# Transparency in Investor-State Arbitration: An Incremental Approach

Boisson de Chazournes, Laurence; Baruti, Rukia

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Laurence Boisson de Chazournes* & Rukia Baruti**

ABSTRACT

*Transparency is an evolving concept in international dispute resolution. This is becoming increasingly evident in the arbitral practice of investor-state disputes. This article takes cognizance of recent practice in this area. It reviews the recent changes in this context introduced by the United Nations Commission on International Trade Law ("UNCITRAL") and the United Nations General Assembly in treaty based investor-state arbitration. While it acknowledges the significance of the changes introduced, it recognizes that transparency in dispute resolution was a practice initiated in other dispute resolution fora and is likely to undergo further changes as a consequence of the application of the mega regional investment agreements currently being negotiated.*

## 1 INTRODUCTION

December 10, 2014 is an important date in the evolution of investor-state arbitration. It represents the moment the international investment regime officially integrated transparency in treaty-based investor-state arbitration with the formal adoption by the United Nations General Assembly of the draft United Nations Convention on Transparency in Treaty-based Investor-State Arbitration[1] ("the Convention").

Events leading up to the Convention saw the United Nations Commission on International Trade Law ("UNCITRAL") undertake the task of drafting rules on transparency. The result was the adoption of the UNICTRAL Rules on

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1 G.A. Res. 69/116, U.N. Doc. A/RES/69/116 (Dec. 10, 2014), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/116.

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Transparency in Treaty-based Investor-State Arbitration[2] ("Transparency Rules") in 2013, which came into force on April 10, 2014. Although the Transparency Rules will not apply to treaties concluded before this date (unless state parties "opt-into" the new rules), the Convention will facilitate the "opt in" process.

This recent development in investor-state arbitration is a response to a call to take account of the public interest involved in such arbitrations.[3] It finds its roots in areas of international law such as environmental protection and human rights, traditionally known to allow the public's input, as the issues raised created the need for public knowledge. As investor-state arbitrations deal with disputes involving states in relation to their public activities, transparency is intended to promote accountability by allowing members of the public access to documents and hearings, while also giving them the opportunity to participate by making submissions to these arbitrations.[4]

This article considers how transparency evolved in the context of international dispute resolution; reviews how it has been recognized internationally; summarizes the key features of the Convention and the Transparency Rules; and concludes with an analysis of the Transparency Rules by comparing them to the 2006 International Centre for Settlement of Investment Disputes ("ICSID") amendments.

## 2 BACKGROUND

Since the early 2000s, increasing attention has been given to transparency in international dispute settlement proceedings. Decisions taken by international courts and tribunals paved the way for procedural devices that were then enshrined in various legal instruments. Indeed, emulation trends can be identified in practice.

Such has been the case with *amicus curiae* briefs. WTO case law in relation to *amicus curiae* undoubtedly influenced decisions by investment tribunals under Chapter 11 of the North American Free Trade Agreement ("NAFTA"). For example, in the *Methanex* award, the tribunal said:

> The distinction between parties to an arbitration and their right to make submissions and a third person having no such right was adopted by the WTO Appellate Body in

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2 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf [hereinafter Transparency Rules].

3 General Assembly UNCITRAL Draft Resolution, *supra* note 1 ("*Recognizing* the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations . . .").

4 For a general overview of the various meanings of transparency, *see* Julie Maupin, *Transparency in International Investment Law: The Good, the Bad and the Murky*, *in* Transparency in International Law 142-71 (Andrea Bianchi & Anne Peters eds., 2013).

> *Hot-Rolled Lead and Carbon Steel* . . . . Further, the Appellate Body there found that it had power to accept amicus submissions under Article 17.9 of the (WTO) Dispute Settlement Understanding . . . . For present purposes, this WTO practice demonstrates that the scope of a procedural power can extend to the receipt of written submissions from non-party third party persons, even in a juridical procedure affecting the rights and obligations of state parties . . . .[5]

NAFTA decisions rendered on the basis of the UNCITRAL Rules (the then Article 15(1) of the UNCITRAL Rules) had for their part some influence on the ICSID tribunals before the amendment of the ICSID Arbitration Rules (Article 37). The ICSID tribunal in an order given in the *Aguas Argentinas* case on May 19, 2005, referring to previous WTO and NAFTA decisions, considered that it was able to decide such questions of procedure under the ICSID Convention (Article 44).[6] NAFTA Rules formally interpreted in this sense in 2003[7] and ICSID Rules amended in 2006 endorsed and developed further the decisions taken by the various dispute settlement bodies that have been mentioned.

Although decisions and legal instruments have given content to various aspects of transparency, it remains to be seen how they are understood and applied in practice. An example is offered by the *Biwater Gauff* case that dealt with transparency issues following the 2006 ICSID amendments. There, the tribunal, while acknowledging that there is no general principle of confidentiality in investment treaty arbitration and that the claimant's request for non-disclosure mitigated transparency, precluded disclosure of all documents (except the award and the procedural order concerned with non-disclosure). In doing so, the tribunal highlighted the limitations to transparency by drawing attention to the need to balance the competing interests of transparency and the need for integrity in arbitral proceedings.[8]

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5 In the Matter of an Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", Final Award on Jurisdiction and Merits, 44 I.L.M. 1345, ¶ 33 (2005).

6 Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic, Order in Response to a Petition for Participation as *Amicus Curiae*, ICSID Case No. ARB/03/19, ¶15 (May 19, 2005).

7 *See infra* note 12.

8 Christina Knahr & August Reinisch, *Transparency Versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise*, *in* THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 6, 97-118 (2007).

## 3 TRANSPARENCY IN INVESTOR-STATE ARBITRATION IN THE VARIOUS REGIONS OF THE WORLD

Transparency in investor-state arbitration has been accepted in varying degrees across the globe, as reflected in a variety of regional investment agreements.

*North America*

It is fair to say that under the practice of the NAFTA,[9] North America encouraged the transparency trend in investor-state arbitrations. With respect to transparency provisions, Article 1127 of the NAFTA Chapter 11 deals with notice of new arbitrations. The article requires a disputing party to notify other parties, *i.e.*, the non-disputing parties to the agreement, of the notice of claim no later than thirty days after submission of the claim, and to provide them with copies of all pleadings filed in the arbitration. Article 1128 permits a non-disputing party to the agreement (after notifying the disputing parties) to make submissions to the tribunal on questions of interpretation of the agreement. Furthermore, Article 1129 entitles a non-disputing party to the agreement to receive the evidence submitted to the tribunal and written arguments of the disputing parties at its own cost. With respect to publication of documents in the arbitration, Annex 1137.4 provides that in arbitrations involving Canada or the United States, either the disputing state or a disputing investor that is a party to the arbitration may make an award public. However, with respect to disputes involving Mexico, Annex 1137.4 provides that "the applicable arbitration rules apply to the publication of an award."

It was through the practice of arbitrating claims under the NAFTA Chapter 11 that the members of NAFTA came to expand the transparency requirements under investor-state arbitrations.[10] This expansion was particularly achieved through binding interpretations of the NAFTA Free Trade Commission, which addressed the question of publicity of documents submitted to and issued by investor-state arbitral tribunals,[11] the participation of third parties,[12] and public access to arbitral hearings first agreed to by Canada and the United States[13] and later by Mexico.[14]

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9 Concluded between Canada, Mexico, and the United States.

10 S. J. Byrnes, *Balancing Investor Rights and Environmental Protection Investor-State Dispute Settlement Under CAFTA: Lessons From the NAFTA Legitimacy Crisis*, 8(1) U.C. DAVIS BUS. L.J. 120 (2007).

11 Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001), *available at* http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

12 Free Trade Commission, Statement on Non-Disputing Party Participation (Oct. 7, 2003), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf.

13 U.S. Trade Rep., NAFTA Commission Announces New Transparency Measures (Oct. 7, 2003), *available at* https://ustr.gov/archive/Document_Library/Press_Releases/2003/October/NAFTA_Commission_Announces_New_Transparency_Measures.html.

14 U.S. Trade Rep., NAFTA Free Trade Commission Joint Statement - "A Decade of Achievement" (July 16, 2004), *available at* https://ustr.gov/archive/Document_Library/Press_Releases/2004/July/NAFT

*Europe*

The Lisbon Treaty, adopted in December 2009, grants the European Union ("EU") with exclusive competence on foreign direct investment.[15] This entails that negotiations on investment with non-European states are to be pursued at the EU level. Although the EU has neither a Model Bilateral Investment Treaty nor has it concluded a regional agreement on investment, its acceptance of transparency is evidenced through its on-going negotiations with other countries[16] and its public statements,[17] as well as through its concluded negotiations with Canada on the Comprehensive Economic and Trade Agreement ("CETA").[18] Once adopted, the CETA and any other EU agreements containing provisions on investment will replace all bilateral investment treaties previously concluded by EU Member States with the same countries.[19]

The CETA requires transparency in the dispute settlement proceedings, subject to confidentiality. It provides that the UNCITRAL Transparency Rules shall apply as modified[20] to the disclosure of information to the public. In this respect, it specifies further requirements than the UNCITRAL Transparency Rules by directing that additional documents be included in the list of documents to be mandatorily disclosed under the Transparency Rules.[21] The CETA also provides that Canada or the EU make publicly available, in a timely manner, relevant documents even before the tribunal is constituted.[22] Additionally, all hearings must be open to the public unless the tribunal determines that there is a need to protect confidential or protected information.[23] It also provides for submissions by a non-disputing state party by permitting the tribunal to accept or invite oral or written submissions regarding interpretation of the agreement.[24] It does not explicitly deal with third-party submissions.

*Africa*

Transparency in investor-state arbitration finds acceptance in various instruments negotiated by African countries. This acceptance is nowhere more

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A_Free_Trade_Commission_Joint_Statement_-_A_Decade_of_Achievement.html.

15 Treaty on the Functioning of the European Union, arts. 207(1) & 3(1)(e).

16 Including Singapore, India, Vietnam, Japan, Morocco, China, and the United States.

17 Statement of the European Union and the United States on Shared Principles for International Investment (Apr. 12, 2012), *available at* http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf.

18 Negotiations were concluded on September 26, 2014.

19 Rupert Schlegelmilch, Director EU Commission, World Investment Forum, IIA Conference (Oct. 16, 2014).

20 Comprehensive Economic and Trade Agreement [CETA], Ch. 10, art. X.33.

21 *Id*. art. X.33(2) & (3).

22 *Id*. art. X.33(4).

23 *Id*. art. X.33(5).

24 *Id*. art. X.35(2).

evident than in the Model Bilateral Investment Treaty ("BIT") of the Southern African Development Community ("SADC") concluded in May 2012. It contains far-reaching transparency provisions. For instance, Article 29.17 requires the state party to the arbitration (subject to the protection of confidentiality) to promptly make available to the public and to the non-disputing state party all documents in the arbitration. With respect to third-party participation, Article 29.14 allows a non-disputing state party to make oral and written submissions to the tribunal regarding the interpretation of the treaty and be present at the oral arguments. Further, Article 29.15 grants the tribunal authority to accept and consider *amicus curiae* submissions.

Interestingly, the SADC Model BIT also requires a different kind of transparency—that of investment information. Under Article 24, a state party is obliged to "promptly publish, or otherwise make publicly available, its laws and regulations of general application as well as international agreements that may affect the investments of Investors of the other State Party."[25] Further, a state party is required to "endeavour to promptly publish, or otherwise make publicly available, its policies and administrative guidelines or procedures that may affect investment under this Agreement."[26] The purpose of this article is to obviate the need to resort to investment arbitration by promoting transparency of information to potential investors.

Similarly, the regional investment agreement concluded in May 2007 by the Member States of the regional economic community of the Common Market for Eastern and Southern Africa[27] ("COMESA")—the COMESA Common Investment Area ("CCIA")—also features transparency provisions.

The CCIA incorporates most aspects of transparency relevant to investor-state arbitration. This includes a mandatory disclosure to the public (upon commencement of an arbitration) of all documents relating to a notice of the intention to arbitrate, including the constitution of the tribunal, the pleadings, evidence, and decisions;[28] all procedural and substantive oral hearings are to be open to the public;[29] and the tribunal is required to "be open to the receipt of *amicus curiae* submissions."[30] Annex A of the CCIA sets out the process for submitting *amicus curiae* submissions. When providing public access to documents

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25 Southern African Development Community [SADC] Model BIT, art. 24(1).
26 *Id*. art. 24(2).
27 Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.
28 Common Market for Eastern and Southern Africa [COMESA] Common Investment Area [CCIA], art. 28(5).
29 *Id*. art. 28(6).
30 *Id*. art. 28(8).

and open hearings, the tribunal is required to take all necessary steps to protect confidential business information.[31]

While SADC Member States[32] are yet to adopt the SADC Model BIT, and the CCIA is yet to come into force, both instruments indicate African countries' acceptance of transparency in investor-state arbitrations.

*Asia*

The 1987 Association of Southeast Asian Nations ("ASEAN") Agreement for the Promotion and Protection of Investments ("AIA") contained no provisions on transparency of arbitration proceedings. The ASEAN practice has been to incrementally revise its agreements by way of Protocols.[33] The approach of adapting its legal framework to global trends saw the ASEAN members adopt transparency provisions in the successor of the AIA: the 2009 ASEAN Comprehensive Investment Agreement ("ACIA").

The ACIA came into effect on March 29, 2012. While the ACIA's transparency provisions are not as broad as those of the SADC Model BIT, it does permit (though does not require) disputing parties to make awards and decisions of the tribunal publicly available,[34] subject to the protection of confidential information. With respect to the notification of new arbitrations, the ACIA limits disclosure of the notice of arbitration to non-disputing state parties and requires the disputing state party to notify all other Member States of the receipt of the notice of arbitration within thirty days.[35] Significantly, there are no provisions relating to third-party participation. So, while ASEAN countries appear to show acceptance of transparency, the acceptance appears to be gradual.

*Middle East*

Regional investment agreements in the Middle East are relatively old. Arab countries were more active in regional investment treaty making in the 1960s and 1970s.[36] The two most relevant investment agreements are the Unified Agreement for the Investment of Arab Capital in the Arab States ("AIC Agreement"),

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31 *Id.* art. 28(7).

32 Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

33 1996 Protocol that added the Dispute Settlement Mechanism; 2004 Protocol on Enhanced Dispute Settlement Mechanism; 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms.

34 ASEAN Comprehensive Investment Agreement [ACIA], art. 39(1).

35 *Id.* art. 39(6).

36 *See*, *e.g.*, the 1971 Convention Establishing the Inter-Arab Investment Guarantee Corporation. *See* Hamed El-Kady, *An International Investment Policy Landscape in Transition: Challenges and Opportunities*, 10(4) TDM 16 (2013).

concluded between the Members States of the League of Arab States[37] in 1980, and the Agreement on Promotion, Protection and Guarantee of Investments ("OIC Agreement"), concluded in 1986 between the Member States of the Organisation of the Islamic Cooperation.[38]

Unlike the OIC Agreement, the AIC Agreement established the Arab Investment Court to hear disputes. Other than permitting a third-party to "submit a request to intervene" if it is subject to the jurisdiction of the Arab Investment Court and believes that its "interests will be affected by the judgement,"[39] there are no transparency provisions to speak of, either in the AIC or the OIC Agreement. This is not surprising since transparency had not yet become an issue in investor-state arbitration when both of these agreements were concluded.

In the early 2010s, Arab countries began reconsidering their investment agreements. This led to the amendment of the AIC Agreement in 2013. Generally, the amendments to the AIC Agreement have the effect of increasing an investor's protection,[40] without dealing with transparency issues.

## 4 THE UNCITRAL RULES ON TRANSPARENCY AND THE CONVENTION ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION

Before analyzing the main features of transparency in investment arbitration, it is important to apprehend the scope of application of the UNCITRAL Rules on Transparency and of the Convention on Transparency.

### 4.1 Scope of application of the rules on transparency

In 2013, the 2010 UNCITRAL Arbitration Rules were amended by the insertion of a new Article 1(4) to expressly incorporate the Transparency Rules. The amendment provides that the UNCITRAL Arbitration Rules now include the Transparency Rules, which will apply automatically to investor-state arbitrations pursuant to a treaty concluded on or after April 2014, unless the parties to the treaty had expressly "opted out"[41] by, for example, making reference to a different version of the UNCITRAL Arbitration Rules in their treaty. The Transparency

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37 Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Syrian Arab Republic, Somalia, Sudan, Tunisia, the United Arab Emirates, and Yemen.

38 There are fifty-seven Member States. The full list is available at http://www.oic-oci.org/oicv2/states/.

39 Arab Capital in the Arab States [AIC] Agreement, art. 33(2).

40 Hamed El-Kady, *The Amendments to the 1980 Arab League Investment Agreement: Implications on the Right to Regulate Investment in Arab Countries*, 11(3) TDM 5 (2011).

41 Transparency Rules, *supra* note 2, art. 1(1).

Rules will thus not apply to treaties concluded before April 1, 2014, unless the disputing parties or the parties to the treaty agree.[42] Similarly, they will not apply to treaties that make reference to an older version of the UNCITRAL Rules unless state parties "opt-into" the new rules. Although reference is made specifically to the UNCITRAL Arbitration Rules, the Transparency Rules can also be used in connection with investor-state arbitrations under other arbitration rules.[43]

The ability of the disputing parties to agree to derogate from the Transparency Rules is restricted by Article 1(3)(a), unless permitted to do so by the treaty. However, Article 1(3)(b) gives tribunals the discretion, after consulting the disputing parties, to adapt the requirements of any specific provision of the Transparency Rules to the particular circumstances of the case, if doing so would assist with the conduct of the arbitration in a practical manner. Any adaptations should further the aim of promoting transparency.[44]

Article 1(5) aims to counter any presumption against transparency by instructing that in UNCITRAL arbitrations where the Transparency Rules do not apply, it should not mean that less weight should be accorded to the importance of promoting transparency. This means that any transparency requirements under older versions of UNCITRAL Arbitration Rules should not be reduced by any non-application of the Transparency Rules.[45]

### 4.2 Scope of application of the convention on transparency

The purpose of the Convention is to facilitate the "opt in" process for applying the UNCITRAL Transparency Rules to existing treaties. It has the effect of amending a treaty if both parties to the Convention are parties to it. On July 10, 2014, UNCITRAL approved the draft convention on transparency in treaty-based investor-state arbitrations, which was adopted on December 10, 2014 by the United Nations General Assembly.

The Convention has been opened for signature on March 17, 2015 by any state or regional economic integration organization that is a contracting party to an investment treaty.[46] It will enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.[47]

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42 *Id*. art. 1(2).
43 *Id*. art. 1(9).
44 *Id*. art. 1(4).
45 Lise Johnson & Nathalie Bernasconi-Osterwalder, *New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps*, Inv. Treaty News, at 12 (Sept. 18, 2013).
46 Convention, art. 7(1).
47 *Id*. art. 9.

The Secretary-General of the United Nations is the depositary of the Convention.[48]

The Convention will apply to investor-state or investor-regional economic integration organization arbitrations arising under an investment treaty concluded before April 1, 2014.[49] Furthermore, Article 5 provides that the Convention and any reservation, or withdrawal of a reservation, will apply to investor-state arbitrations commenced after the date the Convention, reservation, or withdrawal of reservation enters into force in respect of each party.[50] Article 3 permits a party to exclude the application of the Convention to investor-state arbitration under either a specific investment treaty[51] or specific set of arbitration rules or procedures (other than the UNCITRAL Arbitration Rules), and in which it is a respondent.[52] It also permits a party to exclude the application of the Convention in investor-state arbitration in which it is a respondent.[53]

Article 3(3) deals with reservations. It permits a party to declare multiple reservations in a single instrument. However, each declaration will constitute a separate reservation that can be withdrawn separately. A party to the Convention may also exclude application of any revised Transparency Rules within six months of their adoption.[54] In all cases, unless a reservation is made, the most recent version of the Transparency Rules will apply.[55]

With respect to bilateral or multilateral application of the Convention, the Transparency Rules will apply to any investor-state arbitration whether or not initiated under the UNCITRAL Arbitration Rules,[56] unless a reservation has been made under Article 3 of the Convention with respect to a specific investment treaty or set of arbitration rules or procedures. Similarly, as far as a unilateral offer of application of the Convention is concerned, and where the claimant agrees to their application, the Transparency Rules will apply whether or not initiated under the UNCITRAL Arbitration Rules[57] if the respondent makes no reservation either under a specific investment treaty or set of arbitration rules, or declares that the Convention will not apply when it is a respondent.

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48 If a party wishes to denounce the Convention, it may do so by means of a formal notification addressed to the depositary. The denunciation will take effect twelve months after the notification is received. Nonetheless, the Convention will continue to apply to investor-state arbitrations commenced before the denunciation takes effect (the Convention, art. 11).

49 *Id.* art. 1(1).

50 *Id.* art. 5.

51 *Id.* art. 3(1)(a).

52 *Id.* art. 3(1)(b).

53 *Id.* art. 3(1)(c).

54 *Id.* art. 3(2).

55 *Id.* art. 2(3).

56 *Id.* art. 2(1).

57 *Id.* art. 2.

Finally, parties to the Convention agree not to invoke a most favoured nation provision either to seek to apply or avoid the application of the Transparency Rules.[58]

### 4.3 The rules on transparency—The facets of transparency

The adoption of the Transparency Rules by the United Nations is a reflection of the significance of transparency in the context of dispute resolution between a sovereign entity and a private entity.

The Transparency Rules address four aspects of transparency relevant to investor-state arbitration: notification of new arbitrations; access to documents; third-party submissions; and open hearings.

*Notification of New Arbitrations*

Article 2 of the Transparency Rules requires prompt and mandatory disclosure of new arbitrations. The disputing parties have the obligation to transmit a notice of arbitration to the UNCITRAL Transparency Registry, which is the central repository for the publication of information and documents in treaty-based investor-state arbitrations.[59] Upon receipt of the notice of arbitration and evidence that the respondent has been sent the notice of arbitration, the repository is required to promptly disclose the names of the disputing parties, the relevant economic sector, and the treaty under which the claim is being made.

*Access to Documents*

Documents in the proceedings will be disclosed to the public as a matter of course.[60] Article 3 of the Transparency Rules—subject to the exceptions under Article 7—establishes three categories of documents to be disclosed. The first includes documents that must be mandatorily and automatically disclosed.[61] This encompasses a comprehensive set of documents submitted by the disputing parties to the tribunal, to parties that are not a party to the dispute but that are a party to the relevant treaty ("Non-Disputing Party to the Treaty"), and to parties that are not a party to the dispute or the relevant treaty ("Third Persons").[62] It also includes orders, decisions, and awards issued by the tribunal during the proceedings, including all transcripts of the hearings.

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58 *Id*. art. 2(5).

59 The function of the Registry is undertaken by the Secretary-General of the United Nations, through the UNCITRAL Secretariat.

60 Julia Salasky & Corinne Montineri, *UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, 31 ASA Bull. 4, 787 (Dec. 2013).

61 Transparency Rules, *supra* note 2, art. 3(1).

62 Indicating that the request of documents should be made while the tribunal is *functus officio.*

The second category covers documents that must be mandatorily disclosed once any person requests their disclosure from the tribunal.[63] It includes witness statements and expert reports.

The third category relates to documents that do not fall under either of the above categories, for which the tribunal has discretion, after consulting the disputing parties, regarding whether and how to make available such documents.[64] This may include making the documents available at a specified location. A person granted access of documents under this category is responsible for the administrative costs of making them available, but not the costs of making them available to the public through the repository.[65] The disclosed documents will be made public via the repository after the tribunal ensures that steps have been taken to restrict disclosure of protected or confidential information.

*Third-party Submissions*

With respect to third-party submissions, the Transparency Rules draw a distinction between Third Persons and a Non-Disputing Party to the Treaty. Third-party submissions relating to Third Persons are dealt with in Article 4, while those relating to a Non-Disputing Party to the Treaty are dealt with under Article 5.

Article 4 of the Transparency Rules creates a standard for Third Persons to make written submissions regarding a matter that is within the scope of the dispute.[66] The application for making a submission must be in writing and must provide relevant details of the Third Person, including its legal status and activities, connections it has with a disputing party, information on any financial assistance received in preparing the submission or for its overall operations, the nature of its interest in the arbitration, and issues it wishes to address.[67] In making its decision, the tribunal will take into consideration the Third Person's interest in the arbitration and the extent to which its submissions will assist the tribunal in the determination of an issue in the proceedings by bringing a different perspective to that of the disputing parties.[68]

Article 5 of the Transparency Rules creates a standard for a Non-Disputing Party to the Treaty to make submissions. Unlike submissions under Article 4, these submissions are not restricted to written submissions. A Non-Disputing Party to the Treaty may make submissions on treaty interpretations[69] and other matters

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63 Transparency Rules, *supra* note 2, art. 3(2).
64 *Id*. art. 3(3).
65 *Id*. art. 3(5).
66 *Id*. art. 4(1).
67 *Id*. art. 4(2).
68 *Id*. art. 4(3).
69 *Id*. art. 5(1).

relevant to the dispute,[70] subject to the same considerations given to third-party submissions.[71] Conscious of the risk of a non-disputing state party abusing this article, Article 5(2) directs the tribunal not to accept any submissions "which would support the claim of the investor in a manner tantamount to diplomatic protection." Conversely, the tribunal is prohibited from drawing any inferences based on the silence of a Non-Disputing Party to the Treaty.[72]

Under both Articles 4 and 5, submissions may be allowed at the discretion of the tribunal and after consulting the parties. The tribunal is required to ensure that submissions do not disrupt or duly burden the arbitral process or unfairly prejudice a disputing party,[73] and requires the tribunal to ensure that a reasonable opportunity is afforded to the disputing parties to respond to the submissions.[74]

*Open Hearings*

Article 6 of the Transparency Rules creates a default rule that all hearings are public.[75] This rule is, however, subject to the need to protect confidential information or the integrity of the arbitral process pursuant to Article 7.[76] It is also subject to Article 6(3), where for logistical reasons, and in consultation with the parties, the tribunal decides that it is necessary to hold hearings *in camera*. The tribunal is required to make arrangements to facilitate public access to hearings, including, where appropriate, through means such as video links.

*Exceptions to the Transparency Rules*

Article 7 of the Transparency Rules lists two exceptions to the obligations of transparency: information that is considered "confidential or protected" and information that will jeopardize the "integrity of the arbitral process." Under the confidential or protected information, Article 7(2) lists four categories of information that will be exempt from disclosure: confidential business information; protected information under the treaty; protected information under the law of the respondent; and other protected information under any law determined by the tribunal to be applicable, or information which would impede law enforcement.

These exceptions will apply to information on a case-by-case basis based on their nature and the applicable law. For instance, if the information relates to the respondent state and the respondent state's security, the applicable law will be the law of the respondent state. However, there are limitations inserted to guard against

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70 *Id*. art. 5(2).
71 *Id*. art. 4(3).
72 *Id*. art. 5(3).
73 *Id*. arts. 4(5) & 5(4).
74 *Id*. arts. 4(6) & 5(5).
75 *Id*. art. 6(1).
76 *Id*. art. 6(2).

respondent states' abuse of these special state protections. Conversely, if it relates to other information, the applicable law or rules relating to the disclosure of such information will be determined by the arbitral tribunal. The tribunal is granted leeway to determine how to proceed when designating information as confidential or protected.

In order to guard against jeopardizing the integrity of the process, Article 7(7) of the Transparency Rules allows the tribunal to take steps to "restrain" or "delay" mandatory disclosure of information.[77]

### 4.4 How to submit documents to the registry

As previously indicated, the Registry is the central repository for the publication of information and documents in treaty-based investor-state arbitrations. The process of submitting documents to the Registry is set out on the UNCITRAL Transparency website. It covers the following:

*Information by Disputing Parties*

Pursuant to Article 2 of the Transparency Rules, a copy of the notice of arbitration is to be submitted to the Registry. If either party challenges the application of the Transparency Rules, that party is required to inform the Registry immediately. Once constituted, the tribunal will bear the sole responsibility for the submission of documents to the Registry.

*Validation of Authenticity*

The presiding arbitrator is required to communicate all contact details of the parties and members of the tribunal to the Registry by using the template for arbitral tribunals. The tribunal is required to designate a person from whom the Registry will receive information and to whom the Registry can revert for questions. The presiding arbitrator is considered to be the default contact person for the Registry.

*Objection to the Application of the Transparency Rules*

If either disputing party objects to the application of the Transparency Rules, the tribunal is required to promptly decide on their application and communicate the decision to the Registry.

*Submission of Documents*

The tribunal is required to submit the documents to the Registry electronically without hard copies. If the disputing parties have failed to submit the notice of

[77] Transparency Rules, *supra* note 2, art. 7(7).

arbitration to the Registry, the tribunal is required to do so. The tribunal's communication to the Registry is to be in English or in French.

*Format of the Documents*

The documents sent to the Registry are required to be in searchable PDF format, 300 dpi, and not exceed 5 MB. If a document exceeds this size, it should be divided into smaller documents.

The tribunal is required to redact all confidential or protected information in accordance with the Transparency Rules. The redacted sections will neither be searchable nor recoverable.

*Closure of Publication Period*

Once the arbitral tribunal has discharged its function and its mandate is terminated, the Registry will not publish any additional documents on that case.

*Costs*

In principle, the service of the Registry is at no cost to the parties, tribunals, and the public, except if the requirement of submitting documents in electronic format is not complied with and except with respect to administrative costs if disclosure is made pursuant to Article 3(3) of the Transparency Rules referred to above. Costs for submission of documents will be borne by the submitting party or the submitting tribunal.[78]

## 5 THE UNCITRAL RULES ON TRANSPARENCY IN COMPARISON TO THE 2006 ICSID AMENDMENTS

It is interesting to compare the provisions on transparency in the Transparency Rules to those of the ICSID Arbitration Rules. The former went a step further.

Prior to the adoption of the Transparency Rules in 2013, the provisions under the UNCITRAL Arbitration Rules (as amended in 2010) offered little transparency in arbitral proceedings[79] compared to the 2006 ICSID amendments.[80] Parties were generally not allowed to disclose the terms of the award; hearings were closed to the public; and third state party submissions were not generally permitted. However, with the adoption of the Transparency Rules, the UNCITRAL Arbitration Rules offer a significant degree of openness

[78] The UNCITRAL Transparency Registry Guidelines, at G(3), *available at* http://www.uncitral.org/transparency-registry/en/guidelines.html.

[79] Samuel Levander, *Resolving "Dynamic Interpretation": An Empirical Analysis of the UNCITRAL Rules on Transparency*, 52 COLUM. J. TRANSNAT'L L. 506, 521 (2014).

[80] Aurélia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21(2) ICSID REV. – FOR. INV. L.J. 427 (2006).

throughout UNCITRAL arbitral proceedings. In comparison to the Transparency Rules, the 2006 ICSID amendments continue to allow disputing parties substantial scope to control transparency of the proceedings.

With regard to notification of new arbitrations, both the Transparency Rules and the relevant ICSID regulations require public disclosure of the names of the disputing parties. The ICSID secretariat publishes this information in the register on its website and also includes the date of registration and a short summary of the dispute. The Transparency Rules require the repository to also disclose the relevant economic sector of the disputing parties and the treaty under which the claim is being made.

Regarding the disclosure of documents, the Transparency Rules require, subject to exceptions, the mandatory disclosure of documents (including the award) in the proceedings as a matter of course. Although the 2006 ICSID amendments maintain the position of the old rules in prohibiting publication by the ICSID Secretariat of an award without the consent of both parties, consent of the parties is actively sought by ICSID and is usually provided. Additionally, the 2006 ICSID amendments require the ICSID secretariat to promptly publish excerpts of the award. While the 2006 ICSID amendments refer to awards only, there is no provision in the ICSID Arbitration Rules that expressly provides for the confidentiality of other documents. Accordingly, this remains at the individual discretion of the disputing parties.

Arguably, the biggest transparency change under ICSID arbitration proceedings relates to third-party submissions. Prior to the 2006 ICSID amendments, the ICSID Arbitration Rules did not provide for written submissions other than those from the parties to the proceedings. The introduction of Rule 37(2) to the ICSID Arbitration Rules enabled greater public participation in the proceedings by requiring tribunals to consider third-party requests to file *amicus* briefs. While the Transparency Rules are more detailed in this respect and provide greater clarification by differentiating between a "Third Person" and a "Non-Disputing Party to the Treaty," practically the rules have the same effect under both the ICSID and UNCITRAL arbitration proceedings.

With respect to the final aspect of transparency—open hearings—the Transparency Rules create a default position that all hearings are public, whereas the 2006 ICSID amendments maintain the disputing parties' right to deny the public access to open hearings.

## 6 CONCLUSION

The prevailing position under the ICSID Arbitration Rules retains the disputing parties' discretion to allow transparency in investor-state arbitrations. For their part, the Transparency Rules represent a departure from this position. They have

reversed the presumption for confidentiality and privacy in investor-state arbitrations in favor of openness.

Having said that, in view of the ICSID practice on transparency following the 2006 ICSID amendments,[81] it remains to be seen how tribunals will exercise the discretion afforded to them in dealing with transparency requests under the Transparency Rules, especially in light of the need to maintain the "integrity in arbitral proceedings," which is one of the exceptions to transparency in the UNCITRAL Rules on Transparency.

While the purpose of the Convention is to address the rather limited scope of application of the Rules on Transparency, its success will ultimately depend not only on the number of states that ratify it without reservations, but also on having both parties to a relevant treaty agree to their application. As such, the impact of the Rules on Transparency in treaty-based investor-state arbitration will only become ascertainable through years of practice following their adoption.

What is clear, however, is that transparency has become a discernible trend in investment arbitration. We have seen it make its pervasive presence known in dispute resolution fora—a practice started by the WTO, developed by NAFTA, followed by ICSID and, conceivably perfected by UNCITRAL. New features might emerge in agreements currently being negotiated by the EU, highlighting that transparency is an evolving concept.

*Comparison of the Rules on Transparency between UNCITRAL and ICSID*

| *RULE* | *UNCITRAL Rules on Transparency* | *ICSID Arbitration Rules* |
|---|---|---|
| **Disclosing information of new arbitrations** | Article 2 requires parties to notify the registry of the notice of arbitration and prompt and mandatory disclosure of new arbitrations by the repository. The repository is required to promptly disclose the names of the disputing parties, the relevant economic sector, and the treaty under which the claim is being made. | ICSID Administrative Regulations 22(1) and 23(2) require the ICSID secretariat to publish and register new arbitrations in the register on its website and include the names of the parties, the date of registration, and a short summary of the dispute. |

[81] Biwater Gauff (Tanzania) Ltd v. Tanzania, Procedural Order No. 3, ICSID Case No. ARB/05/22 (Sept. 29, 2006).

| *RULE* | *UNCITRAL Rules on Transparency* | *ICSID Arbitration Rules* |
|---|---|---|
| **Access to Documents** | Article 3 allows for a wide range of documents, including the award, to be mandatorily and automatically disclosed, and the tribunal has discretion regarding whether to order disclosure of other documents. However, Article 3 is subject to Article 7 on exceptions to transparency. | Rule 48(4) requires ICSID to publish excerpts of legal reasoning of every award promptly and only allows publication of the award with the consent of the parties. Although it makes no provision for disclosure of other documents, these would be subject to the parties' consent. |
| **Third-Party Submissions** | Articles 4 and 5 differentiate between submissions by Third Persons and submissions by a Non-Disputing State Party to the Treaty. Submissions by Non-Disputing State Party to a Treaty are not limited to written submissions. Submissions are permitted subject to some discretion of the arbitral tribunal to ensure that any submissions do not disrupt or unduly burden the proceedings, or unfairly prejudice a disputing party. | Rule 37(2) authorizes tribunals to accept *amicus* submissions even if both parties object. However, Rule 37(2) requires that certain conditions be met to ensure that submissions would neither disrupt the proceedings nor unduly burden either party. |
| **Open Hearings** | Article 6 creates a default rule (subject to Article 7 on exceptions to transparency) that all substantive hearings are public. | Rule 32(2) authorizes the tribunal to allow third parties to attend hearings only if none of the parties to the proceedings object. |