

Submission to UNCITRAL Working Group II on International Arbitration¹ Vienna October 1–5, 2012

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I. Introduction

System-wide, the United Nations is pushing to strengthen the rule of law, promoting transparency, good governance, and accountability at the national and international levels.² Consistent with that direction, a UN body, the United Nations Commission on International Trade Law (“UNCITRAL” or the “Commission”) has launched an effort to move from being a barrier to transparency to a facilitator of it.

In 2008, recognizing that investor–State arbitrations have a different need for transparency than purely commercial arbitrations between private parties, the Commission “agreed by consensus on the importance of ensuring transparency in investor–State dispute settlement,”³ and directed Working Group II, its working group with expertise in international arbitration, to develop “as a matter of priority” a legal standard reflecting that policy decision.⁴ At subsequent sessions in 2011 and 2012, the Commission “reaffirmed the importance of ensuring transparency in treaty-based investor–State arbitration” and urged the Working Group to push its work on that issue to completion.⁵ The Working Group is now two years into that effort.⁶ Reports of the Working Group’s progress, however, reveal questions regarding whether the Working Group’s final product will be consistent with the mandate from the Commission and the broader UN push to deepen transparency, or whether it will resist that movement, and seek to entrench the status quo under which investors, States, and arbitrators would have wide latitude to keep disputes closed off from the public view.

In this context, the outcome of the discussions relating to the scope of application of the new transparency rules will be of particular relevance. If those discussions result in limiting the application of the rules such that they do not apply to disputes under the roughly 3,000 treaties that currently exist, the new rules will do little to actually contribute to increased transparency. This could lead to rules that are state of the art in terms of content and form, but that are in reality largely irrelevant because not applicable to the majority of investment disputes.

In light of the crucial stage the Working Group is at in terms of implementing its mandate from the Commission to ensure transparency in investor-State arbitration, this paper hopes to clarify what tools are available to the Working Group to achieve that goal. In order to put the Working Group’s efforts in context, the paper provides an overview of how UNCITRAL’s arbitration rules can and do impact the public’s ability to access information regarding investor–State arbitrations. The paper then takes stock of the Working Group’s progress in the four meetings before its session in October 2012. It describes proposed revisions to the form and content of

² *Delivering Justice: Programme of action to strengthen the rule of law at the national and international levels*, Report of the Secretary-General (2012), A/66/749.

³ Report of the United Nations Commission on International Trade Law, 41st session (June 16–July 3, 2008), Gen. Ass. 63rd session, supp. No. 17, A/63/17, para. 314.

⁴ *Id.*

⁵ Report of the United Nations Commission on International Trade Law, 45th session (June 25–July 6, 2012), Gen. Ass. 67th session, supp. No. 17, A/67/17, para. 69.

⁶ The Working Group began work on the issue of transparency in treaty-based investor–State arbitration at its 53rd session, held in Vienna in October 2010.

the procedural rules, the disclosures they would require, and the exceptions they would allow. It addresses some open issues and areas of uncertainty at the time of the October 2012 session, and also identifies how proposed changes align with current practices regarding disclosure. The paper then examines in more detail the circumstances in which those changes would apply to future investor–State disputes. It discusses, on the one hand, proposals to narrow such application and, on the other, to facilitate it. Finally, the paper also addresses options for moving the effort to ensure transparency in investor–State arbitration beyond the context of the UNCITRAL arbitration rules through creation of an international convention on the issue.

II. The Impact of UNCITRAL Arbitration Rules on the Openness of Investor–State Disputes

In their investment treaties, States offer investors the option to take disputes arising under the treaties to international arbitration. When doing so, States generally condition or limit their offers to arbitrate by saying that when investors do pursue investment arbitration, they must do so in accordance with certain procedural rules. States commonly offer investors a menu of rules to choose from, which may include the UNCITRAL arbitration rules, the arbitration rules of the International Centre for the Settlement of Investment Disputes (ICSID) or ICSID’s Additional Facility,⁷ the arbitration rules of the International Chamber of Commerce (ICC), or the arbitration rules of the Stockholm Chamber of Commerce (SCC). Some treaties widen their menus further by saying that, in the context of a particular dispute, the investor and the respondent State may agree to develop their own rules on a purely ad hoc basis, or to modify the provisions of the UNCITRAL, ICC or other existing arbitration rules.

Under this arrangement, States set the outer limits of the options for arbitration rules in their treaties. Investors, though bounded by the limits set in the treaty, have the ability to determine which option will actually apply. Although the investor and respondent State may (depending on the language of the treaty, applicable rules, and relevant domestic law) be able to agree to modify or supplement all or some of the rules selected, it is the investor that has the privileged position of being able to choose the procedural regime that will actually govern the dispute. Within the regime selected, the tribunal also generally has power to determine procedural issues not addressed in the rules or settled by the parties.

This system makes achieving the goal of “ensuring transparency in investor–State arbitration” complex. In essence, there are only two approaches through which States can “ensure”

⁷ Pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), ICSID only has jurisdiction over disputes between nationals of one Contracting State and another Contracting State. ICSID, however, also has an Additional Facility that can administer certain arbitrations that would otherwise be excluded from the scope of ICSID jurisdiction, such as arbitrations when only one disputing party is a national of a Contracting State or a Contracting State. These disputes are not governed by the ICSID Convention and the standard ICSID arbitration rules, but are governed by a separate set of rules, the ICSID Additional Facility Rules. The ICSID Additional Facility Rules are very similar to the standard ICSID arbitration rules for disputes also falling under the ICSID Convention.

transparency. The first is for States to include provisions directly in their treaties making transparency obligatory. A small but diverse and growing number of States uses this first approach.⁸

The second is for States to *only* offer to arbitrate disputes under arbitration rules that require transparency. At present, this approach is only a theoretical option, as no set of arbitration rules mandate transparency throughout the arbitration proceedings.⁹

The fact that no arbitration rules currently mandate transparency throughout the arbitral process is not, however, to say that confidentiality is required in arbitration, much less the specific breed of arbitration that is treaty-based investor–State arbitration. Here, the background of various sets of procedural rules governing international arbitrations is useful to review. The rules frequently governing international arbitration, including treaty-based investor–State arbitrations, are, as noted above, the arbitration rules developed by ICSID, UNCITRAL, the ICC, and the SCC.

The ICSID arbitration rules, like the ICSID system they were designed to operate within, are the only arbitration rules established exclusively for disputes arising between investors and States¹⁰ and in recognition of the fact that resolution of these disputes implicates matters of international law relating to the treatment of investments.¹¹ The ICSID system’s specialized focus manifests itself in various ways, including its approach to transparency. In particular, ICSID’s financial and administrative regulations require the ICSID Secretary-General to make publicly available information about

all significant data concerning the institution, conduct and disposition of each proceeding, including in particular the method of constitution and the membership of each . . . Tribunal and Committee. On the Arbitration Register he shall also enter, with respect to each award, all significant data concerning any request for the supplementation, rectification, interpretation, revision or annulment of the award, and any stay of enforcement.”¹²

⁸ For a survey of the provisions on transparency, see Nathalie Bernasconi-Osterwalder & Lise Johnson, *Transparency in the Dispute Settlement Process: Country best practices* (IISD & CIEL, 2011), available at <http://www.iisd.org/publications/pub.aspx?id=1529>.

⁹ Even if one option in the menu were to provide for this level of transparency, the investor could then opt for a set of arbitration rules that did not similarly require disclosure. The investor may do this in an attempt to specifically avoid being subject to the rules on transparency, or in response to other concerns not related to issues of public disclosure.

¹⁰ See, ICSID Convention, Art. 25(1).

¹¹ ICSID Administrative and Financial Regulations, Regulation 22 (If both parties to a proceeding consent to the publication of: ... (b) arbitral awards; or (c) the minutes and other records of proceedings, the Secretary-General shall arrange for the publication thereof, *in an appropriate form with a view to furthering the development of international law in relation to investments.*) (emphasis added)).

¹² ICSID Administrative and Financial Regulations, Regulation 23; see also *id.*, Regulation 22.

ICSID’s administrative and financial regulations also require the Secretary-General to publish awards if both disputing parties consent to publication. In cases when both parties do not consent to publication of the award, the ICSID arbitration rules require ICSID to “promptly include in its publications excerpts of the legal reasoning of the Tribunal.”¹³

Apart from the ICSID arbitration rules, the rules used in investor–State arbitrations have largely been crafted to apply to commercial disputes between private parties, disputes that generally arise from contracts and do not involve issues of public rights or interests. It is therefore not surprising that the drafters of these arbitration rules did not incorporate provisions requiring transparency, facilitating development of international law, or otherwise attempting to take into account public rights and interests raised or touched on by the disputes.

Indeed, most arbitration rules referred to in investment treaties are essentially silent on the matter of transparency, neither mandating confidentiality nor requiring disclosure. The rules allow the disputing parties significant latitude to determine—individually or through agreement—the degree of openness of the proceedings. Restrictions on disclosure, where they are present, are primarily directed at the arbitrators and arbitral institutions, not the parties themselves.¹⁴

Nothing in the SCC, ICC, ICSID, or UNCITRAL arbitration rules, for example, prevents either party to the dispute from unilaterally disclosing information regarding the initiation and core of the case. Those rules do not preclude either disputing party from releasing the notice of arbitration, pleadings, or briefs.¹⁵ Thus, there are a number of these documents generated at the commencement and during the course of the proceedings that are available in the public domain.

The rules of the SCC, ICC and ICSID also permit either disputing party to unilaterally disclose orders, decisions, and final awards issued by the tribunal.¹⁶ On this issue, the UNCITRAL arbitration rules stand out as being more restrictive than those other bodies’. Article 32(5) of the 1976 UNCITRAL Rules provides that “[t]he award may be made public only with the consent of both parties.” Pursuant to this provision, a State must seek and obtain approval from the investor to publish an award, and vice versa. The 2010 UNCITRAL Rules are slightly different and more liberal toward disclosure. They state in Article 34(5) that “[a]n award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.”

¹³ ICSID Arbitration Rules, Rule 48(4); Additional Facility Rules, Art. 53(3).

¹⁴ See, e.g., ICC Arbitration Rules, Article 34(2) (“Additional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.”).

¹⁵ See ICC Arbitration Rules, Article 22(3) (“Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings ... and may take measures for protecting trade secrets and confidential information.” There is no default rule of confidentiality).

¹⁶ An exception to this is that the arbitration rules of the ICC state that decisions regarding arbitrator challenges “shall not be communicated.” ICC Arbitration Rules, Article 11(4).

The one aspect of investor–State arbitrations where the various sets of rules all can generally be said to constrain public access is in their treatment of hearings. The rules of ICSID, UNCITRAL, the ICC, and the SCC all currently require the consent of both disputing parties for hearings to be open to those not involved in the proceedings.¹⁷ If those conditions are not met, hearings in treaty-based investor–State disputes will only be open when required by the underlying treaty.

Thus, with the exception of the rather common restrictions on access to hearings, and the UNCITRAL arbitration rules’ provisions on disclosure of awards, arbitration rules used in investor–State arbitrations do not impose much of a mandatory barrier to public access to information and, at least in the case of the ICSID rules, require a certain amount of disclosure. Nevertheless, there are restrictions on access to information generated in and about these cases. These restrictions derive from two main sources: one, agreements by the parties to keep the disputes (or aspects thereof) confidential; and two, orders by the tribunal to bar or restrict publication by one or both of the disputing parties.

Some of these agreements and orders aim to prevent disclosure of information commonly deemed “confidential,” such as trade secrets or state secrets. These types of agreements and orders can be entirely consistent with and are an integral part of transparent regimes. In contrast, other confidentiality agreements and orders are broader and more restrictive, closing the entirety of the proceedings off to the public view irrespective of whether the information at issue would, outside the context of the arbitration, generally be deemed confidential or protected. In large part, these agreements of the disputing parties and orders of the arbitral tribunal—not arbitration rules or investment treaties—are the instruments that restrict transparency of investor–State arbitration.

Canvassing (much less evaluating) the arguments in support of and against transparency in investor–State arbitration is outside the scope of this note. Nevertheless, it must be recognized that there have been increasing concerns raised that agreements of the disputing parties to keep disputes private impinge on the interests and even rights of non-disputing parties, and that orders by a tribunal to limit what one or both disputing parties can communicate regarding the disputes creates tension between the investor–State arbitration system and the rights and obligations of the disputing parties to disclose information. These concerns underlie the Commission’s decision on the importance of ensuring transparency in investor–State dispute settlement and its mandate to the Working Group reflecting that decision. This brings us to the topic of the next section: the efforts of Working Group II and its progress to date.

¹⁷ See ICSID Arbitration Rules, Rule 32(2); ICSID Additional Facility Rules, Article 39(2); ICC Arbitration Rules, Article 26(3); SCC Arbitration Rules, Article 27(3).

III. UNCITRAL's Reform Efforts

A. Progress on Revisions to the Rules' Form and Content

In 2006, UNCITRAL formally decided to initiate work on revising and updating the UNCITRAL arbitration rules, which had not been changed since their adoption in 1976. It tasked Working Group II with implementing the effort. At its first meeting after receiving its mandate, the Working Group noted that the UNCITRAL arbitration rules were being applied in a variety of types of arbitrations, including arbitrations between two States, between an investor and a State, and between private, commercial parties. The Working Group considered whether and how to take these variations into account when revising the rules, and decided to maintain the arbitration rules' "generic approach" by drafting revisions that would apply to all types of arbitrations irrespective of the subject matter or the nature of the parties. The Working Group noted early on its work, however, that some situations, including aspects of investor-State disputes, might need a separate set of rules or explanatory provisions due to their unique features.

During Working Group II's first biannual meetings dedicated to revising the UNCITRAL arbitration rules, some participants suggested that the rules be revised or an annex added to them so as to ensure transparency in the subset of arbitrations involving States. After much discussion, the Working Group concluded that, because investor-State arbitrations differed in key respects from ordinary commercial arbitrations, they required distinct regulations on certain points, including the issue of transparency. The Working Group also concluded, however, that it did not want its work on those issues specific to investor-State arbitration to delay completion of the work on the UNCITRAL arbitration rules in their generic form. It thus decided to proceed with the general revisions and to ask its governing body, the Commission, for instruction on whether and how to proceed on specific issues relating to treaty-based investor-State arbitration.

The Commission provided that guidance during its session in June-July 2008. It explicitly recognized "the importance of ensuring transparency in investor-State dispute resolution" and directed the Working Group to address the topic of transparency "as a matter of priority immediately after completion" of general revisions to the Arbitration Rules.¹⁸

Working Group II finalized its general revisions to the UNCITRAL arbitration rules at its February 2010 session and the Commission adopted them that summer. Working Group II then picked up the issue of transparency. The Working Group has now had four meetings on the topic of ensuring transparency in investor-State dispute settlement and has made substantial progress on developing the content of rules that would make these arbitrations more open.

¹⁸ Report of the United Nations Commission on International Trade Law, 41st session (June 16-July 3, 2008), Gen. Ass. 63rd session, supp. No. 17, A/63/17, Para. 314.

1. Rules on Disclosure and Openness

Support has coalesced around a number of proposals for increasing transparency. One is for a rule explicitly giving the tribunal authority to allow participation from *amicus curiae*. Another is for a rule that would require (subject to certain exceptions, which are discussed below) disclosure of specific categories of documents produced throughout the course of the proceedings. Types of documents that have been among the more popular candidates for this list include the notice of arbitration, briefs submitted by the parties, submissions by non-disputing parties, witness statements, expert reports, transcripts of hearings, and orders, decisions and awards issued by the tribunal. The issue of exhibits is more contentious, however, as various delegations have expressed concerns about the burdens and costs associated with what, in some cases, could be a voluminous set of materials and information. Nevertheless, for materials such as exhibits that may not be included in the list of documents subject to mandatory disclosure, many in the Working Group have supported a proposal stating that the tribunal would have the authority to order their publication upon its own motion, a request by a party, or a request by a non-party.¹⁹ Another topic on which there seems to be broad agreement is the matter of non-derogability. Customary in arbitration rules is a provision allowing the disputing parties to agree to modify some or all of the rules. In the context of rules on transparency, however, there has been wide support for a provision that would prevent the disputing parties from agreeing to deviate from the rules on transparency, but would allow the tribunal some flexibility in applying those rules.²⁰

Some aspects of transparency have been generating more resistance or trepidation in the Working Group than others.²¹ For one, there has been concern regarding rules mandating disclosure of notices of arbitration prior to constitution of the tribunal. Delegations have worried that without a tribunal in place there would be inadequate supervision and management of issues relating to protection of confidential or sensitive information. Thus, draft Article 2 now reflects an approach whereby (1) basic facts about the dispute (i.e., the identity of the disputing parties, the relevant economic sector, and the underlying treaty or treaties) must be made public shortly after the claimant issues a notice of arbitration to set a case in motion, but the actual notice is not subject to *mandatory* disclosure requirements until after the tribunal has been constituted. Notably, this is a departure from a number of treaty provisions

¹⁹ Draft Article 3, A/CN.9/WG.II/WP.169, at p. 10. One issue that is not clear is why a tribunal would have to order disclosure of information upon the request of a party. Presumably, a party would be able to disclose information unilaterally if it wished, as it is currently allowed to do so under the UNCITRAL arbitration rules, and discussions in the Working Group have not suggested that the rules' intent is to prohibit what is currently allowed.

²⁰ A rationale behind this approach is that the decision to make the UNCITRAL arbitration rules available to investors is a decision made by States at the inter-State level. Should States want to make certain aspects of the rules mandatory, they can. And if the rules aim to ensure transparency in investor-State dispute settlement, they should.

²¹ In addition to the two issues noted below, another question that has generated much debate in the Working Group is the issue of how to treat non-disputing State parties to the treaty that might want to make a submission to a tribunal in an investor-State dispute, or from which a tribunal might request input. Due to the number of questions that issue raises that are not directly relevant to the issue of transparency, this paper does not cover the matter of non-disputing State party participation.

on transparency in investor–State arbitration,²² as well as from several delegations’ policies, and therefore does not represent “best practices” in terms of transparency. Nevertheless, this should not hinder states’ continued early disclosures of notices of arbitration: In some cases, the treaties require such disclosure and would trump any UNCITRAL rules to the contrary, and, even absent a treaty mandating early prompt and automatic publication of the notices of arbitration, the disputing parties presumably could, as they can under the 1976 and 2010 UNCITRAL arbitration rules, continue to unilaterally or jointly decide to *voluntarily* release the notice of arbitration.²³

Another aspect of transparency that has met with some resistance is the issue of a flat rule for open hearings (subject, again, to certain exceptions). Many delegations expressed support for the idea of open hearings, and for preventing either or both disputing parties from having the power to close the proceedings; however, a number also suggested giving the tribunal the authority to close the hearings if it decided to do so. Thus, in contrast to the 1976 and 2010 UNCITRAL arbitration rules in which each disputing party holds a veto power over whether to open hearings to non-parties, the draft transparency rules would give that veto power to the tribunal. Notably, like the draft provision on disclosure of notices of arbitration, this rule would represent a lesser degree of transparency than various countries have already committed to via their investment treaties, and therefore falls short of “best practices” in terms of openness.²⁴

2. Exceptions

To balance the draft rules’ provisions on disclosure, there has been seemingly unanimous backing for an article specifying that the rules on transparency would be subject to exceptions for “protected” or “confidential or sensitive” information.²⁵ And although, as is discussed briefly below, crucial questions regarding the scope and meaning of “protected,” “confidential” and “sensitive” information remain unanswered and will continue to be subjects addressed by the Working Group, there has been broad recognition by delegations that they need to ensure that the exceptions are not allowed to swallow the transparency rules.

²² See Bernasconi & Johnson, *supra* n. 7, at pp. 3–4 (citing treaties that require prompt disclosure of notices of arbitration).

²³ Consistent with the idea of ensuring transparency in treaty-based investor–State arbitration, the issue of voluntary disclosures appears to be generally left untouched in the draft transparency rules.

²⁴ See Bernasconi & Johnson, *supra* n. 7, at pp. 7–8 (citing treaties that require open hearings).

²⁵ Draft Art. 8, A/CN.9/WG.II/WP.169.

As currently proposed, the rules seem to make the parties and non-disputing parties initially responsible for identifying what aspects of their own submissions should be protected from disclosure,²⁶ but also allow each disputing party to argue either for increased protection or disclosure of (1) information submitted by the other disputing party or non-disputing party, and (2) documents issued by the tribunal. There is no similar provision that would allow non-parties to contest designation of information as being covered (or not) by the exceptions.²⁷

Should a question or dispute arise regarding whether information has been appropriately designated as “protected” or “confidential or sensitive,” the current draft does not appear clear on how the issue will be resolved. In one provision, Article 8(2)(c), the draft suggests that the arbitral tribunal has the power to decide the issue, and should find that the information is shielded from disclosure under the transparency rules if it is “protected against being made available to the public under the law of a disputing party or any other law or rules determined to be applicable to the disclosure of such information by the arbitral tribunal,” a rather vague and open-ended standard.²⁸ However, in another provision, Article (8)(7), the draft appears to call for a different, and even less disciplined approach, stating that the tribunal “shall determine, *in the exercise of its discretion*, the extent to which any information contained in documents which are to be made available to the public, should be redacted.”²⁹ It is unclear why, if Article 8(2) attempts to set standards (albeit broad) by which to determine whether information is “protected” or “confidential or sensitive”, the text would also include Article 8(7), which seems to eviscerate Article 8(2)’s standards by injecting broad discretionary authority for the tribunal to judge requests for withholding and redaction.³⁰ To safeguard the effectiveness of and reduce uncertainty regarding the implementation of the rules, the Working

²⁶ The draft rules are somewhat unclear on this point, however. Article 8(3) explains that disputing parties are to assert which submissions or aspects thereof they contend constitute “protected” or “confidential or sensitive” information, but, pursuant to Article 8(2)(c), whether information falls within the definition of “protected” or “confidential or sensitive” information seems to depend on a preliminary determination by the tribunal of what is the applicable law or rules governing the definition of “protected” or “confidential or sensitive” information. See Art. 8(2)(c) (defining “protected” and “confidential and sensitive” information as “information which is protected against being made available to the public under the law of a disputing party or any other law or rules *determined to be applicable to the disclosure of such information by the arbitral tribunal*”).

²⁷ Some uncertainties seem to arise from the relationship between the provision in Article 8(5), which states that each disputing party “may object to the proposed redaction [of any other party or non-party] and/or propose that the document be redacted differently,” and the current situation under the UNCITRAL arbitration rules whereby each disputing party and non-party such as amicus curiae may unilaterally and immediately disclose its submission without giving providing that opportunity for redaction. Would Article 8(5) as drafted be interpreted to restrict such unilateral disclosures? *Could* it restrict such unilateral disclosures? Does the introductory clause, “Where a redaction is proposed,” mean that it is only triggered in cases when the submitting party or non-party makes redactions in or claims protections for its submissions? If it were interpreted to restrict unilateral disclosures, could this provision be seen as one that hinders, rather than promotes transparency? Or does it merely give the transparency regime structure and protections?

²⁸ Draft Article 8(2)(c), A/CN.9/WG.II/WP.169, at p. 14.

²⁹ Emphasis added. The draft does give some guidance as to how the tribunal should exercise its discretion. Draft Article 1(5) states that “[w]here these Rules provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account, (a) the public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings and (b) the disputing parties’ interest in a fair and efficient resolution of their dispute.”

³⁰ The draft text leaves unclear whether the tribunal can review designations *sua sponte*. Draft Article 8(7) states that “[t]he arbitral tribunal shall rule on all *questions* relating to the proposed redaction of documents.” (emphasis added). This could be read as referring solely questions that were presented to it by the disputing parties.

Group will need at future sessions to continue considering how to better define and constrain these exceptions.

Another issue of creating and delineating exceptions that the Working Group has been considering and is still evaluating is the proposal to limit disclosure of information and access to hearings where necessary to protect the “integrity of the process.”³¹ Because that language can be read broadly, and may threaten to effectively eviscerate the rules on transparency, delegations have proposed clarifying the phrase by inserting language, now reflected in draft Article 8(11), noting that it only aims to encompass situations when disclosure could “hamper the collection or production of evidence” or “lead to the intimidation of witnesses, lawyers acting for the disputing parties, or members of the arbitral tribunal,” or other “comparably exceptional circumstances.” Overall, progress on developing the content of disclosure requirements, and general approaches toward exceptions, has been significant, with agreement forming (though not yet formally formed) around a number of proposed rules. Yet, in contrast to what has been rather smooth movement on the *content* of the rules on transparency, the issue of their *applicability* is drastically more contentious.

B. The Applicability of Revised Arbitration Rules

The applicability issue addresses whether, when and how any new provisions on transparency incorporated within the UNCITRAL arbitration rules can or will apply to disputes arising under existing and future treaties. There are a number of complementary scenarios under which UNCITRAL transparency rules can apply to arbitrations under existing and future treaties, and under arbitrations under UNCITRAL or other arbitration rules.

First, the applicable treaty may give the disputing parties the ability to use any arbitration rules they can agree upon to govern the dispute. The bilateral investment treaty between South Korea and Japan, for example, states the investor may submit an investment dispute for settlement by binding arbitration:

- (a) to the Centre, if both Contracting Parties are parties to the ICSID Convention;
- (b) in accordance with the UNCITRAL Arbitration Rules; or
- (c) ***if agreed by both parties to the dispute, to any other arbitration institution or in accordance with any other arbitration rules.***³²

When a treaty has this type of provision, the disputing parties may choose to apply the UNCITRAL transparency rules alongside (1) any version of the UNCITRAL arbitration rules, (2) any other established set of arbitration rules, or (3) any ad hoc rules developed by the disputing parties for the dispute. Pursuant to the flexibility granted in the treaty, if the disputing parties choose to adopt the UNCITRAL transparency provisions, they may decide not to apply them in their entirety. The disputing parties, for example, may opt not to incorporate the provision

³¹ Draft Article 8(10), A/CN.9/WG.II/WP.169, at p. 15.

³² South Korea–Japan BIT, art. 15(3) (signed March 22, 2002, entered into force January 1, 2003) (emphasis added).

preventing them from modifying or derogating from the transparency rules. They might also opt to widen the exceptions to disclosure requirements.

This first scenario essentially represents the status quo. In cases when the governing treaty allows the parties to craft or modify the arbitration rules that will govern the dispute, then the disputing parties can, even at present, decide together to adopt rules on transparency. The UNCITRAL transparency rules, once adopted, would provide the advantage of giving the disputing parties a clear template and system for disclosure they could incorporate that, depending on the content of the rules actually adopted, may represent “best practices” in the area. Nevertheless, an established set of UNCITRAL transparency rules would not be *necessary* to provide for transparency in these cases where parties are free to craft their own rules; nor would the availability of UNCITRAL transparency rules be *sufficient* to ensure transparency in the disputes. Neither the investor nor the respondent State could unilaterally require any measure of transparency.

Second, many of the arbitration rules currently referred to in investment treaties explicitly allow the disputing parties to agree to modify them. Article 1(1) of the 1976 UNCITRAL arbitration rules states, for instance:

Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.³³

Article 1(1) of the 2010 UNCITRAL arbitration rules contains a similar provision. Likewise, the ICSID arbitration rules provide that “[i]n the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the [ICSID] Convention or the Administrative and Financial Regulations.”³⁴

In accordance with these provisions in the arbitration rules, the investor and respondent State could agree in the context of a particular dispute to incorporate all or some of the UNCITRAL transparency provisions into rules governing their dispute. Thus, whereas under the first scenario the flexibility to incorporate the provisions is granted directly in the treaties, here it is granted in the arbitration rules. As under the first scenario in which the UNCITRAL transparency provisions could be incorporated via treaty provisions allowing the disputing parties freedom to craft their arbitration rules, under this second scenario the existence of UNCITRAL transparency rules is neither necessary nor sufficient to ensure the openness of the proceedings. The transparency provisions, in essence, would serve as a template or guidelines from which the disputing parties could draw.

³³ Art. 1(1).

³⁴ ICSID Arbitration Rules, Rule 20(2).

A third scenario in which the UNCITRAL transparency provisions could apply is if, in accordance with the treaty, the investor selects those rules to govern the dispute.

For existing treaties, if the treaty provides that the version of the UNCITRAL arbitration rules in effect at the time of the dispute will apply, then, if the amended UNCITRAL arbitration rules with the transparency provisions are adopted, those new rules on transparency would apply in any case in which the investor chooses to resolve the dispute under the UNCITRAL arbitration rules (unless the treaty gave the disputing parties the freedom to modify the arbitration rules and they decided to do so by excluding all or some of the transparency provisions). Similarly, if a dispute were to arise under a treaty concluded after the transparency provisions are adopted as part of the UNCITRAL arbitration rules, and the investor chooses to arbitrate the dispute under the UNCITRAL rules, then the new provisions on transparency would likely apply unless the treaty provided otherwise.

This third scenario differs in an important respect from those first two in that it is the only one that represents a significant departure from the status quo by making application of a full UNCITRAL transparency regime mandatory. Notably, however, application of that regime will only be mandatory when two conditions are met. The first condition is that the treaty—existing or future—must permit application of the UNCITRAL rules as amended with the transparency provisions.³⁵ In other words, the State must have consented to the rules' application. The second is that the investor must select those rules from the treaty's menu of options as the rules that will govern the proceedings, manifesting the investor's consent to those rules.³⁶

1. The Issue of Consent

It is the issue of this first condition—the requirement that the treaty allow application of the UNCITRAL rules as amended with the transparency provisions— that is most charged in the Working Group. Delegations are divided on how this condition will be satisfied for existing and future treaties.

The starting point for looking at this issue is the treaty. The terms of the treaty are fundamental for determining whether the new rules on transparency will apply to future disputes. Treaties may, for instance, provide for arbitration under:

³⁵ Whether the treaty permits application of the amended arbitration rules is an issue of treaty interpretation. This is discussed further in this section B.1 and section B.2.

³⁶ This also assumes that the governing treaty did not give the disputing parties the right to modify the rules and that, if it did grant such a right, the disputing parties did not exercise it.

1. the UNCITRAL arbitration rules “in effect on the date the claim or claims were submitted to arbitration;”³⁷
2. “the rules of the United Nations Commission on International Trade Law (UNCITRAL);”³⁸
3. a “tribunal set up from case to case in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL);”³⁹ or
4. the “1976 UNCITRAL Arbitration Rules.”

Treaties using the language of the first example appear to explicitly resolve the issue of applicability by stating that the version of the arbitration rules in force at the time an action is initiated will control. In contrast, treaties making a specific reference to the 1976 Arbitration Rules (or 2010 Arbitration Rules) as in the fourth example, may indicate that new amendments to the rules would not apply.⁴⁰ Treaties using the language of the second and third example are more vague, but the general rule is that they would likely be interpreted as referring to the version of the rules in effect at the time of the commencement of the dispute.⁴¹ The principal rule is that treaties *can* allow for amendments to the UNCITRAL arbitration rules to apply to disputes arising under existing treaties; whether they do is an issue of treaty interpretation.

Practice in treaty-based investor–State arbitrations illustrates these points. For one, similar to some investment treaties, the ICSID Convention specifies in Article 44 that, for disputes under that treaty, the version of the ICSID Arbitration Rules “in effect on the date on which the parties consented to arbitration will apply.” Pursuant to Article 44, changes in the ICSID Arbitration Rules can and have governed disputes arising under preexisting investment treaties.⁴²

The Energy Charter Treaty (ECT) provides another relevant example. That treaty specifies that an investor may submit covered disputes for resolution under the ICSID Convention and ICSID

³⁷ See, e.g., U.S.–Uruguay BIT (entered into force Nov. 1, 2006), Art. 24(5) (stating that the arbitration rules “in effect on the date the claim or claims were submitted to arbitration . . . shall govern the arbitration except to the extent modified by this Agreement”); U.S.–Singapore FTA (entered into force Jan. 1, 2004), Art. 15.15(7) (also stating that the rules “in effect on the date the claim or claims were submitted to arbitration . . . shall govern the arbitration except to the extent modified by this Agreement”).

³⁸ India–Singapore FTA, art. 6.21(3)(c). See also, e.g., China–Peru FTA, art. 139;

³⁹ Thailand–Argentina BIT, art. (9)(5)(b). See also, e.g., China–Netherlands BIT, art. 10(3)(b);

⁴⁰ A reference to the 1976 UNCITRAL Arbitration Rules does not necessarily indicate the States’ desire to apply the rules in effect at that time to the exclusion of any subsequent modification. The ASEAN–Australia–New Zealand FTA (signed February 27, 2009), for example, states in Article 21(1)(d) that an investor may submit claims for resolution “under the UNCITRAL Arbitration Rules.” The text defines “UNCITRAL Arbitration Rules” as “the arbitration rules of the United Nations Commission on International Trade Law approved by the United Nations General Assembly on 15 December 1976.” The treaty then states in Article 21(3), however, that the rules “as in effect on the date the claim or claims were submitted to arbitration . . . shall govern the arbitration” Moreover, if a treaty were to refer to the 2010 UNCITRAL arbitration rules, those rules, in turn, may arguably bring in new transparency provisions. This is because Article 1(2) of the 2010 UNCITRAL arbitration rules states that “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”

⁴¹ See, e.g., Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (2007), at pp. 80–81 (discussing applicability of amended arbitration rules).

⁴² See, e.g., *AES Summit Generation Ltd. v. Republic of Hungary*, ICSID Case No. ARB/07/22 (applying the 2006 ICSID arbitration rules, including their provisions on *amicus curiae*, to the dispute).

Arbitration Rules, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). It does not specify which version of the rules will apply. Yet each of those sets of rules have been amended at least once since the ECT has come into effect, and the amended versions of each of those sets of rules have applied to arbitrations against States that were party to the treaty before the rules' amendments were adopted.

More specifically, disputes have applied the 2006 ICSID arbitration rules even when the 2006 amendments post-dated the respondent State's signature and ratification of the ECT.⁴³ Similarly, the SCC rules have been revised three times since 1999; and the most recent versions of the rules in effect at the time the ECT arbitrations were commenced have been used to govern those disputes irrespective of whether the amendments were adopted after the respondent State had signed or ratified the ECT.⁴⁴ Likewise, the 2010 UNCITRAL arbitration rules have been applied to ECT arbitrations even though the respondent States were party to the ECT before the 2010 amendments were adopted.⁴⁵

2. The Working Group's Treatment of Consent for Existing Treaties

Accepting that there is nothing inherent in treaty-based investor–State arbitration that prevents amendments to procedural rules from applying to disputes arising under *existing* treaties, it is important to turn to some of the proposals in the Working Group regarding the issue of application. Notably, some draft language explicitly seeks to preclude what the treaties would allow; thus, although an existing treaty may permit the amendments to apply, the rules themselves would narrow their scope of application.

⁴³ See *Europe Cement Investment & Trade v. Republic of Turkey*, ICSID Case No. ARB(AF)/02/2, Award, Aug. 13, 2009, para. 11 (noting agreement that the Additional Facility “Rules in effect on 10 April 2006 would apply”); *Cementownia ‘Nowa Huta’ S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, Sept. 17, 2007, para. 32 (noting that “it was agreed that the Arbitration (Additional Facility) Rules in effect as of April 10, 2006 apply to the proceedings”). Disputes under other treaties that, like the ECT, use a general reference to the arbitration rules, have also been settled under the amended ICSID arbitration and additional facility rules. *Foresti v. Republic of South Africa*, Case No. ARB(AF)/07/01, is a notable example. It arose under the 1997 Italy–South Africa BIT and the 1998 Belgium–Luxembourg–South Africa BIT, and was settled under the 2006 ICSID Additional Facility Rules, which included language on *amicus curiae* that the previous Additional Facility Rules had not. The fact that those new rules applied was significant because *amicus curiae* were in fact an issue in the case.

⁴⁴ See, e.g., *Mohammad Anmar Al-Bahloul v. Republic of Tajikistan*, SCC Arbitration No. V (064/2008), para. 38. Tajikistan signed the ECT in 1994, and ratified it in 1997. The treaty entered into force in 1998. This case was brought in 2008, and the award was issued in 2010. In the award, the tribunal applied the 2007 arbitration rules rather than prior versions. The differences among the relevant provisions are not insignificant. For example, the tribunal relied Article 26(1) of the 2007 SCC arbitration rules for the proposition that it had the authority to determine the “admissibility, relevance, materiality and weight of evidence.” In contrast, the 1999 SCC arbitration rules did not give the tribunal that power. Rather, Article 26(1) merely stated that the parties were required to “state the evidence on which they intend to rely, specifying what they intend to prove with each item of evidence, and present the documentary evidence on which they rely.” The tribunal also applied the 2007 SCC arbitration rules on costs, which also differed notably from earlier versions of the rules.

⁴⁵ See, e.g., *Khan Resources Inc. v. Gov't of Mongolia*, Notice of Arbitration (Jan. 10, 2011), para. 12. The 2010 UNCITRAL Arbitration Rules have also been used in disputes under other treaties that use a general reference to the UNCITRAL arbitration rules without specifying the particular version that will apply. See, e.g., *Guaracachi America, Inc. v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No. AA406.

More specifically, proposed text that will be under consideration in the October 2012 Working Group session states the following:

These Rules shall apply to investor–State arbitration initiated pursuant to a treaty providing for the protection of investments or investors (“treaty”)* when the Parties to the treaty [or all parties to the arbitration (the “disputing parties”)] *have agreed to their application*.⁴⁶

The requirement that the State parties to the treaty “have agreed to” the rules’ application could be read as including implicit agreement (e.g., through a treaty allowing for dynamic interpretation⁴⁷ and application of the UNCITRAL arbitration rules). Discussions during the Working Group and the explanatory note to the UNCITRAL Secretariat’s text, however, make clear that the language is intended to preclude the possibility of a dynamic interpretation.⁴⁸ Under this language, therefore, an existing treaty would have to expressly refer to the as yet non-existent transparency provisions in order for them to be part of the treaty’s menu of rules available to investors.

This approach would have extremely significant implications for the task of ensuring transparency in investor–State arbitration. This is because there are some 3,000 existing treaties, and it is under these treaties that investor–State disputes are going to arise for years to come. If the Working Group hinders application of the UNCITRAL transparency rules in these disputes, the rules will rarely, if ever, apply.⁴⁹

Notably, this approach reflects a policy choice, not an approach required by law. It therefore prompts the question of whether the Working Group—which the Commission has directed to develop a legal standard that would “ensure transparency in investor–State arbitration” —is undermining that mandate.

Some country delegations, however, have protested what appears to be the prevailing direction of the Working Group and are not ready to accept the language reflected in the Secretariat’s draft. These delegations are comfortable with—if not supportive of—the possibility that a dynamic interpretation of a reference to the UNCITRAL Arbitration Rules could result in new rules on transparency being applied in disputes arising under existing treaties. They have noted that changes to the UNCITRAL rules have long been anticipated,⁵⁰ and that

⁴⁶ Draft Article 1(1), A/CN.9/WG.II/WP.172, at p. 3 (emphasis added).

⁴⁷ A “dynamic interpretation” of an investment treaty’s reference to the UNCITRAL arbitration rules is one in which the treaty is interpreted to provide for the application of the UNCITRAL arbitration rules as they might evolve over time.

⁴⁸ See, e.g., A/CN.9/WG.II/WP.172, at p. 4, para. 9.

⁴⁹ Disputing parties could agree to apply the rules, but in such cases the rules would operate more as voluntary guidelines rather than “rules” on transparency.

⁵⁰ See, e.g., 1976 UNCITRAL Arbitration Rules, Model Arbitration Clause (“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules *as at present in force*.” (emphasis added)). See also Jan Paulsson & Georgios Petrochilos, Revision of the UNCITRAL Arbitration Rules (2006), at p. 1, available at

when drafting their treaties they had wanted to allow for such changes and updates to ensure that the most modern set of rules governed their disputes.

Some of these countries, namely Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States, have made a joint counter-proposal to the draft text in the Secretariat's note. These governments outlined the reasoning behind their position:⁵¹

1. The Commission, at its forty-fourth and forty-fifth sessions, reaffirmed its commitment regarding the importance of ensuring transparency in treaty-based investor-State arbitration.
2. To be effective in promoting transparency, it is essential to consider the investment treaties currently in force internationally.
3. Application of the rules on transparency under an existing investment treaty is subject to the agreement of the Parties to that treaty.
4. In most cases, it will be clear if an existing treaty did not envision the application of the rules on transparency, and where it is not clear, the Parties to the treaty can take steps to prevent such application if they so desire.
5. However, those who do not wish the rules on transparency to apply under their treaties should not attempt to compel a similar result in cases where others desire the rules on transparency to apply under their own treaties and the language of the treaties provides for such application. To suggest otherwise would be unfair and not in keeping with the mandate from the Commission.
6. Moreover, the rules on transparency cannot purport to establish rules of treaty interpretation, which are governed by international law, including the Vienna Convention on the Law of Treaties.⁵²

The language these countries have proposed to address the issue of applicability to existing treaties reads:

If a treaty concluded prior to [date of adoption/effective date of the Rules on Transparency] refers to the UNCITRAL Arbitration Rules, that reference means the version of the UNCITRAL Arbitration Rules that incorporates these Rules on Transparency if the treaty, as interpreted in accordance with international law, reflects the treaty Parties' agreement to the application of that version of the UNCITRAL Arbitration Rules.⁵³

http://www.uncitral.org/pdf/english/news/arbrules_report.pdf (stating, in a report commissioned by UNCITRAL in advance of work leading to the 2010 revisions, that revision of the UNCITRAL Rules was "clearly envisaged in 1976").

⁵¹ The countries that have made this proposal have made their position public. In contrast, the countries that are resisting application of the transparency rules to existing treaties have not yet been as open about their positions.

⁵² A/CN.9/WG.II/WP.174, at pp. 3-4. Internal footnotes omitted.

⁵³ A/CN.9/WG.II/WP.174, at p. 4.

This text incorporates the settled rule that the treaty, as interpreted under international law, will determine which version of the rules will apply. It would leave open the possibility of, but would not require, a dynamic interpretation of general references to the “UNCITRAL Arbitration Rules.” If parties to a treaty-based investor–State dispute were to disagree about which version of the rules would apply, the tribunal will resolve that dispute based on applicable rules of treaty interpretation. As noted below, State parties to the governing treaty can make that task easier for the tribunal (or prevent such disputes from arising) by issuing interpretive statements or taking other steps to promote or prevent the rules’ application.

3. Clarifying the Scope of Consent for Existing Treaties: The role of interpretive declarations

If a treaty does not clearly require or preclude a dynamic interpretation, there are various avenues through which States could seek to promote or prevent application of the transparency rules in the context of a particular investor–State dispute or before one arises. The Vienna Convention on the Law of Treaties⁵⁴ (VCLT) and the International Law Commission’s (ILC) Guide to Practice on Reservations to Treaties⁵⁵ (the “ILC Guide”) provide guidance.

Article 31 of the VCLT addresses the issue of treaty interpretation. Its subparagraph (3) requires that treaty interpretation take into account “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” and “subsequent practice” in the treaty parties’ application of the treaty which establishes their agreement as to its meaning. Such agreements and practice can take various forms:

The agreement need not be in binding or treaty form but must demonstrate that the parties intended their understanding to constitute an agreed basis for interpretation. Such agreements may be more or less formal, ranging from a jointly signed document to a series of acts or communications from which an agreement can be inferred. The more informal the basis, the greater the overlap with subsequent practice . . . tribunals look for a “concordant, common and consistent” sequence of acts or pronouncements about a treaty that “is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation.” Subsequent practice may include executive, legislative, and judicial acts. It can be between the parties or internal within one party, provided that it is known by the other parties. Not every treaty party has to have engaged in a common practice, so long as all assent or acquiesce to it.⁵⁶

Through the role the VCLT carves out for States to influence the interpretation of their treaties, and the measure of flexibility it gives them in terms of how to reach “agreement” or establish the “practice” that must be taken into account by arbitral tribunals, the VCLT provides

⁵⁴ Vienna Convention on the Law of Treaties (1969), Art. 31.

⁵⁵ Yearbook of the International Law Commission, 2011, vol. II, Part Two. This report was adopted by the ILC at its sixty-third session, in 2011, and submitted to the General Assembly.

⁵⁶ Anthea Roberts, *Power and Persuasion in Investment Treaty Arbitration: The Dual Role of States*, 104 AM. J. INT’L L. 179, 199–200 (2010) (internal footnotes omitted).

opportunities for States to promote or contest dynamic interpretations of their references to the UNCITRAL arbitration rules.⁵⁷

⁵⁷ See *id.*

The ILC Guide addresses a more specific issue relevant to interpretation—namely, the role of interpretative declarations. The Guide defines an “interpretative declaration” as a “unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its positions.”⁵⁸ “An interpretive declaration does not modify treaty obligations.”⁵⁹ Rather, it “may only specify or clarify the meaning or scope which its author attributes to” all or part of a treaty “and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties.”⁶⁰

In terms of procedure, an interpretive declaration can be made at any time,⁶¹ should “preferably be formulated in writing,”⁶² and by “a person who is considered as representing a State . . . for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State . . . to be bound by a treaty.”⁶³ It should also be appropriately communicated to the other treaty party or parties.⁶⁴

The other treaty party or parties can explicitly approve or oppose the interpretive declaration, or can remain silent. If an interpretive declaration is made by one party to a bilateral treaty, and accepted by the other party to the treaty, the resulting interpretation “constitutes an authentic interpretation of the treaty.”⁶⁵ Similarly, “an interpretive declaration that has been approved by all the contracting States . . . may constitute an agreement regarding the interpretation of the treaty.”⁶⁶ Approval must be manifested—it cannot be inferred from mere silence.⁶⁷

Based on these principles, the Working Group can formulate model interpretive declarations for States to assert how references in investment treaties to UNCITRAL Arbitration Rules should be understood.⁶⁸ States could either assert that the rules at the time of the commencement of the dispute or at the time the treaty was concluded or any other set of UNCITRAL Arbitration Rules apply. Text could state, for example:

⁵⁸ Para. 1.2

⁵⁹ Para. 4.7.1.

⁶⁰ Para. 4.7.1.

⁶¹ The treaty may modify this general rule. Para. 2.4.4.

⁶² Para. 2.4.1.

⁶³ Para. 2.4.2.

⁶⁴ Para. 2.4.5; see also Arts. 2.1.5, 2.1.6, and 2.1.7.

⁶⁵ Para. 1.6.3.

⁶⁶ Para. 4.7.3.

⁶⁷ Para. 2.9.9

⁶⁸ In some instances, unilateral interpretive declarations have been viewed with skepticism. Yet the skepticism has usually emerged in situations where the State asserting the interpretation did so (1) while a dispute regarding the treaty or provision was ongoing, and (2) in order to assert a narrow reading of a (3) substantive obligation. Thus, declarations made in advance of and untied to a particular dispute, involving the assumption of a commitment (i.e., a commitment to transparency) and relating to issues of procedure, rather than substance, are distinguishable, and should not raise the same concerns.

For greater certainty, the reference in the [name of the specific treaty] [investment treaties concluded by that include the option of investor–State arbitration] to the “UNCITRAL Arbitration Rules” means the version of the UNCITRAL Arbitration Rules as in force at the time the dispute is commenced.

4. The Default Rule for Future Treaties

With respect to *future* treaties, delegations fall into what have been called the “opt-in” and “opt-out” camps. The general “opt-out” position is that, once provisions on transparency are integrated within the UNCITRAL arbitration rules (but with provisions limiting their application to investor–State disputes), references to the UNCITRAL arbitration rules in treaties concluded after the transparency provisions are adopted would thereby bring in those rules on transparency, unless countries specified otherwise (or “opted out” of the transparency rules) in their treaties. States could do this, for example, by referring in their treaties to versions of the UNCITRAL arbitration rules that do not contain transparency provisions (e.g., the 1976 and 2010 arbitration rules),⁶⁹ or by stating explicitly that they do not want the rules on transparency to apply.

In contrast, the “opt-in” advocates argue that, if and when new rules on transparency are concluded, they should contain a limiting provision making clear that they will only apply to disputes if the State parties to the governing treaty have specifically “opted into” the transparency provisions in addition to the general arbitration rules that may apply. In other words, a simple reference to the UNCITRAL arbitration rules would not bring along the UNCITRAL rules on transparency. A treaty would have to explicitly refer to the UNCITRAL arbitration rules (and/or other arbitration rules) *and* the UNCITRAL rules on transparency for the transparency rules to apply. Thus, the rules on transparency would effectively function as a stand-alone instrument, not as an integral aspect of an amended version of the UNCITRAL rules.

At the early Working Group II sessions on the issue of transparency, a large contingent of countries supported the “opt-in” approach for future treaties, arguing that this would ensure that States had clearly consented to the application of new rules on transparency. However, as the “opt-out” proponents responded, even under the “opt-out” approach, State consent would be required. It would simply be manifested differently: Provided the rules on transparency were integrated within the general UNCITRAL arbitration rules, States would give their consent to the transparency provisions by including the UNCITRAL arbitration rules in their treaties, similar to how States would be deemed to have consented to other provisions contained in the UNCITRAL rules. The “opt-out” approach would make transparency the default rule for UNCITRAL arbitrations under future treaties, but States could restrict or bar application of all or some of the transparency provisions if they so choose.

⁶⁹ But see *supra*, n. 41.

Those two points—one, that consent would still be required under the “opt-out” approach, and two, that the “opt-out” approach, which makes transparency the default rule, is more consistent with the aim of ensuring transparency in investor–State arbitrations—have led some former proponents of the “opt-in” path to indicate they would accept the “opt-out” approach. Consequently, the article reflected in the Secretariat’s draft incorporates an “opt-out” presumption for future treaties. Yet critically, some of those delegations that expressed support for the “opt-out” approach for future treaties have made clear that their switch is tentative, and conditional upon their ability to narrow the rules and limit their application under existing treaties.

C. Other “Creative Solutions” or Mechanisms for Expanding the Rules’ Application

Amendment of the UNCITRAL arbitration rules to incorporate provisions requiring openness of the proceedings, and to facilitate wide application of those rules (consistent with international law), will bring the UN’s rules in line with trends evidenced by ICSID, and will also finally bring them into alignment with principles of transparency, good governance, and accountability advanced throughout the UN system.

Yet, as noted to above, even if the UNCITRAL arbitration rules are revised to contain comprehensive rules on transparency, and even if the rules enable application to disputes under existing treaties, there are limits to when the full suite of the rules will apply. First, the treaty will have to allow it; and second, the investor will have to select those rules from the treaty’s menu. Only when those two conditions are met will there be mandatory application of the package of rules. Pursuant to the flexibilities that are provided to investors to select the rules that will govern disputes, and to disputing parties to shape their own rules, many options will remain for investor–State arbitration to proceed behind closed doors.⁷⁰

Thus, in addition to revising the UNCITRAL arbitration rules, States and the Working Group should consider options for broadening their application through use of “creative solutions.” When consistent with the treaty, States can, for example, unilaterally declare their consent to apply the revised rules on transparency to investor–State disputes, and ask investors to likewise consent. Thus, pursuant to provisions in treaties or applicable arbitration rules that give disputing parties flexibility to select the rules of procedure that will govern a particular dispute, a State can offer advance consent to apply the UNCITRAL transparency rules. The NAFTA parties used this approach in 2003 to provide for open hearings. The Government of Canada, for example, stated:

Having reviewed the operation of arbitration proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, Canada affirms that it will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven

⁷⁰ Though this practice may conflict with international and domestic law on access to information.

disputes to which it is a party be open to the public, except to ensure the protection of confidential information, including business confidential information. Canada recommends that tribunals determine the appropriate logistical arrangements for open hearings in consultation with disputing parties. These arrangements may include, for example, use of closed-circuit television systems, Internet webcasting, or other forms of access.⁷¹

Mexico and the United States have made similar declarations.⁷²

Another option would be for States to conclude a separate agreement in which they commit to apply the revised rules on transparency in future investor–State disputes applying UNCITRAL or other arbitration rules. This document could be open for signature (or other means of establishing consent to be bound) by other States, and could contribute to gradual expanded implementation of the transparency rules.⁷³ Pursuant to Article 30 of the VCLT, this new agreement’s provisions on transparency in investor–State dispute settlement could control and modify relevant provisions in existing investment treaties where the State parties to the investment treaties were also parties to the transparency convention.

Such a convention could be a viable and important long-term strategy for increasing transparency of investor–State arbitrations and widening application of UNCITRAL’s new transparency rules. If and when drafted, and widely signed and ratified, it would complement the work that the Working Group can accomplish in the near term through revision of the UNCITRAL arbitration rules. Efforts on such a convention, however, can be complementary to and need not displace the current undertaking to make UNCITRAL arbitrations more transparent.

⁷¹ Canadian Department of Foreign Affairs and International Trade, Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations, October 7, 2003.

⁷² NAFTA Free Trade Commission Joint Statement: A Decade of Achievement, July 16, 2004.

⁷³ See Vienna Convention on the Law of Treaties (1969), Art. 30.

Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
 - (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
 - (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

IV. Conclusion

To comply with the Commission’s mandate to ensure transparency in investor–State arbitration requires two things: one is the development of procedural rules that require regular, automatic and prompt disclosure of initiation of arbitrations, documents submitted to tribunals, orders, decisions and awards issued by tribunals, and open hearings and/or published transcripts. The other is ensuring that those procedural rules on transparency have the widest possible application in investor–State disputes arising under existing and future treaties. The Working Group has made significant progress on the first element of transparency, i.e., defining the rules’ form and content, though there are some areas where it currently seems to be falling short of adopting “best practice” standards. With respect to the second issue, i.e., the issue of applicability of the transparency rules, there remains a risk that the Working Group will block the extension the scope of application of the transparency rules to disputes under *existing* investment treaties. Such a development would reflect a policy choice, not a legally mandated outcome, and would fall short of fulfilling the mandate of the Commission and the United Nations more generally to ensure and promote transparency.