

# CHAPTER 3

## UNCITRAL STANDARDS ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION

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### I INTRODUCTION

The UNCITRAL<sup>1</sup> standards on transparency - the Rules on Transparency in Treaty-based Investor-State Arbitration (the "Transparency Rules" or the "Rules"), the Mauritius Convention on Transparency (the "Transparency Convention" or the "Convention"), and the Transparency Registry<sup>2</sup> - are the most recent successful results of a multilateral endeavor to reform investment arbitration, an area of much public and media attention at the moment with, for instance, the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP).

UNCITRAL commenced work on transparency in investment arbitration in October 2010, after completion of the revision of the UNCITRAL Arbitration

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1 UNCITRAL, United Nations Commission on International Trade Law, established by the General Assembly by resolution 2205 (XXI) of 17 December 1966 as one of the General Assembly Commissions. The Commission is the core legal body of the United Nations system in the field of international trade law, and its mandate is to further the progressive harmonization and modernization of the law of international trade.

2 The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17), Annex I, available on the UNCITRAL website at <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html)>; The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency"), Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17), Annex I, available on the UNCITRAL website at <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency\\_Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html)>; The UNCITRAL Registry on Transparency, at <[www.uncitral.org/transparency-registry/registry/index.jsp](http://www.uncitral.org/transparency-registry/registry/index.jsp)>.

Rules, which are the second most frequently used set of rules for the settlement of dispute between a State and an investor after the rules of the International Centre for Settlement of Investment Disputes (ICSID). In 2008, during the revision of the UNCITRAL Arbitration Rules, the Government of Canada urged Member States to consider undertaking work on transparency in investment arbitration. The Government pointed out that not undertaking that work might amount to an endorsement of secrecy in investor-State arbitration and would be contrary to the fundamental principles of good governance and human rights upon which the United Nations is founded. The delegation of Canada at UNCITRAL was at that time led by a woman of conviction, Ms Meg Kinnear, now Secretary-General of ICSID.

The policy considerations for such a call were summarised, in 2008, by the Government of Canada as follows:<sup>3</sup>

Investor-State arbitration implicates the interests of the citizens and residents of the disputing State. Disputes brought pursuant to investment treaties often involve regulations with public policy implications, such as tax laws, environmental laws, health regulations and natural resources laws. Further, the defense of any claim and the payment of any award will ultimately come from public funds. As Professor John Ruggie, the Special Representative of the United Nations' Secretary-General on the issue of human rights and transnational corporations and other business enterprises, explains when discussing investor-state arbitration in his report to the Human Rights Council, '[w]here human rights and other public interests are concerned, transparency should be a governing principle, without prejudice to legitimate commercial confidentiality'.

Indeed, transparency and inclusiveness are expressions of core United Nations values such as human rights, good governance and the rule of law. The right of access to information is an integral component of the freedom of expression under international human rights law. Six years after that call for change from the Government of Canada, three main instruments are in place: the Transparency Rules – the Transparency Convention – the Transparency Registry. While the Rules mainly apply to "future" investment treaties, the Convention aims at making the Rules applicable to "existing" investment treaties, and both instruments would not fulfill their purpose without the Transparency Registry.

The work undertaken by UNCITRAL in the field of transparency is to be considered in the context of foreign direct investment as a tool for the long-term sustainable growth of developing countries. Investment arbitration arises out of a

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3 See A/CN.9/662, para. 9.

body of law that has "development" as one of its overall objectives. The purpose of UNCITRAL work on transparency is to make public information on disputes arising from such investments, thereby contributing to building confidence in the existing international investment framework.<sup>4</sup>

Further, UNCITRAL standards on transparency constitute an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such. Those challenges include, among others: an increasing number of treaty-based investor-State arbitrations, including an increasing number of frivolous claims; increasing amount of awarded damages; increasing inconsistency of awards and concerns about the lack of predictability and legal stability; and uncertainties regarding how the investor-State dispute settlement system interacts with important public policy considerations. The UNCITRAL legal standards on transparency are meant to enhance the public understanding of the process and its overall credibility.

The Transparency Rules (Part II below) have been prepared and adopted by UNCITRAL, whereas the Transparency Convention (Part III) has been prepared by UNCITRAL and adopted by the General Assembly<sup>5</sup> of the United Nations. The Transparency Registry (Part IV) has been accessible on line since the coming into effect of the Transparency Rules, on 1 April 2014. This paper presents the instruments on transparency, highlighting the various views that were expressed during the multilateral process that led to their adoption.<sup>6</sup>

## ***II THE TRANSPARENCY RULES, THEIR CONTENT, THEIR APPLICATION***

The Rules are the result of three years intensive negotiations by State delegations at the sessions of the UNCITRAL Working Group II (Arbitration and Conciliation), a process, which was observed by around 50 international organizations, both intergovernmental and non-governmental.

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4 FDI flows could rise to \$1.6 trillion in 2014, \$1.7 trillion in 2015 and \$1.8 trillion in 2016. Estimates for investment needs in developing countries alone range from \$3.3 to \$4.5 trillion per year. At current levels of investment in sustainable development-related sectors, developing countries face an annual gap of some \$2.5 trillion.(source: *UNCTAD*)

5 See General Assembly resolution 69/116 of 10 December 2014.

6 The paper is based on the reports of the sessions of the UNCITRAL Working Group on Arbitration on the works of its fifty-third to sixtieth sessions, referenced A/CN.9/712, A/CN.9/717, A/CN.9/736, A/CN.9/741, A/CN.9/760, A/CN.9/765, A/CN.9/794, A/CN.9/799, and available on the Internet at <[www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html)>.

In 2013, UNCITRAL adopted the Transparency Rules, which apply to disputes under the UNCITRAL Arbitration Rules arising under investment treaties<sup>7</sup> concluded after 1 April 2014, unless otherwise agreed by the Parties to the treaty. The Rules may also become applicable to disputes under investment treaties concluded before that date where there is an express consent of the Parties to the investment treaty or between disputing parties for their application. In addition, the Parties to an investment treaty or the disputing parties may agree to apply the Transparency Rules to arbitrations under sets of rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings.

The Transparency Rules, comprising 8 articles, constitute an innovative set of procedural rules that make arbitrations involving a State, initiated under an investment treaty, accessible to the public. The Transparency Rules represent a fundamental change from the status quo of arbitrations conducted outside the public spotlight. They accomplish the following objectives: (i) creating public knowledge of the initiation of an investor-state arbitration; (ii) making documents including the decisions and awards of arbitral tribunals public; (iii) allowing third parties to make submissions to arbitral tribunals where such submissions would be helpful and relevant and would not unduly delay, interfere with, or increase the costs of, the proceedings; allowing submissions by non-disputing Party (a State or a regional economic integration organization) to the investment treaty; (iv) allowing open hearings; and (v) preserving the existing power of arbitral tribunals to allow closed proceedings and restrict access to documents, or portions thereof, when necessary to protect confidential and sensitive information and the integrity of the arbitral process.

Regarding the structure of the Rules, article 1 addresses their scope of application, and in particular the question of how the consent of the Parties to an investment treaty would be expressed so that the Transparency Rules would apply. It includes important principles, such as on the exercise of its discretion by the arbitral tribunal, the interplay between the Transparency Rules and the investment treaty provision that could conflict with the Rules, as well as the interplay between the Transparency Rules and the applicable set of arbitration rules. Articles 2 to 6 deal with substantive issues on transparency. Article 7 addresses exceptions to transparency, which are limited to the protection of confidential and sensitive

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<sup>7</sup> In the Transparency Rules, an investment treaty is defined broadly "as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty."

information and of the integrity of the arbitral process. Article 8 determines who is in charge of making the information available to the public.

The Rules are based on principles, such as:

- The obligation of disputing parties to apply and comply with the Rules if these are applicable under the relevant investment treaty - see article 1 (3) (a) of the Rules:

In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty: (a) The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty);

- The arbitral tribunal discretion in the application of the Rules, in particular in balancing the interest of the parties for an efficient dispute settlement process and the interest of the public for receiving information - see article 1 (4) of the Rules:

Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account: (a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and (b) The disputing parties' interest in a fair and efficient resolution of their dispute;

article 1 (5):

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

- The Rules aim at fostering transparency, without creating delays, increasing costs or unduly burdening the arbitral proceedings; further, they aim at establishing the right balance between the public interest and the manageability of the arbitral proceedings - see article 1 (3)(b):

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

- Any limitation on transparency should not defeat its very purpose with regard to good governance - see article 1 (6):

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

## **A Content**

### *1 Creating public knowledge of the initiation of an investor-state arbitration*

Article 2 of the Transparency Rules, addressing "Publication of information at the commencement of arbitral proceedings" reads as follows:

Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 8. Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made.

This simple and straightforward provision is the result of much debate, as briefly illustrated below.

Publication of the initiation of arbitral proceedings is an important step for ensuring transparency and for making other provisions on transparency meaningful. During the drafting process of the Transparency Rules at the sessions of the UNCITRAL Working Group on Arbitration, different views were expressed regarding the information to be made public at that early stage of the proceedings, in particular, whether it should be limited to the existence of a dispute, or also include publication of the notice of arbitration.

- (a) Information to be made public: the notice of arbitration or general information?

Views were expressed during the sessions of the UNCITRAL Working Group on Arbitration that the notice of arbitration, that triggered the commencement of arbitration under article 3 of the UNCITRAL Arbitration Rules, should be made public. However, it was also highlighted during the deliberations that publicizing the notice of arbitration might not provide balanced information on the case. In turn, that might give rise to various issues such as protection of confidential or sensitive information and risks of frivolous claims. Therefore, there were suggestions that providing only preliminary information regarding the parties

involved, their nationality, and the economic sector concerned would be sufficient, following the publication by the ICSID Secretariat which does not make the notice of arbitration public and posts on its website, after registration, the name and subject matter of the case as well as the date of registration of the case.

The notice of arbitration would then be made public after the constitution of the arbitral tribunal. The arbitral tribunal was seen as best placed to police matters of confidential and sensitive information that might be contained in the notice of arbitration. However, there were also opposing views and concerns that publication after constitution of the arbitral tribunal would not permit civil society to be informed of the commencement of the proceedings, to express their views at an early stage of the proceedings, and to possibly express views on the composition of the arbitral tribunal. Under those views, there should be full disclosure of the notice of arbitration, once served, with possible solutions to address the need to protect sensitive and confidential information. Hence, the suggestion to devise a procedure in the Rules whereby the notice of arbitration could be published, subject to the parties' agreement to redact sensitive and confidential information. In case of disagreement between the parties on the information to be redacted, the most redacted version of the notice of arbitration would be published. After its constitution, the arbitral tribunal could decide on the disputed information to be made public and, if necessary, order publication of a revised notice of arbitration. However, the proposed procedure was seen as complicated for a legal standard meant to establish clear rules of universal application.

As a compromise solution, it was decided that the notice of arbitration would be published once the arbitral tribunal was constituted and there would also be disclosure of information on the existence of the proceedings, along the lines of the ICSID procedures, promptly upon the receipt of the notice of arbitration.<sup>8</sup>

- (b) Timing for the publication of information: at the commencement of arbitration, or when the arbitral tribunal is constituted?

As to timing, different views were expressed during the deliberations of the UNCITRAL Working Group on Arbitration on whether the information should be made public once the arbitration started at the time the notice of arbitration was received, or when the arbitral tribunal was constituted. Providing early information to the public on the existence of proceedings was said to be important in order to

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8 Regulation 22(1) of the ICSID Administrative and Financial Regulations provides that "[t]he Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding".

allow public awareness of procedural steps of the arbitration. A practical concern was expressed that publication at a premature stage of the proceedings would not be advisable, as at the time of the notice of arbitration, no arbitral tribunal had yet been constituted and there existed a possibility that the arbitral proceedings would never take place. Also, views were expressed that it might be preferable to provide for publication of information once the arbitral tribunal had been constituted, in order to ensure the reliability of the information published. The decision on that matter was to publish information once the arbitration started, a decision guided by policy consideration on whether civil society should play an active role at that stage of the proceedings.

(c) Person responsible for taking the initiative of publication

As to the person responsible for taking the initiative of publication regarding the initiation of the proceedings, various views were expressed on whether the host State or the investor, or the disputing parties jointly should be responsible for the publication; in the context of those discussions, the question of sanctions in case of failure to do so was also raised. As the negotiations progressed, it became clear that publication would be undertaken by the Transparency Registry.

*2 Making documents, including decisions and award of the arbitral tribunal, public*

The provision on the publication of documents illustrates the pragmatic approach adopted in the Rules. For that provision also, different views were expressed on whether and, if so, which documents should be published, and the persons responsible for publication.

(a) All documents or some documents?

A view was that all documents submitted to, and issued by, the arbitral tribunal should be made available to the public, so as to ensure that the public would be informed of the arbitral proceedings and to facilitate submission by third parties of amicus curiae briefs. Of course, mechanisms would be designed to provide opportunity for protection of confidential or sensitive information and to resolve any dispute that might arise between the parties in relation to information to be protected from publication. The purpose of such mechanisms would be to ensure that transparency would not unduly prejudice one party. That aspect was agreed from the beginning. Discussions focused on whether all documents should be published, or only some of them, in particular in view of the necessity to find the right balance between the requirements of public interest and the legitimate need to ensure manageability and efficiency of the arbitral procedure. In that respect, the publication of briefs was viewed as burdensome but still manageable, whereas the

publication of witness testimonies and expert reports was viewed as potentially costly. Consequently, it was proposed to differentiate between briefs of the parties and orders by arbitral tribunals, which could be published; and other evidentiary materials or exhibits, which could be treated differently.

(b) Who should decide on the publication of documents?

Different views were expressed on whether the parties or the arbitral tribunal should be the ones to decide on publication of documents. It was suggested that the parties were in the best position to judge the appropriateness of publication of documents, so that they should be the ones deciding on that issue. However, it was pointed out that a number of States did not have experience in that field and that matter should be taken into account in designing provisions on transparency.<sup>9</sup> Other views were expressed that the arbitral tribunal should decide the issue of publication of documents on a case-by-case basis. Therefore, any provision on that matter could provide that publication of all materials submitted to, or issued by, the arbitral tribunal, should be as directed by the arbitral tribunal. Concerns were expressed that leaving the matter fully in the hands of the arbitral tribunal would give too much discretion and power to the arbitral tribunal in the absence of any guidelines. Another concern expressed was that it might be too burdensome for the arbitral tribunal to undertake that task.

After deliberations on the matter, article 3 on publication of documents clearly identifies the documents to be published by the Transparency Repository, as follows:

1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defense and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.
2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.

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<sup>9</sup> A/CN.9/WAGDI/WP.159 and its addenda.

3. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified site. 8

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

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

*3 Allowing third parties to make submissions to the arbitral tribunal where such submissions would be helpful and relevant and would not unduly delay, interfere with, or increase the costs of, the proceeding - allowing submissions by the non-disputing Party to the investment treaty*

Two possible types of amicus curiae have been distinguished and considered differently under the Transparency Rules. The first type, covered under article 4 of the Transparency Rules, is any third party that has an interest in contributing to the solution of the dispute. The second type, addressed under article 5 of the Rules, is another Party to the investment treaty at issue - a State or a regional economic integration organization - that is not a party to the dispute. Such non-disputing Party often has important information to provide, such as information on *travaux préparatoires*, and its submissions aim at preventing one-sided treaty interpretation. The UNCITRAL Working Group on Arbitration, during its deliberations on the matter was well aware of the fact that an intervention by a non-disputing Party, of which the investor is a national, could raise issues of diplomatic protection, and therefore, careful consideration has been given to that question.

(a) Submissions by third parties

Submissions by third parties (also referred to as amicus curiae submissions) are usually viewed as useful for the arbitral tribunal in resolving the dispute; they also

promote legitimacy of the arbitral process in proceedings between an investor and a State. During the preparation of the provisions on *amicus curiae* in the Rules, attention focused on restricting criteria to be designed for such submissions, including the subject-matter of the submission, expertise of the *amicus curiae*, relevance for the proceedings, appropriate page limits, and the time when such submissions would be allowed. The arbitral tribunal itself has to play a "gate-keeping" role and decide on whether to allow *amicus curiae* submissions based on certain criteria.

Article 5, on submissions by third persons, provides details to assist the arbitral tribunal in its decision-making process in relation thereto, as follows:

1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.
2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal: (a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person); (b) Disclose any connection, direct or indirect, which the third person has with any disputing party; (c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually); (d) Describe the nature of the interest that the third person has in the arbitration; and (e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.
3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant: (a) Whether the third person has a significant interest in the arbitral proceedings; and (b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.
4. The submission filed by the third person shall: (a) Be dated and signed by the person filing the submission on behalf of the third person; (b) Be concise, and in no

case longer than as authorised by the arbitral tribunal; (c) Set out a precise statement of the third person's position on issues; and (d) Address only matters within the scope of the dispute.

5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party. 6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.

(b) Intervention by non-disputing State(s) or regional economic integration organisations

Another Party to the investment treaty at issue that is not a party to the dispute could also wish, be invited, or have a treaty right to make submissions. Several investment treaties allow for the participation of a non-disputing State, such as the North American Free Trade Agreement (NAFTA) in article 1128 entitled "Participation by a Party". Instances of similar provisions found in other treaties include the Central American Free Trade Agreement (CAFTA), and in the Canadian Model BIT

During the deliberations of the UNCITRAL Working Group on Arbitration, doubts were expressed on the need for such a provision in the Rules, because non-disputing Party(ies) to an investment treaty enjoy the right to comment on the treaty, or arbitral tribunals might request submissions, a situation that was said to arise in practice. For instance, a Party to an investment treaty might issue statements on treaty interpretation, or unilateral declarations on its understanding of a treaty provision. A different view was expressed that a provision on submission by a non-disputing Party to the treaty was not needed for the reason that a State should enjoy the same rights as third parties in that respect.

After deliberation on the matter, wide support was expressed for a separate provision devoted to the matter of submission by a non-disputing State Party to the treaty for the reasons that it would contribute to clarifying the legal regime applicable to that category of submissions and would mark the difference between submission by third party and by non-disputing Party to the treaty.

Regarding treaty interpretation, it was widely felt that the non-disputing State Party to the treaty might bring a perspective on the interpretation of the treaty, including access to the *travaux préparatoires* which might not be otherwise available to the tribunal, thus avoiding one-sided interpretations limited to the respondent State's contentions.

Views were expressed that if the investor's home State were allowed to file a submission beyond matters of treaty interpretation, and to address matters of law,

there would be a risk that the submission by the non-disputing Party to the treaty might come very close to diplomatic protection. Contrary views were expressed that a State should not be prevented from making a factual submission or a submission on matters of law. For example, the arbitral tribunal might need information on the nationality or corporate status of the investor, or the policy of the investor's home State, and the non-disputing Party to the treaty, as home State of the investor, might be best placed to provide such information that belonged to the realm of domestic law or factual matters.

Further, views diverged on whether the Rules ought to create a right for the non-disputing Party to make a submission, by providing that the arbitral tribunal "shall" instead of "may" accept a submission from a non-disputing State Party. It was said that the non-disputing Party should have the right to make submission, and if it did so, the arbitral tribunal should accept it. However, it was pointed out that ICSID Rule 37 (2), which provided that "the Tribunal may allow a person or entity ..." indicated that the arbitral tribunal enjoyed discretion to refuse a submission by non-disputing Party, and views were expressed that a similar approach should be adopted in the Rules. It was suggested during the deliberations on that matter that a non-disputing State Party to the treaty should not be under an obligation to make a submission, and in instances where the arbitral tribunal would invite such a State to make a submission, the arbitral tribunal should not draw any inference from non-participation by the State. It was agreed that the Rules should reflect that the arbitral tribunal might accept or might invite submissions, but could not compel a State to make such submission.

Article 5 on submissions by non-disputing Parties to a treaty, as it results from the deliberations of the UNCITRAL Working Group on Arbitration, and as adopted by UNCITRAL, reads as follows:

1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.
2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.

3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.
4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.
5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.

#### *4 Allowing open hearings*

Allowing open hearings, ie, allowing the public to attend the hearings is a key feature of the Transparency Rules. Public hearings are essential for enhancing awareness and confidence of the public regarding treaty-based investor-State arbitration.

As hearings could also touch upon confidential or sensitive information, mechanisms are provided for to limit public access to hearings when dealing with confidential or sensitive information. There was general agreement during the deliberations of the UNCITRAL Working Group on Arbitration that it would be best to leave the decision to the arbitral tribunal on closed hearings in exceptional circumstances on a case-by-case basis, as the arbitral tribunal is best placed to balance the public interest with countervailing interests such as the need to ensure that the hearings remained manageable, and avoid aggravation of the dispute.

Article 6 on hearings reads as follows:

1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ("hearings") shall be public.
2. Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.
3. The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.

*5 Preserving the existing power of an arbitral tribunal to allow closed proceedings and restrict access to documents, or portions thereof, when necessary to protect confidential and sensitive information and the integrity of the arbitral process*

The guiding principle during the deliberations of the Working Group on that matter was that while exceptions for reasons of protecting confidential or sensitive information were necessary, they should not be so wide as to weaken the main rules on transparency. It was also suggested that exceptions to transparency to protect confidential or sensitive information should provide clarity and guidance, in order to avoid disputes between the parties on that matter. The very carefully drafted provisions on confidentiality were part of the provisions that were discussed and agreed to at the last session of the Working Group on the matter. They were part of an overall compromise that was found, and permitted an adoption of the Rules by consensus. It is notable that the Rules are the first instrument in which confidentiality is defined by UNCITRAL, as neither the UNCITRAL Model Law on International Commercial Arbitration nor the UNCITRAL Arbitration Rules contain a provision on the matter.

That provision, also includes a section on the protection of the integrity of the arbitral process. The integrity of the arbitral process includes the protection of the parties to the proceedings, their counsel, the witnesses and the arbitral tribunal from intimidation and physical threats. There are other examples falling in that category, such as disruption to hearings by members of the audience. Other examples were given during the deliberations of matters external to the arbitral proceedings, including general politicization of the proceedings and manipulation by the mass media.

Article 7 provides as follows:

Exceptions to transparency Confidential or protected information

1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred 11 to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6.
2. Confidential or protected information consists of: (a) Confidential business information; (b) Information that is protected against being made available to the public under the treaty; (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such

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

3. The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate: (a) Time limits in which a disputing party, non-disputing Party to the treaty or third person shall give notice that it seeks protection for such information in documents; (b) Procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and (c) Procedures for holding hearings in private to the extent required by article 6, paragraph 2. Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.

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

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

#### Integrity of the arbitral process

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

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

## ***B Application of the Transparency Rules***

### *1 At the level of the investment treaty*

The most debated question and the most delicate to address related to the application of the Transparency Rules. Indeed, the Transparency Rules are meant to apply in relation to treaty-based arbitration. Their application was therefore to be

considered at the level of the Parties to an investment treaty, and also at the level of the parties to the dispute. In relation to the first level of consent (treaty level), a distinction was made between future and existing investment treaties. As a solution to conciliate different views, the approach adopted was to draft Rules reflecting a high level of transparency, applicable only if Parties - States or regional economic integration organizations - had expressly opted into transparent arbitration.

(a) Future multilateral or bilateral investment treaties

The Working Group considered at length whether an express reference in future investment treaties to the Transparency Rules would be necessary for their application beside a reference to the UNCITRAL Arbitration Rules. Views were expressed that, in order to avoid legal uncertainty and diverging interpretations that might result from the absence of reference to the Transparency Rules, a preferable solution would be to provide for an express consent of the parties. States would have knowledge of the existence of new rules on transparency, and the lack of an explicit reference to them in an investment treaty should be interpreted as an agreement not to apply such rules. In particular, it was highlighted that the UNCITRAL Arbitration Rules did not contain provisions on the publication of documents, open hearings, and third parties' participation and, therefore, it would be difficult to deduce from a reference to the UNCITRAL Arbitration Rules an implied agreement to apply additional rules on transparency.

However, requiring a specific reference to the Transparency Rules for them to apply in the context of future investment treaties was seen as potentially undermining the importance of the work undertaken by UNCITRAL.

Further, the overall feeling was that it is timely to address criticisms under which the current investor-State arbitration system is sometimes described as being closed, and not serving the public interest and to respond to those criticisms by adopting provisions on transparency that would receive the widest application in treaty-based investor-State arbitration. With that purpose in mind, the UNCITRAL Working Group on Arbitration decided to provide a presumption that the Transparency Rules would apply in investment arbitration in the future, and considered how best to create that presumption. The guiding principle was that a presumption on the application of the Rules could be structured in a way that provided the needed level of certainty to parties as to whether or not they were operating under the transparency provisions in a given arbitration.

Article 1(1), which is providing the necessary level of certainty as to the existence of consent of Parties to investment treaties to use such Rules as part of their arbitration process, reads as follows:

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty")\* concluded on or after 1 April 2014 unless the Parties to the treaty\*\* have agreed otherwise.

It is worth noting that according to article 1(9) of the Transparency Rules, the "Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings." This applies in the context of future or existing treaties.

(b) Existing multilateral or bilateral investment treaties

The Working Group discussed various possible means to achieving certainty as to the application of Transparency Rules to existing investment treaties. It was suggested that application of the Rules to already existing investment treaties should not imply any retroactive application of that standard. That question has an important practical impact as there are more than 3,200 investment treaties in force. It was questioned whether such application was practically feasible, for example, due to the wide variety of treaty provisions referring to arbitration under the UNCITRAL Arbitration Rules, and could be achieved through any instrument prepared by the Working Group and adopted by UNCITRAL.

A suggestion was that the consent in the investment treaty of the State party to investor-State arbitration under the UNCITRAL Arbitration Rules could be interpreted as consent to a system of arbitration that would develop over time. Under that view, adopting a dynamic interpretation of treaties, the Transparency Rules would automatically apply, as they would be part of that evolving system of UNCITRAL arbitration. Under another view, it was uncertain whether it could be derived from a mere reference to the UNCITRAL Arbitration Rules in investment treaties that parties agreed automatically to be bound by any amendments thereto. It was further said that automatic application of Transparency Rules to existing investment treaties referring to the UNCITRAL Arbitration Rules would be impossible, unless there were joint declarations by the State parties pursuant to article 31 of the Vienna Convention on the Law of Treaties (1969).

The Working Group explored the question of the form that an express consent by States would take. With a view to enhancing certainty as to the applicability of the Transparency Rules with respect to existing investment treaties, various suggestions were made, including unilateral declarations by Governments, joint interpretation by Governments, an instrument open to signature or ratification whereby States could express consent or agree to apply the transparency rules under existing treaties. It was at the session of the Commission in 2013, after the

adoption of the Transparency Rules that the decision was made to undertake the preparation of convention on transparency.

The Rules themselves in article 1(2) have provision for their application to existing investment treaties by Parties to the investment treaty, or by disputing parties, as follows:

In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when: [] (a) The parties to an arbitration (the "disputing parties") agree to their application in respect of that arbitration; or (b) The Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application.

## *2 At the level of the relation between the host State and the investor*

As for the second level of consent (investor-State level), a policy question was considered, whether an investor would be bound by an offer by a State to arbitrate under the UNCITRAL Arbitration Rules, including the Transparency Rules, or whether the investor would have discretion to refuse the offer of transparent arbitration. It was widely felt that providing the investor with the last word on the application of the Transparency Rules would unduly privilege the investor and lead to a decrease of transparency. Further, in contrast to commercial arbitration, treaty-based investor-State arbitration is conducted on the basis of an underlying investment treaty between State parties, which limits the ability of the investor to depart from offers made by the host State. A question was whether, for the purpose of ensuring the equality of parties in treaty-based investor-State arbitration, it would be advisable to provide the right for an investor to react to the host State's offer of transparent arbitration.

In other words, the question was whether the disputing parties should be allowed to depart from certain provisions of the Rules on Transparency, and whether they could legally be prevented from doing so. The view was expressed that the underlying treaty between State parties would prevent one State party and the investor from departing from the Transparency Rules. A contrary view expressed was that the disputing parties could, as a matter of law, always amend their arbitration agreements (including the reference to the Transparency Rules contained therein) and that it was accordingly not possible to entrench non-derogable provisions in the Transparency Rules.

The result of the deliberations was that in any arbitration in which the Rules apply pursuant to an investment treaty or to an agreement by the Parties to that

treaty, the disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty (article 1(3)(a) of the Rules).

### ***III THE UN TRANSPARENCY CONVENTION ("MAURITIUS CONVENTION ON TRANSPARENCY")***

In 2013, UNCITRAL recommended that the Transparency Rules be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before 1 April 2014, to the extent that such application is consistent with those investment treaties. Further, the Commission decided to prepare a convention "that was intended to give those States that wished to make the Transparency Rules applicable to their existing investment treaties concluded before 1 April 2014 an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention". This is a very carefully drafted mandate, which provided the necessary level of confidence to States to continue with the preparation of a convention on transparency.

In 2014, UNCITRAL finalised the Transparency Convention, which comprises 11 articles and provide for the application of the Transparency Rules to existing investment treaties (ie, treaties concluded before 1 April 2014). As mentioned above, there are currently around 3,200 investment treaties in force, and the Transparency Convention is the first successful attempt aimed at reforming and modernizing those treaties.

By becoming parties to the Transparency Convention, States agree to apply the Transparency Rules to arbitration arising under their existing investment treaties, either on a bilateral or unilateral basis. The Transparency Convention contains reservations that allow States to exclude from the scope of the Convention certain investment treaties, certain sets of arbitration rules, or unilateral application. The Convention takes a negative-list approach, ie, a Party that wishes to exclude a specific investment treaty and/or a specific set of arbitration rules from the application of the Convention under article 3(1) must explicitly list such treaty and/or set of arbitration rules to that effect in the reservation.

Reservations made at the time of ratification, acceptance or approval of the Convention or accession thereto take effect simultaneously with the entry into force of the Convention in respect of the Party concerned (article 4(3) of the Convention). A reservation made to the effect of excluding the application of a revised version of the Transparency Rules under article 3(2) takes effect immediately upon deposit. All other reservations deposited after the entry into force of the Convention for the Party concerned shall take effect twelve months after the date of its deposit (article 4(4) of the Convention). This mechanism of

reservations is quite unique and innovative. It is tailored to ensure that the reservations cannot be used to defeat the purpose of transparency in a given arbitration. Hence, the longer period of time for adding reservations. On the other hand, as withdrawal of a reservation will allow the Transparency Rules to apply in a wider range of cases, a Party may withdraw a reservation at any time. In accordance with article 3(3) of the Convention, Parties may make multiple reservations in a single instrument. In such an instrument, each declaration shall constitute a separate reservation capable of separate withdrawal.

The Transparency Convention, which is open for signature by States and regional economic integration organizations, will enter into force after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

#### ***IV THE UNCITRAL TRANSPARENCY REGISTRY***

The central feature of both the Transparency Rules and the Transparency Convention is the UNCITRAL Transparency Registry. The Registry, which is the practical public-facing manifestation of transparency, will provide a consolidated, transparent and easily accessible global case record database for all investor-State arbitrations conducted pursuant to the Transparency Rules and the Transparency Convention. It is notable that the UNCITRAL Rules on Transparency are currently the only existing stand-alone standard in the field, and one that is meant to apply not only to arbitrations under the UNCITRAL Arbitration Rules, but also to arbitrations under other applicable arbitration rules (such as ICSID, should the parties so decide).

During the discussions of the UNCITRAL Working Group on Arbitration with respect to the manner in which publicity would be organised under the Transparency Rules, various suggestions were initially made, such as leaving it to States to publish information on the website of their relevant ministries, or other appropriate channels in the countries concerned or establishing a central registry. Regarding the first option, there was divergence in the experience of States with treaty-based investor-State arbitration. Experienced States would have the right channels in place to publicise such information, whereas for less experienced States, that option would be practically difficult to implement.

UNCITRAL has published on the Registry website guidelines addressing matters such as challenge by one party of the applicability of the Transparency Rules before the constitution of the arbitral tribunal, the exclusive responsibility of the arbitral tribunal to communicate documents for publication to the Registry, validation of authenticity of information received, redaction of confidential information, format of documents. The guidelines also clarify that, once the arbitral

tribunal has discharged its function and its mandate is terminated, the repository will not publish any additional document on that case.

## **V CONCLUSION**

In addition to the broader objective of promoting sustainable development through international investment law, ensuring transparency and meaningful opportunity for public participation in treaty-based investor-State arbitration constitutes a means of promoting the rule of law, good governance, due process, fairness, equity and rights to access to information.

At the UNCTAD Meeting on Transformation of the International Investment Agreement Regime held on 25-27 February 2015, countries underlined the importance of the UNCITRAL Transparency Registry, as it will be a unique place for Governments to share information about investment cases and law, and for policy makers and Government officials to gain first-hand knowledge of how the system functions. The importance of ensuring transparency in investment arbitration stems from the significance of investment as a tool for sustainable development.

Transparency in treaty-based investor-State arbitration is only one aspect of the broader notion of transparency in the treatment of investment. Beyond treaty-based investor-State arbitration, transparency is essential for the conduct of States' investment-related administrative procedures, for the design and implementation of domestic investment laws and regulations, and for States interactions with individual investors.

UNCITRAL transparency standards are considered as an efficient mechanism for the application of a modern transparency regime in investor-State dispute settlement to existing investment treaties. It remains to be seen whether the Transparency Convention could constitute a model for further reform and a model to follow to modernise investment treaties. There are various questions to be taken into consideration when looking into that question, such as the relation between an instrument/mechanism like the Convention and the issues at stake, and the relation between such an instrument and the investment treaties to which it is meant to apply. Depending on the focus of the reform, a convention may or may not constitute a workable solution.