to the repository “as soon as possible” after steps have been taken to restrict disclosure of information deemed protected or confidential. The repository is then to publish the information on its website. In contrast, the tribunal has more flexibility regarding the means of disclosure of requested exhibits or other documents covered by paragraph 3 and can, for example, send them to the repository or order that they be made available to be viewed at the location at which they are held.

The general rule adopted by UNCITRAL is that the public will not bear the cost of or have to pay for information disclosed. The only exception is for information disclosed to a particular person pursuant to a request under Article 3(3), under which release of materials is discretionary and may be made by means other than through transmission to the repository. More specifically, pursuant to Article 3(5), a person or entity requesting and receiving access to documents covered by Article 3(3) is to bear the administrative costs of making those documents available to that person or entity (but not any administrative or other costs relating to also making that information available to the general public through the repository, which the tribunal may order). The term “administrative” is intended to exclude costs such as the legal costs associated with reviewing and making redactions.

Finally, UNCITRAL did not establish any rules regarding disclosure of information requested after the tribunal had ceased to exist, but did note that in the context of a particular arbitration, these issues (including whether to provide at all for post-dispute availability of the documents) could and should be addressed through development of relevant guidelines or procedures of the specific arbitration.

#### **Article 4 – Submission by a Third Person**

##### ***Text***

*1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty, (“third person(s)”) to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.*

2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:

(a) describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the third person);

(b) disclose any connection, direct or indirect, which the third person has with any disputing party;

(c) provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually);

(d) describe the nature of the interest that the third person has in the arbitration; and

(e) identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

(a) whether the third person has a significant interest in the arbitral proceedings; and

(b) the extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

4. The submission filed by the third person shall:

(a) be dated and signed by the person filing the submission on behalf of the third person;

(b) be concise, and in no case longer than as authorized by the arbitral tribunal;

(c) set out a precise statement of the third person's position on issues; and

(d) only address matters within the scope of the dispute.

5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.

## Comments

Article 4 deals with submissions from non-parties to the dispute who are also not parties to the treaty.

In line with previous practice by tribunals, Article 4(1) expressly affirms the authority of investment tribunals to accept submissions from so-called *amicus curiae*. This express grant or acknowledgement of authority concerns “written submissions” and does not address other forms of participation such as statements at hearings. Tribunals, however, may be able to permit other forms of participation pursuant to their discretionary authority under Article 15 of the 1976 UNCITRAL Arbitration Rules and Article 17 of the 2010 UNCITRAL Arbitration Rules.

The remainder of Article 4 governs the procedures and considerations relevant to the tribunal’s decision regarding whether or not to permit the *amicus* submission and how to manage the proceedings in relation to that submission. In contrast to the approach taken in some treaties to be vague on the standards and procedures for making and accepting submissions, the transparency provisions incorporate detailed rules and guidelines. Article 4(2)(c), for instance, provides that potential submitters must disclose information regarding their significant sources of support irrespective of whether such support comes directly or indirectly from a disputing party or whether it was specifically given for preparation of the submission.

Article 4(3) provides a non-exclusive list of factors for tribunals to consider when determining whether or not to permit the submission. The factors that must be taken into account include the interests the third person might have in the arbitration, and considerations relating to the usefulness of factual or legal information that third person can provide. In exercising its discretion regarding whether or not to allow the submission, the tribunal will also consider the factors listed in Article 1(4) relating to the public interest and efficiency considerations; Article 4(4) sets out the conditions for form and content of the submission. It is not, however, meant to be an exhaustive list of the requirements. Tribunals may also impose separate conditions on the form and content of the submissions.

Article 4(5) addresses and acknowledges the procedural and substantive impacts of the submission on the dispute and disputing parties. It recognizes that the submissions can impose additional burdens on the disputing parties, but that those burdens must not be “undue.” It also implicitly recognizes and accepts that non-party submissions can, in some instances, negatively affect the strength of a disputing party’s position. Articles 4(5) and 4(6) respond to this by requiring that the procedure be managed in a way that ensures that any substantive prejudice not be unfair. As emphasized by Article 4(6), this means that the disputing parties must be given a reasonable opportunity to respond to the third person’s submission.

## Article 5 – Submission by a Non-disputing Party to the Treaty

### Text

*1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite submissions on issues of treaty interpretation from a non-disputing Party to the treaty.*

*2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. In*

*determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.*

*3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.*

*4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.*

*5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.*

### **Comments:**

Article 5 discusses submissions from non-disputing State parties to the treaty. Notably, in contrast to Article 4, Article 5 does not limit itself to addressing only “written submissions.”

Article 5(1) *requires* that tribunals accept submissions on issues of *treaty interpretation* from non-disputing State parties to the relevant treaty, provided that the submission does not “disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party” as instructed by Article 5(4). Article 5(1) also expressly authorizes tribunals to invite submissions from non-disputing State parties on matters of treaty interpretation under the same conditions.

Article 5(2) then adds that the tribunal has authority to accept submissions on other matters relevant to the dispute from non-disputing State parties to the underlying treaty. And although it does not expressly grant the tribunal the authority to invite such submission, the omission was not intended to imply that the tribunal did not have such authority.

During the negotiations, a number of delegations expressed concerns that Article 5(2) (but not 5(1)) would be used as a tool for home States to exercise diplomatic protection. The last clause of paragraph 2 attempts to address that issue by directing the tribunal to be wary of such use of Article 5.

Recognizing the myriad factors that may influence a non-disputing State party’s decision whether or not to make a submission, Article 5(3) bars tribunals from drawing any inferences based on a non-disputing State party’s silence.

Articles 5(4) and 5(5) mirror Articles 4(5) and 4(6). These provisions guard against undue burdens and unfair prejudice to disputing parties, but implicitly acknowledge, foresee and accept the fact that such submissions may impact the position of a disputing party.

## **Article 6 – Hearings**

### **Text**

*1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument (‘hearings’) shall be public.*

2. *Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.*

3. *The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render infeasible any original arrangement for public access to a hearing.*

### **Comments:**

Article 6 represents a notable departure from other arbitration rules in that it requires hearings to be open, subject to three limitations: (a) to protect confidential information; (b) to protect the “integrity of the arbitral process”; and (c) for logistical reasons. The disputing parties—alone or together—cannot veto open hearings.

With respect to confidential information and issues relating to the “integrity of the process”, Article 6(2) refers to Article 7, which further defines these concepts.

Article 6(3) addresses the issue of logistics: It explicitly gives the tribunal authority to determine how to make hearings open, and contemplates that the tribunal may decide to facilitate public access through online tools. It also allows the tribunal limited authority to close the hearings for logistical reasons. In order to ensure that the power to close hearings for logistical reasons will only be narrowly applied and not abused, the Working Group inserted language in the provision indicating that logistical issues should be arranged in advance of the hearing to facilitate public access and avoid practical challenges. Only if (a) unforeseen or unexpected circumstances later arise and (b) those circumstances make closure necessary (as opposed to merely convenient), should hearings be closed under Article 6(3).

When the hearings are closed for any of the three reasons listed in Articles 6(2) and 6(3), they are only to be closed to the extent necessary.<sup>21</sup>

It must be recalled here that transcripts are subject to a different rule in Article 3. Thus, if all or part of a hearing is closed for any of the three permissible reasons identified in Article 6, non-confidential aspects of the transcript of that hearing (if prepared) will nevertheless be disclosed in accordance with Articles 3 and 7.

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<sup>21</sup> See Art. 6(2) (referring to closure of “that part of the hearing requiring such protection”) and Art. 6(3) (referring to closure of all or part of the hearings if “necessary for logistical reasons”).

## Article 7 – Exceptions to Transparency

### Text

#### **Confidential or protected information**

1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6.

2. Confidential or protected information consists of:

(a) confidential business information;

(b) information that is protected against being made available to the public under the treaty;

(c) information that is protected against being made available to the public, in the case of the information of the respondent, under the law of the respondent, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or

(d) information the disclosure of which would impede law enforcement.

3. The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public including by putting in place, as appropriate:

(a) time limits in which a disputing party, non-disputing Party to the treaty, or third person shall give notice that it seeks protection for such information in documents;

(b) procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and

(c) procedures for holding hearings in private to the extent required by article 6, paragraph 2.

Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.

4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

5. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.

### ***Integrity of the arbitral process***

*6. Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardise the integrity of the arbitral process as determined pursuant to paragraph 7.*

*7. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardise the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties, or members of the arbitral tribunal, or in comparably exceptional circumstances.*

### **Comments:**

To balance the Rules on Transparency's provisions on disclosure, there was unanimous backing for an article specifying that they would be subject to exceptions for confidential or protected information.

Article 7(2) lists four potentially overlapping categories of information that are confidential or protected. Whether and what information will fall under the exceptions will be an issue to be decided on a case-by-case basis based on the nature of the information and the applicable law.

The rules leave the tribunal discretion to determine how parties and non-parties should proceed when designating information as confidential or protected. Designations are subject to the tribunal's review on its own motion or the motion of a disputing party. The substantive law governing the question of whether information is confidential or protected is likewise largely left open, giving the tribunal the power to determine questions regarding that preliminary issue on its own motion or on the motion of a party. Only in two instances are the tribunal's authority to determine the applicable law or rules narrowed. First, Article 7(2)(c) declares that in the case of information "of the respondent," the respondent State's law will govern questions of whether the information is protected from disclosure. Second, and more broadly, Article 7(5) provides respondent States a self-judging exception to protect against disclosure of information if they "consider" that disclosure of such information would be contrary to their essential security interests.

While potentially broad, there are certain limits on the scope of those exceptions. For one, information that a State contends is protected from disclosure under its law, or argues should be shielded from disclosure in order to protect its essential security interests, would in many cases not have been submitted to the tribunal (and thus not subject to the Rules on Transparency's disclosure requirements) in the first place. The applicability of the exceptions would only become relevant if the allegedly confidential or protected information were (1) (a) ordered to be provided by the respondent State to the investor/claimant by the tribunal or court, or otherwise already in the possession of the investor/claimant and (b) later submitted by the investor/claimant to the tribunal, or (2) voluntarily submitted to the tribunal by the respondent State. Second, in the event the information were submitted to the tribunal, the tribunal would have the power under Article 1(8) to resist efforts to use improper tactics to shield information from disclosure. As noted above, UNCITRAL inserted this limitation specifically to guard against respondent States' abuse of these special State protections.

In addition to its safeguards for confidential and protected information, Article 7 contains provisions “restraining” or “delaying”—but not necessarily permanently barring—mandatory disclosure of information where such disclosure would jeopardize the “integrity of the process.” Because of the danger that the “integrity of the process” concept could potentially be read broadly, and could threaten to effectively swallow the Rules on Transparency, UNCITRAL inserted additional language in Article 7(7) clarifying that the exception is narrow and only applies in situations when disclosure could “hamper the collection or production of evidence” or “lead to the intimidation of witnesses, lawyers acting for the disputing parties, or members of the arbitral tribunal,” or in “comparably exceptional circumstances.” Notably, the Working Group was unable to agree on any other circumstances that would serve as an example of a “comparably exceptional” case warranting a restriction on transparency under the “integrity of the process” exception.

## **Article 8 – Repository of the Published Information**

### **Text**

*The repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations, or an institution named by UNCITRAL.*

### **Comments**

This article reflects the unanimous decision by UNCITRAL that the repository should be UNCITRAL itself.

At the time of adoption of the Rules on Transparency, however, it was not known whether UNCITRAL would have the resources available to play this role. If, come April 1, 2014, UNCITRAL is unable to serve as the repository, the PCA will take over that function. Such delegation of that function to the PCA, however, is intended to be temporary: the function will be transferred to UNCITRAL if and when UNCITRAL is ready for the task.

## **IV. Next Steps**

UNCITRAL’s adoption of the Rules on Transparency represents crucial progress in the long-running efforts to increase transparency of treaty-based investor-State arbitrations. But in order to ensure that these efforts bear fruit, UNCITRAL and States need to take a number of additional steps.

### **A. Interpretive Statements and Offers of Consent**

#### Unilateral Offers of Consent

As noted above, Article 1(2) provides that one of two conditions must be satisfied for the Rules on Transparency to apply to UNCITRAL arbitration arising under treaties concluded *before* April 1, 2014. One is for the disputing parties to agree to their application. In order to facilitate such agreement, States can unilaterally provide their advance consent to apply the Rules on Transparency, and ask investors to likewise consent once a dispute arises. Preferably, States will



give that advance consent to apply the Rules on Transparency with respect to all possible disputes initiated under any of the States' investment treaties.

The North American Free Trade Agreement (NAFTA) parties used this approach in 2003 to provide for open hearings. The Government of Canada, for example, stated:

Having reviewed the operation of arbitration proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, Canada affirms that it will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven disputes to which it is a party be open to the public, except to ensure the protection of confidential information, including business confidential information.<sup>22</sup>

Mexico and the United States have made similar declarations.<sup>23</sup>

Through this approach, States could enable and encourage application to disputes governed by UNCITRAL and other rules, irrespective of the date on which the underlying investment treaty was concluded.

#### Unilateral and Joint Interpretive Statements

The other possibility for satisfying the conditions of Article 1(2) is for the State parties to the relevant investment treaty to agree *after* April 1, 2014 to apply those Rules. A mechanism through which States can do this is to issue interpretive statements manifesting such consent in accordance with Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT).<sup>24</sup>

In recognition of this possibility, the UNCITRAL Secretariat has produced draft language for consideration by delegations that could be used by States to manifest their joint consent. It reads:

*The Governments of the Contracting States [listing the names] to the [name of the investment treaty] share the understanding that the term 'UNCITRAL Arbitration Rules' as used in [specific articles] of the [name of the investment treaty] includes the UNCITRAL Rules on Transparency.*<sup>25</sup>

An interpretive statement can also be issued unilaterally. In terms of procedure, such an interpretive declaration can be made at any time,<sup>26</sup> should “preferably be formulated in writing,”<sup>27</sup> and by “a person who is considered as representing a State . . . for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State . . . to be bound by a

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<sup>22</sup> Canadian Department of Foreign Affairs and International Trade, Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations, October 7, 2003.

<sup>23</sup> NAFTA Free Trade Commission Joint Statement: A Decade of Achievement, July 16, 2004.

<sup>24</sup> Vienna Convention on the Law of Treaties, May 23, 1969, [1155 U.N.T.S. 331 \(entered into force January 27, 1980\)](#), reprinted in [8 I.L.M. 679](#) (1969) and 63 Am. J. Int'l L. 875 (1969). For more discussion of these issues, see also CIEL, IISD, VCC, Submission to UNCITRAL Working Group II on International Arbitration, Vienna, October 1-5, 2012, available at [http://www.vcc.columbia.edu/files/vale/content/CIEL\\_IISD\\_VCC\\_UNCITRAL\\_Background\\_Note\\_Sept\\_2012.pdf](http://www.vcc.columbia.edu/files/vale/content/CIEL_IISD_VCC_UNCITRAL_Background_Note_Sept_2012.pdf).

<sup>25</sup> A/CN.9/784, at p. 12.

<sup>26</sup> The treaty may modify this general rule. International Law Commission, Guide to Practice on Reservations of Treaties (2011), para. 2.4.4.

<sup>27</sup> Id. at para. 2.4.1.

treaty.”<sup>28</sup> It should also be appropriately communicated to the other treaty party or parties.<sup>29</sup> The other treaty party or parties may explicitly approve or oppose the interpretive declaration, or do nothing. If an interpretive declaration is made by one party to a bilateral treaty, and accepted by the other party to the treaty, the resulting interpretation “constitutes an authentic interpretation of the treaty.”<sup>30</sup> “[A]n interpretive declaration that has been approved by all the contracting States . . . may constitute an agreement regarding the interpretation of the treaty.”<sup>31</sup>

In light of these principles and the potential role of unilateral declarations in facilitating use of the Rules on Transparency, the UNCITRAL Secretariat has also produced draft language that may be used by States:

*Understanding of Government of [listing the names] on the interpretation and application of certain provisions of the [name of the investment treaty]*

*The provision[s] of articles [specific articles] of the [name of investment treaty] permitting an investor from a Contracting State to initiate an arbitration against another Contracting State [under the UNCITRAL Arbitration Rules] in the context of the [name of investment treaty] shall be understood as including the application of the UNCITRAL Rules on Transparency.*

While these various options have yet to be discussed in much detail in UNCITRAL sessions, they represent viable and seemingly simple mechanisms for facilitating broad use of the Rules on Transparency.

#### ***B. Treaty Amendment and Adoption of a Transparency Convention***

Another option to enable the Rules on Transparency to apply to existing treaties is for States to amend their existing investment treaties to expressly allow, if not require, their use.

One route for amendment is to open up an existing treaty for renegotiation—an option that many States will likely wish to avoid, as it could complicate their international economic relations with their trading partners. An easier approach is for States to sign onto a new treaty—a transparency convention. Pursuant to Article 30 of the VCLT, such a treaty could supplement or supersede provisions in investment treaties between transparency convention parties.

As an integral part of furthering its work on ensuring transparency in investor-State transparency, UNCITRAL has mandated continued work on this transparency convention in order to facilitate application of the Rules on Transparency to disputes arising under treaties concluded prior to the rules’ effective date, including arbitrations under rules other than the UNCITRAL Arbitration Rules.

A draft text of this convention has been prepared by the UNCITRAL Secretariat to inform discussions in UNCITRAL sessions. Among the key features of the draft prepared by the Secretariat are its provisions on application (Article 1), provisions requiring use of the Rules on Transparency (Article 3) and provisions regarding reservations to the transparency convention (Article 4). More specifically, Article 1 provides that the transparency convention will apply to

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<sup>28</sup> Id. at para. 2.4.2.

<sup>29</sup> Id. at para. 2.4.5; see also paras. 2.1.5, 2.1.6, and 2.1.7.

<sup>30</sup> Id. at para. 1.6.3.

<sup>31</sup> Id. at para. 4.7.3.

disputes arising under an investment treaty where the relevant parties to that investment treaty are also party to the transparency convention. Article 3 is the key operative provision requiring application of the transparency rules, with the current draft stating:

*Each Contracting Party to this Convention agrees to apply the UNCITRAL Rules on Transparency to investor-State arbitration conducted pursuant to a treaty providing for the protection of investments or investors to which it is a Party. Nothing in this Convention prevents a Contracting Party from applying standards that provide for a higher degree of transparency than the Rules on Transparency.*<sup>32</sup>

Article 4 of that draft then enables State parties to declare reservations, removing specified investment treaties from the convention's coverage. Once States sign onto the transparency convention, therefore, it operates on an "opt-out" rather than "opt-in" basis for the investment treaties that will be covered. Pursuant to draft Article 4(1), unless an investment treaty is reserved from the transparency convention, the whole package of the transparency rules will apply.

While those are the outlines of the Secretariat's draft convention at present, it is worth emphasizing that the text has not yet been openly debated in UNCITRAL sessions. That will happen when UNCITRAL's Working Group II begins work on the transparency convention this fall.

## **V. Conclusion**

Five years after officially recognizing the public interest in treaty-based investor-State arbitrations, and three years after beginning negotiations on a legal standard to ensure openness of those proceedings, UNCITRAL has adopted a set of Rules on Transparency providing for increased disclosure of information generated from the initiation through the termination of the disputes. By incorporating those rules as an integral part of the UNCITRAL Arbitration Rules as amended in 2013, UNCITRAL has also taken an important policy decision reflecting the UN body's commitment to make transparency, rather than confidentiality, the default rule for investor-State disputes.

However, UNCITRAL has not yet completed its task. In order to truly achieve the goal of ensuring transparency in investor-State dispute settlement, it must now take additional steps to facilitate application of the Rules on Transparency to disputes initiated under both existing and future treaties. If done right, the new UN Rules on Transparency will have a reach beyond disputes conducted under UNCITRAL Arbitration Rules to apply to all investor-State disputes. Work towards these goals will continue this fall in accordance with the mandate set out by the Commission in July 2013.

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<sup>32</sup> UNCITRAL, Settlement of Commercial Disputes: Applicability of the UNCITRAL Rules on Transparency to the Settlement of Disputes Arising under Existing Investment Treaties, Note by the Secretariat, Mar. 6, 2013, A/CN.9/784, p. 5.