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**THROUGH THE LOOKING GLASS:  
THE UNCITRAL RULES ON TRANSPARENCY AND  
WHAT THEY REVEAL ABOUT THEORIES OF  
INVESTMENT TREATY ARBITRATION**

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***Abstract***

This paper aims to use the transparency debate within investment arbitration, and specifically the discussions of Working Group II when preparing the UNCITRAL Rules on Transparency, as a lens to examine how the international community conceptualises investment arbitration. It will argue that investment arbitration is no longer viewed as a private system of dispute resolution akin to international commercial arbitration. Rather, the public interest, public international law, and regulatory nature of investment arbitration is increasingly coming to the fore. Accordingly, the consent of the parties is no longer at the heart of arbitral authority. This paper aims to identify what alternate theoretical conception of investment arbitration is driving transparency initiatives in investment arbitration.

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International investment law is suffering a legitimacy crisis.<sup>1</sup> Countries have withdrawn from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,<sup>2</sup> and proposed investment regimes have come under increasing public attack.<sup>3</sup>

One of the criticisms levelled at international investment law is that dispute resolution between foreign investors and host States – investment treaty arbitration (ITA) – is secretive and opaque. In the words of the *New York Times*:<sup>4</sup>

Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged.

ITA can have significant regulatory and budgetary consequences for the host State, and yet the citizens of that State may never be aware of the existence of the dispute. This is because ITA occurs under the auspices of international commercial arbitration, a dispute resolution mechanism designed to resolve private disputes between private parties, where confidentiality is seen as a key benefit.<sup>5</sup>

One of the responses to the perceived democratic deficit in ITA has been a push for greater transparency in ITA proceedings. There have been two components to transparency initiatives: first, greater public access to ITA awards, hearings, and other documents produced during the course of the arbitration; and second, the opportunity for public interest groups to participate in arbitration proceedings as *amici curiae*.

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<sup>1</sup> Stephan W Schill “International Investment Law and Comparative Public Law – An Introduction” in Stephan W Schill (ed) *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford, 2010) 3 at 6; Kyla Tienhaara “Regulatory Chill and the Threat of Arbitration: A View from Political Science” in Chester Brown and Kate Miles *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011) 606 at 614.

<sup>2</sup> Schill, above n 1, at 6.

<sup>3</sup> See for example the debate surrounding negotiations of the Trans Pacific Partnership Agreement: Calida Smylie “Calls for Govt to Release Draft Text of TPPA” (1 October 2013) *The New Zealand Herald* <[www.nzherald.co.nz](http://www.nzherald.co.nz)>; New Zealand Herald “TPPA petition: ‘It’s not democracy’” (1 October 2013) *The New Zealand Herald* <[www.nzherald.co.nz](http://www.nzherald.co.nz)>; Radio Live “Govt Urged to Walk Away from TPPA” (5 October 2013) 3 News <[www.3news.co.nz](http://www.3news.co.nz)>.

<sup>4</sup> Anthony de Palma “NAFTA’s Powerful Little Secret; Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say” (*The New York Times*, 11 March 2001).

<sup>5</sup> Expert Report of Stephen Bond Esq (in *Esso/BHP v Plowman*) (1995) 11 *Arbit Intl* 273.

There have been substantial transparency reforms within the North American Free Trade Agreement (NAFTA) regime and within the International Centre for Settlement of Investment Disputes (ICSID). Both now provide for significantly more public access to ITA than is the case under commercial arbitration procedural rules. Most recently, in July 2013 the United Nations Commission on International Trade Law (UNCITRAL) finalised its preparation of Rules on Transparency for use in ITA under the UNCITRAL Arbitration Rules, which will come into effect from 1 April 2014.

There has been significant debate over the appropriateness of greater transparency within ITA. While some believe that it is necessary in order to recognise the legitimate and substantial public interest in ITA, others argue that transparency is inappropriate in any arbitration, where the interests of the parties should be paramount.<sup>6</sup>

The disagreement over transparency in ITA is one facet of a broader debate about the nature of ITA. Is it a private system of dispute resolution designed to further the interests of the parties to the dispute, or is it a public system of adjudication which should take into account the broader societal interests which might be affected by the award?<sup>7</sup>

This paper aims to use the transparency debate, and specifically the discussions of Working Group II (WGII) when preparing the UNCITRAL Rules on Transparency, as a lens to examine how the international community conceptualises ITA. It will argue that ITA is no longer viewed as a private system of dispute resolution akin to international commercial arbitration. Rather, the public interest, public international law, and regulatory nature of ITA is increasingly coming to the fore. Accordingly, the consent of the parties is no longer at the heart of arbitral authority. This paper aims to identify what alternate theoretical conception of ITA is driving international transparency initiatives in ITA.

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<sup>6</sup> See for example Santiago Dussan Laverde “Analysis of the Principle of Transparency with Special Reference to its Implications for the Procedure of International Investment Arbitration” (2011) 11 *Criterion Juridico* 105; Anibal Sabater “Towards Transparency in Arbitration (A Cautious Approach)” (2010) 5 *Berkeley J Intl L Publicist* 47.

<sup>7</sup> See Alex Mills “The Public-Private Dualities of International Investment Law and Arbitration” in Chester Brown and Kate Miles *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011) 97; Zachary Douglas “The Hybrid Foundations of Investment Treaty Arbitration” in *The British Yearbook of International Law 2003* (Oxford University Press, Oxford, 2003) 151.

Part I of this paper will explore the principal arguments in the transparency debate, and establish the key differences between international commercial arbitration and ITA. It will then discuss movements towards transparency within the NAFTA regime and in the ICSID Arbitration Rules.

Scholars of international arbitration have conceptualised ITA in numerous different ways. Part II of this paper will introduce a number of theories of ITA: ITA as contract-based arbitration; ITA as public law regulatory review; ITA as a form of global administrative law; and ITA as international law adjudication. It will discuss what these different theories reveal about ITA, and evaluate the extent to which they can explain the movement towards transparency in ITA.

Part III of this paper will introduce the recently finalised UNCITRAL Rules on Transparency, and discuss the impetus for their creation. It will examine the form of the transparency rules and how they will apply to ITA under the UNCITRAL Rules in the future.

Parts IV to VII of the paper will explore the specific provisions of the transparency rules on publication, third party participation, public hearings, and exceptions to the transparency rules. They will discuss how the deliberations of WGII led to the provisions ultimately adopted, and they will assess the likely effectiveness of the transparency rules. They will also examine what the deliberations of WGII reveal about how the international community is conceptualising ITA.

Finally, Part VIII will utilise the material introduced in previous sections to draw some conclusions on what is the predominant theory of ITA within the international community.

## *I Transparency in ITA*

### ***A Arbitration Historically***

The traditional conception of arbitration is that it is private and party-controlled. Parties are free to determine by agreement all aspects of how their dispute will be settled, including what – if any – information is made public.<sup>8</sup> Confidentiality is seen as a key benefit of arbitration, serving to expedite dispute settlement and protect sensitive information and the reputation of the parties.<sup>9</sup> Parties to arbitration expect it to be private and confidential.<sup>10</sup> A commercial arbitration might run its course without public disclosure of even the existence of the dispute.<sup>11</sup>

In recent years there has been debate over whether arbitration gives rise to an obligation of confidence.<sup>12</sup> In *Esso v Plowman*, the High Court of Australia found that a private arbitration does not necessarily give rise to an obligation of confidentiality on the part of the parties.<sup>13</sup> United States courts have also refused to protect the confidentiality of arbitration communications in the context of requests for discovery of arbitration documents.<sup>14</sup> In New Zealand, any doubt on this question was resolved when a duty of confidentiality in arbitration was codified in section 14B of the New Zealand Arbitration Act 1996.<sup>15</sup>

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<sup>8</sup> Dora Marta Gruner “Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform” (2003) 41 Colum J Transnatl L 923.

<sup>9</sup> Organisation for Economic Co-operation and Development “Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures” *OECD Working Papers on International Investment* (2005, OECD Publishing) at [3]; Fulvio Fracassi “Confidentiality and NAFTA Chapter 11 Arbitrations” (2001) 2 Chi J Intl L 213 at 213.

<sup>10</sup> *Dolling-Baker v Merrett* [1991] 2 All ER 890 (CA) at 899; Organisation for Economic Co-operation and Development, above n 9, at [3]; Dimitrij Euler “UNCITRAL Working Group II Standards in Treaty Based Investor-State Arbitration: How do they Relate to Existing International Investment Treaties?” (2012) 12 *Asper Rev Intl Bus & Trade L* 139 at 140; Alexis Mourre “Are *Amici Curiae* the Proper Response to the Public’s Concerns on Transparency in Investment Arbitration?” (2006) 5 *Law & Prac Intl Cts & Tribunals* 257 at 258.

<sup>11</sup> Organisation for Economic Co-operation and Development, above n 9, at [3].

<sup>12</sup> See the discussion in Gary B Born *International Arbitration: Law and Practice* (Wolters Kluwer, The Netherlands, 2012) at §10.02.

<sup>13</sup> *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

<sup>14</sup> *United States v Panhandle Eastern Corp* 118 FRD 346 (D Del 1988); *Contship Container lines Ltd v PPG Industries Inc* WL 1948807 (SDNY, April 23, 2003); see generally Richard C Reuben “Confidentiality in Arbitration: Beyond the Myth” (2006) 54 *U Kan L Rev* 1255.

<sup>15</sup> Arbitration Act 1996, s 14B; Amokura Kawharu “New Zealand’s Arbitration Law Receives a Tune-Up: A Review of Recent Amendments to the New Zealand Arbitration Act 1996” (2008) 24 *Arbitration International* 405.

## ***B ITA is different to Commercial Arbitration***

Although ITA shares most procedural features with international commercial arbitration,<sup>16</sup> many scholars have distinguished ITA from international commercial arbitration for a number of reasons.

### *1 ITA involves a State*

First, ITA necessarily involves a State as a party. Andrew Tuck argues that the very presence of a State changes the nature of the arbitration. Citizens and residents of that State have a legitimate interest in knowing how the government acts during the arbitration and in the outcome of the arbitration.<sup>17</sup> Furthermore, ITA will impact the citizens of the State as well as the State itself: ITA may necessitate changes in regulation or policy, and it may have significant budgetary repercussions for the public purse.<sup>18</sup>

This is also true, however, of commercial arbitration involving a State. The good governance considerations that mandate public access to arbitration also apply to arbitration involving a State born of contractual obligations. This commercial arbitration may also impact State policy and the public purse. Accordingly, the mere presence of a State in ITA is not sufficient to distinguish it from commercial arbitration.

There are a number of factors which differentiate ITA from other arbitration involving a state. First, the nature of the State's consent is different. In commercial arbitration, the parties enter a contractual agreement to arbitrate a particular dispute. Consent to ITA, on the other hand, is established through the State's offer to arbitrate (usually found in an investment treaty)<sup>19</sup> and the investor's acceptance of that offer.<sup>20</sup> Consent to ITA is therefore entered into by the State through the sovereign act of entering into a treaty.<sup>21</sup> It is a general and prospective consent, which might catch any future dispute with any

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<sup>16</sup> Dussan Laverde, above n 6, at 107; Schill, above n 1, at 14.

<sup>17</sup> Andrew P Tuck "Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules" (2007) 13 L and Bus Rev of the Americas 885 at 912.

<sup>18</sup> Fracassi, above n 9, at 220.

<sup>19</sup> Sometimes the State's offer to arbitrate may be found in national legislation: see Gus Van Harten *Investment Treaty Arbitration and Public Law* (Oxford University Press, Oxford, 2007) at 24.

<sup>20</sup> Van Harten says that the investor's consent "has no meaning in the absence of the original consent of the state" – at 68.

<sup>21</sup> At 127.



foreign investor, rather than consent to arbitrate disputes arising out of a particular contractual relationship.<sup>22</sup>

Secondly, unlike commercial arbitration, ITA engages the regulatory relationship existing between a State and an investor subject to its laws.<sup>23</sup> The relationship between the disputing parties is not a private contractual one. ITA often involves questions of the scope and limits of the host State's regulatory powers, and challenges sovereign actions undertaken by the State.<sup>24</sup>

### *2 ITA is based in international law*

ITA claims are based on obligations owed by States under an international investment agreement (IIA) concluded with other States.<sup>25</sup> This means that the law governing the dispute is international law, which allows the investor to challenge the domestic legislation and regulation of States to a greater extent than in commercial arbitration, as the State is unable to rely on the domestic lawfulness of its actions to excuse breaches of international obligations. This is distinct from commercial arbitration, where the obligations owed between the parties were freely negotiated as part of a contractual relationship.<sup>26</sup>

### *3 Precedent in ITA*

While there exists no strict system of precedent in arbitration, ITA awards are persuasive and as a result may affect parties to a wholly unrelated dispute.<sup>27</sup> Investors and states expect ITA tribunals to follow past arbitral decisions, and those expectations influence the way the case is argued in front of the tribunal.<sup>28</sup> In turn, that influences the tribunal, such that decisions are situated within a framework of past decisions.<sup>29</sup> The development of a system of persuasive awards has caused States to take tribunal decisions into account when drafting and negotiating future IIAs.<sup>30</sup>

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<sup>22</sup> At 24; Schill, above n 1, at 15.

<sup>23</sup> Schill, above n 1, at 14-15.

<sup>24</sup> At 1; Fracassi, above n 9, at 220.

<sup>25</sup> Norbert Horn "Current Use of the UNCITRAL Arbitration Rules in the Context of Investment Arbitration" (2008) 24 Arb Intl 587 at 591.

<sup>26</sup> Schill, above n 1, at 15.

<sup>27</sup> At 18.

<sup>28</sup> At 18-19.

<sup>29</sup> At 19.

<sup>30</sup> At 20-23.

### *C The Transparency Debate*

These distinguishing features of ITA have sparked a debate about the need for greater transparency in ITA.<sup>31</sup>

On the one hand, some scholars argue that ITA is still arbitration, and it should be treated as such.<sup>32</sup> Arbitration belongs to the parties.<sup>33</sup> Transparency is likely to add unwanted costs and delays.<sup>34</sup> ITA should not be modelled after a judicial system – it should be left to evolve according to the needs of its users.<sup>35</sup> Without confidentiality, arbitration might lose its appeal as an alternate form of dispute resolution.<sup>36</sup>

Furthermore, confidentiality is an important aspect of arbitration. It allows business and government secrets to be safeguarded.<sup>37</sup> It de-politicises the dispute, and might reduce the tensions between the parties, making settlement easier.<sup>38</sup>

On the other hand, it is argued that ITA needs to be more transparent in order to achieve greater representation of the public interest, public acceptance of ITA, and to aid the development of a coherent body of ITA jurisprudence.

#### *1 Representation of the Public Interest*

The most-cited reason for transparency in ITA is that ITA implicates the public interest in ways which are not present within international commercial arbitration.<sup>39</sup> Past ITA claims have involved disputes arising from bans on export of hazardous wastes,<sup>40</sup> the creation of

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<sup>31</sup> Alessandra Asteriti and Christian J Tams “Transparency and Representation of the Public Interest in Investment Treaty Arbitration” in in Stephan W Schill (ed) *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford, 2010) 787 at 788.

<sup>32</sup> See for example Dussan Laverde, above n 6; Sabater, above n 6.

<sup>33</sup> Dussan Laverde, above n 6, at 107; Sabater, above n 6, at 50.

<sup>34</sup> Dussan Laverde, above n 6, at 122.

<sup>35</sup> Nana Japaridze “Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration” (2008) 36 *Hofstra L Rev* 1415 at 1444.

<sup>36</sup> Dussan Laverde, above n 6, at 113-114.

<sup>37</sup> At 114.

<sup>38</sup> At 114; *Bewater Gauff (Tanzania) Ltd v United Republic of Tanzania (Procedural Order Number 3)* ICSID ARB/05/22, 29 September 2006. at [136].

<sup>39</sup> Organisation for Economic Co-operation and Development, above n 9, at [1]; Fracassi, above n 9; “Confidentiality and NAFTA Chapter 11 Arbitrations” (2001) 2 *Chi J Intl L* 213; Tuck, above n 17, at 912.

<sup>40</sup> *S.D. Myers, Inc v Government of Canada (Merits)* (2000) 40 *ILM* 1408.

an ecological park,<sup>41</sup> Argentina's management of an economic crisis,<sup>42</sup> mining within Native American reserve land,<sup>43</sup> and provision of water to major cities.<sup>44</sup> All of these disputes implicated third-party rights, including human and cultural rights.<sup>45</sup>

Transparency protects democratic values by ensuring that those who are affected by an ITA award are informed about that award.<sup>46</sup> Transparency initiatives give the public an opportunity to participate in ITA and ensure that the adverse impact of any award on third parties is known by the tribunal.

## 2 *Legitimacy of ITA*

A second rationale for transparency in ITA is that it would diffuse criticism of ITA as secretive and un-democratic.<sup>47</sup> Given the public interests involved in ITA, there is an expectation that the public be able to access information about ITA. This is particularly so given the near-universal principle of open justice in domestic courts.<sup>48</sup> The perceived secrecy of arbitral tribunals has prompted attacks on the democratic legitimacy of ITA.<sup>49</sup> Transparency is accepted as an important aspect of regaining public acceptance of ITA.<sup>50</sup>

## 3 *Development of ITA Jurisprudence*

Greater transparency of ITA awards would allow a more coherent ITA jurisprudence to develop. This would increase the predictability and consistency of ITA.<sup>51</sup>

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<sup>41</sup> *Metalclad Corporation v United Mexican States (Merits)* (2000) 40 ILM 36.

<sup>42</sup> See the discussion in Benedict Kingsbury and Stephan Schill "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law" (IILJ Working Paper 2009/6, Global Administrative Law Series, 19 August 2009) at 6.

<sup>43</sup> *Glamis Gold Ltd v The United States of America (Award)* Michael Young, David Caron, Kenneth Hubbard 14 May 2009

<sup>44</sup> *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic (Decision on Liability)* ICSID ARB/03/19, 30 July 2010

<sup>45</sup> See also the comments of the Special Representative of the Secretary-General at UNCITRAL Working Group II *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-Fourth Session A/CN.9/717* (2011) at [15].

<sup>46</sup> Dussan Laverde, above n 6, at 126.

<sup>47</sup> Schill, above n 1, at 6.

<sup>48</sup> Organisation for Economic Co-operation and Development, above n 9, at [13].

<sup>49</sup> See for example Anthony de Palma "NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say" (*The New York Times*, 11 March 2001).

<sup>50</sup> J Anthony Van Duzer "Enhancing Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation" (2007) 52 McGill LJ 681 at 686.

<sup>51</sup> Organisation for Economic Co-operation and Development, above n 9, at [42].

Most importantly, greater transparency would allow equal access for all parties to past ITA awards. Top international firms build up private libraries of past awards which they then draw upon when faced with similar issues in future disputes. Some parties, particularly developing States, cannot afford representation by such firms.<sup>52</sup> This means they have limited access to prior ITA decisions. Making those decisions publicly available would go some way to addressing that inequality.

#### ***D Movements towards Transparency***

In response to this debate, there has been a marked move towards transparency in ITA.

Increasingly, investment treaties themselves include more detailed provisions on transparency in ITA.<sup>53</sup> Notably, section 2102 (b) (3) of the United States Trade Act of 2002 provides that, in negotiating treaties, the administration must: “ensur[e] the fullest measure of transparency in the dispute settlement mechanism [...]”.<sup>54</sup>

##### (a) NAFTA

The development of transparency has been particularly notable within Chapter 11 of NAFTA.<sup>55</sup>

There are minimal transparency provisions within NAFTA Chapter 11. Article 1126 (13) requires that a public register of arbitration claims be maintained. In awards against Canada or the United States, but not against Mexico, either party may make the award public.<sup>56</sup> Other than that, all procedural measures are determined by reference to the applicable arbitral rules.

NAFTA tribunals have readily found space for transparency measures within those procedural rules. In the first Chapter 11 case brought against the United States, in 2001,

<sup>52</sup> Tienhaara, above n 1, at 612.

<sup>53</sup> Euler, above n 10, at 143; James Harrison “Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration” University of Edinburgh Working Paper Series No 2011/01 at 8; Organisation for Economic Co-operation and Development, above n 9, at [18].

<sup>54</sup> Trade Act of 2002 19 USC §2102.

<sup>55</sup> North American Free Trade Agreement, United States-Canada-Mexico 32 ILM 605 (signed 17 December 1992, entered into force 1 January 1994) [NAFTA]

<sup>56</sup> Frederico Ortino “External Transparency of Investment Awards” (paper presented to Inaugural Conference of the Society of International Economic Law, Geneva, July 2008) at 697; NAFTA annex 1137.4.

the tribunal considered the United States government's obligations under the Freedom of Information Act.<sup>57</sup> The tribunal concluded that there was no general obligation of confidentiality in NAFTA, and thus the relevant documents could be released.<sup>58</sup>

This interpretation of NAFTA Chapter 11 was confirmed in an Interpretative Note from the Free Trade Commission.<sup>59</sup> The Interpretative Note instructed each of the NAFTA Parties to make publicly available all documents submitted to, or issued by, a Chapter 11 tribunal.<sup>60</sup> Following this Note, the public has had substantial access to information and documents related to Chapter 11 cases.<sup>61</sup>

Subsequently, a number of Chapter 11 tribunals allowed amici curiae submissions from non-disputing parties.<sup>62</sup> In these cases, the tribunal considered that it was within the scope of art 15(1) of the UNCITRAL Rules (which allows the tribunal to conduct the arbitration in such manner as it considers appropriate)<sup>63</sup> to receive submissions from third-parties.<sup>64</sup>

The Free Trade Commission then made a Statement in October 2003 confirming that no provision of NAFTA limits a tribunal's discretion to receive submissions from a non-disputing party, and sets out guidelines for procedures to be followed by prospective third-parties.<sup>65</sup>

A number of NAFTA arbitrations have also been held in public. The hearings in *Methanex v United States*, *UPS v Canada*, and in *Canfor v United States of America* were open to the public and broadcast live.<sup>66</sup>

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<sup>57</sup> Freedom of Information Act 5 USC; *Loewen Group Inc and Raymond Loewen v United States of America (Award)* (2003) 42 ILM 811 [*Loewen*].

<sup>58</sup> *Loewen*.

<sup>59</sup> NAFTA Free Trade Commission *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001).

<sup>60</sup> *Ibid*.

<sup>61</sup> Van Duzer, above n 50, at 700.

<sup>62</sup> *Methanex Corporation v United States (Final Award on Jurisdiction and Merits)* (2005) 44 ILM 1345; *United Parcel Service of America Inc v Canada (Award)* (2007) IIC 306.

<sup>63</sup> United Nations Commission on International Trade *1976 UNCITRAL Arbitration Rules* GA Res 31/98 (1976) [1976 UNCITRAL Rules].

<sup>64</sup> *United Parcel Services of America v Canada*, above n 62, at [70].

<sup>65</sup> NAFTA Free Trade Commission *Statement of the Free Trade Commission on non-disputing party participation* (7 October 2003).

<sup>66</sup> Organisation for Economic Co-operation and Development, above n 9, at [29], [34], [35].

## (b) ICSID

ICSID reformed its Rules in 2006 to ensure that ICSID arbitrations were more transparent.<sup>67</sup> The new Rules now allow the tribunal to open hearings to the public.<sup>68</sup> Rule 37 allows the tribunal to accept written submissions from third parties, after consulting with both parties. Rule 48 mandates early publication of awards. The ICSID Secretariat registers all cases, including the name of the parties, the date of registration and a short description of the dispute.<sup>69</sup>

***E Transparency's Discontents***

It is not universally accepted that ITA should be transparent.

Some argue that the control an arbitration-as-contract framework gives the parties in ITA is one of its strengths. Nana Japaridze, for example, argues that it is important that arbitration remain distinct from national court systems, in order to retain its appeal as an alternative to courts.<sup>70</sup> It is feared that the imposition of mandatory rules will negate the viability of arbitration as an alternative to courts, and push investors towards other, even less transparent options, such as mediation.<sup>71</sup>

Furthermore, it might be questioned whether transparency will achieve its aims. Democratic accountability requires more than openness.<sup>72</sup> The success or not of transparency in ITA will ultimately be measured by arbitral practice.<sup>73</sup> Greater openness will only lead to greater representation of the public interest if the public do *in fact* take an interest in ITA, and ITA tribunals genuinely take the views of the public into account. As for the development of a coherent jurisprudence, publication of awards in the cases of *CME v Czech Republic* and *Lauder v Czech Republic* did not prevent the tribunals reaching opposite conclusions on the same facts.<sup>74</sup>

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<sup>67</sup> See ICSID Rules of Procedure for Arbitration Proceedings, as amended 2006 [ICSID Arbitration Rules].

<sup>68</sup> Rule 32.

<sup>69</sup> Organisation for Economic Co-operation and Development, above n 9, at [5].

<sup>70</sup> Japaridze, above n 35, at 1423.

<sup>71</sup> Dussan Laverde, above n 6, at 107; Munir Maniuzzaman "A Rethink of Investor-State Dispute Settlement" 30 May 2013 Kluwer Arbitration Blog <[www.kluwerarbitrationblog.com](http://www.kluwerarbitrationblog.com)>.

<sup>72</sup> Thomas N Hale and Anne-Marie Slaughter "Transparency: Possibilities and Limitations" (2006) 30 Fletcher F World Aff 153 at 153; Thomas N Hale "Transparency, Accountability, and Global Governance" (2008) 14 Global Governance 73.

<sup>73</sup> Tuck, above n 17, at 901.

Ultimately, transparency is one step towards establishing democratic legitimacy in ITA. It should not be considered a panacea.

## *II Theorising Investment Treaty Arbitration*

The increasing recognition of the importance of transparency in ITA is a significant step away from contract-based conceptions of arbitration where the parties are totally in control of arbitral procedure. The imposition of mandatory transparency measures is contrary to a consent-based theory of arbitration. This section will explore a number of alternate theories of arbitration which have been put forward, and examine whether those theories might explain the development of mandatory transparency standards. It will begin by setting out the contract-based theory of arbitration, before discussing ITA as a form of public law regulatory review; ITA as global administrative law; and ITA as global administrative law.

### *A Arbitration as a Creature of Contract*

The classical conception of arbitration is as a creature of contract. Party autonomy is of primary importance.<sup>75</sup> The tribunal has authority because the parties have agreed to be bound by an award made by the tribunal.<sup>76</sup> The parties are free to agree upon the arbitral procedure, and rules of procedure have force because of the parties' agreement to be bound by them.<sup>77</sup> Accordingly, transparency could not be imposed unless the parties consented to it.

In ITA, there is no contract between the parties. It is "arbitration without privity".<sup>78</sup> Rather, consent to arbitration is found in the combination of the offer to arbitration made in the IIA signed between States and the investor's acceptance of that offer. The "contract" which governs the arbitration is in fact a treaty between sovereign entities.

Gus Van Harten argues that a private party's consent to arbitration should not be conflated with a State's agreement to arbitrate in a BIT. Commercial arbitration

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<sup>74</sup> *CME Czech Republic BV v The Czech Republic (Award)* (2002) 9 ICSID Reports 121; *Lauder v The Czech Republic (Award)* (2002) 9 ICSID Reports 66.

<sup>75</sup> Gary B Born *International Commercial Arbitration* (3<sup>rd</sup> edition, Kluwer Law International, The Netherlands, 2009) at 185.

<sup>76</sup> At 185; Sabater, above n 6, at 50; Van Harten, above n 19, at 59.

<sup>77</sup> Born, above n 75, at 1748.

<sup>78</sup> Jan Paulsson "Arbitration Without Privity" (1995) 10 ICSID Review 232.

agreements are entered into by private parties acting as such, or by a State acting in a private rather than sovereign capacity.<sup>79</sup> States concluding BITs do so in their sovereign capacity. Furthermore, State consent to ITA is anomalous to contractual consent to arbitration: it will apply to all disputes arising under the IIA, rather than a specific dispute or disputes arising from a specific relationship.<sup>80</sup>

A contractual conception of ITA fails to consider the fact that no contract exists between the parties as such, and accordingly there has been little opportunity to negotiate the specifics of procedure.

### ***B ITA as Public Law Adjudication***

Gus Van Harten proposes that ITA is closer to regulatory review than it is to contract-based commercial arbitration. Accordingly, he argues that principles of public law adjudication – such as openness – should be incorporated into ITA.<sup>81</sup>

First, Van Harten notes that the jurisdiction of an ITA tribunal originates in a treaty: an instrument of public, rather than private, law.<sup>82</sup>

Second, like public law forms of dispute resolution, ITA has a one-sided dynamic: States are always liable, and only investors can bring a claim.<sup>83</sup>

The nature of the relationship between the parties to an ITA dispute is distinct from that existing in commercial arbitration. The State and the investor are not juridical equals; rather, ITA engages the regulatory relationship existing between State and subject.<sup>84</sup> ITA disputes almost always occur when the regulatory actions of the host State impact negatively on the operation of a foreign investor. The investor then seeks to prevent that exercise of regulatory power, by bringing a claim that the State has breached its obligations under a relevant IIA. ITA imposes restraints on the State's exercise of its regulatory power vis-à-vis investors, according to the obligations found in the IIA.<sup>85</sup>

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<sup>79</sup> Gus Van Harten and Martin Loughlin “Investment Treaty Arbitration as a Species of Global Administrative Law” (2006) 17 EJIL 121 at 142.

<sup>80</sup> Van Harten, above n 19.

<sup>81</sup> Ibid.

<sup>82</sup> At 128

<sup>83</sup> At 124.

<sup>84</sup> At 45, 48.

<sup>85</sup> At 65; Schill, above n 1, at 17.



Van Harten questions whether it is appropriate for a private dispute resolution system to address these disputes. Privately appointed arbitrators review the sovereign acts of States. There is no requirement to show deference towards the decisions of the democratically elected legislature, as is usually required by domestic courts acting within a constitutional framework.<sup>86</sup> The State cannot argue that it has acted within the law: ITA engages the international principle of state responsibility.<sup>87</sup> Arbitrators can award damages against the State without regard to the usual limitations on public law damages.<sup>88</sup> The award is then enforceable internationally through the ICSID Convention or the New York Convention.<sup>89</sup>

Van Harten argues that, in recognition of the regulatory nature of investment disputes, ITA should draw on principles of public law adjudication. Thus, procedural principles broadly recognised in public law review – such as transparency – would be incorporated into ITA.<sup>90</sup> Tribunals would be expected to be aware of the broader regulatory concerns implicated in ITA.<sup>91</sup> It might also make room for tribunals to show some deference to States in difficult cases.<sup>92</sup>

One problem with conceptualising ITA as an extension of the administrative law system of States is that ITA was designed to avoid domestic court procedures.<sup>93</sup> Arguing that ITA tribunals should look more like domestic courts ignores the desire of States to avoid the court system in entering into arbitration clauses in their IIAs.

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<sup>86</sup> Van Harten, above n 19, at 4, 106.

<sup>87</sup> At 67.

<sup>88</sup> At 4, 102-105

<sup>89</sup> At 5; Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 UNTS 159 (opened for signature 18 March 1965, entered into force 14 October 1966), art 48(5) [ICSID Convention]; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 330 UNTA 38 (signed 10 June 1958, entered into force 7 June 1959).

<sup>90</sup> See Van Harten Chapter 7; Giacinto della Cananea “Minimum Standards of Procedural Justice in Administrative Adjudication” in Stephan W Schill (ed) *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford, 2010) 39; Chester Brown “Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law” in Stephan W Schill (ed) *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford, 2010) 659; Asteriti and Tams, above n 31.

<sup>91</sup> Van Harten, above n 19, at 144.

<sup>92</sup> Ibid.

<sup>93</sup> Jan Paulsson “International Arbitration is Not Arbitration” (2009) 6 TDM 1.

The purpose of creating arbitration as an alternative to domestic courts was to provide a neutral and independent forum for the resolution of disputes with States.<sup>94</sup> This aim is not incompatible with addressing the concerns raised by authors such as Van Harten who believe that ITA as private arbitration strays too far from general principles of regulatory review. Thus, the fact that ITA was envisaged as an alternative to courts does not prevent the incorporation of regulatory review principles into ITA.

Thinking of the parallels between ITA and regulatory review helps make clear some of the concerns that arise from applying a private model of dispute resolution to investment disputes. One of these concerns is the lack of transparency in ITA. It is possible, therefore, that international efforts to make ITA more transparent are guided by the recognition that ITA is a form of regulatory review.

### *C ITA as a form of Global Administrative Law*

Some legal scholars have looked beyond national regulatory review structures to the growing framework of international regulation. This global regulation has given rise to a study of “global administrative law” (GAL): the study of the systems and structures in place to ensure the accountability of global regulatory bodies.<sup>95</sup>

Gus Van Harten and Marin Loughlin argue that ITA is “the clearest form of global administrative law”.<sup>96</sup> This paper will now explore the concept of GAL, and ITA’s place within GAL.

#### *1 A Global System of Administration*

Underlying GAL is an increase in reach and forms of international regulation.<sup>97</sup> Global regulators are coming together in international institutions to set standards that are then

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<sup>94</sup> At 2-3

<sup>95</sup> Benedict Kingsbury, Nico Krisch, Richard B Stewart and Jonathan B Wiener “Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law” (2005) 68 *Law & Contemp Probs* 1; Benedict Kingsbury, Nico Krisch and Richard B Stewart “The Emergence of Global Administrative Law” (2005) 68 *Law & Contemp Probs* 15.

<sup>96</sup> Van Harten and Loughlin, above n 79.

<sup>97</sup> Benedict Kingsbury, Nico Krisch, Richard B Stewart and Jonathan B Wiener “Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law” (2005) 68 *Law & Contemp Probs* 1 at 16.

implemented within domestic law.<sup>98</sup> These standards are often addressed to individuals or private entities, rather than to States.<sup>99</sup>

International regulation now comes in many forms, such as treaty organisations like the World Trade Organisation (WTO); international institutions like the World Bank; informal international regulatory networks such as the Basel Committee on Banking Supervision; and networks of national bodies such as the International Organisation for Standardisation (ISO). All of these bodies are exercising functions that, if they existed on a domestic level, would be recognised as administrative.<sup>100</sup>

GAL thus operates between a range of international entities: States, non-governmental organisations, inter-state agencies and multinational corporations.<sup>101</sup> Not all of these entities derive their legitimacy through the consent of States expressed in international instruments. This is one source of concern about the legitimacy of global regulation. Another is that global regulation does not operate like traditional international law. Traditional international legal instruments leave States free to choose how to implement the standards set out therein into domestic law. When specific regulation is developed at an international level, to be incorporated wholesale into domestic law, States have no room to opt out of the application of that standard if it does not enjoy domestic democratic support.<sup>102</sup>

This has led to criticism of these regulatory bodies based on their lack of legitimacy and accountability.<sup>103</sup> GAL aims to address these concerns. It identifies the emergence of administrative law-type mechanisms to combat the democratic deficit in these organisations,<sup>104</sup> and to avoid these often powerful organisations becoming a “runaway and shadowy technocracy”.<sup>105</sup>

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<sup>98</sup> Nico Krisch and Benedict Kingsbury “Introduction: Global Governance and Global Administrative Law in the International Legal Order” (2006) 17 EJIL 1at 11.

<sup>99</sup> At 11.

<sup>100</sup> At 3.

<sup>101</sup> Andrew D Mitchell and John Farnik “Global Administrative Law: Can It Bring Global Governance to Account?” (2009) 37 Fed L Rev 237 at 237.

<sup>102</sup> Krisch and Kingsbury, above n 98, at 3.

<sup>103</sup> Benedict Kingsbury “The Administrative Law Frontier in Global Governance” (2005) 99 ASIL PROC 143 at 153.

<sup>104</sup> At 245.

<sup>105</sup> At 244.

## 2 *Transparency in GAL*

Transparency is often identified as an important principle of GAL.<sup>106</sup> Transparency is seen as an important check on the exercise of arbitrary power.<sup>107</sup> It allows the effective exercise of participation rights and rights of review, and encourages accountability by allowing scrutiny of the decision-making process.<sup>108</sup>

Thus, the push for transparency in ITA might be sourced from recognition that ITA is a form of GAL.

## 3 *ITA as a form of GAL*

The challenges facing ITA are similar to those facing the global regulatory sphere which GAL seeks to address.<sup>109</sup>

ITA can be seen as a form of GAL because it reviews the regulatory actions of States for consistency with obligations owed under investment treaties.<sup>110</sup> ITA awards increasingly place procedural as well as substantive limitations on domestic regulation, such that ITA awards define for many States proper standards of good governance.<sup>111</sup> To the extent that it places limits on domestic regulation, it fits into the global system of administration identified by GAL.

Conceptualising ITA as GAL, rather than simply domestic regulatory review, takes into account the international element of the dispute. This might provide guidance as to the sort of measures which should be put in place to address the legitimacy challenges to ITA. If the international community were thinking of ITA as GAL, we could expect that the discussion around what reforms to make – and why – would have parallels with GAL literature.

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<sup>106</sup> Susan Marks “Naming Global Administrative Law” (2005) 37 NYUJ Intl L & Pol 995 at 998; Kingsbury, above n 103, at 143; Kingsbury, Krisch and Stewart, above n 95, at 38.

<sup>107</sup> Marks, above n 106, at 998.

<sup>108</sup> Kingsbury, Krisch and Stewart, above n 95, at 38.

<sup>109</sup> Kingsbury and Schill, above n 42, at 40.

<sup>110</sup> At 1.

<sup>111</sup> Kingsbury, Krisch and Stewart, above n 95, at 2, 36.

#### 4 *GAL as Law*

The core principles recognised as emerging within GAL include fair and legal decision-making; access to review mechanisms; proportionality and reasonableness; legitimate expectations; and procedural participation and transparency.<sup>112</sup>

It is necessary to locate a source of authority for these emerging principles. GAL draws on relevant treaties and rules of customary international law, the decisions of intergovernmental organisations, and the practices of domestic and international regulatory forums.<sup>113</sup> It is possible that these principles might gain authority as general principles of international law if adopted by a sufficient number of institutions.

A detailed and coherent approach of GAL as law has yet to appear. No definitive body of GAL rules and principles has been formulated and agreed upon.<sup>114</sup> While scholars such as Dyzenhaus and Kingsbury have made good inroads into conceptualising GAL as a system of law,<sup>115</sup> no agreed-upon theory of GAL has yet emerged.

GAL is very much an emerging field of study, and this lack of coherence might be expected as a result. However, this poses serious challenges for the use of GAL as a framework for reform in ITA. It is likely to prevent GAL from gaining orthodoxy as a source of principles among international law-makers.

#### ***D ITA as a species of public international law adjudication***

Rather than relying on the nascent study of GAL to explain the nature of ITA, it is possible to locate ITA within more familiar fields of international law.

The source of legal authority of both the agreement to arbitrate and the obligations owed to investors by States is a treaty – an instrument of public international law. Thus, ITA can be located within international law. This presents two challenges: first, how can investors, as non-State actors, fit within an international law paradigm? Second, what insight does conceptualising ITA within international law provide, and does it give rise to a source of authority for transparency obligations?

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<sup>112</sup> Kingsbury, above n 103, at 145.

<sup>113</sup> Kingsbury, above n 103, at 146; Kingsbury, Krisch and Stewart, above n 95, at 29.

<sup>114</sup> Kingsbury, Krisch and Stewart, above n 95, at 31.

<sup>115</sup> David Dyzenhaus “Accountability and the Concept of (Global) Administrative Law” (IILJ Working Paper 2008/7, Global Administrative Law Series, finalised 32 September 2008); Benedict Kingsbury “The Concept of ‘Law’ in Global Administrative Law” (2009) 20 EJIL 23.

### 1 *Investors as Actors in Public International Law*

Although the source of legal authority for ITA is an investment treaty signed by States, the arbitration itself occurs between a State and a private investor.

There has long been debate over whether investors can be considered actors in international law.<sup>116</sup> It is possible that private investors gain some limited form of international personality when States, through mutual consent, grant it to them.<sup>117</sup>

Even if investors are not recognised as international legal persons, States may confer rights on private parties through international legal instruments,<sup>118</sup> including the ability to enforce those rights.<sup>119</sup> This is found in international human rights regimes such as the European Convention on Human Rights, which not only confers rights upon individuals as against States but also gives those individuals a procedural mechanism through which those rights can be enforced directly against States.<sup>120</sup> This is in many ways analogous to the position of investors under BITs.

Accordingly, the fact that ITA occurs between a State and a non-State is not a barrier to it being a form of international law adjudication.

### 2 *Implications*

Thinking of ITA as a form of international arbitration changes the basis of arbitral authority. Arbitral authority is no longer rooted in the consent of the parties to the

<sup>116</sup> Patrick Dumberry and Érik Labelle-Eastaugh “Non-State Actors in International Investment Law: the Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration” in Jean d’Aspremont *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, Oxon, 2011) 360 at 362; Douglas, above n 7, at 182.

<sup>117</sup> W C Jenks “Multinational Entities in the Law of Nations” in O J Lissitzyn, L Henkin and W G Friedmann (eds) *Transnational Law in a Changing Society: Essays in Honor of Philip C Jessup* (New York, Columbia University Press, 1972) at 74: “The law of nations permits the creation of any new legal entity which the needs of international society require, provided the will to create it is clearly expressed and what is created is tangible and workable”; Dumberry and Labelle-Eastaugh, above n 116, at 363.

<sup>118</sup> Douglas, above n 7, at 182; *Jurisdiction of the Courts of Danzig (Advisory Opinion)* [1928] PCIJ (series B) No 15 at 17-19; H Lauterpacht *Survey of International Law in Relation to the Work of Codification of the International Law Commission A/CN.4/I/Rev 1* (1949) at 19-20.

<sup>119</sup> Dumberry and Labelle-Eastaugh, above n 116, at 364.

<sup>120</sup> Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953) [ECHR]; see also the discussion in G Burdeau “Nouvelles perspectives pour l’arbitrage dans le contentieux économique intéressant l’Etats” (1995) *Revue de l’arbitrage* 3; Douglas, above n 7, at 186.

dispute. Rather, the consent of the State Parties to the IIA becomes paramount, and ITA is bounded by rules of international law. Those rules might provide a source of authority for transparency obligations.

### 3 *Transparency as a Principle of International Economic Law*

Transparency has been characterised as a fundamental principle of international economic law.<sup>121</sup> It is recognised as a general principle of NAFTA, and transparency provisions are included in many international economic agreements.<sup>122</sup> Some tribunals have also considered transparency to be an element of the fair and equitable treatment standard found in almost all IIAs.<sup>123</sup>

Transparency as a principle of international economic law is addressed to the State as regulator of the investment environment. It requires that States make readily available laws and regulations which might affect foreign investors.<sup>124</sup> The purpose of this transparency is to enable foreign investors to make business and legal decisions with full knowledge of the relevant facts.<sup>125</sup>

It is questionable whether this principle of regulatory transparency can be applied wholesale to ITA, so as to found a principle of adjudicatory transparency. The purpose of

<sup>121</sup> Carl-Sebastian Zoellner “Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law” (2006) 27 *Michigan J Intl L*; Akira Kotera “Regulatory Transparency” in Peter Muchlinski, Frederico Ortion and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (Oxford University Press, Oxford, 2008) 617 at 618; United Nations Conference on Trade and Development *Transparency* UNCTAD/ITA/IIT/2003/4 (2003); Todd Weiler “Good Faith and Regulatory Transparency: The Story of *Metalclad v Mexico*”, in Todd Weiler (ed) *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, London, 2005) at 738.

<sup>122</sup> See for example NAFTA, above n 55, art 102, art 1801, art 1802, art 1803; TRIPS art 63; General Agreement on Tariffs and Trade 55 UNTS 194 (opened for signature 30 October 1947, entered into force 1 January 1948), art 10; Energy Charter Treaty 1080 UNTS 95 (opened for signature 17 December 1994, entered into force 16 April 1998), art 20.

<sup>123</sup> See Stephan W Schill “Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law” in Stephan W Schill (ed) *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford, 2010) 151; *Metalclad Corporation v United Mexican States (Merits)* (2000) 40 ILM 36 (although it was overturned by the Supreme Court of British Columbia in *United Mexican States v Metalclad Corporation* 2001 SCBC 667); *Técnicas Medioambientales Tecmed SA v The United Mexican States (Award)* ICSID ARB (AF)/00/2, 29 May 2003; *Técnicas Medioambientales Tecmed SA v The United Mexican States (Award)* ICSID ARB (AF)/00/2, 29 May 2003.

<sup>124</sup> Zoellner, above n 121, at 584.

<sup>125</sup> At 584-585.

regulatory transparency in international economic law – to ensure a predictable investment environment – is distinct from the purposes of transparency in ITA, as discussed above.

It might be argued that, to the extent an ITA award can impact a State’s regulatory policy, ITA should be caught by this principle of regulatory transparency. However, the content of transparency measures would then be determined by the purpose of ensuring a predictable investment environment. This is not the case: transparency in ITA is primarily for the benefit of the general public. Thus an analysis of transparency in ITA as an aspect of regulatory transparency does not fit with the way transparency reforms are being talked about.

#### *4 Transparency as a Principle of International Adjudication*

It is possible to conceptualise ITA tribunals as bodies of international law adjudication, bound by the procedural principles which govern such institutions.<sup>126</sup> ITA tribunals would thus be seen as more similar to the International Court of Justice (ICJ) or the European Court of Human Rights (ECtHR) than to commercial arbitration tribunals. Reform of ITA would be driven by a desire to put in place the appropriate procedural mechanisms to reflect the nature of ITA tribunals as international adjudicatory bodies. That leads to the question of whether it is possible to identify a general procedural law of international adjudication.<sup>127</sup>

Various sources of international procedure can be identified. Of course, there are the constituent instruments of the international courts. Procedural rules may also be derived from customary international law, international judicial and arbitral practice, and general principles of law.<sup>128</sup> Chester Brown argues that a “common law of international adjudication” is emerging, as international courts draw on each other’s procedural practice when exercising their own inherent powers.<sup>129</sup>

The ICJ has identified “principles of procedural law”.<sup>130</sup> It is possible that transparency is one such principle. ICJ hearings are by default public.<sup>131</sup> The judge may decide to hold a

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<sup>126</sup> Brown, above n 90, at 662.

<sup>127</sup> See Chester Brown *A Common Law of International Adjudication* (Oxford University Press, Oxford, 2007).

<sup>128</sup> Brown, above n 90, at 662; Asteriti and Tams, above n 31, at 796.

<sup>129</sup> Brown, above n 127.



closed hearing, or the hearing may be closed on the request of both the parties.<sup>132</sup> However, it is unusual for the Court to hold closed hearings.<sup>133</sup>

Hearings are also public before the International Tribunal for the Law of the Sea (ITLOS),<sup>134</sup> the European Court of Justice,<sup>135</sup> and the ECtHR.<sup>136</sup>

There are, however, a number of international adjudicatory bodies which operate under default rules of confidentiality. This includes WTO dispute settlement and the Permanent Court of Arbitration (PCA).<sup>137</sup> However, recent pushes for more transparency in WTO dispute settlement procedures have led to greater access for NGOs and the public,<sup>138</sup> and the PCA has held public hearings where there is significant public interest in the dispute.<sup>139</sup>

It seems, then, that the importance of public hearings is widely recognised by international law adjudicatory bodies. It seems unlikely that this has the force of law sufficient to mandate that ITA tribunals establish transparent procedures, if they were recognised as international adjudicatory bodies. The content of transparency rules differs

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<sup>130</sup> Shabtai Rosenne *The Law and Practice of the International Court, 1920-2005* (Martinus Nijhoff Publishers, Leiden, 2006).at 1022. Principles of procedural law were referred to by the court at *South West Africa (Ethiopia v South Africa) (Second Phase)* [1966] ICJ Rep 6 at 39.

<sup>131</sup> Statute of the International Court of Justice, art 46.

<sup>132</sup> Ibid.

<sup>133</sup> Rosenne, above n 130, at 1301. Closed hearings have been held On 15 and 16 March in connection with hearings on the composition of the Court in *South West Africa (Ethiopia v South Africa)* [1965] ICJ Rep 3; and in connection with the composition of the Court in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Advisory Opinion)* [1971] ICJ Rep 12.

<sup>134</sup> United Nations Convention on the Law of the Sea 21 ILM 1261 (signed 10 December 1982, entered into force 16 November 1994), annex VI -Statute of the International Tribunal for the Law of the Sea, art 26(2) [ITLOS Statute]; *Rules of the Tribunal* ITLOS/8 (1997), art 74 [ITLOS Rules].

<sup>135</sup> Rules of Procedure of the Court of Justice [2012] OJ L 265/1, art 79, 88 [ECJ Rules].

<sup>136</sup> ECHR art 40

<sup>137</sup> Marrakesh Agreement Establishing the World Trade Organisation 1867 UNTS 154 (signed 15 April 1994, entered into force 1 January 1995), Annex 2 – Understanding on Rules and Procedure governing the Settlement of Disputes, art 4(6), art 17(10); Hague Convention for the Pacific Settlement of International Disputes 205 CTS 233 (signed 29 July 1898, entered into force 4 September 1900).

<sup>138</sup> Euler, above n 10, at 141; see *United States-Import Prohibition of certain Shrimp and Shrimp Products (Complaint by India, Malaysia, Pakistan, Thailand)* WT/DS58/AB/R, 6 November 1998 (Report of the Appellate Body).

<sup>139</sup> *Abyei Arbitration (Sudan v The Sudan People's Liberation Movement/Army) (Award)* (2009) 48 ILM 1258.

from body to body, such that it cannot be said that a general principle of transparency exists among international courts and tribunals.<sup>140</sup>

However, characterising ITA as a form of international adjudication situates it next to these bodies, rather than private commercial arbitration tribunals. The dispute resolution process is seen to have different stakeholders: it is not only the parties to the dispute who are recognised as having an interest in the outcome. As a result, a different framework for procedure emerges. The will of the parties is no longer paramount. This makes space for the imposition of transparency requirements to serve the interests of third parties who might be affected by the dispute.

Having set out a number of possible conceptions of ITA, this paper will now introduce the recently finalised UNCITRAL Rules on Transparency. It will analyse the transparency rules, and the discussions around their development, to examine whether any of the above conceptions of ITA help explain the push for transparency within the UNCITRAL Rules.

### *III The New UNCITRAL Rules on Transparency*

The UNCITRAL Arbitration Rules were not specifically designed to resolve investor-State disputes; rather, they are intended to provide procedural guidance in any arbitration.<sup>141</sup> They are designed to be acceptable in countries with different legal, social and economic systems.<sup>142</sup>

In 2010, a revised version of the UNCITRAL Arbitration Rules was finalised in order to address the changes in arbitral practice that had taken place in the thirty years prior.<sup>143</sup>

When preparing the revised version of the Rules, the issue of transparency in investor-State arbitration became contentious when Canada submitted that the reform should include enhanced transparency measures for ITA.<sup>144</sup> It was joined by two NGOs, the

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<sup>140</sup> See Brown, above n 127.

<sup>141</sup> Tuck, above n 17, at 912.

<sup>142</sup> At 911.

<sup>143</sup> UNCITRAL Working Group II *Report of Working Group II (Arbitration and Conciliation) on the Work of its Forty-Fifth Session* A/CN.9/614 (2006) at [16].

<sup>144</sup> Government of Canada *Settlement of commercial disputes – Revision of the UNCITRAL Arbitration Rules: Observations by the Government of Canada* A/CN.9/662 (2008).

Centre for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD).<sup>145</sup> Canada, CIEL and IISD argued that ITA could be distinguished from commercial arbitration by reason of its public interest implications, and that enhanced transparency for ITA disputes under the UNCITRAL Rules could be easily achieved.

Working Group II (WGII) decided that the question of transparency in ITA should be considered, but after completion of the revision of the Rules.<sup>146</sup> Discussion of transparency in ITA began in June 2010 with the circulation of a questionnaire to States regarding their practice on transparency in ITA.<sup>147</sup>

The decision to reform the UNCITRAL Rules is significant because it closes a loophole that investors might have been exploiting to avoid transparent arbitration. The offer to arbitrate found in most IIAs gives investors the option to choose between arbitration under the ICSID Rules, UNCITRAL Rules and possibly some other option. When the ICSID Rules were reformed in 2006, investors may have elected for arbitration under the UNCITRAL Rules in order to avoid the transparency requirements of ICSID. Although there is little evidence of this,<sup>148</sup> it is possible that investment disputes taken under the UNCITRAL Rules by reason of their enhanced confidentiality would not have reached the public sphere at all, thus skewing known statistics.<sup>149</sup> Given that an estimated 25% of all known ITA is conducted under the UNCITRAL Rules, the UNCITRAL reforms will have a significant effect on arbitration practice.

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<sup>145</sup> Centre for International Environmental Law and the International Institute for Sustainable Development *Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations* (2007).

<sup>146</sup> UNCITRAL Working Group II *Report of Working Group II (Arbitration and Conciliation) on the Work of its Forty-First Session A/CN.9/569* (2004).

<sup>147</sup> UNCITRAL Working Group II *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-Third Session A/CN.9/712* (2010) at [2] [Report of Fifth-Third Session].

<sup>148</sup> According to UNCTAD statistics, in the years since the ICSID reforms, 3-6 times as many known claims have been brought under the ICSID Rules as under the UNCITRAL Rules. See UNCTAD *IIA Issues Note* (June 2013).

<sup>149</sup> One source suggests that in recent years more ITA was commenced under UNCITRAL than under ICSID. See Judith Levine “Navigating the Parallel Universe of Investor-State Arbitrations under the UNCITRAL Rules” in Chester Brown and Kate Miles *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011) 369 at 370.

WGII believed that ensuring greater transparency in ITA was an important response to the increasing challenges to the legitimacy of international investment law and ITA. Increased transparency would enhance the public understanding of the process and its overall credibility.<sup>150</sup> Transparency and inclusiveness were expressions of core United Nations values such as human rights, good governance and the rule of law.<sup>151</sup> Transparency in ITA was understood as only one aspect of the broader notion of transparency in international investment law.<sup>152</sup>

It was generally agreed that ITA could be distinguished from purely private arbitration, where confidentiality was recognised as an essential feature.<sup>153</sup> ITA tribunals might scrutinise the legislative, administrative or judicial activities of a State, with very limited possibility of appeal.<sup>154</sup> ITA might involve consideration of public policy and could lead to large potential monetary liability for governments.<sup>155</sup> The Special Representative of the Secretary-General made a statement that transparency in ITA was essential where human rights, including access to clean water, affirmative action policies and the protection of indigenous peoples' rights, were concerned, in order to ensure that societies were aware of proceedings that might affect the public interest and therefore their own welfare.<sup>156</sup>

The reasons given by WGII for transparency reforms in ITA give clues as to how WGII was thinking about ITA. WGII distinguished ITA from commercial arbitration on the grounds that it implicated core public interests and engaged the tribunal in regulatory review of the State's actions. This mirrors the discussion in Part I above, and matches the arguments of theorists who highlight the regulatory nature of ITA disputes. This indicates that one motivation for transparency reforms in UNCITRAL might be the recognition that ITA is closer to regulatory review than it is to contract-based arbitration.

WGII was, however, keen to protect the consensual nature of arbitration. Delegations were wary of transparency being made a mandatory rule.<sup>157</sup> Yet it was noted that consent

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<sup>150</sup> Report on Fifty-Third Session, above n 147, at [17].

<sup>151</sup> At [18].

<sup>152</sup> At [14].

<sup>153</sup> At [19].

<sup>154</sup> At [23].

<sup>155</sup> At [19].

<sup>156</sup> UNCITRAL Working Group II *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-Fourth Session* A/CN.9/717 (2011) at [15] [Report of Fifty-Fourth Session].

<sup>157</sup> Report of Fifty-Third Session, above n 147, at [21].

to ITA is expressed in a different way than consent to commercial arbitration. It exists on two levels: one between States, and the other between the host State and the investor.<sup>158</sup> The nature of consent to ITA formed an important part of discussions about the way in which the transparency standard would apply.

WGII's transparency reforms were motivated by a desire to recognise the interests of non-parties to the dispute. The reforms were not aimed to benefit the parties to the arbitration, but rather to ensure that ITA serves the broader public interest. This is a further step away from a contractual conception of ITA, under which the only interests to be considered are those of the parties.

The substantive issues to be considered when discussing transparency reforms were publication of arbitration documents, publication of arbitral awards, submissions by third parties, public hearings, possible exceptions, and establishing a repository for the published information.<sup>159</sup>

### ***A Application of the New Transparency Standard***

It was clear that WGII considered it necessary to gain the consent of the State parties to the relevant treaty before any transparency standard would apply in ITA. There was significant debate about how that consent might be expressed.

Debate centred around whether consent to the application of the standard for treaties concluded after the rules on transparency came into force (future treaties) would be opt-in or opt-out; and whether and how the rules on transparency would apply to investment treaties which had been concluded prior to the standard entering into force (existing treaties).

#### *1 Opt-out versus opt-in*

The key issue for the application of the transparency standard to future treaties was the manner in which consent to be bound by the standard would be expressed.<sup>160</sup> Consent to the transparency standard might be presumed by reference to the UNCITRAL Rules in the absence of any express indication to the contrary (the opt-out option); or consent might require an express reference to the transparency standard (the opt-in option).

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<sup>158</sup> At [23].

<sup>159</sup> At [31].

<sup>160</sup> Report of Fifty-Fourth Session, above n 156, at [19].

## (a) Opt-out

Some delegations felt that a presumption that the transparency standard apply would better fulfil the mandate given to WGII to enhance and promote transparency in ITA.<sup>161</sup> The opt-out option was said to be similar to art 1(2) of the 2010 UNCITRAL Rules,<sup>162</sup> which provides that “the parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules [...]”.<sup>163</sup>

## (b) Opt-in

The opt-in mechanism would require the IIA to contain an express reference to the transparency standard. This would avoid any legal uncertainty as to whether the transparency standard applied to a particular arbitration.<sup>164</sup> Furthermore, it was argued that the opt-in mechanism best complied with public international law and practice, insofar as it ensured that States were not subject to any obligations to which they had not consented.<sup>165</sup>

## (c) Compromise

It was agreed that an opt-out standard would apply for future treaties, while an opt-in standard would apply to existing treaties.<sup>166</sup>

This means that for future treaties, the transparency standard would apply if the treaty referred to the UNCITRAL Rules, unless the State Parties agreed otherwise. For existing treaties, the transparency standard would only apply when the State Parties had expressly consented to it.<sup>167</sup>

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<sup>161</sup> Report of Fifty-Third Session, above n 147, at [82].

<sup>162</sup> Report of Fifty-Fourth Session, above n 156, at [20].

<sup>163</sup> United Nations Commission on International Trade *UNCITRAL Arbitration Rules As revised in 2010* GA Res 65/22 (2010), art 1 (2) [2010 UNCITRAL Rules].

<sup>164</sup> Report of Fifty-Third Session, above n 147, at [29].

<sup>165</sup> UNCITRAL Working Group II *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-Sixth Session* A/CN.9/741 (2012) at [25] [Report of Fifty-Sixth Session].

<sup>166</sup> UNCITRAL Working Group II *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-Eighth Session* A/CN.9/765 (2013) at [17] [Report on Fifty-Eighth Session].

<sup>167</sup> Report of Fifty-Sixth Session, above n 165, at [54].

It seems that future treaties must refer to the 2014 version of the UNCITRAL Rules, or not specify the applicable version, in order for the transparency standard to apply. Although the transparency standard specifies that it will apply to all arbitration “initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors”,<sup>168</sup> thus indicating that the standard would apply no matter the version of the UNCITRAL Rules being used, only the 2014 version of the Rules will contain a link to the transparency standard. Furthermore, it was suggested during deliberations that a reference to the 2010 UNCITRAL Rules would be sufficient to indicate that the State parties to the treaties did not intend the transparency standard to apply.<sup>169</sup>

## 2 *Application to Existing Treaties*

By 2010, 2,500 investment treaties were already in force.<sup>170</sup> The question of whether the transparency standard would apply to existing treaties would therefore determine whether it applied to the majority of ITA. Many delegations wanted the transparency standard to apply to these existing treaties, in order to enhance transparency in ITA.<sup>171</sup>

WGII recognised that the UNCITRAL Rules should be interpreted in light of public international law, as they are included in a treaty. Any application of the transparency standard is therefore not possible without the consent of the State Parties to the treaty.<sup>172</sup> Application of the transparency standard to treaties entered into force prior to the completion of the transparency standard could give rise to a legal challenge on the ground of retroactivity.<sup>173</sup>

One possible way to get around that was through interpreting a reference to the UNCITRAL Rules as a “dynamic reference” to a system that develops over time.<sup>174</sup> Thus, applying the transparency standard to ITA under existing treaties would not require retroactive application of the standard, but would rather be fulfilling the intention of the parties that the UNCITRAL Rules as they existed at the time of the arbitration should apply.<sup>175</sup> The key question was determining the intention of the parties in referring to the

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<sup>168</sup> UNCITRAL Rules on Transparency, art 1(1).

<sup>169</sup> Report of Fifty-Sixth Session, above n 165, at [54].

<sup>170</sup> Report of Fifty-Third Session, above n 147, at [85].

<sup>171</sup> At [86].

<sup>172</sup> Report of Fifty-Fourth Session, above n 156, at [38].

<sup>173</sup> At [39].

<sup>174</sup> Report of Fifty-Third Session, above n 147, at [89].

<sup>175</sup> Report of Fifty-Fourth Session, above n 156, at [37].

UNCITRAL Rules. If the treaty provides for the application of updated versions of the UNCITRAL Rules, evolution of those rules had been contemplated at the time of negotiation.<sup>176</sup>

In response, it was argued that it was impossible to tell from a reference to the UNCITRAL Rules whether that included consent to any changes to those rules.<sup>177</sup> The treaty may have been concluded at a time when transparency standards were not contemplated.<sup>178</sup> States should not be put in a position where they would have to reopen negotiations or issue declarations on interpretation on each of their existing treaties to indicate whether or not the rules on transparency would apply.<sup>179</sup>

Ultimately, it was agreed that the transparency standard should not apply to existing treaties unless the parties to that treaty had expressly consented to its application.<sup>180</sup> Under this final compromise, the tribunal would have no discretion to determine that an IIA included a “dynamic reference” to an evolving system of UNCITRAL Rules.<sup>181</sup> The compromise between delegations to WGII ensured that a high standard of transparency would be required by the transparency rules, but it would only apply where the State parties to the treaty had so elected.<sup>182</sup>

Work has commenced on the drafting of a convention which will allow States to express consent to the transparency rules, so that they might apply in ITA under existing treaties.<sup>183</sup> The convention will make the transparency standard applicable to ITA under IIAs between States which are parties to that convention.

### 3 Analysis

While the adoption of the opt-out approach for future treaties means that States must make clear an intention that the transparency rules not apply, this could be done quite simply by referring to the 2010 version of the Rules rather than the 2014 version.

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<sup>176</sup> Report of Fifty-Eighth Session, above n 166, at [25].

<sup>177</sup> Report of Fifty-Sixth Session, above n 165, at [21].

<sup>178</sup> Report of Fifty-Eighth Session, above n 166, at [25].

<sup>179</sup> Report of Fifty-Sixth Session, above n 165, at [44].

<sup>180</sup> Report of Fifty-Eighth Session, above n 166, at [68].

<sup>181</sup> See discussion at [19-32].

<sup>182</sup> At [68].

<sup>183</sup> UNCITRAL Working Group II *Settlement of Commercial Disputes: Applicability of the UNCITRAL Rules on Transparency to the Settlement of Disputes Arising under Existing Investment Treaties* A/CN.9/784 (2013).



Furthermore, the vast body of ITA happens under existing treaties. The transparency standard will not apply to these arbitrations unless all State Parties to the treaty have signed the convention which is currently being drafted, or have otherwise indicated consent to the application of the standard.

The result of these two factors is that the practical effect of the transparency standard might be limited. Given the broad agreement of the State delegations to WGII that transparency in ITA is important, it might be hoped that these States will then incorporate the transparency standard in their future IIA drafting practice, and sign up to the convention. However, if this is not the case, the transparency standard may ultimately apply to only a fraction of ITA conducted under the UNCITRAL Rules. While the drafting of such a standard is in itself an important step in mainstreaming transparency in ITA, the measure of its success will be whether it has a substantial impact on the conduct of ITA tribunals.

WGII's discussion about how the transparency standard would apply to future treaties and existing treaties indicates how WGII was thinking about the nature of ITA. It is not the consent of the disputing parties which was considered paramount, but the consent of the State parties to the BIT.

The importance of State consent to the transparency standard is born out of the fact that the relevant reference to the transparency standard is contained within an IIA. This means that its application is governed by international principles of treaty interpretation, including the primacy of State consent and the rule against retroactive application. WGII clearly locates ITA within an international law framework. The source of authority of ITA tribunals is not an agreement between the disputing parties, but the agreement between States to provide ITA as a dispute resolution mechanism in their investment treaties.

### ***B Conflict between the Transparency Standard and Other Provisions***

It is possible that the provisions of the transparency standard will conflict with other rules governing the arbitration. These rules might be found in the relevant treaty, the applicable arbitration rules, or in national law governing either of the parties to the dispute. WGII discussed which rule would be given priority in case of conflict.

It was agreed that the rules should not supersede a provision in the relevant treaty that required greater levels of transparency.<sup>184</sup> In February 2012, questions were raised as to how to determine whether the treaty provision of the transparency standard required a greater level of transparency.<sup>185</sup> WGII decided that the treaty provision should always prevail if there was a conflict between it and the transparency standard.<sup>186</sup> This is reflected in art 1(7) of the transparency standard.

It was agreed that, in case of a conflict between the transparency standard and the applicable arbitration rules, the transparency standard should prevail.<sup>187</sup>

(a) Conflict with national law

One issue was how national legal requirements to keep certain information confidential would fit with the rules on transparency.<sup>188</sup> Most States are subject to legislation preventing the disclosure of certain kinds of information, particularly information relating to national security<sup>189</sup> or information held by the government relating to individuals.<sup>190</sup>

Possible conflict between national law and the transparency rules is addressed by art 7(2)(c), which provides that, for information of the respondent State, any information that is protected against being made available to the public according to the law of the State is considered confidential. For all other information, any information which is protected against being made available to the public under any law or rules which the tribunal determines to be applicable to the disclosure of such information will be protected information.

This exception ensures that compliance with the transparency standard will not put States or investors in breach of their national legal obligations. However, it also opens up the

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<sup>184</sup> UNCITRAL Working Group II *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-Fifth Session* A/CN.9/736 (2011) at [31] [Report of Fifty-Fifth Session]; UNCITRAL Rules on Transparency, art 1 (7).

<sup>185</sup> Report of Fifty-Sixth Session, above n 165, at [87].

<sup>186</sup> At [89].

<sup>187</sup> At [97]; UNCITRAL Rules on Transparency, art 1(7)

<sup>188</sup> Report of Fifty-Fourth Session, above n 156, at [131].

<sup>189</sup> Official Secrets Act 1989 (UK), Homeland Security Act of 2002 (US); Security of Information Act 2001 (Canada); Crimes Act 1914 (Cth), Part VII; Crimes Act 1961 (NZ), section 78A.

<sup>190</sup> Privacy Act 1993 (NZ); Privacy Act 1988 (Cth); Privacy Act 1982 (Canada); Privacy Act of 1974 (US); Directive 95/46/EC on the Protection of Personal Data with Regard to the Processing of Personal Data and on the Free Movement of Such Data [1995] OJ L281/31.

possibility of States legislating to avoid the transparency standard, or using existing legislation to trigger this exception. This might be particularly problematic where legislation exists to protect the “commercially sensitive” information held by State organs.

The decision that the law of the respondent State should apply to all information provided by that State, such that the State would not be under any obligation to release information that was protected by its own law, was controversial. Some delegations believed that it was necessary in order to reassure States that they would be able to protect national security information.<sup>191</sup> Other delegations were concerned that the provision would be open for abuse, by allowing States to circumvent the transparency standard by legislating against the disclosure of information.<sup>192</sup>

### ***C Departing from the Transparency Standard***

Where the parties have elected to arbitrate under the UNCITRAL Rules, the parties are able to agree to modify the application of those Rules.<sup>193</sup> One issue discussed by WGII was whether the parties to ITA should be similarly free to modify the application of the transparency standard. It was decided that they should not have the ability to alter how the provisions of the transparency standard apply to their dispute.

Article 1(3)(a) of the transparency standard provides that “the disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty”. WGII considered that it would be inappropriate to allow the parties to depart from the transparency standard for two reasons. First, some delegations expressed the view that, because the arbitration was conducted on the basis of an underlying treaty between States, the ability of the disputing parties to depart from the prescribed route set out by that treaty was limited.<sup>194</sup> It was not seen as appropriate to allow the disputing

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<sup>191</sup> UNCITRAL Working Group II *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-Seventh Session* A/CN.9/760 (2012) at [103] [Report on Fifty-Seventh Session].

<sup>192</sup> At [103]; Report on Fifty-Eighth Session, above n 166, at [62].

<sup>193</sup> 2010 UNCITRAL Rules 2010, art 1(1); see also investment arbitration decisions where the application of the procedural rules has been modified: *Canfor Corporation v United States of America (Decision on the Place of Arbitration and Bifurcation of the Proceedings)* Emmanuel Gaillard, Joseph Weiler, Conrad Harper 23 Jan 2004 at 2; *Glamis Gold Ltd v The United States of America (Agreement on Certain Procedural Matters)* Michael Young, David Caron, Kenneth Hubbard 20 January 2004.

<sup>194</sup> Report of Fifty-Fourth Session, above n 156, at [49], [55].

parties to reverse a policy choice made by the State parties to the treaty.<sup>195</sup> Accordingly, the parties should not be able to vary the transparency provisions mandated by the State parties to the treaty.

The second reason against allowing the disputing parties to vary the application of the transparency standard was because the beneficiaries of the transparency provisions are the members of the general public, and not solely the investor and the host State.<sup>196</sup> It would be inappropriate to allow the disputing parties to limit the rights transferred upon the general public by the transparency standard.

### *1 By the Decision of the Tribunal*

A further issue was whether the tribunal might deviate from the transparency standard using its power in art 17(1) of the 2010 UNCITRAL Arbitration Rules to conduct the arbitration in such manner as it considers appropriate.<sup>197</sup> In the interests of ensuring efficient arbitral proceedings, some delegations proposed giving the tribunal the authority to vary practical matters such as time periods.<sup>198</sup> Others suggested that the discretion of the tribunal to depart from the standard should not be limited.<sup>199</sup> In response, it was said that an unlimited discretion to depart from the rules would erode the transparency standard.<sup>200</sup>

It was agreed that some flexibility should be given to the tribunal, and so the tribunal should be given the discretion to adapt the rules in certain circumstances.<sup>201</sup> The provision which ultimately became art 1(3)(b) was drafted accordingly. The provision was not intended to confer any significant power on the tribunal to diverge from the rules.<sup>202</sup>

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<sup>195</sup> Report of Fifty-Fifth Session, above n 184, at [33]; Report of Fifty-Sixth Session, above n 165, at [61].

<sup>196</sup> Report of Fifty-Fifth Session, above n 184, at [33].

<sup>197</sup> Report of Fifty-Sixth Session, above n 165 UNCITRAL Working Group II *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-Sixth Session* A/CN.9/741 (2012) at [66].

<sup>198</sup> At [67].

<sup>199</sup> At [68].

<sup>200</sup> At [68].

<sup>201</sup> At [73].

<sup>202</sup> Report on Fifty-Eighth Session, above n 166, at [35].

## 2 *Analysis*

Whereas a contract-based conception of arbitration would give the parties full freedom to modify the procedural rules applying to the arbitration, WGII decided it was not appropriate to allow the disputing parties to depart from the transparency standard unless the treaty at the heart of the dispute provides otherwise. This ensures that the transparency standard will not be watered down when it is applied in ITA.

WGII's comments that the transparency standard is for the benefit of the general public, and therefore the parties should not be able to alter its application indicate that WGII does not view ITA as being a matter simply between the parties. Rather, non-parties are recognised as having a genuine interest in ITA proceedings, giving rise to some rights under the transparency standard.

The reasoning of WGII on this point emphasises the importance of the IIA at the heart of the dispute. The parties are unable to alter that agreement unless the treaty so allows. This shows that WGII views the international agreement as the key document in ITA, rather than the agreement between the parties. This indicates a shift in thinking away from a contract-based conception of arbitration and towards arbitration as a form of international law adjudication.

## *IV Publication*

Publication of the awards of tribunals has occurred in practice for a long time, and is a core part of many transparency regimes. Following the 2001 Interpretative Note from the FTC, the public has substantial access to information and documents related to Chapter 11 cases.<sup>203</sup> The 2006 revision of the ICSID Rules makes early publication of awards mandatory.<sup>204</sup> However, if both parties do not consent to publication of the award, ICSID only require the publication of excerpts of the legal conclusions of the tribunal.<sup>205</sup>

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<sup>203</sup> Van Duzer, above n 50, at 700. Many of the relevant documents can be found on the websites of Department of Foreign Affairs and International Trade Canada, the U.S. State Department, and Mexico's Secretaria de Economia.

<sup>204</sup> ICSID Arbitration Rules, r 48

<sup>205</sup> Andrew P Tuck "Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules" (2007) 13 L and Bus Rev of the Americas 885 at 900.

Publication was recognised as an important aspect of transparency by WGII.<sup>206</sup> A registry would be established with responsibility for managing the publication of documents related to ITA.<sup>207</sup>

### ***A Publication at the Commencement of Arbitration***

Publication of the existence of the dispute at the initiation of arbitration is an important first step in ensuring that that dispute is conducted in a transparent manner.<sup>208</sup> A debated issue in WGII discussions was what information should be made public at the initiation of arbitration proceedings, and when that information should be disclosed.

There was debate over whether the notice of arbitration should be disclosed immediately upon receipt by the host State, or if it should only be disclosed once the tribunal had been constituted.<sup>209</sup> Some delegations believed that it was important to inform civil society of the commencement of proceedings so as to allow civil society groups to express their views at an early stage, including possibly as to the composition of the tribunal.<sup>210</sup> Others felt that civil society should have no role at this early stage of the proceedings, particularly in determining the membership of the arbitral tribunal.<sup>211</sup> It was also said that publishing the parties' positions at this point would preclude the possibility of settlement before the proceedings began.<sup>212</sup>

Some delegations were concerned that the notice of arbitration would not provide balanced information on the case.<sup>213</sup> Accordingly, the notice of arbitration should only be publicised once the respondent State had an opportunity to present its own position in response to the notice.<sup>214</sup> There was support for the response to the notice of arbitration being published alongside the notice of arbitration.<sup>215</sup>

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<sup>206</sup> Report of Fifty-Third Session, above n 147, at [31].

<sup>207</sup> At [73]; Report of Fifty-Fourth Session, above n 156, at [150]; UNCITRAL Rules on Transparency, art 8.

<sup>208</sup> Report of Fifty-Third Session, above n 147, at [32].

<sup>209</sup> Report of Fifty-Fourth Session, above n 156, at [62].

<sup>210</sup> At [64]; Report of Fifty-Fifth Session, above n 184, at [48].

<sup>211</sup> Report of Fifty-Fourth Session, above n 156, at [63].

<sup>212</sup> At [73]; Report of Fifty-Fifth Session, above n 184, at [49].

<sup>213</sup> Report of Fifty-Third Session, above n 147, at [33].

<sup>214</sup> Report of Fifty-Fourth Session, above n 156, at [63].

<sup>215</sup> Report of Fifty-Fifth Session, above n 184, at [52].

At the October 2011 meeting, it was generally understood that some information should be made public before the constitution of the tribunal, to allow the public to be informed of the commencement of the proceedings.<sup>216</sup> The delegations agreed in February 2012 that, upon receipt of the notice of arbitration, the repository would make available information regarding the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being made.<sup>217</sup> The notice of arbitration would then be released by the tribunal, after the tribunal had been constituted, through the mechanisms of art 3.

### ***B Documents to be Published***

A number of options for publication of documents were put forward. These included: making all documents publicly available;<sup>218</sup> preparing a list of documents to be made public;<sup>219</sup> giving the tribunal the discretion to make some documents public, provided that the parties consented;<sup>220</sup> and providing a list of documents that *could* be made publicly available, and to give the tribunal the discretion to decide which documents to publish in each case.<sup>221</sup>

The first option received strong support at the October 2011 meeting.<sup>222</sup> A draft list of documents to be published was put forward. This list included the notice of arbitration; the pleadings; submissions to the tribunal by a disputing party and any written submissions by any third-party; minutes or transcripts of the hearings of the tribunal; and orders, awards and decisions of the tribunal.<sup>223</sup>

The question whether evidentiary material (such as witness statements, expert reports and exhibits) should be included provoked controversy.<sup>224</sup> Some delegations felt that the exhibits might be too voluminous to publish.<sup>225</sup> One proposal was that the parties prepare a list of exhibits, which would be made public, while the exhibits themselves would not

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<sup>216</sup> At [43].

<sup>217</sup> Report of Fifty-Sixth Session, above n 165, at [104].

<sup>218</sup> Report of Fifty-Fourth Session, above n 156, at [89].

<sup>219</sup> At [83].

<sup>220</sup> At [88].

<sup>221</sup> At [91].

<sup>222</sup> Report of Fifty-Fifth Session, above n 184, at [58].

<sup>223</sup> Report of Fifty-Fourth Session, above n 156, at [83].

<sup>224</sup> Report of Fifty-Fifth Session, above n 184, at [55]; Report of Fifty-Sixth Session, above n 165, at [112].

<sup>225</sup> Report of Fifty-Sixth Session, above n 165, at [112].

be made automatically available.<sup>226</sup> Some delegations felt that it was inappropriate to require extra work of the parties in this way.<sup>227</sup> It was agreed that, if such a list had already been prepared, it should be made publicly available.<sup>228</sup>

At the October 2012 meeting, it was agreed that expert statements and witness reports should not be made available automatically, but that the tribunal would make them available to any party who requested them.<sup>229</sup>

Any documents not otherwise covered by art 3 may be made public by the tribunal after consultation with the parties under art 3(3).<sup>230</sup>

*1 How does this compare to other ITA procedural rules?*

(a) NAFTA

After the 2001 Interpretative Note on transparency, parties to NAFTA arbitration have been obliged to make available all documents submitted to, or issued by, a NAFTA tribunal.<sup>231</sup> In practice, the tribunal will issue an order near the beginning of the arbitration, usually with the consent of the parties, regarding what information and documents relating to the proceedings may be publicly disclosed.<sup>232</sup> This has tended to include the parties' submissions, evidence, communications between the tribunal and the parties, submissions from non-disputing Parties, orders of the tribunal, transcripts of oral proceedings, and awards.<sup>233</sup> Many of the documents are available online, and are accessible through the websites of the US State Department and the Canadian Department of Foreign Affairs and International Trade.

Which documents are made public in NAFTA hearings is a matter of discretion for the tribunal, and in some arbitrations the disclosure of documents has been more limited.<sup>234</sup>

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<sup>226</sup> At [112].

<sup>227</sup> At [112].

<sup>228</sup> Report of Fifty-Seventh Session, above n 191, at [16].

<sup>229</sup> At [20], [22].

<sup>230</sup> UNCITRAL Rules on Transparency, art 3(3)

<sup>231</sup> NAFTA Free Trade Commission *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001) at 2(2).

<sup>232</sup> Van Duzer, above n 50, at 699.

<sup>233</sup> At 700; see *Pope & Talbot v Canada (Amended Procedural Order of Confidentiality No 5)* Lord Deviard 17 September 2002.



The UNCITRAL transparency standard, by specifying that certain documents must be made public, ensures a greater level of transparency than is available under NAFTA.

(b) ICSID

Nothing in the ICSID Rules directly addresses the publication of arbitration documents. The Secretary-General is obliged to publish some information about claims before ICSID, and this information is primarily available on ICSID's website.<sup>235</sup> Nothing in the Rules prevents the parties from publishing their submissions.<sup>236</sup>

The disclosure of arbitration documents under the ICSID Rules relating to the arbitration was considered in detail by the tribunal in *Biwater Gauff v Tanzania*.<sup>237</sup> The tribunal noted that, in the absence of a confidentiality agreement, there was nothing preventing the parties from disclosing documents related to the arbitration. However, it warned of the possible negative repercussions of drawing public and media attention to an on-going arbitration, particularly when that might politicise the dispute.<sup>238</sup> The tribunal issued detailed recommendations for each of the different categories of documents.<sup>239</sup> It recognised that decisions of the tribunal would be published through ICSID and that the parties were free to discuss the case in public, including through publication of their own documents. On the other hand, the tribunal felt that it would be inappropriate for records of the hearings, parties' pleadings, correspondence between the tribunal and the parties, and documents provided by the other party to be disclosed without the agreement of both parties.

The disclosure requirements of the UNCITRAL transparency standard are therefore much higher than the ICSID Rules. Under the transparency standard, there is no question of needing the agreement of the parties before documents may be published: the matters listed in art 3(1) must be made publicly available, subject only to the limited exceptions in art 7.

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<sup>234</sup> Van Duzer, above n 50, at 699-700, *Ethyl Corporation v The Government of Canada* (Procedural Order) Karl-Heinz Bockstiegel, Charles Brower, Marc Lalonde 28 November 1997.

<sup>235</sup> ICSID Administrative and Financial regulations, reg 22

<sup>236</sup> Note F to Arbitration Rule 30 of 1968 [1968]1 ICSID Reports 93

<sup>237</sup> *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (Procedural Order Number 3) ICSID ARB/05/22, 29 September 2006.

<sup>238</sup> At [136]-[142].

<sup>239</sup> At [148]-[161]

### ***C Publication of Awards***

The 2010 UNCITRAL Rules required the consent of all parties before an award could be published.<sup>240</sup> Among the delegations to WGII there was early and broad support for the reversal of this rule, so that publication of all ITA awards would be required.<sup>241</sup> Even if no other documents were published, the publication of awards would be a decisive step towards enhancing the legitimacy of the process and towards establishing an accessible and consistent jurisprudence.<sup>242</sup>

Some delegations argued that the parties should be able to agree to keep the award confidential. This proposal did not receive support. Under art 3 of the transparency rules, all decisions of the tribunal will be made public, subject only to the exceptions to transparency enumerated in art 7.<sup>243</sup>

This is a stronger publication rule than found in the ICSID Rules, which requires the consent of the parties before any award may be published.<sup>244</sup> In the absence of the consent of the parties, ICSID will publish only excerpts of the legal reasoning of the tribunal.<sup>245</sup> That being said, many ICSID awards are freely available online even in the absence of the consent of the parties.<sup>246</sup>

Publication of all awards rendered in ITA under the UNCITRAL Rules will go a considerable way to achieving the aims of transparency in ITA. It will allow universal access to ITA awards, encouraging the development of a coherent, consistent investment jurisprudence. It allows public scrutiny of the reasoning of investment tribunals. Provided that legal reasoning is sound, this may lead to increased public confidence in ITA as a legitimate mechanism of dispute resolution.

### ***D Analysis***

Publication of documents does not further the interests of the parties to the dispute, and nor does it further the interest of the State parties to the treaty. Rather, its purpose is to increase public knowledge of ITA proceedings and to enable public participation. This

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<sup>240</sup> 2010 UNCITRAL Rules, art 34 (5).

<sup>241</sup> Report of the Fifty-Third Session, above n 147, at [62].

<sup>242</sup> At [62].

<sup>243</sup> Report of Fifty-Fourth Session, above n 156, at [96], [100].

<sup>244</sup> ICSID Convention, art 48(5).

<sup>245</sup> ICSID Arbitration Rules, r 48(4)

<sup>246</sup> See for example ITA Law <italaw.com>.

shows that WGII recognises that ITA may have implications for those who are not directly involved in the dispute, and that accordingly third parties should have some rights in ITA. WGII thus seems to be conceptualising ITA in a way that allows for third party rights in the proceedings. This fits with theories of ITA as regulatory review.

### *V Third Party Participation*

Third party participation has been a controversial issue within transparency initiatives in ITA. The possibility of third-party submissions as *amicus curiae* is seen as a valuable mechanism for ensuring the representation of non-party interests which might be affected by the outcome of the arbitration.<sup>247</sup> Allowing *amicus curiae* briefs ensures that affected parties have the opportunity to make the tribunal aware of the possible impacts of its decision.<sup>248</sup> *Amicus curiae* may also bring a particular expertise to the proceedings.<sup>249</sup>

When the applicable procedural rules are silent as to the participation of third parties, tribunals have allowed third party submissions in an exercise of their discretion. In the NAFTA case of *Methanex v United States*, a case governed by the UNCITRAL Rules, the tribunal allowed a number of groups to appear as *amicus curiae* in recognition of the public interest in the arbitration.<sup>250</sup> The Free Trade Commission then confirmed that *amicus curiae* could be admitted in NAFTA arbitration.<sup>251</sup>

An ICSID tribunal also found that third party submissions could be accepted in *Agua Cordobesas SA Suez n Argentine Republic*, a case commenced before the 2006 reform of the ICSID rules.<sup>252</sup>

Third party participation was addressed in the 2006 revision of the ICSID Rules. Rule 37 now allows ICSID tribunals to accept written submissions from non-disputing parties after consultation with the parties. The tribunal must be satisfied that the submission would be helpful in the determination of a factual or legal issue in the dispute; that the non-disputing party has a significant interest in the dispute; and that the *amicus*

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<sup>247</sup> Tuck, above n 17, at 898.

<sup>248</sup> At 898.

<sup>249</sup> Schill, above n 1, at 235.

<sup>250</sup> Gruner, above n 8, at 954.

<sup>251</sup> NAFTA Free Trade Commission *Statement of the Free Trade Commission on non-disputing party participation* (7 October 2003).

<sup>252</sup> Tuck, above n 17.

submission would not disrupt the proceeding or unfairly burden either party.<sup>253</sup> The adoption of rule 37(2) has not led to non-disputing parties becoming regular participants in ITA.<sup>254</sup> There have been a small number of cases where non-disputing parties have filed amicus applications with tribunals based on rule 37(2).<sup>255</sup> From these cases, the trend seems to be that tribunals will grant permission for non-disputing parties to make written submissions.<sup>256</sup>

### *A In the UNCITRAL Rules on Transparency*

There was strong support for allowing submissions by third parties as part of the transparency standard.<sup>257</sup> It was said that third party submissions might be useful in resolving the dispute and in promoting the legitimacy of the arbitral process.

Two options were presented at the October 2011 meeting. Option one would allow third party submissions without going into detail over questions of procedure.<sup>258</sup> Option two more closely reflected the relevant provision in the ICSID Rules, and the NAFTA Free Trade Commission's Statement on non-disputing parties. It contained a detailed procedure on the information to be provided regarding the third party that wishes to make a submission; matters to be considered by the tribunal when determining whether or not to accept that submission; and the form of the submission itself.<sup>259</sup> WGII proceeded on the basis of option two.<sup>260</sup> Some delegations were concerned by the lack of guidance in option one, particularly given that some States might not be familiar with the concept of third party submissions.<sup>261</sup>

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<sup>253</sup> ICSID Arbitration Rules, r 37.

<sup>254</sup> Christina Knahr "The New Rules on Participation of Non-Disputing Parties in ICSID Arbitration: Blessing or Curse?" in Chester Brown and Kate Miles *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011) 319.at 337.

<sup>255</sup> At 323; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania (Procedural Order Number 3)* ICSID ARB/05/22, 29 September 2006; *Piero Foresti, Laura de Carli and ors v South Africa (Procedural Order)* ICSID ARB(AF)/07/1, 25 September 2009.

<sup>256</sup> Christina Knahr "The New Rules on Participation of Non-Disputing Parties in ICSID Arbitration: Blessing or Curse?" in Chester Brown and Kate Miles *Evolution in Investment Treaty Law and Arbitration* (Cambridge, Cambridge University Press, 2011) 319 at 337.

<sup>257</sup> Report of Fifty-Third Session, above n 147, at [46].

<sup>258</sup> Report of Fifty-Fifth Session, above n 184, at [69].

<sup>259</sup> At [70].

<sup>260</sup> At [70].

<sup>261</sup> At [69].

Article 4 of the transparency standard was drafted accordingly. Article 4 requires the tribunal to consult with the parties before accepting third party submissions.<sup>262</sup> It also allows the tribunal to reject third party submissions on the basis that they would disrupt or unduly burden the proceedings, or unfairly prejudice a disputing party.<sup>263</sup> It requires that the parties be given a reasonable opportunity to comment on any third party submissions.<sup>264</sup>

*1 Distinguishing between non-disputing State Parties and other third parties*

At the February 2011 meeting of WGII, a proposal was made to distinguish between submissions made by a non-disputing State Party to the investment treaty at issue in the dispute (non-disputing Parties) and submissions made by other third parties.<sup>265</sup> This was based on two factors: first, that State might have important information on the travaux préparatoires of the treaty, which would help prevent one-sided treaty interpretation;<sup>266</sup> and second, there might be a need to limit the possible involvement of the investor's home State in order to avoid straying into the territory of diplomatic protection.<sup>267</sup>

It was agreed that non-disputing Parties should be able to comment on matters of treaty interpretation, and that the tribunal should be able to invite non-disputing Parties to make a submission on questions of treaty interpretation.<sup>268</sup> If the tribunal did extend such an invitation, no inference would be drawn from the failure of any non-disputing Party to make a submission.<sup>269</sup> If a non-disputing party made such a submission on their own initiative, the submission "shall" be accepted by the tribunal.<sup>270</sup>

This language was the subject of debate within WGII. Some delegations preferred drafting which would allow the tribunal to refuse submissions from non-disputing Parties – the "may accept" option.<sup>271</sup> Those who supported a "shall accept" option argued that: the interpretation of the treaty might affect the rights of the non-disputing Party in future; the non-disputing Party's interventions were likely to be helpful to the tribunal; and that

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<sup>262</sup> UNCITRAL Rules on Transparency, art 4(1).  
<sup>263</sup> Art 4(5).  
<sup>264</sup> Art 4(6).  
<sup>265</sup> Report of Fifty-Third Session, above n 147, at [49].  
<sup>266</sup> At [49].  
<sup>267</sup> At [49].  
<sup>268</sup> UNCITRAL Rules on Transparency, art 5(1)  
<sup>269</sup> Art 5(3).  
<sup>270</sup> Art 5(1).  
<sup>271</sup> Report of Fifty-Fifth Session, above n 184, at [90].

experience showed that a non-disputing Party rarely intervened simply to protect its own investor's interests.<sup>272</sup> In support of the "may accept" option, it was said that requiring the tribunal to accept submissions from the non-disputing Party amounted to facilitating diplomatic protection, and could lead to politicisation of the proceedings.<sup>273</sup> "May" would also provide the tribunal with the discretion to refuse submissions, for example, if made at such a late stage of the proceedings that the submission would be disruptive.<sup>274</sup>

Although the "shall accept" option won out, it was agreed that the tribunal should be able to refuse submissions from a non-disputing Party if allowing them would be overly disruptive to the proceedings. This is reflected in art 5(4).

There was disagreement over whether the non-disputing Party should be limited to commenting on questions of treaty interpretation,<sup>275</sup> or whether non-disputing Parties should be free to comment on questions of law or fact.<sup>276</sup> On the one hand, the tribunal might need information on, for example, the nationality or corporate status of the investor within the home State.<sup>277</sup> On the other, allowing the non-disputing Party to comment on legal or factual matters within the dispute risks the appearance of diplomatic protection.<sup>278</sup>

It was decided that the tribunal should be able to accept submissions from non-disputing Parties on other matters within the scope of the dispute after consultation with the disputing parties.<sup>279</sup> In determining whether to allow such submissions, the tribunal would consider the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.<sup>280</sup>

The fact that special provision has been made for submissions from non-disputing Parties indicates that WGII views ITA as part of a broader international system. WGII is aware that the decisions of ITA tribunals might impact obligations held by other States. ITA is being recognised as a system of international adjudication, where the treaty-based nature

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<sup>272</sup> Report of Fifty-Seventh Session, above n 191, at [60].

<sup>273</sup> At [61].

<sup>274</sup> Report of the Fifty-Eighth Session, above n 166, at [43].

<sup>275</sup> Report of Fifty-Fifth Session, above n 184, at [87].

<sup>276</sup> At [88].

<sup>277</sup> At [88].

<sup>278</sup> At [87].

<sup>279</sup> UNCITRAL Rules on Transparency, art 5(2).

<sup>280</sup> Art 5(2).

of claims means that decisions in one award might affect States in otherwise unrelated disputes. This can be contrasted with commercial arbitration, where arbitration awards do not form a system of jurisprudence and with impact only the parties to that particular dispute. Thus, ITA is seen as more similar to other forms of international adjudication – such as the ICJ and the ECtHR – than to commercial arbitration. Because international courts and tribunals are engaged in treaty interpretation, which might impact States who are not party to the particular dispute, it is common for these courts and tribunals to grant interested States the right to be heard.<sup>281</sup>

## *2 Restrictions on Third Party Participation*

The need to restrict non-party participation in arbitration has been widely recognised.<sup>282</sup> This was reflected in WGII deliberations on how to manage third party rights within the transparency standard.<sup>283</sup> WGII agreed that a detailed procedure should be set out for how tribunals should manage third party submissions, and that the tribunal should be required to consult the parties before deciding whether to accept third party submissions.<sup>284</sup>

That decision is reflected in art 4 of the transparency standard. Article 4(2) requires possible third party submitters to detail: the identity of the third party, including any parent organisation; any connection it might have with any disputing party; the identity of any government, person or organisation that has provided it assistance in preparing the submissions, or substantial assistance in the two years prior; the nature of the interest the third party has in the arbitration; the specific issues it wishes to address in its submissions; and the extent to which the submission would assist the tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties. Article 4(3) requires the submission to be concise; to set out a precise statement of the third party's position on issues; and to only address matters within the scope of the dispute.

## ***B Analysis***

Like publication of arbitral documents, the ability of third parties to participate in ITA serves the interest of the general public rather than the interests of the parties to the

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<sup>281</sup> Statute of the International Court of Justice, art 46; ITLOS Statute art 31(1); ECHR, art 36(1)

<sup>282</sup> See for example Organisation for Economic Co-operation and Development, above n 9, at [45].

<sup>283</sup> Report of Fifty-Third Session, above n 147, at [47].

<sup>284</sup> Report of Fifty-Fourth Session, above n 156, at [125]; also see UNCITRAL Rules on Transparency, art 4(1).

dispute or the State parties to the treaty. The general public is recognised as having a legitimate interest in the arbitration, and accordingly given some rights to participate in the proceedings.

Third party rights to participate are, however, limited. The restrictions on amicus curiae submissions make clear that it is still the disputing parties who are central to the arbitration. Nevertheless, the ability of non-parties to participate represents a significant step away from contract-based models of arbitration, where no one but the parties has any interest or rights in the dispute.

Third party participation under the transparency rules also goes further than is provided for in the rules of most national and international courts.<sup>285</sup> In providing third-party participation rights, WGII is going beyond bringing ITA into line with accepted practice in domestic regulatory review, or in international adjudication. There is more of a concern to provide for some democratic participation in ITA than there is in those judicial institutions.

It is worth noting that the groups which utilise the amicus curiae process are often international NGOs rather than the local groups who will be directly affected by the outcome of the arbitration.<sup>286</sup> It might be questioned whether these international organisations actually fulfil the purposes for which third party participation rights were established, that is, to ensure that anyone who is impacted by ITA has their chance to have a say. On the one hand, the assistance of sophisticated NGOs might help narrow an information and power gap existing between the parties to the dispute and affected non-parties.<sup>287</sup> On the other hand, it might be questioned whether these NGOs – which are

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<sup>285</sup> Asteriti and Tams, above n 31.

<sup>286</sup> In *Methanex Corporation v United States*, above n 62, two local organisations made submissions, as did international NGOs International Institute for Sustainable Development and the Centre for International Environmental Law. In *Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, above n 44, three local organisations made submissions, alongside international organisation the Centre for International Environmental Law. In *UPS v Canada*, above n 62, three local organisations made submissions. In *Piero Foresti, Laura de Carli and ors v South Africa*, two local organisations made submissions, alongside two international organisations. In *Biwater Gauff*, above n 255, three local organisations made submissions, alongside international organisations the Centre for International Environmental Law and the International Institute for Sustainable Development. In *Glamis Gold Ltd v United States*, above n 43, three local organisations made submissions.

<sup>287</sup> Hale, above n 72, at 86.



often based in and staffed by developed countries – will accurately represent the interests of local groups.

## *VI Public Hearings*

Public access to hearings is widely seen as a fundamental aspect of transparent dispute resolution.<sup>288</sup> In recognition of this, WGII agreed that the *in camera* rule in the UNCITRAL Rules should be reversed so that there would be a presumption in favour of hearings being open.<sup>289</sup>

Some delegations said that open hearings were contrary to the very notion of arbitration, being inherently confidential.<sup>290</sup> Furthermore, it was argued that public hearings were likely to lead to undesirable political pressure on the parties, adversely affecting the possibility of settlement of the dispute.<sup>291</sup>

One suggestion to balance the confidential nature of arbitration with the importance of public hearings was to provide the parties with the ability to veto public hearings. This would be in line with Rule 32(2) of the ICSID Rules.<sup>292</sup> This suggestion did not receive support.<sup>293</sup> WGII viewed public hearings as being for the benefit of civil society, rather than the parties, and therefore the parties should not have the right to prevent hearings being held in public.<sup>294</sup>

Some delegations argued that hearings should remain private so as to protect sensitive or confidential information.<sup>295</sup> At the least, mechanisms should be put in place to limit public access to hearings when matters of confidential or sensitive information were

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<sup>288</sup> See Joachim Delaney and Daniel Barstow Magraw “Procedural Transparency” in Peter Muchlinski, Frederico Ortion and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (Oxford University Press, Oxford, 2008) 721 at 774; Nathalie Bernasconi-Osterwalder and Lise Johnson “Transparency in the Dispute Settlement Process: Country Best Practices” *IISD Best Practices Series* (International Institute for Sustainable Development, Winnipeg, February 2011) at 7.

<sup>289</sup> Report of Fifty-Third Session, above n 147, at [54].

<sup>290</sup> At [57].

<sup>291</sup> At [57].

<sup>292</sup> Report of Fifty-Fourth Session, above n 156, at [105].

<sup>293</sup> At [104].

<sup>294</sup> At [104].

<sup>295</sup> Report of Fifty-Third Session, above n 147, at [56].

being discussed.<sup>296</sup> It was agreed that the tribunal should be able to hold parts of the hearings in private when necessary to protect confidential and sensitive information.<sup>297</sup>

A further issue was whether the tribunal should be able to limit public access to hearings for practical and logistical reasons.<sup>298</sup> Article 6(3) gives the tribunal the discretion to hold the hearings in private after consultation with the parties if necessary for logistical reasons.

If the parties wish to keep hearings private, this allows them to argue that private hearings are necessary for some practical reason. Thus art 6(3) provides a possible workaround the public hearings rule, possibly allowing it to be undermined in some cases. However, the rule is still stronger than it is in the ICSID equivalent, which gives the parties a joint veto right over public hearings.

At the October 2011 meeting, it was suggested that, where hearings are held in private, it would be possible to publish transcripts of the hearings with any confidential and sensitive information redacted.<sup>299</sup> It was agreed in October 2012 that transcripts should be added to the list of documents to be made public under art 3.<sup>300</sup>

The reversal of the *in camera* rule represents a significant step away from contractual conceptions of arbitration. The parties are left with very little control over public access to the arbitration hearings. Rather, as is the case for publication of documents and third party participation, WGII recognises that the general public has certain rights in ITA proceedings. This is made explicit when WGII states that public hearings are for the benefit of the general public, and therefore it would be inappropriate for the disputing parties to have any veto right. Again, WGII is concerned about providing a mechanism for public participation in ITA. This concern has parallels within the theory of global administrative law, which aims to ensure the democratic accountability of international regulatory bodies.

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<sup>296</sup> At [56].

<sup>297</sup> Report of Fifty-Fourth Session, above n 156, at [102]; Report of Fifty-Seventh Session, above n 191, at [78]; UNCITRAL Rules on Transparency, art 6(1).

<sup>298</sup> Report of Fifty-Fourth Session, above n 156, at [109]; Report of Fifty-Eighth Session, above n 166, at [57].

<sup>299</sup> Report of Fifty-Fifth Session, above n 184, at [108].

<sup>300</sup> Report of Fifty-Seventh Session, above n 191, at [24].

## *VII Exceptions to Transparency*

Those who advocate for transparency within ITA are aware of the need to balance the public interest with the protection of business and government information.<sup>301</sup>

There was early agreement among delegations to WGII that the transparency standard should include mechanisms for the protection of confidential and sensitive information, to ensure that transparency would not unduly prejudice either party.<sup>302</sup> There was concern that any exceptions provision should not be so wide as to weaken the main rules on transparency.<sup>303</sup>

It was agreed that the tribunal should oversee the process of determining what information was properly considered confidential, rather than leaving the matter to the parties.<sup>304</sup>

There was dispute over whether it was appropriate to include an exception to protect the integrity of the arbitral process. It was argued that this was needed to protect participants from intimidation, and to prevent the politicisation of the proceedings or manipulation by the media.<sup>305</sup> Some delegations thought this exception was too broad and might be open to abuse.<sup>306</sup> Accordingly, the exception should be limited to exceptional circumstances to avoid undermining the transparency standard.<sup>307</sup> Ultimately, an exception was included for when disclosure of information would “jeopardise the integrity of the arbitral process”.<sup>308</sup>

At the October 2012 meeting, one proposal was to include an exception for information “the disclosure of which would impede law enforcement or would be contrary to the public interest or its essential security interests”.<sup>309</sup> There was opposition to this on the basis that the exception was so broad that practically any information could be withheld

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<sup>301</sup> Organisation for Economic Co-operation and Development, above n 9, at [43].

<sup>302</sup> Report of Fifty-Third Session, above n 147, at [41].

<sup>303</sup> At [70].

<sup>304</sup> Report of Fifty-Fifth Session, above n 184, at [129].

<sup>305</sup> Report of Fifty-Fourth Session, above n 156, at [138].

<sup>306</sup> At [137].

<sup>307</sup> Report of Fifty-Fifth Session, above n 184, at at [114-115].

<sup>308</sup> UNCITRAL Rules on Transparency, art 7(6), (7).

<sup>309</sup> Report of Fifty-Seventh Session, above n 191, at [105].

under it.<sup>310</sup> As the result of an overall compromise between the delegations reached at the February 2013 meeting, it was agreed that no State would be required to make information publicly available if it saw that information as key to its security interests.<sup>311</sup> Information the disclosure of which would impede law enforcement was also protected as part of this compromise, but is not subject to the same self-judging standard as security information.<sup>312</sup>

The development of exceptions to the transparency standard shows pragmatism on the part of WGII: if ITA failed to protect the confidential information of the parties, this would drive them to other – likely less transparent – forms of dispute resolution, such as mediation. Protection of confidential information is not inconsistent with any of the alternative conceptions of ITA explored in Part II: national and international courts all make provision for the protection of confidential information.<sup>313</sup>

### *VIII Conclusions*

It is clear that WGII has moved away from a contractual conception of ITA. This is evident at a number of points in their deliberations. First, in opening the discussion on transparency, WGII is careful to distinguish ITA from commercial arbitration on the basis that ITA scrutinises the actions of States and has sufficient implications for the public interest. Second, WGII explains how the nature of consent to ITA is distinct from consent in commercial arbitration. This seems to be out of an abundance of caution to prevent the possibility of anyone thinking that the transparency rules were ever intended to apply to commercial arbitration.

That WGII is distancing itself from a contract-based view of ITA is again clear in the development of art 1(3)(a), which prevents the parties from agreeing to derogate from the transparency standard; and from the fact that the parties have no veto right over the holding of public hearings or the publication of documents. Whereas in contract-based arbitration the parties are free to negotiate the procedural aspects of their arbitration, this is no longer the case for ITA undertaken under the UNCITRAL Rules.

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<sup>310</sup> At [106].

<sup>311</sup> UNCITRAL Rules Art 7(5)

<sup>312</sup> Art 7(2)(d).

<sup>313</sup> See for example High Court Rules, rr 3.12, 3.16 concerning access to documents; r 7.79 that settlement conferences are to be held in chambers; Statute of the ICJ, art 46, and also Rosenne, above n 130, at 1301; ITLOS Statute, art 26(2).

If international conceptualisations of ITA have moved away from a contract-based model, what have they moved towards? From the deliberations of WGII, it seems clear that the international law element of ITA has come to the fore. Thus, the international community appears to see ITA as something more akin to international law adjudication between private individuals and states – as seen in the ECtHR – than to private commercial arbitration.

This international conception of ITA is evident from the paramouncy WGII gave to the consent of States when considering how the transparency rules would apply. It is clear from this discussion that WGII viewed the treaty at the heart of the dispute as the key constitutive instrument of the ITA tribunal. The arbitral procedure must be determined in accordance with that treaty. Any ambiguities would be resolved with reference to international rules of treaty interpretation. This is reinforced by the fact that treaty provisions may override the transparency rules,<sup>314</sup> and that the parties may derogate from the transparency standard to the extent that is allowed by the treaty.<sup>315</sup>

It is thus the terms of the treaty between States which is considered to be the determinative instrument in ITA. This can be contrasted with international commercial arbitration, where the agreement between the parties is key, and the parties are free to agree to alter it as they see fit. Because the treaty is an agreement between States, rather than the parties to the dispute, it cannot be altered by agreement of the parties to the dispute. Some delegations to WGII expressed the view that the investor's acceptance of the offer to arbitrate contained in the treaty could not depart from the terms of the treaty.<sup>316</sup>

This bears more resemblance to international law adjudication than to commercial arbitration. To draw out this parallel, the ICJ, ITLOS and ECtHR will be used as representatives of international adjudicatory bodies. International adjudicatory bodies are bounded by the terms of their constituent treaties.<sup>317</sup> Similarly, WGII's discussion of ITA sees it as bound by the treaty which forms the basis of the dispute. The investment treaty grounds the ITA tribunal's authority to hear and resolve the dispute; it sets out the

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<sup>314</sup> UNCITRAL Rules on Transparency, art 1(7).

<sup>315</sup> Art 1(3)(a).

<sup>316</sup> Report of Fifty-Fourth Session, above n 156, at [49], [55].

<sup>317</sup> ICJ Statute; ITLOS Statute; ECHR respectively.

procedural rules by which the arbitration will be conducted; and it sets out the substantive obligations owed by States to investors.

Thus, both the substance and procedure of ITA disputes can be said to be grounded in an international legal instrument, situating ITA alongside international adjudication rather than alongside commercial arbitration.

This goes some way to explaining the basis for transparency requirements in ITA. As explained above, all international courts (if not all international adjudicatory bodies) have in place transparency requirements. This is in recognition of the public interest in international claims made against States,<sup>318</sup> and also an expected consequence of the judicial character of the proceedings.<sup>319</sup> Thus introducing transparency requirements in ITA brings it into line with other forms of international adjudication.

This is also true to a certain extent as concerns the participation of non-parties. ICJ, ITLOS and the ECtHR all allow submissions from interested but non-disputing States Parties.<sup>320</sup> This parallels art 5 of the transparency rules, which allows States to submit on matters of treaty interpretation as of right. Furthermore, the right of non-State third parties to intervene is recognised by both ITLOS<sup>321</sup> and ECtHR,<sup>322</sup> although not by the ICJ.

It is notable that the institutions discussed above are all courts, rather than arbitral bodies. The PCA, which oversees arbitration between States on questions of international law, adheres as a rule to confidential and private arbitral procedures. It is thus arguable that transparency in these institutions is more a result of their being set up as a court, than their nature as international adjudicatory bodies.

One key difference between the ICJ and ITLOS and ITA is that disputes before the ICJ and ITLOS occur between States. ITA disputes occur between the host State and a

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<sup>318</sup> Howard M Holtzmann and Edda Kristjansdottir *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, Oxford, 2007) at 369; Rosenne, above n 130, at 1283; Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds) *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, Oxford, 2006) at 1065.

<sup>319</sup> P Van Dijk and GJH van Hoof *Theory and Practice of the European Convention on Human Rights* (3rd ed, Kluwer Law International, The Hague, 1998) at 35.

<sup>320</sup> ICJ Statute art 62, art 63; ITLOS Statute, art 31; ECHR art 36, Rules of Court r 44

<sup>321</sup> ITLOS Rules, art 84.

<sup>322</sup> ECHR, art 36.

foreign investor, a non-State private individual. In this way, ITA is perhaps most similar to the ECtHR.<sup>323</sup> The ECtHR is governed by the European Convention on Human Rights (ECHR). The ECHR, like investment treaties, establishes a minimum standard of treatment which States must accord to private individuals. Like ITA, the ECHR sets out a mechanism through which individuals may enforce this minimum standard of treatment directly against the State.

Although WGII conceptualises the theoretical underpinnings of ITA as comparable to international adjudication, WGII does not explain the motivation for its transparency initiatives in terms of bringing ITA in line with other forms of international adjudication. Rather, it seems that the driving force behind transparency reforms in the UNCITRAL Rules is a desire to recognise the impact that ITA can have upon the general public, and the resulting public interest in ITA. In accordance with this aim, WGII sees the general public as being the ultimate beneficiaries of transparency reforms, and therefore views the transparency rules as granting the general public certain rights in the arbitral proceedings.

This perspective is clear in WGII's discussion about publication of arbitral documents, public hearings, and third party participation. The parties to the dispute gain nothing from any of these measures: they are put in place entirely for the benefit of civil society and the general public. This was explicitly recognised by delegations to WGII at several points during discussions.<sup>324</sup> Civil society was recognised as the beneficiary of the transparency reforms, and accordingly the rights of the parties to limit or alter the application of the transparency rules was restricted.

It is notable that in all three of these areas, the transparency rules go further than comparable arbitral rules: unlike in ICSID and NAFTA, the parties have no say in what documents are published, or in whether hearings are public; and third parties are given a broader right to participate than under the rules of the ICJ or the ECtHR. The

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<sup>323</sup> This was suggested by G Burdeau "Nouvelles perspectives pour l'arbitrage dans le contentieux économique intéressant l'Etats" (1995) *Revue de l'arbitrage* 3It was also recognised by Douglas, above n 7, 154.

<sup>324</sup> Report of Fifty-Fourth Session, above n 156, at [50], when discussing whether investors should be allowed to depart from the offer of transparent arbitration; at [55], Report of Fifty-Fifth Session, above n 184, at [34], Report of Fifty-Sixth Session, above n 165, at [61] when discussing if the parties should be allowed to agree to depart from the transparency rules; Report of the of Fifty-Fourth Session, above n 156, at [104] when discussion whether the parties should have a veto right over public hearings

transparency rules also go further than most domestic models of public law adjudication, where access to party submissions is rarely guaranteed and the ability for third parties to participate as *amicus curiae* is usually limited.<sup>325</sup>

The impact of the transparency reforms is to give the general public rights to access arbitral documents and ITA proceedings, and a limited right to participate in ITA. Not only does this go beyond a conception of arbitration grounded in the consent of the parties to the dispute, it also goes beyond treaty-based conceptions of ITA as international adjudication. Rights are given to individuals and organisations who are neither party to the dispute nor to the investment treaty underlying the dispute.

Granting rights to civil society and the general public resonates with global administrative law concerns of making international regulatory regimes legitimate and accountable. Transparency is a first step in democratic accountability, to the extent that it is a prerequisite for full and informed democratic engagement with regulatory processes.<sup>326</sup> It might be a stretch to argue that there is a need for democratic participation within ITA itself, and this was probably not envisaged by WGII. Rather, to the extent that ITA might impact the regulatory and budgetary policy of the host State, there is a need for some measure of democratic legitimacy within ITA to ensure the democratic legitimacy of the development of policy in that State.

In conclusion, the deliberations of WGII when preparing the transparency rules demonstrate clearly that the international community no longer thinks of ITA as the sibling of international commercial arbitration. Rather, the deliberations reveal that the investment treaty underlying the dispute is viewed as the key constitutive document in ITA, and it is that agreement between States – rather than the agreement between the parties to the dispute – which is paramount. This situates ITA closer to the ECtHR than to international commercial arbitration. Like ITA tribunals, the ECtHR oversees the implementation of an international instrument which grants rights to individuals, and provides a mechanism for individuals to enforce those rights directly against States. Thus, the theoretical underpinnings of ITA are centred on the international agreement between States which underlies the dispute, rather than the consent of the parties to the dispute.

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<sup>325</sup> See High Court (Access to Court Documents) Amendment Rules 2009 (NZ); Asteriti and Tams, above n 31.

<sup>326</sup> Hale, above n 72, at 89.



This does not, however, explain the impetus for transparency reforms in the UNCITRAL Rules. The push for transparency comes from recognition of the potential impact ITA may have on a host State's law and policy, and the resulting need for some democratic legitimacy in ITA. This resonates with global administrative law concerns about the legitimacy and accountability of international regulatory regimes. It explains the desire to provide the general public with some rights in ITA proceedings.

Transparency reforms aim to enhance the legitimacy of ITA. Whether or not the UNCITRAL Rules on Transparency manage to achieve this will ultimately depend upon the extent of their use, given their limited application to existing treaties which form the basis of the majority of ITA disputes. It will also depend on whether investors choose to submit their investment disputes to investment arbitration, or seek alternate confidential methods of dispute resolution such as mediation.

Notwithstanding the clear challenges to the efficacy of the transparency rules, the very fact that UNCITRAL saw it necessary to implement transparency reforms shows a significant shift in international thinking about the nature of ITA.

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