Northwestern Journal of International Law & Business

Volume 33
Issue 2 *Winter 2013*

Winter 2013

UNCITRAL's Unclear Transparency Instrument: Fashioning the Form and Application of a Legal Standard Ensuring Greater Disclosure in Investor-State Arbitrations

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Julie Lee, *UNCITRAL's Unclear Transparency Instrument: Fashioning the Form and Application of a Legal Standard Ensuring Greater Disclosure in Investor-State Arbitrations*, 33 Nw. J. Int'l L. & Bus. 439 (2013).
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UNCITRAL's Unclear Transparency Instrument: Fashioning the Form and Application of a Legal Standard Ensuring Greater Disclosure in Investor-State Arbitrations

By Julie Lee*

Abstract: Confidentiality in commercial arbitrations—a main feature of international arbitration—is highly coveted by companies that safeguard their reputation and proprietary information. However, secrecy may not be so sacrosanct to investor-State arbitrations involving economic disputes between sovereign States and private actors. Recognizing the different demands for transparency in purely private versus investor-State arbitrations, the United Nations Commission on International Trade Law (UNCITRAL) tasked a Working Group with drafting new transparency standards for incorporation into the existing set of UNCITRAL Rules. In addition to evaluating the merits of the desirability for increased disclosure in the arbitral process, this Comment focuses on the importance of the form in which these standards are drafted as well as the complexities surrounding the application of the standards to existing and future treaties. For over two years, the forms and applications of transparency standards were debated amidst a flurry of policy considerations. Rather than probing the content of the proposal that recently emerged from this debate, this Comment focuses on the policy considerations that went into drafting the new standards. This Comment further advocates for a form and application of the standards that best achieve the Commission's objective in promoting greater transparency in investor-State arbitrations. Under such a rubric, party consent and autonomy should still be preserved and the application of new transparency standards should remain consistent with the approaches taken in the prior 2010 rule changes.

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I. INTRODUCTION

At its forty-eighth session held in New York during February of 2008, the United Nations Commission on International Trade Law (UNCITRAL or the Commission) discussed the possibility of creating rules on transparency for investment arbitrations[1] as part of the revisions to the UNCITRAL Arbitration Rules (2010 UNCITRAL Rules).[2] However, the task of crafting and incorporating transparency provisions as part of the 2010 UNCITRAL Rules was eventually shelved for future consideration; the Commission maintained that the scope of the 2010 revisions would be

[1] The terms "investment arbitration" and "investor-State arbitration" are used interchangeably throughout this Comment.

[2] *See* U.N. Comm'n on Int'l Trade Law Rep. of the Working Group on Arbitration and Conciliation on the work of its 48th Sess., New York, U.S., Feb. 4–8, 2008, ¶ 57, U.N. Doc. A/CN.9/646 (Feb. 29, 2008) [hereinafter Report of the Working Group Forty-Eighth Session].

limited to updating and modernizing the 1976 UNCITAL Rules.[3] Any wholesale revisions or complex modifications to the Rules, such as designing transparency standards, would be revisited upon completion of the 2010 changes. Accordingly, after the completion of the 2010 UNCITRAL Rules, delegates returned their attention to introducing transparency standards to investment arbitrations.[4]

The development of the UNCITRAL Rules is a success story in itself. Since their adoption in 1976, they have been hailed as "one of the most widely recognized sets of rules for the settlement of disputes arising in the context of international commerce."[5] Since its inception, UNCITRAL has facilitated ad hoc arbitrations to parties that prefer a method of dispute resolution different from litigation.[6] There are many advantages to arbitration over litigation. For example, parties to arbitration may enjoy the benefits of a more expedited and cost-efficient dispute resolution process administered by a neutral tribunal than they would through litigation under a foreign jurisdiction. Additionally, one of the most valued features of international arbitration is the imposition of confidentiality restrictions over the arbitration process, which allows parties to resolve their disputes outside of the public arena.[7] This cloak of confidentiality has afforded a wide swath of protection to commercial arbitrations—foregoing open hearings, third-party participation, and public disclosure of documents, awards, and damages.

Today, over thirty years have passed since the genesis of the 1976 UNCITRAL Rules. As the Commission seeks to incorporate transparency

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[3] *See* U.N. Comm'n on Int'l Trade Law Rep. of the Working Group II (Arbitration and Conciliation) on the work of its 54th Sess., New York, U.S., Feb. 7–11, 2011, ¶ 4, U.N. Doc. A/CN.9/717 (Feb. 25, 2011) [hereinafter Report of the Working Group Fifty-Fourth Session].

[4] *See id.*

[5] Markus Wirth, *The Current Revision of the UNCITRAL Rules*, *in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 1 (Christoph Müller & Antonio Rigozzi eds., 2008), *available at* http://www.homburger.ch/fileadmin/publications/UONO26O_01.pdf.

[6] Ad hoc arbitration is a proceeding that is not administered by an arbitral institution and requires parties to make their own arrangements for the selection of arbitrators and for the designation of rules, applicable law, procedures, and administrative support. *See generally* PUBLISHER'S EDITORIAL STAFF, CORPORATE COUNSEL'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES § 3:42 (2012).

[7] Confidentiality is widely perceived to be a principle advantage to private arbitration as compared with litigation. There is commonly an expectation that arbitration will take place in privacy with limited disclosure of documents, hearings, and awards to the general public. *See* Geoff Nicholas & Briana Young, *Global Overview*, *in* ARBITRATION WORLD: JURISDICTIONAL COMPARISONS xi, xxvi (J. William Rowley ed., 2d ed. 2006). However, where there is an absence of an explicit agreement on what should be held confidential, there is little uniformity among arbitral institutions over which aspects of arbitration are subject to public scrutiny. *Id.*

standards to the UNCITRAL Rules for the first time in its history, commentators remark that "the [original] drafters of the Rules could not possibly have anticipated all of the difficulties that have emerged in the international arbitral process."[8] Nevertheless, in the complex, modern world that has arisen over thirty years of rapid globalization, the Commission must and does recognize the importance and desirability of enhancing transparency in investor-State arbitrations.

When considering transparency standards, investor-State arbitrations should be distinguished from purely private or commercial arbitrations. In investor-State arbitrations, States are parties to the dispute, and government activities may be subject to basic requirements of transparency and public participation.[9] Claims against the State are usually based on international legal obligations found in treaties, "such as the obligation not to expropriate except for a public purpose, without discrimination, and on payment of prompt, adequate, and effective compensation."[10] Provisions geared towards increased transparency could enhance the public understanding of the arbitration process and its overall credibility. Thus, while companies that safeguard their reputation and proprietary information covet confidentiality in commercial arbitrations, secrecy in investor-State arbitrations may not be as sacrosanct to sovereign government parties involved in treaty disputes.

The incorporation of transparency provisions is more easily proposed than achieved. The 1976 UNCITRAL Rules were designed and enacted with the purpose of facilitating the expeditious and effective settlement of commercial disputes.[11] The UNCITRAL Arbitration Rules were not initially designed as a public mechanism for settling disputes since investment arbitration was far less common in the 1970s than today.[12] However, even today the vast majority of arbitrations facilitated by the UNCITRAL Rules remain commercial in nature. Therefore, UNCITRAL's challenge is to strike the proper balance of incorporating transparency standards (unanticipated by the original drafters) that will not drastically

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[8] JAN PAULSSON & GEORGIOS PETROCHILOS, REVISION OF THE UNCITRAL ARBITRATION RULES 2 (2006), *available at* http://www.uncitral.org/pdf/english/news/arbrules_report.pdf.

[9] Investor-State arbitrations provide foreign investors rights to seek redress for damages arising out of alleged breaches of investment-related obligations by host governments. Investor-State arbitrations have grown in popularity over the past two decades because of the procedure's advantages: investor disputes are resolved by mechanisms and institutions governed by international standards, rather than the inherently conflicting jurisdictions of domestic, host States. *See generally* Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1270 (2009).

[10] *Id.*

[11] *See* Jonathan Sutcliffe & Anibal Sabater, *UNCITRAL Arbitration: New Rules on Transparency?*, 23 MEALEY'S INT'L ARB. REP., May 2008, at 32, 33.

[12] *Id.*

alter the original structure, spirit, or drafting style of the text.[13]

An assembly of delegates that comprise the Working Group II recently reached a long-awaited consensus on a draft proposal of the new transparency standards.[14] This Comment does not probe into the content of the new transparency standards themselves. Rather, this Comment focuses on the challenges surrounding the form and application of the new standards. The task of designing and incorporating transparency standards is not merely a rote technical exercise; it entails a careful deliberation and sifting of weighty policy considerations.

This Comment contends that in order to promote and legitimize greater public disclosure and access to investor-State disputes, UNCITRAL transparency standards should take the form of binding rules applicable to (a) existing treaties by express consent and (b) future treaties by default. These recommendations aim to recognize party autonomy and the principle of contractual respect in the pursuit for greater transparency.

This Comment first examines the rise in popularity of investor-State arbitrations and the increasing use of UNCITRAL Arbitration Rules in Part II. Next, Part III explores the case for transparency and then discusses the merits of greater disclosure in investment arbitrations. In Part IV, this Comment takes lesson from the developments of transparency rules and guidelines issued by the North American Free Trade Agreement (NAFTA) and the International Centre for Settlement of Investment Disputes (ICSID). Part V introduces the Working Group that was tasked with drafting the transparency standards. More importantly, Part V advocates for the form in which UNCITRAL transparency provisions should be drafted and argues that the standards should apply differently to existing and future treaties. Part VI concludes this Comment.

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[13] *See* Rep. of the U.N. Comm'n on Int'l Trade Law, 43rd Sess., June 21–July 9, 2010, U.N. Doc. A/65/17, annex I; GAOR, 65th Sess., Supp. No. 17 (2010) [hereinafter 2010 UNCITRAL Arbitration Rules], http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (last visited Mar. 5, 2013).

[14] At the Working Group II meetings in October of 2012, "some issues were settled, [while] many very significant ones remain[ed] contentious . . . ." Lise Johnson, *Inching Towards Consensus: An Update on the UNCITRAL Transparency Negotiations*, INVESTMENT TREATY NEWS (Oct. 30, 2012), http://www.iisd.org/itn/2012/10/30/inching-towards-consensus-an-update-on-the-uncitral-transparency-negotiations/. The Working Group II reconvened in February 2013, at which time they finally reached a consensus on a draft version of the transparency standards, which "must still be subjected to a 'legal scrub' and then approved by the UNCITRAL Commission at its next meeting in July in Vienna." Luke Eric Peterson, *UN Working Group Finalizes UNCITRAL Transparency Rules, but They Won't Apply Automatically to Stockpiles of Existing Investment Treaties*, INVESTMENT ARB. REP. (Feb. 14, 2013), http://www.iareporter.com/articles/20130215_4.

II. BACKGROUND AND OVERVIEW OF INVESTOR-STATE ARBITRATION

The popularity of international arbitration continues to grow. According to the 2010 International Arbitration Survey, international arbitration is the dispute resolution mechanism of choice for many corporations.[15] Private investors have demonstrated an increased willingness to rely on international investment agreements to resolve transnational disputes.[16] Likewise, international arbitration is a popular form of investment dispute resolution and protection between a State and foreign investors. Investment-treaty or State arbitrations, in which States are held accountable by private foreign investors for alleged breaches of their international obligations, have multiplied over the past decades with the growth of bilateral and multilateral trade and investment treaties.[17] States have resorted to investment treaties to ensure that among the parties to an agreement or negotiation, there would be definitive rules relating to foreign investment.[18] The dramatic growth of investment arbitration is "largely the result of the proliferation of bilateral investment treaties (BITs),[19] and free trade agreements[20] at the bilateral, regional, and interregional levels, which allow private investors to resort to arbitration to protect their commercial interests against measures adopted by States in their sovereign capacity."[21]

Direct arbitration between the host State and the foreign investor is the preferred option for the settlement of investment disputes.[22] International

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[15] *See generally* PAUL FRIEDLAND & LOUKAS MISTRELIS, WHITE & CASE LLP, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN INTERNATIONAL ARBITRATION 1, 6 (2011), *available at* http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf.

[16] Andrew P. Tuck, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13 L. & BUS. REV. AM. 885, 886 (2007).

[17] Judith Levine, *Current Trends in International Arbitral Practice as Reflected in the Revision of the UNCITRAL Arbitration Rules*, 31 U.N.S.W. L.J. 266, 278 (2008).

[18] M. SORNARAJAH, INTERNATIONAL LAW OF FOREIGN INVESTMENT 233 (1994).

[19] BITs are "agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country." *What are BITs?*, UNITED NATIONS CONF. ON TRADE DEV., http://www.unctadxi.org/templates/Page____1006.aspx (last updated Aug. 17, 2004).

[20] A free trade agreement is an agreement between two or more countries to establish a free trade area where commerce in goods and services can be conducted across their common borders without tariffs or hindrances, but capital or labor may not move freely. *See Free Trade Agreements*, INT'L TRADE ADMIN., http://trade.gov/fta/ (last visited Mar. 10, 2013).

[21] Tuck, *supra* note 16, at 885–86.

[22] Surridge & Beecheno, *Arbitration/ADR Versus Litigation*, HG.ORG (Sept. 4, 2006), http://www.hg.org/articles/article_1530.html.

arbitration provides an attractive alternative to the settlement of investment disputes by national courts or through diplomatic protection.[23] Investors rarely view the settlement of a dispute through a host State's court as sufficiently impartial.[24] Additionally, regular courts may in fact lack the neutrality required to resolve complex international investment disputes.[25] Diplomatic protections, moreover, are discretionary, meaning the investor has no right to them. Therefore, it is not surprising that investment disputes are commonly settled through international arbitration.

Most investor-State arbitrations are conducted under the ICSID Rules, the ICSID Additional Facility Arbitration Rules, or the UNCITRAL Arbitration Rules.[26] The second most common type of investor-State arbitration after the institutional form of arbitration is the ad hoc form pursuant to the UNCITRAL Rules.[27] The UNCITRAL Rules are the most popular rules for ad hoc arbitrations.[28] Of the over 219 known investor-State arbitrations to date, about thirty percent have used the UNCITRAL Rules.[29]

III. THE CASE FOR GREATER TRANSPARENCY

The rise of investor-State arbitrations under the UNCITRAL Rules

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[23] *See* Steven P. Finizio et al., *Recent Developments in Investor-State Arbitration: Effective Use of Provisional Measures*, *in* EUROPEAN ARBITRATION REVIEW: GLOBAL ARBITRATION REVIEW SPECIAL REPORT 15, 15 (2007), *available at* http://www.wilmerhale.com/files/Publication/d76150c5-651f-4fb2-ae40-2334c60fe8ca/Presentation/PublicationAttachment/b8503dde-d3c8-4c8d-9cc9-2c180a7203d3/investor_state_arbitration.pdf.

[24] *Id.*

[25] *Id.* (noting that international investment agreements are designed to guarantee legal protections "above and beyond that provided by the host state's laws. Equally important, they usually provide for [an arbitration system that includes] a neutral forum for resolving disputes with local government entities, which allows foreign investors to avoid the local courts when such disputes arise—a particularly valuable benefit in countries with unreliable, inefficient (or even corrupt) judicial systems.").

[26] More than sixty percent of investor-State arbitrations are brought under the ICSID Convention and proceed under the ICSID Arbitration Rules or the ICSID Additional Facility Rules United Nations Conference on Trade and Development. Gary B. Born & Ethan G. Shenkman, *Confidentiality and Transparency in Commercial and Investor-State International Arbitration*, *in* THE FUTURE OF INVESTMENT ARBITRATION 5, 28 (Catherine A. Rogers & Roger P. Alfred eds., 2009); *see also* U. N. Conference on Trade & Dev., *Latest Developments in Investor-State Dispute Settlement*, [2008] IIA Monitor, No. 1, at 1–2, U.N. Doc. UNCTAD/WEB/ITE/IIA/2008/3.

[27] *See* U.N. Conf. on Trade & Dev., *supra* note 26; *see generally supra* note 6 (defining what an ad hoc arbitration consists of).

[28] *See A Comparison Between the ICC Arbitration Rules and the UNCITRAL Arbitration Rules*, ALWAYS ASSOCIATES (Feb. 2005), http://www.alway-associates.co.uk/legal-update/article.asp?id=72.

[29] Tuck, *supra* note 16, at 886.

raises issues regarding public disclosure and accessibility. Arbitrations involving a State are markedly different from commercial arbitrations involving only private parties, because the latter do not implicate public interest concerns in ways that the former do. Purely commercial arbitration, agreed upon between private parties without registration or publication of final decisions, "does not offend fundamental principles of justice, nor does it as such involve questions of democratic legitimacy" so long as the dispute does not pertain to matters of public policy.[30] In general, arbitration is a private process, and confidentiality is widely perceived to be one of the key advantages to arbitration.[31] Commercial arbitration exercises higher degrees of confidentiality and privacy through means of closed doors and unpublished awards rather than judicial proceedings before courts of law.[32] Regulatory measures taken because of legitimate government concerns in investor-State arbitrations, on the other hand, demand more accountability and greater scrutiny by the public.[33] "Arbitrations brought by foreign investors against governments under the auspices of bilateral and multilateral investment treaties"[34] give rise to special issues of public interest:

> [T]he very presence of a State as a party to the arbitration raises a public interest because the nationals and residents of that State have an interest in how government acts during the arbitration and in the outcome of the arbitration. Moreover, the existence of this public interest has obvious implications for the conduct of the arbitration: according to principles of human rights law and good governance, government activities should be subject to basic requirements of transparency and public participation.[35]

The case for increased transparency and third party participation mostly centers on "the more prominent notions of democratic legitimacy" of good governance.[36] Investor-State arbitration has the potential to

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[30] Carl-Sebastian Zoellner, *Third-Party Participation (NGO's and Private Persons) and Transparency in ICSID Proceedings*, *in* THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): TAKING STOCK AFTER 40 YEARS 179, 180 (Rainer Hofmann & Christian J. Tams eds., 2007); *see generally* Nigel Blackaby, *Public Interest and Investment Treaty Arbitration*, 1 TRANSNAT'L DISP. MGMT. 355 (2004).

[31] *See* Nicholas & Young, *supra* note 7, at xii.

[32] *See* Report of the Working Group Fifty-Fourth Session, *supra* note 3, ¶ 14.

[33] Levine, *supra* note 17, at 279.

[34] *Id.*

[35] CTR. FOR INT'L ENVTL. LAW & INT'L INST. FOR SUSTAINABLE DEV., REVISING THE UNCITRAL ARBITRATION RULES TO ADDRESS INVESTOR-STATE ARBITRATIONS 4 (rev. ed. 2007), *available at* http://www.ciel.org/Publications/CIEL_IISD_RevisingUNCITRAL_Dec07.pdf.

[36] Zoellner, *supra* note 30, at 200.

significantly affect the public interest, not merely because a State may be a party to the dispute, but mainly because many of the issues at stake impact the provision and costs of public goods and services.[37] Some examples of recent investment arbitration cases implicating public interests include: water supply systems in South America, regulation of hazardous waste by Canada and Mexico, fiscal responses by Argentina, and positive racial discrimination laws in South America.[38] These cases are brought in increasing numbers under the UNCITRAL Rules on an ad hoc basis, but the Rules are silent as to the issue of transparency.[39]

The issue of transparency has risen to prominence in the international arbitration community in recent years.[40] For example, there has been a movement towards wider publication of awards over the last twenty years.[41] This movement has been undertaken "in the interests of establishing a body of decisions that may be a useful reference for arbitrators" and thus has been instrumental in building a body of case law.[42]

Another motivation for promulgating rules for better transparency is the benefit of allowing third party participation in the arbitration process. Third party amicus submissions enhance the availability of knowledge and information pertaining to a certain dispute. Non-disputing parties may file amicus curiae briefs to enlighten the tribunal about important aspects of a case that have been omitted from the parties' own submissions.[43] The parties to the dispute may overlook supplemental concerns, fail to provide key information either due to a lack of expertise on a subject,[44] or lack a personal stake in the outcome of certain public matters.[45] It is a truism that

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[37] *See id.*

[38] *See generally* CTR. FOR INT'L ENVTL. LAW & INT'L INST. FOR SUSTAINABLE DEV., *supra* note 35.

[39] Wirth, *supra* note 5, at 16.

[40] *See generally infra* Part V.

[41] An example of published awards may be found at *Search Online Decisions and Awards*, INT'L CENTER FOR SETTLEMENT INVESTMENT DISPUTES, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=OnlineAward (last visited Jan. 3, 2013). Certain investor-State awards can also be found at *New Awards, Decisions and Materials*, INVESTMENT TREATY ARB., http://ita.law.uvic.ca (last visited Jan. 3, 2013), and certain awards under the UNCITRAL Arbitration Rules are available at *Case Law on UNCITRAL Texts (CLOUT)*, UNITED NATIONS COMMISSION ON INT'L TRADE L., www.uncitral.org/uncitral/en/case_law.html (last visited Jan. 3, 2012).

[42] *See* Nicholas & Young, *supra* note 7, at xvii.

[43] *See, e.g.*, Whitney Debevoise, *Key Procedural Issues: Transparency—Access to Documents and Panel and Appellate Body Sessions: Practice and Suggestions for Greater Transparency*, 32 INT'L L. 817, 837–38 (1998) (discussing a case where NGOs prepared amicus briefs covering environmental issues that were not addressed by arbitrating parties).

[44] *See id.*

[45] *See* Dora Marta Gruner, *Accounting for the Public Interest in International*

the quality and availability of information leads to better, more informed decision-making. The Working Group II on Arbitration and Conciliation has thus expressed broad support for greater transparency in investor-State arbitrations, which invariably affect the public interest.[46]

IV. NAFTA & ICSID: THE MOVEMENT TOWARDS TRANSPARENCY

The transparency movement has received significant traction over the past decade as evidenced by the application of transparency standards by a number of arbitral institutions, countries, and investment agreements.[47] The trend in increasing transparency signifies an accord among members of the public that they recognize a legitimate public interest in investment arbitration.[48] In tracing the evolution of increased expectation for greater transparency and openness in international investment arbitration, this Part examines how NAFTA Chapter Eleven arbitrations—including the NAFTA Free Trade Commission's Interpretations and Guidelines, and the 2006 Amendments to ICSID Rules—have taken the lead in this area. An examination of how transparency standards operate under NAFTA arbitrations and ICSID Rules serves various purposes for this Comment. Most importantly, it highlights the growing trend in investor-State arbitration towards greater transparency, and provides precedential value that may be instructive for the UNCITRAL in formulating and applying its own transparency standards.

Notably, UNCITRAL cannot draw a direct analogy from existing transparency standards, because the UNCITRAL Arbitration Rules differ

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Arbitration: The Need for Procedural and Structural Reform, 41 COLUM. J. TRANSNAT'L L. 923, 955–56 (2003).

[46] The Working Group II agreed to the importance of transparency upon considering written observations that addressed public interest policy. *See, e.g.*, U.N. Comm'n on Int'l Trade Law Secretariat, *Settlement of Commercial Disputes, Revision of the UNCITRAL Arbitration Rules, Observations by the Government of Canada*, ¶ 8, U.N. Doc. A/CN.9/662 (June 12, 2008) ("Investment arbitration often implicates the public interest and government policy in ways simply not salient in commercial arbitration.").

[47] For example, the permissibility of amicus curiae participation has been supported by the practice of NAFTA, the Iran-United States Claims tribunal, and the World Trade Organization. When looking at the most recent versions of prominent national model BITs, disclosure policies applied by NAFTA countries, and recent practice of investor-State arbitration tribunals, there is currently a general trend towards transparency in international investment arbitration. Barton Legum, *Trends and Challenges in Investor-State Arbitration*, 19 ARB. INT'L 143, 144 (2003); *see generally* Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third Party Participation*, 29 BERKELEY J. INT'L L. 200 (2011).

[48] Ruth Teitelbaum, *A Look At The Public Interest In Investment Arbitration: Is It Unique? What Should We Do About It?*, 5 BERKELEY J. INT'L L. PUBLICIST 54, 54 (2010), *available at* http://bjil.typepad.com/teitelbaum_final-1.pdf.

from the ICSID Rules and NAFTA Chapter Eleven guidelines in a nontrivial way: UNCITRAL Rules operate in ad hoc arbitrations and are not limited to any treaty's States signatories.[49] In contrast, ICSID Rules facilitate institutional rather than ad hoc arbitration, meaning that ICSID services and conducts arbitrations under the supervision of its established arbitral institution.[50] The particular advantages of an ad hoc versus institutional arbitration appeal to different audiences; accordingly, distinguishing attributes are oftentimes desired. However, the ways in which NAFTA's and ICSID's transparency standards furnish the public with greater access to investment arbitrations act as a point of reference for structuring transparency rules in other contexts, including the ad hoc arbitrations conducted under the UNCITRAL Rules. Thereon, the UNCITRAL can determine whether its Arbitration Rules should remain consistent with or depart from current practices.

A. NAFTA at the Helm of the Transparency Movement

The North American Free Trade Agreement (NAFTA) represents "the most concerted effort to date to increase transparency and reduce or eliminate confidentiality in investor-State proceedings."[51] NAFTA is a trilateral free trade deal among the United States, Canada, and Mexico.[52] NAFTA Chapter Eleven specifically deals with investment treaties, and allows individuals or corporations to sue any signatories of the NAFTA when an investment is adversely impacted by government action.[53] This subpart highlights: (1) the progressive steps taken by NAFTA parties to achieve greater public disclosure of arbitral proceedings; and (2) how the NAFTA regime has pushed arbitration proceedings into the open forum through guidelines and interpretations. Notably, the force of NAFTA guidelines or interpretations is weighted against the rules administered by

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[49] Born & Shenkman, *supra* note 26; North American Free Trade Agreement § 1B *et seq.*, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289, *available at* http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=142#A1115 [hereinafter NAFTA].

[50] *See A Primer on International Arbitration*, COVINGTON & BURLING 5 (May 1998), http://www.cov.com/files/Publication/f394b11c-381d-4838-a6e2-02812ed6b093/Presentation/PublicationAttachment/969db08e-5cc1-4f3f-a72e-034ca2c8e9b2/oid6181.PDF ("Institutions that employ professional staffs can provide a wide range of services that may not be available in an ad hoc arbitration. For instance, institutions can act as appointing authorities when parties cannot agree on the appointment of a sole arbitrator, or when party-appointed arbitrators cannot agree on the appointment of a neutral arbitrator. They also can supervise proceedings, assist the arbitrators when necessary, fix the remuneration of arbitrators, and collect any advances against the costs of arbitration.").

[51] Born & Shenkman, *supra* note 26, at 31.

[52] Lee Hudson Teslik, *NAFTA's Economic Impact*, COUNCIL ON FOREIGN REL. (July 7, 2009), http://www.cfr.org/economics/naftas-economic-impact/p15790#p2.

[53] NAFTA, *supra* note 49, arts. 1116–1117.

ICSID, ICSID Additional Facility, or UNCITRAL selected by the investor in the arbitration.

1. NAFTA's Progressive Measures

NAFTA Chapter Eleven's arbitration regime has given attention to policies that make transparency a critical part of investor-State arbitrations involving NAFTA governments. In particular, NAFTA Chapter Eleven has favorably addressed the issues of public access to documents, third-party participation,[54] and open hearings.[55]

On July 31, 2001, the NAFTA Free Trade Commission (NAFTA FTC), pursuant to its authority to interpret NAFTA provisions, issued an interpretation in favor of public access to documents (Document Access Interpretation).[56] The NAFTA FTC, comprised of Trade Ministers from each of the three NAFTA governments, states in its Document Access Interpretation that "[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration . . . ."[57] The Document Access Interpretation further states:

> Each Party agrees to make available to the public in a timely manner all documents submitted to . . . a Chapter Eleven tribunal, subject to redaction of: (i) confidential business information; (ii) information which is privileged or otherwise protected from disclosure under the Party's domestic law . . . .[58]

The Document Access Interpretation clarified NAFTA's endorsement for public access to documents generated during investor-State arbitrations held in Chapter Eleven tribunals. In the aftermath of the Interpretation, Chapter Eleven tribunals have effectively put into practice the standard for public document disclosure: the public has nearly unfettered access to relevant documents generated during arbitration proceedings.[59]

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[54] *See* Press Release, Office of the U.S. Trade Rep., NAFTA Commission Announces New Transparency Measures (Oct. 7, 2003), http://www.ustr.gov/about-us/press-office/press-releases/archives/2003/october/nafta-commission-announces-new-transparen.

[55] *See Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations*, U.S. TRADE REPRESENTATIVE (Oct. 7, 2003), http://www.ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf.

[56] NAFTA Free Trade Comm'n, *Notes on Interpretation of Certain Chapter 11 Provisions*, U.S. DEP'T ST. (July 31, 2001), http://www.state.gov/documents/organization/38790.pdf. NAFTA FTC interpretations are binding on NAFTA Chapter 11 tribunals. NAFTA, *supra* note 49, art. 1131.

[57] NAFTA Free Trade Comm'n, *supra* note 56, ¶ A.1.

[58] *Id.* ¶ A.2(b)

[59] Andrea J. Menaker, *Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration*, *in*

The practice of allowing non-disputing parties to file written submissions has also gained substantial ground with NAFTA Chapter Eleven arbitrations. The Canadian government recently submitted a comment to the UNCITRAL Working Group, stating that "Canada's experience . . . with respect to amicus curiae participation is that, as long as reasonable limits are established, amicus submissions can be a benefit for the [t]ribunal."[60] In this regard, the NAFTA FTC issued a *Statement of the Free Trade Commission on Non-disputing Party Participation* in 2003 (Non-disputing Party Statement).[61] In this Statement, the NAFTA FTC provided the following interpretation:

> 1. No provision of [NAFTA] limits a tribunal's discretion to accept written submissions from a person or entity that is not a disputing party . . . .
> 2. Nothing in this statement by the [FTC] prejudices the rights of NAFTA Parties under Article 1128 of the NAFTA.[62]

According to the Non-disputing Party Statement, the tribunal has the discretion to determine whether an interested amicus is to participate: "The disputing parties are permitted to comment on whether the tribunal should grant leave for the amicus to file, but the tribunal may, in principle, accept the submission over the objection of both disputing parties."[63] The Non-disputing Party Statement recommends that:

> [I]n exercising its discretion, the tribunal should consider a number of factors designed to help it determine whether or not the *amicus* submission will be helpful to the tribunal—these include whether the *amicus* has knowledge or insight different from the parties and whether there is both an interest of the *amicus* and of the public in the dispute.[64]

Recognizing that written submissions by non-disputing parties may affect the operation of Chapter Eleven arbitration, the Non-disputing Party

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ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 129, 134 (Katia Yannaca-Small ed., 2010).

[60] U.N. Comm'n on Int'l Trade Law Secretariat, *Settlement of Commercial Disputes, Transparency in Treaty-based Investor-State Arbitration, Comments of the Governments of Canada and of the United States of America on Transparency in Treaty-Based Investor-State Arbitration Under Chapter Eleven of the North American Free Trade Agreement*, § 1.III, at 4, U.N. Doc. A/CN.9/WG.II/WP.163 (Dec. 7, 2010).

[61] *Statement of the Free Trade Commission on Non-Disputing Party Participation*, NAFTA FREE TRADE COMMISSION (Oct. 7, 2003), http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf.

[62] *Id.* ¶ A.

[63] U.N. Comm'n on Int'l Trade Law Secretariat, *supra* note 60.

[64] *Id.*

Statement also contains detailed, *nonbinding*[65] guidelines for evaluating amicus petitions: "an interested *amicus* must request leave to file a submission, *amicus* submissions must be in written form and must be attached to the application for leave, and the submission cannot be more than [twenty] pages in length. In preparing submissions, *amicus* have access only to the publicly available documents."[66]

Finally, the initiative for open hearings in investor-State arbitrations under NAFTA Chapter Eleven has also seen incremental progress since the NAFTA FTC issued a statement in October 2003 consenting to open all Chapter Eleven hearings to the public (Open Hearings Statement).[67] The Open Hearings Statement provides that "hearings in Chapter Eleven disputes [must] be open to the public, except to ensure the protection of confidential information, including business confidential information."[68] The Open Hearings Statement recommends several possible arrangements for open hearings, such as closed-circuit television systems and online webcasting.[69] The NAFTA regime's pioneering movement towards a more transparent arbitration regime—through its endorsement of public disclosure of documents, third party participation, and open hearings—has been influential in the international community of investment arbitrations.

2. Limitations of NAFTA's Interpretations

As a leader of the transparency movement, the NAFTA FTC has issued interpretations promoting obligations of transparency in investor-State treaties in the form of statements and guidelines. The issued statements and guidelines are somewhat constrained, however, because disputing parties are still subject to the administering rules selected at the time of arbitration.[70] Treaties referencing ICSID Rules, ICSID Additional Facility Rules, or UNCITRAL Arbitration Rules are bound by legal standards set forth by the relevant institution or intergovernmental

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[65] Menaker, *supra* note 59, at 143.

[66] U.N. Comm'n on Int'l Trade Law Secretariat, *supra* note 60.

[67] *See Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations*, *supra* note 55.

[68] *Settlement of Disputes Between a Party and an Investor of Another Party*, FOREIGN AFF. & INT'L TRADE CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-transparency-alena-transparence.aspx?lang=en&view=d (last visited Jan. 3, 2013).

[69] *Id.*

[70] As an example of a case that involved a NAFTA dispute that proceeded under the UNCITRAL Rules, *Methanex* was the first case to recognize the "privilege" of third parties to participate as amicus curiae in investment arbitration proceedings. Methanex Corp. v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, ¶¶ 52–53 (NAFTA Arb. Trib. Jan. 15, 2001), *available at* http://www.iisd.org/pdf/methanex_tribunal_first_amicus_decision.pdf.

organization. The investor-State arbitration mechanism, set forth in NAFTA Chapter Eleven, does not provide express provisions addressing any obligations of confidentiality or public disclosure during the arbitral process.[71] Where NAFTA's text and the governing arbitration rules are silent on such obligations, relevant administering rules may explicitly state otherwise. For example, a private investor may initiate an arbitration against a NAFTA party before a Chapter Eleven tribunal under the UNCITRAL Rules. In such a case, NAFTA's texts have been silent on issues of public document disclosure and third-party participation, but open hearings are subject to the governing UNCITRAL Rule, which states that "[h]earings shall be held in camera unless the parties agree otherwise."[72] Despite NAFTA's consent to open hearings, the UNCITRAL Rules require the claimant party to consent before hearings can be made open.[73] Such consent has been given in some, but not all cases.[74] Consequently, the NAFTA regime's initiative for open hearings in investment arbitrations has seen only marginal change.

In light of this, UNCITRAL, in determining the form, applicability, and content of its transparency standards, should note that legal standards in the form of rules have greater authority than guidelines or interpretations. NAFTA's interpretations and recommendations on third-party participation, open hearings, and public disclosures are *nonbinding*. However, the standards relating to these issues that UNCITRAL administers can have the force of binding rules if desired.

B. ICSID's Newly Amended Rules Designed to Achieve Greater Transparency

The majority of investor-State arbitrations have been administered by the International Centre for Settlement of Investment Disputes (ICSID): more than sixty percent of investment arbitrations proceed under the ICSID Arbitration Rules or ICSID Additional Facility Rules.[75] Therefore, it is worthwhile to examine how ICSID has addressed the demand for greater transparency by incorporating several amendments into its rules.

ICSID amended its arbitration rules in 2006 to address the growing popularity of investor-State arbitrations (2006 ICSID Amendments). The

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[71] *Id.* ¶¶ 9, 24, 38, 39.

[72] 2010 UNCITRAL Arbitration Rules, *supra* note 13, art. 28(3). For another example, the *Mondev* tribunal prohibited the United States from publishing on its website a tribunal order and interim decision pursuant to the then-existing ICSID Additional Facility Rule in Article 44(2). Mondev Int'l Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 26, 28 (Oct. 11, 2002), 6 ICSID Rep. 192 (2004).

[73] Menaker, *supra* note 59, at 155.

[74] *See, e.g.*, U.N. Comm'n on Int'l Trade Law Secretariat, *supra* note 60, at 12.

[75] Born & Shenkman, *supra* note 26.

number of bilateral treaties arbitrated under the ICSID convention has exploded in recent years.[76] Investors have been equipped with the right to bring ICSID arbitration claims against States based on "[n]umerous multilateral agreements, such as the Energy Charter Treaty, NAFTA, and the recently-concluded Central American Free Trade Agreement (CAFTA)."[77] The 2006 ICSID Amendments were "intended to make ICSID proceedings more streamlined and transparent, while instilling greater confidence in the arbitral process."[78]

1. ICSID'S Progressive Measures

ICSID implemented several rule changes to satisfy demands for increased access to investor-State arbitration proceedings by the public. ICSID aims to achieve greater transparency via amicus submissions by third parties, public attendance at oral hearings, and publication of awards.

ICSID has provided new standards and procedures that enable greater public participation in investment arbitrations. The 2006 ICSID Amendments require tribunals to consider third-party requests to file amicus briefs so that issues inadequately addressed by treaty parties may have an opportunity to be addressed by the broader public. For example, there are issues that may arise in an arbitration proceeding that may be overlooked by the treaty parties themselves, but that may be significant to the public at large, such as environmental or trade issues. ICSID does not restrict the type of third parties that may make a submission as indicated by its reference to non-disputing parties as any "persons or entity"[79] that meets certain requirements. The broad wording of "persons or entity" is inclusive of private citizens, nongovernmental organizations (NGOs), business organizations, and local and national governments. Moreover, the 2006 ICSID Amendments have made great strides towards transparency by authorizing tribunals to accept amicus submissions by third parties even if both parties object. However, the tribunal is required to consult both parties before ruling on an amicus request if accepted over both parties' objections.[80]

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[76] Gary Born et al., *Investment Treaty Arbitration: ICSID Amends Investor-State Arbitration Rules*, WILMERHALE (Apr. 14, 2006), http://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=90393.

[77] *Id.*

[78] *Id.*

[79] "After consulting both parties, the tribunal may allow a person or entity that is not a party to the dispute . . . to file a written submission with the tribunal regarding a matter within the scope of the dispute." Int'l Ctr. for Settlement of Inv. Disputes [ICSID], *ICSID Convention, Regulations and Rules*, rule 37(2), at 117, ICSID Doc. ICSID/15 (Apr. 2006), *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [hereinafter ICSID Rules].

[80] *Id.*

In addition to amicus submissions, the 2006 ICSID Amendments address transparency objectives by opening ICSID hearings to the public.[81] Transparency advocates, such as NGOs and civil society organizations, have pushed for open hearings to persons other than those directly involved in the arbitration proceeding.[82] The revised rules partly meet this demand by giving tribunals the power to permit persons besides the parties and their agents to attend the hearings, or even open them to the public, but only with the consent of both parties.[83] The rule is still mindful of certain confidentiality concerns, as it requires tribunals presiding over open proceedings to "establish procedures for the protection of proprietary or privileged information."[84]

The 2006 ICSID Amendments also further ICSID's transparency objectives by instituting a rule that facilitates the timely publication of awards by making such publication mandatory.[85] The revised rule prohibits ICSID from publishing an award without the consent of both parties.[86] If there is no consent between the parties, ICSID must promptly publish excerpts of the legal conclusions of the tribunal.[87] In contrast, the old rules authorized but did not mandate ICSID to publish excerpts of the awards that revealed the tribunal's reasoning.[88] Moreover, in the old rules, there were no provisions as to the promptness in publishing legal excerpts of the awards, occasionally leading to delayed publications that took several months.[89] In publicizing basic information "on every investor-State dispute that it registers, ICSID arbitration distinguishes itself from most other forms of international arbitration, where the existence of a dispute . . . is not made public contemporaneously and may remain permanently confidential."[90]

ICSID has revised its rules to further its objective of streamlining

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[81] *Id.* rule 32, at 115.

[82] *See, e.g.*, CTR. FOR INT'L ENVTL. LAW & INT'L INST. FOR SUSTAINABLE DEV., *supra* note 35 (commenting on the initiatives of the Center for International Environmental Law and the International Institute for Sustainable Development).

[83] "Unless either party objects, the tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the tribunal, to attend or observe all or part of the hearings . . . ." ICSID Rules, *supra* note 79, rule 32(2), at 115.

[84] *Id.*

[85] Andrew de Lotbinière McDougall & Ank Santens, *ICSID Amends Its Arbitration Rules*, WHITE & CASE LLP (Oct. 2006), http://www.whitecase.com/files/Publication/e6da84a5-e1a8-462a-89e3-147a369efdb8/Presentation/PublicationAttachment/232b4eb2-3248-48f9-aca5-16652b545fd8/article_Icsid_Amends_its_Arbitration_Rules.pdf.

[86] ICSID Rules, *supra* note 79, rule 48, at 122.

[87] *Id.*

[88] Tuck, *supra* note 16, at 900.

[89] *Id.*

[90] Born & Shenkman, *supra* note 26.

greater transparency. The 2006 ICSID Amendments—by promoting amicus participation, open hearings, and publication of awards—are significant changes to its existing rules and will affect the greater majority of investment arbitrations that proceed under ICSID.

2. ICSID's Transparency Rules in Amended Form

Unlike NAFTA guidelines and interpretations, the 2006 ICSID Amendments are binding on arbitrations subject to the institution. The rules governing transparency, effective as of April 10, 2006, were directly incorporated into the existing 1966 version of the ICSID rules, giving the Amendments binding force.[91] Rather than having issued interpretive statements favoring greater transparency, ICSID designed transparency standards as revisions to its existing regulations. ICSID goes further in administering new transparency standards. The 2006 ICSID Amendments apply to disputes that arise on or after the effective date, even if the investment treaties themselves were signed prior to 2006.[92]

The 2006 ICSID Amendments were a response to the proliferation of investor-State arbitrations and the evolution of the growing body of international investment law. ICSID departed from the previously prevailing trend of dealing with transparency issues in the context of voluntary guidelines for foreign investors. Rather, it sought to legitimize its transparency objectives and give the revised rules a binding effect. Likewise, in order for UNCITRAL to reach its objective in promoting greater transparency to ad hoc arbitrations, its transparency standards should be crafted and administered as rules so that they have a greater governing force than guidelines and interpretations.

V. UNCITRAL'S COMMITMENT TO ESTABLISHING TRANSPARENCY STANDARDS

The incorporation of transparency standards into the current UNCITRAL Rules signifies no small change or minimal effort by the Commission. In 2010, UNCITRAL adopted a new version of its Arbitration Rules thirty-four years after their inception. The adoption of the 2010 UNCITRAL Rules concluded four years of drafting work by UNCITRAL's Arbitration Working Group, which produced important additions to the text after thorough debates and deliberations during the

[91] For example, subsection (2) of Rule 37 is a completely new addition to the 1966 version of the rule. Subsection (2) of Rule 37, which deals with submissions of non-disputing parties, has been incorporated in its entirety as an amendment to the old rule. *See* ICSID Rules, *supra* note 79, rule 37(2), at 117. The rule was previously only concerned with the tribunal's ability to visit places connected to the dispute.

[92] Born et al., *supra* note 76.

eight weeks of its meeting.[93] The Working Group II approached the task of revising the already functional and largely successful UNCITRAL Arbitration Rules with the rule of consensus: "no revision was adopted unless it garnered virtually unanimous support among the delegates."[94] Though the rule of consensus required lengthy debates, "it was crucial to obtaining broad acceptance of the revisions within the international community."[95]

Likewise, the Working Group II approached the adoption of a transparency standard—which will affect all states arbitrating under UNCITRAL Rules—with the principle that broad-based support is required for effective implementation of existing and future treaties. The Working Group II is, therefore, composed of varied interests and governments.[96] To further garner broad international support for transparency standards, the Working Group II operated on a consent-based approach.[97] This approach strategically allows future users of newly revised or introduced rules to "take comfort from the fact that representatives from a wide range of legal and economic systems have approved them."[98]

The issue of the need for greater transparency with the rise of investor-State arbitration under the UNCITRAL Rules received great attention in the Working Group sessions, transparency standards were eventually tabled for

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[93] Working Group II is one of six working groups "undertak[ing] the substantive preparatory work on [various] topics" covered by the UNCITRAL program. *FAQ—Methods of Work*, UNITED NATIONS COMMISSION ON INT'L TRADE L., http://www.uncitral.org/uncitral/en/about/methods_faq.html (last visited Jan. 3, 2013). Working Group II, was designated to work on drafting the 2010 UNCITRAL Rules. *See* Levine, *supra* note 17, at 268. Working Group II has now been tasked with setting a standard on transparency in treaty-based investor-State arbitrations. U.N. Comm'n on Int'l Trade Law Rep. of Working Group II (Arbitration and Conciliation on the work of its 55th Sess., Oct. 3–7, 2011, ¶ 1, U.N. DOC. A/CN.9/736 (Oct. 17, 2011). For a list of all six working groups and their respective tasks, see *Working Group Documents*, UNITED NATIONS COMMISSION ON INT'L TRADE L., http://www.uncitral.org/uncitral/en/commission/working_groups.html (last visited Jan. 3, 2013).

[94] James E. Castello, *Unveiling the 2010 UNCITRAL Arbitration Rules*, 65 J. DISP. RESOL., May/Oct. 2010, at 21, 21.

[95] *Id.*

[96] Working Group II is composed primarily of delegations from the sixty member States of UNCITRAL as well as observer groups from arbitral institutions and think tanks. Levine, *supra* note 17, at 268. The composition of this working group reflects growing collaboration among governments, organizations, and practitioners. *Id.* at 269. Among those in attendance at the Working Group II sessions were a host of observers from the United Nations System, international intergovernmental organizations, and international non-governmental organizations. *Id.* at 268–69; *see also* Report of the Working Group Fifty-Fourth Session, *supra* note 3, ¶¶ 5–9.

[97] *See* Castello, *supra* note 92, at 21.

[98] *Id.*

future discussion. In launching the revision project, the Working Group was "tasked by UNCITRAL to 'modernize the Rules and to promote greater efficiency in arbitral proceedings.'"[99] The "focus of the revision should be on updating the Rules to meet changes that had taken place over the last thirty years in arbitral practice," not to radically change the UNCITRAL Rules' form and substance[100]:

> In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit or its drafting style, and should respect the flexibility of the text rather than make it more complex.[101]

Thus, the updates were designed to accommodate developments in arbitral practice and make some procedural aspects of the UNCITRAL Rules more efficient.[102]

While the 2008 New York Working Group meeting saw broad support for the principle of greater transparency in investor-State arbitrations that affect the public interest, it was agreed that such changes should not be introduced until after the passage of the 2010 UNCITRAL Rules. The reason for shelving transparency reforms until after completion of the 2010 UNCITRAL Rules was that UNCITRAL Arbitration Rules largely apply to commercial arbitration, while only a small percentage arise under investment treaties.

Broad support for transparency standards was not met without serious concerns. While the Working Group II expressed general agreement "regarding the desirability of dealing with transparency in investor-State arbitration, which differ[s] from purely private arbitration, where confidentiality was an essential feature,"[103] there were reservations about issuing full transparency in all respects, as investor-State arbitrations are but one type of arbitration to which UNCITRAL Rules apply. The Working Group therefore concluded, for the purposes of the current round of proposed rule changes, that "it would not be desirable to include specific

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[99] Levine, *supra* note 17, at 269.

[100] U.N. Comm'n on Int'l Trade Law Secretariat, *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, ¶ 5, U.N. DOC. A/CN.9/WG.II/WP.145 (Dec. 6, 2006).

[101] Rep. of the U.N. Comm'n on Int'l Trade Law, 39th Sess., June 19–July 7, 2006, ¶ 184, U.N. DOC. A/61/17; GAOR, 61st Sess., Supp. No. 17 (2006).

[102] *See, e.g.*, Kate Davies, *Meeting the Challenge: Efficiency and Flexibility in International Commercial Arbitration*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: INTERNATIONAL ARBITRATION 2011, at 1, 1 (Steven Finizio & Wendy Miles eds., 2011).

[103] Report of the Working Group Forty-Eighth Session, *supra* note 2.

provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves."[104]

After revisions to the UNCITRAL Arbitration Rules were issued in 2010, the Commission revisited the complex but worthy issue of creating transparency standards for investor-State arbitrations. After much deliberation, the Working Group II reached a consensus in February 2013 as to the form, application, and content of the new transparency standards.[105] Rather than probing these proposed standards that still face additional scrutiny,[106] this Part discusses the policy considerations underlying the finalized draft. Importantly, this Part advocates for adopting an approach that best pursues UNCITRAL's objectives while preserving party autonomy—even if such a rubric scales back the broadest application of the transparency standards.

A. The Form of New Legal Transparency Standards

The Working Group has the discretion to determine the form of its future work product on transparency standards.[107] Determining the form of the new legal standards is both a technical and policy-driven exercise. Form selection is technical in one sense because transparency standards can take shape in only one of many forms, and policy-driven in another sense because the selected form will affect the drafting style and application of transparency standards.[108] Among the possibilities of instruments are "model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties."[109]

Much debate over the issue of form has transpired among Working

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[104] *Id.* ¶ 69.

[105] *See* U.N. Comm'n on Int'l Trade Law Rep. of Working Group (Arbitration and Conciliation) on the work of its 58th Sess., New York, U.S., Feb. 4–8, 2013, ¶¶ 75–80, U.N. Doc. A/CN.9/765 (Feb. 13, 2013) [hereinafter Report of the Working Group Fifty-Eighth Session]. The Working Group II met in October 2012 and reached a consensus on some, but not all, the transparency issues raised. Johnson, *supra* note 14. The Working Group II reconvened in early February 2013 where it finalized a draft proposal of the rules. Peterson, *supra* note 14. The proposal still needs to be approved by the Commission at its next meeting in July 2013 and amended into the 2010 UNCITRAL Rules. *Id.*

[106] The proposed standards "must still be subjected to a 'legal scrub' and then approved by the UNCITRAL Commission at its next meeting in July [2013] . . . ." Peterson, *supra* note 14. The Working Group II reached a consensus on new standards "that will apply on a default basis to UNCITRAL arbitrations pursuant to future investment treaties – unless the parties to a given treaty expressly opt-out." *Id.* For more details on the proposed rules, see Report of the Working Group Fifty-Eighth Session, *supra* note 105.

[107] *See* Report of the Working Group Fifty-Fourth Session, *supra* note 3, ¶ 1.

[108] *Id.* ¶ 24.

[109] *Id.*

Group II delegates, as well as NGOs and leading international arbitrators, over the past half-decade. The issue has largely rested on whether and how to incorporate new transparency standards into the UNCITRAL Arbitration Rules. While the drafters of the 1976 UNCITRAL Rules consciously designed the Rules generically to allow for adjustments to the "varied circumstances" that arise in investor-State arbitrations, the Rules were primarily intended to govern commercial disputes and did not contemplate the public interest and international law issues that come up.[110]

On October 12, 2007, more than forty renowned international arbitrators signed and issued a declaration (Milan Declaration) through the Chamber of National and International Arbitration of Milan.[111] The proponents of the Milan Declaration advocate for preserving confidentiality in international commercial arbitration and excluding any investor-State provisions from the generic UNCITRAL Rules.[112] It expresses reservations about the possible inclusion of transparency provisions in the UNCITRAL Arbitration Rules. Many delegates hold the view that the generic nature of the Rules needs to be preserved and that full transparency in all circumstances is not desirable.[113] Rather than incorporating specific provisions into the UNCITRAL Rules, some delegates support the utilization of investment treaties to expressly deal with issues surrounding more open dealings. This alternative would "better allow States to reflect such circumstances"[114] and accommodate the desire for greater transparency based on individual treaties. Others support preparing "one or more optional clauses to address specific factors for investor-State arbitration[s] . . . for consideration by States when negotiating such treaties."[115]

A contrasting viewpoint on the form for transparency standards has been expressed by two prominent NGOs: the Centre for International Environmental Law (CIEL) and the International Institute for Sustainable

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[110] PAULSSON & PETROCHILOS, *supra* note 8, at 1–4; Sutcliffe & Sabater, *supra* note 11.

[111] Sutcliffe & Sabater, *supra* note 11, at 33–34.

[112] *See* Report of the Working Group Forty-Eighth Session, *supra* note 2, annex II ("The members of the Milan Club of Arbitrators: 1) reaffirmed their support for the general principle of confidentiality in international commercial arbitrations and, in particular, in arbitrations taking place under the UNCITRAL Arbitration Rules; 2) supported the current proposals in the Working Group to exclude from the new UNCITRAL Arbitration Rules any specific provision for investor-State arbitrations; [and] 3) recommended that one or more optional clauses be formulated by UNCITRAL to address specific factors for investor-State arbitrations taking place under investment treaties, consistent with the new UNCITRAL Arbitration Rules . . . .").

[113] *Id.* ¶ 60.

[114] *Id.*

[115] *Id.*

Development (IISD).[116] CIEL and IISD submitted a report (CIEL-IISD Report) to the Working Group calling for greater transparency of investment arbitration cases conducted under the UNCITRAL Rules "so that citizens know what is at stake[,] . . . can be informed about the outcome[,] . . . [and] have the opportunity to provide input to an investor-State tribunal."[117] In order to accomplish the stated objectives, the CIEL-IISD Report proposed revision of the UNCITRAL Rules themselves, revisions centered on issues of access to awards, access to the notice of arbitration, access to oral hearings, access to materials during proceedings, and third-party participation.[118] The CIEL-IISD Report claims that direct incorporation of these revisions in the Rules "would not affect the resolution of commercial disputes"[119] but would avoid "undue delay, disruption or cost" by leaving untouched the application of the Rules to other types of arbitrations.[120]

The view advocated by CIEL and IISD has been countered by a concern that the proposal to directly revise several UNCITRAL Rules is overly simplistic when dealing with the complexities of transparency issues.[121] The complexities in dealing with transparency require more than amending a few provisions in the UNCITRAL Rules, as there are "other aspects that might need to be dealt with in investor-State arbitration, such as the question of applicable law, or State immunity."[122]

In balancing these views, it appears the Working Group II was intent on including a specific regime to the UNCITRAL Rules in the form of an annex or a supplement.[123] The transparency standards would only apply in the context of investment arbitrations, while the general regime of the UNCITRAL Rules would remain unchanged with respect to commercial arbitrations. While suggestions on the form of transparency standards have varied, there has been general consensus that investment arbitrations have different needs from commercial arbitrations, and that the UNCITRAL Rules are designed to address the latter.[124] An annex or supplement to the

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[116] Report of the Working Group Forty-Eighth Session, *supra* note 2, annex III.

[117] *Id.*

[118] *Id.*

[119] CTR. FOR INT'L ENVTL. LAW & INT'L INST. FOR SUSTAINABLE DEV., REVISING THE UNCITRAL ARBITRATION RULES TO ADDRESS STATE ARBITRATIONS (2007), *available at* http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf.

[120] Report of the Working Group Forty-Eighth Session, *supra* note 2, annex III.

[121] *Id.* ¶ 66.

[122] *Id.*

[123] The form of an annex to the existing UNCITRAL Rules was most supported by delegates of Working Group II. Pedro Martini, *Full Report on the 53rd Session of the UNCITRAL Working Group II (Arbitration and Conciliation)*, MOOT ALUMNI ASS'N 11 (Oct. 4, 2010), http://www.maa.net/uploads/MAA_Docs/WGII_full_report.pdf.

[124] *Id.* at 2–3.

generic UNCITRAL Rules would address the need for greater openness in investment arbitrations while leaving the integrity of the general rules unchanged. Moreover, an annex would allow for more flexibility in addressing complex transparency issues, such as exemptions to certain rules, than the alternative of fitting all transparency issues into the existing framework of the UNCITRAL Rules.

Thus, constructing transparency standards in the form of an annex to the UNCITRAL Rules would restrict the sphere of application of the new transparency standards to UNCITRAL arbitrations. While the scope of the legal standards can be broadened by taking shape in the form of a Model Law,[125] packaging the transparency standards as an annex appropriately applies them to parties who have expressly selected to arbitrate their disputes under the UNCITRAL Rules. This is critical to recognizing that any form of arbitration, investment or commercial, is based on the consent of the parties.[126]

B. The Enforceability of Rules over Guidelines

However the new transparency standards are ultimately incorporated into the UNCITRAL Rules—whether they are drafted as part of the existing rules in relevant clauses, or as a supplement in the form of an annex to the generic rules—the enforceability of new legal standards should be taken into consideration. The weight of legal authority the new standards will have over investment treaties will depend on whether they take form as guidelines or stand-alone rules.[127] The selection between guidelines or rules has other significant implications: it will drive the drafting style of the legal standard on transparency, and it will determine the force of the instrument's application on disputing parties. This Comment takes the position that in order to establish the legitimacy of transparency standards among the

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[125] The UNICTRAL Model Law is a nonbinding legal framework based on best principles of international arbitration. Juliet Blanch, John Reynolds & Andy Moody, *UNCITRAL and NY Convention*, *in* ARBITRATION WORLD: JURISDICTIONAL COMPARISONS cxliii, clvii (J. William Rowley ed., 2d ed. 2006). Since the U.N. Model Law is based on nonbinding principles, it has the capacity to have broader impact than binding laws as it is widely used as a tool for assisting the interpretation of national laws on arbitration. *Id.* The U.N. Model Law was created to encourage the harmonization of arbitration laws around the world and has been successful in that aim since its inception; over forty countries around the world have adopted the U.N. Model Law. *Id.*

[126] *See* Bjorklund, *supra* note 9, at 1270.

[127] This Comment considers guidelines to be inclusive of model clauses and model statement of principle, distinguished from stand-alone rules. For an example of the Working Group's consideration of the forms of a legal standard on transparency, see Report of the Working Group Fifty-Fourth Session, *supra* note 3, ¶ 23; U.N. Comm'n on Int'l Trade Law Secretariat, *Settlement of Commercial Disputes: Preparation of a Legal Standard on Transparency in Treaty-Based Investor-State Arbitration*, U.N. Doc. A/CN.9/WG.II/WP.162 (Dec. 9, 2010).

international community, create a uniform application, and promote greater adoption of the standards, UNCITRAL should fashion its transparency standards in the form of rules instead of guidelines.

1. Guidelines as a Possibility

Guidelines that outline legal standards on transparency would reflect the UNCITRAL's understanding of the international best practice of promoting greater openness in investment arbitrations. Guidelines would embrace principles of transparency and draw upon current practices, case law, and the experience of the Working Group II and others in international arbitration.[128] Significantly, "guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties."[129]

The success in implementing guidelines hinges on their general acceptance by the international arbitration community, which requires broad-based support for the principles laid out in the instrument.[130] Guidelines can have a significant influence over arbitration proceedings; examples of guidelines that have seen success in their application to consenting parties include the International Bar Association Rules on the Taking of Evidence in International Arbitration and the UNIDROIT Principles of International Commercial Contracts (2004).[131] The Working Group II hopes that its proposed guidelines will assist arbitrators, institutions, and courts in their decision-making and practice on the issue of transparency in investment arbitrations.[132]

The Working Group II saw some support for guidelines at its fifty-fourth working session held in New York.[133] Germany presented arguments

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[128] *See generally* INT'L BAR ASS'N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION 5 (2004), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=E2FE5E72-EB14-4BBA-B10D-D33DAFEE8918.

[129] *Id.*

[130] *Id.*

[131] The IBA Rules on the Taking of Evidence and the Unidroit Principles of International Commercial Contract were submitted to the UNCITRAL Working Group II as examples of functional and effective guidelines. Report of the Working Group Fifty-Fourth Session, *supra* note 3, ¶ 23; *see generally IBA Rules on the Taking of Evidence*, INT'L B. ASS'N (May 29, 2010), http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#conflictsofinterest; INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2004 (2004), *available at* http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf.

[132] *See generally* INT'L BAR ASS'N, *supra* note 128, at 5.

[133] *See, e.g.*, U.N. Comm'n on Int'l Trade Law Secretariat, *Settlement of Commercial Disputes, Transparency in Treaty-Based Investor-State Arbitration: Proposals by Governments and International Organizations*, U.N. Doc. A/CN.9/WG.II/WP.164 (Dec. 20,

(German Proposal) in favor of legal transparency standards in the form of non-binding guidelines.[134] The German delegation asserted that "non-binding guidelines most closely comply with the principle of a party-dominated process that underpins arbitration."[135] Furthermore, the German Proposal criticized the alternative of preparing an instrument in the form of rules. The deliberation parties engage over whether to incorporate the new transparency standards in arbitration proceedings "would be contentious, possibly leading to additional expense and delays."[136]

The German Proposal mostly emphasized its desired objective to "establish the widest possible acceptance of transparency rules."[137] According to the Proposal, non-binding guidelines would help achieve the stated objective by providing sufficient flexibility—unlike rigid, mandatory rules—in the ad hoc application of transparency standards to existing and future investment treaties.[138] Guidelines would, under this view, effectuate a broader application of transparency standards than defined rules attached to UNCITRAL, because guidelines allow parties to incorporate transparency rules into their treaties regardless of the arbitration rules to which they submit their dispute. The guidelines would apply to international treaties at the intergovernmental level and to private contracts between States and investors.[139]

2. The Case for Rules over Guidelines

The case for designing transparency standards in the form of rules prevails over the form of guidelines, because rules carry greater weight in legitimacy and enforcement, in addition to providing more clarity and uniformity in facilitating arbitrations. Additionally, Germany's supposition that rules may exacerbate the "party-dominated process" in arbitral proceedings may be rebutted: the application of transparency standards will require the express consent of parties to a treaty to arbitrate under any version of the UNCITRAL Arbitration Rules.[140]

Rules have greater force in facilitating arbitrations than guidelines. Unless the disputing parties expressly agree otherwise, guidelines or interpretations are swallowed by the governing arbitration rules when there is a conflict. For example, open hearings for NAFTA investment treaties are subject to the governing ICSID, ICSID Additional Facility, or

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2010).

[134] *Id.*

[135] *Id.* at 2.

[136] *Id.* at 3.

[137] *Id.* at 2.

[138] *Id.*

[139] U.N. Comm'n on Int'l Trade Law Secretariat, *supra* note 133, at 2.

[140] *See infra* Part V.C (discussing the application of the new transparency standards).

UNCITRAL Rules even though the NAFTA States have consented to open hearings through their Open Hearings Statement.[141] Arbitrating under the UNCITRAL Rules requires the consent of the claimant party for hearings to be made open,[142] so a disputing party can veto the other party's desire to hold an open hearing. Thus, investment treaties to which NAFTA governments are a party are still bound by administering rules selected by the investor at the time of arbitration.[143]

The form of the transparency instrument will affect the drafting style and application of the legal standards. The Working Group II indicated a strong preference for drafting the legal standard in the form of clear rules rather than looser, more discursive guidelines.[144] By drafting guidelines, the legal standard would be less forceful in style and practice. Where guidelines consist of lengthier explanations to parties and present various options parties can choose from, their content will be less definitive in style and more disjointed in application than rules. Without the clear and uniform approach that rules can deliver, disputing parties in investment arbitrations will be left with unpredictable and inconsistent transparency standards.

The United Nations has recognized that UNCITRAL—through its work in international trade law and status as a U.N. body—has an essential role in advancing good governance and promoting the rule of law at the national and international levels in the interest of economic and social development.[145] The Working Group II acknowledged this responsibility in expressing its preference for a transparency instrument in the form of rules:

> [H]igh standards on transparency in treaty-based investor-State arbitration should be established because transparency contribute[s] to promoting the rule of law, good governance, due process and rights to access information. It [is] also seen as an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such . . . [thus] the legal standard on transparency should take the form of detailed rules of procedure . . . .[146]

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[141] *See Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations*, *supra* note 55.

[142] *See* Menaker, *supra* note 59, at 155.

[143] *See* Teslik, *supra* note 52.

[144] Report of the Working Group Fifty-Fourth Session, *supra* note 3, ¶ 25.

[145] *See, e.g.*, G.A. Res. 58/76, at 1, U.N. Doc. A/RES/58/76 (Jan. 8, 2004) ("[T]he United Nations Commission on International Trade Law will be of further assistance to States, in particular developing countries, in promoting good governance and establishing an appropriate legislative framework for such projects.").

[146] Report of the Working Group Fifty-Fourth Session, *supra* note 3, ¶ 25.

Crystallizing greater public disclosure in the form of rules furthers the United Nations objective of good governance and legitimizes the issue of transparency in investment arbitrations, whereas non-binding guidelines may diminish the force of transparency standards.

Finally, detailed rules of procedure would better provide "the certainty contemplated by the objective of UNCITRAL to harmonize international trade law."[147] UNCITRAL has noted that one way of furthering the mandate to promote harmonization and unification of international trade law "is to routinely collect and publish decisions and awards interpreting and applying relevant legal texts."[148] Where current UNCITRAL provisions are mostly silent on the issue of transparency, public disclosure of awards and decisions are "random and incomplete."[149] Moreover, parties arbitrating under nebulous guidelines are without a clearly uniform approach to standards and are thus subject to case-by-case rulings by the authorizing tribunal. Clear procedural rules on the disclosure of arbitration proceedings will reduce uncertainties regarding legal transparency standards. A legal instrument in the form of rules, therefore, is consistent with UNCITRAL's purpose of harmonizing the law of international trade.

Transparency standards should be legitimized by taking shape as rules. Where the 1976 and 2010 UNCITRAL Rules were primarily designed to govern commercial arbitrations between private parties,[150] an additional set of rules on transparency should be available to address the demand for transparency in investment disputes. Rules would take into consideration distinct needs and interests of investor-State arbitrations and clear hurdles

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[147] *Id.*

[148] NATHALIE BERNASCONI-OSTERWALDER, CTR. FOR INT'L ENVTL. LAW & INT'L INST. FOR SUSTAINABLE DEV., ENSURING TRANSPARENCY IN INVESTOR-STATE DISPUTE RESOLUTION UNDER THE UNCITRAL ARBITRATION RULES 3 (2011), *available at* http://www.iisd.org/pdf/2011/ensuring_transparency.pdf; *see generally* U.N. Comm'n on Int'l Trade Law, Case Law on UNCITRAL Texts (CLOUT): User Guide, U.N. Doc. A/CN.9/SER.C/GUIDE/I/Rev.2 (June 2, 2010).

[149] BERNASCONI-OSTERWALDER, *supra* note 148.

[150] The 1976 UNCITRAL Arbitration Rules were not specifically tailored to resolve investor-State disputes or entertain claims for breach of customary or conventional international law. Article 1(1) of the 1976 UNCITRAL Rules, for example, refers only to "disputes in relation to [a] contract." Rep. of the U.N. Comm'n on Int'l Trade Law, 9th Sess., Apr. 12–May 7, 1976, U.N. Doc. A/31/17, ch. V, § C; GAOR, 31st Sess., Supp. No. 17 (1976) [hereinafter 1976 UNCITRAL Arbitration Rules], http://www.uncitral.org/pdf/english/yearbooks/yb-1976-e/vol7-p9-82-e.pdf (last visited Mar. 5, 2013); *see also 1976 - UNCITRAL Arbitration Rules*, UNITED NATIONS COMMISSION ON INT'L TRADE L., http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html (last visited Mar. 4, 2013) ("[T]he UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations.").

presented by the generic UNCITRAL Rules originally designed for commercial purposes.[151]

C. The Application of Transparency Standards

While the Working Group II enjoyed broad consensus in favor of adopting transparency standards, its delegates were at "loggerheads over whether it [was] permissible to read new [transparency] rules" into existing treaties.[152] The issue churned a substantial amount of debate among Working Group II delegates, since the applicability of the new transparency rules would have "an important practical impact as there [are] more than 2,500 investment treaties in force to date, but less than [ten] treaties had been concluded in 2010."[153]

Depending on the form of the new standards, UNCITRAL could apply the transparency standards to both existing and future treaties. The issue of the standards' applicability is a complicated one. The Commission needs to account for a number of legal and policy considerations related to treaties existing prior to the Commission's official issuance of the transparency standards (anticipated for July 2013). Even though the UNCITRAL Commission has reached broad consensus on the "importance of ensuring transparency in treaty-based investor-State arbitration"[154] and has stated that achieving greater transparency is "a desirable objective,"[155] UNCITRAL should not overstep its boundaries in enforcing new legal standards without the consent of the parties.

1. Applicability of the Rules on Transparency to Existing Treaties

The Working Group II explored a number of possible instruments that would facilitate an application of the new transparency standards to existing treaties.[156] Among the buffet of potential solutions were automatic applications to all treaties, or applications only upon the express consent of the arbitrating parties. The applicability of the new standards remains a

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[151] *See* 1976 UNCITRAL Arbitration Rules, *supra* note 150.

[152] Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky*, *in* TRANSPARENCY IN INTERNATIONAL LAW (forthcoming 2013) (manuscript at 10 n.55), *available at* http://ssrn.com/abstract=2058195.

[153] U.N. Comm'n on Int'l Trade Law Rep. of Working Group II (Arbitration and Conciliation) on the work of its 53d Sess., Oct. 4–8, 2010, ¶ 85, U.N. Doc. A/CN.9/712 (Oct. 20, 2010) [hereinafter Report of the Working Group Fifty-Third Session].

[154] Report of the Working Group Fifty-Fourth Session, *supra* note 3, ¶ 1.

[155] *Id.*; Report of the Working Group Fifty-Eighth Session, *supra* note 105, ¶ 75.

[156] Possible solutions discussed by the Working Group II are joint interpretative statements, unilateral declarations, amendments to treaties, automatic application of the new standards, and a convention of the States. *See generally* U.N. Comm'n on Int'l Trade Law Secretariat, *supra* note 127.

contentious topic among the Working Group II delegates. Accordingly, this Comment reviews the merits to both sides of the debate and concludes that the new transparency standards should automatically apply to future treaties, and apply to existing treaties only when parties give express consent.

Some delegates proposed the "opt-in approach," where the new transparency standards would apply to existing treaties only where express consent has been provided by the parties subject to the arbitration.[157] Others, such as Canada and the United States, rejected this option and instead advocated for an "out-out approach" that would automatically apply the new standards to existing treaties unless parties specifically referred to another version of the UNCITRAL Rules.[158] Significantly, the deliberations expose underlying policy concerns, such as maximizing widespread adoption of transparency standards versus preserving parties' intent in the arbitration process. Both policy considerations are worthwhile goals that tug at different approaches to applying the standards. However, an optimal balance to realizing both ends can be achieved by treating existing and future treaties differently through: (1) an opt-out approach to future treaties, and (2) an opt-in approach to existing treaties.

An opt-out approach to existing treaties would embrace the new transparency standards as the default rule, which is objectionable in spite of its advantages. The new standards, "like other provisions of the UNCITRAL arbitration rules, will be deemed to apply unless the State parties to the treaty specified otherwise."[159] Where an investment treaty expressly refers to a prior version of the governing UNCITRAL Rules,[160] an automatic application of any newly amended rules would not be possible. However, where an investment treaty refers generally to the UNCITRAL Arbitration Rules without any further indication of a version, the treaty would be interpreted to have made a "dynamic reference" to the evolution of the Rules.[161] In other words, a general reference to the UNCITRAL Rules implies the "treaty parties . . . consented to a dynamic reference to those rules and contemplated that the rules in force at the time the dispute was initiated would apply."[162] The applicability of the new standards to

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[157] *See id.*

[158] *See* Maupin, *supra* note 152, at 10.

[159] NATHALIE BERNASCONI-OSTERWALDER & LISE JOHNSON, CTR. FOR INT'L ENVTL. LAW & INT'L INST. FOR SUSTAINABLE DEV., COMMENTS ON DRAFT RULES ON TRANSPARENCY IN INVESTOR-STATE ARBITRATION 5 (2011), *available at* http://www.iisd.org/pdf/2011/uncitral_comments_draft_rules.pdf.

[160] Parties to a dispute can expressly request arbitration under a specific version of the UNCITRAL Rules. *See, e.g.*, 1976 UNCITRAL Arbitration Rules, *supra* note 150.

[161] Report of the Working Group Fifty-Fourth Session, *supra* note 3, ¶ 37.

[162] BERNASCONI-OSTERWALDER & JOHNSON, *supra* note 159, at 6.

existing treaties would be conditional on the intention of the parties: treaties explicitly referencing a version of the UNCITRAL Rules would be subject to those rules, even if they were not in force at the time of the dispute.

The driving motivation behind an opt-out approach is to enable the new transparency standards—as default rules for existing treaties—to have a broader application to investment arbitrations, thus "furthering the mandate by the Commission to enhance transparency in treaty-based investor-State arbitration."[163] Otherwise, the limitations of an opt-in approach would have minimal impact on the 2,500 existing treaties, and transparency reforms may see little change to the status quo. Moreover, the tremendous proliferation of bilateral and multilateral investment treaties in recent decades points to the potential for significant disparity on the impact of the new rules on transparency should the legal standards only apply to future treaties.[164] The U.N. Secretary-General's Special Representative on Business and Human Rights submitted a proposal to the Commission advocating for the widest application of transparency standards in investment arbitrations by highlighting the concern that treating existing treaties differently from future treaties would result in an undesirable "two-tiered" set of arbitrating practices:

> [T]ransparency [is] an integral part of UNCITRAL's Arbitration Rules as they apply to investor-State dispute resolution. I also hope that appropriate rules for transparency will not be limited solely to disputes under future agreements or treaties, but will apply equally to those that arise from such existing arrangements that rely on UNCITRAL's rules. It is important that your work not result in setting two tiers of practices, two sets of differing standards, depending only on when the relevant treaty or agreement was signed.[165]

From a human-rights advocacy perspective, the desire for a broad, consistent application of transparency rules is clear, regardless of whether the treaty was signed before the new standards are introduced. As desirable as the objective may be, this Comment argues that UNCITRAL—as a public intergovernmental body—is limited by its scope of authority in enforcing new legal standards and should remain faithful to basic arbitration principles of party consent.

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[163] Report of the Working Group Fifty-Third Session, *supra* note 153, ¶ 86.

[164] *See* Tuck, *supra* note 16, at 885–86.

[165] Rachel Davis, Special Representative of the U.N. Secretary-Gen. on the Issue of Human Rights & Transnat'l Corps. & Other Bus. Enters., Statement to the UNCITRAL Working Group II (Arbitration and Conciliation) (Feb. 7–11, 2011), *available at* http://www.business-humanrights.org/media/documents/ruggie-statement-uncitral-working-group-ii.pdf.

While transparency standards may be desirable and their automatic application to existing treaties would certainly result in greater adoption, UNCITRAL does not have the authority to unilaterally impose new legal standards on States. The introduction and application of a new legal standard to existing treaties "constitute[s] an amendment to the treaty provision on dispute settlement, which could not be done without the agreement of the treaty parties, who are 'masters' of their treaty."[166] Arbitration is based on two parties' consent, while an investment treaty between States is governed by international law pursuant to the Vienna Convention on the Law of Treaties, which prohibits any amendments to a treaty without the consent of the parties to the treaty.[167] The Vienna Convention provides as a general rule of treaty interpretation that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[168]

An approach that takes into consideration conscious decision-making by the parties "complie[s] with public international law and practice."[169] A dynamic interpretation of the treaties is thus impermissible by the standards of international law, and UNCITRAL—as an intergovernmental body—would overstep its authority if it retroactively applied the new standards to existing treaties. Therefore, an opt-in approach, which preserves parties' intent, should prevail with existing treaties. Otherwise, UNCITRAL could face legal challenges for violating the terms of existing treaties and for improperly applying international law.

Moreover, the opt-in approach remains consistent with the approach adopted by the 2010 UNCITRAL Rules. The approach is reflected in Article 1.2 of the Rules:

> The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded

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[166] U.N. Comm'n on Int'l Trade Law Secretariat, *supra* note 127, ¶ 28.

[167] Christoph Schreuer, United Nations Conference on Trade & Dev., *Course on Dispute Settlement—Module 2.3: Consent to Arbitration*, at 1, UN Doc. UNCTAD/EDM/Misc.232/Add.2 (2003), *available at* http://unctad.org/en/docs/edmmisc232add2_en.pdf; Vienna Convention on the Law of Treaties arts. 39–41, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[168] Vienna Convention, *supra* note 167, art. 31.1.

[169] U.N. Comm'n on Int'l Trade Law Rep. of Working Group II (Arbitration and Conciliation) on the work of its 56th Sess., June 25–July 6, 2012, ¶ 25, U.N. Doc. A/CN.9/741 (Feb. 16, 2012).

by accepting after 15 August 2010 an offer made before that date.[170]

The 2010 UNCITRAL Rules do not presumptively apply to agreements made prior to the date of their enactment. This approach was justified partially by the fact that the 1976 UNCITRAL Rules did not contain any presumption that they would be subject to amendments.[171] Likewise, the 2010 UNCITRAL Rules do not contain any presumption that agreements are subject to amendments. The issues of applicability—from the 1976 to the 2010 UNCITRAL Rules, and from the generic rules to the new transparency standards—are similar, and should thus be treated similarly. Any new transparency standard should be consistent with the approach adopted by the 2010 UNCITRAL Rules. Taking a different approach would otherwise create confusion and legal uncertainty in the international arbitration community.

Parties may opt-in to the transparency standards by issuing a joint interpretative declaration. The Vienna Convention provides that "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of the provisions" shall be taken into account, together with the context, as having the effect of an authentic interpretation.[172] A joint interpretative statement by parties to an investment treaty could express the agreement between the States "that the provision of the treaty providing for investor-State arbitration should be interpreted as including [or excluding] the application of the legal standard on transparency."[173]

A joint interpretative declaration, according to the Vienna Convention, does not require any special form, "but would clearly have to demonstrate the intention of the parties that their declaration constitutes an agreed basis for interpretation."[174] Parties to a treaty should have the opportunity to issue an interpretation of which rules govern their existing treaties. Joint interpretative declarations "may be viewed as coming close to a modification or amendment of the original treaty."[175] Even if subsequent declarations deviate from the original intention of the agreement, international courts and tribunals have accepted these declarations as authentic interpretations of the treaty.[176] A joint interpretative declaration should thus be a tool to opt-in to a desired version of the UNCITRAL Arbitration Rules, as it preserves the fundamental principle that

[170] 2010 UNCITRAL Arbitration Rules, *supra* note 13, art. 1.2.
[171] Report of the Working Group Fifty-Third Session, *supra* note 153, ¶ 87.
[172] Vienna Convention, *supra* note 167, art. 31.3(a).
[173] U.N. Comm'n on Int'l Trade Law Secretariat, *supra* note 127, ¶ 34.
[174] *Id.* ¶ 34; *see also* Vienna Convention, *supra* note 167, art. 31.3(a).
[175] U.N. Secretariat, *supra* note 127, ¶ 35.
[176] *Id.*

international arbitration is based on the consent between parties.

2. Applicability of the Rules on Transparency to Future Treaties

While deference is given to parties' consent in existing treaties, the focus should shift to ensuring the widest application of transparency standards to future treaties. This is because an opt-in approach to existing treaties and an opt-out approach to future treaties strike an optimal balance of policy goals: greater transparency in investor-State arbitrations where arbitration is based on the consent of parties.

Under an opt-out solution, there would be a presumption that the transparency standards would apply to future treaties referring to the UNCITRAL Arbitration Rules, unless a reference to a different version of the Rules was made in the treaty.[177] A reference to the UNCITRAL Arbitration Rules in future treaties would therefore include a presumed reference to the transparency standards. Accordingly, transparency standards would apply unless States otherwise expressly opt-out of the legal standards—the approach proposed by the Working Group II.[178] This presumption could be clarified with an amendment to the 2010 UNCITRAL Rules, where Article 1 could state that an arbitration agreement concluded after the effective date of the new transparency standards shall be presumed to have referred to the version of the UNCITRAL Rules in effect on the date of commencement of the arbitration, unless the parties agreed to apply a particular version of the Rules.[179]

Including the new transparency standards in the default version of the UNCITRAL Arbitration Rules for future treaties accomplishes two main policy objectives. First, it situates a "wider application of the legal standard on transparency, and thereby ensure that the mandate given by the Commission to the Working Group to promote transparency to [investor-State arbitrations] would be better fulfilled."[180] Second, it avoids undermining the force and applicability of the Working Group II's new transparency standards. Unlike the case with existing treaties, a different approach from the opt-in solution is recommended for future treaties

[177] *See* Report of the Working Group Fifty-Fourth Session, *supra* note 3, ¶ 19.

[178] *See* U.N. Secretariat, *supra* note 127, ¶ 47; Report of Working Group Fifty-Eighth Session, *supra* note 105, ¶ 75 ("The Rules on Transparency shall apply to investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ('treaty') concluded after [date of coming into effect of the Rules on Transparency], unless the Parties to the treaty have agreed otherwise.") (brackets in original).

[179] *See* Report of the Working Group Fifty-Fourth Session, *supra* note 3, ¶ 20 (discussing the lack of clarity, from a legal perspective, on whether the amendment noting the presumption would be necessary, but noting that from a practical perspective, the amendment would achieve clarity).

[180] *Id.*

because UNCITRAL does not have to violate public international law by retroactively applying new legal standards to treaties completed prior to the effective date of the transparency standards. Under the opt-out option, treaty parties still retain the power not to submit to the new standards. The opt-out solution provides the greatest flexibility in scope of the standards' application to future treaties, while respecting the treaty parties' intent in both existing and future investment treaties.

Furthermore, an amendment to the 2010 UNCITRAL Rules that clarifies the presumption of the applicability of transparency standards provides future parties notice of the default legal standards. Parties to investor-State arbitration can consciously elect the UNCITRAL Rules effective at the commencement of the arbitration, knowing that the presumption in favor of the transparency standards exists, and explicitly reference a different version of the UNCITRAL Rules in the treaty if they prefer it to govern certain disputes or aspects of the dispute. In order to promote a greater adoption of the new standards in investor-State arbitrations, the burden should be placed on the arbitrating parties to opt-out of the new status quo favoring transparency.

Adopting an opt-out approach remains consistent with the approach followed by the Working Group II for the 2010 UNCITRAL Rules.[181] For investment treaties concluded after the effective date of the 2010 UNCITRAL Rules, there is a presumption that a reference to the UNCITRAL Arbitration Rules refers to the 2010 version of the Rules, unless the parties to the treaty agree otherwise.[182] Likewise, the same presumption regarding transparency standards should be practiced in order to limit confusion and uncertainty about the applicability of future amendments and newly developed standards to the UNCITRAL Rules.

VI. CONCLUSION

While there has been broad consensus in the international arbitration community in favor of increased transparency in investment arbitrations, UNCITRAL faces complexities in designing the structure of the new standards. Determining the form and application of new transparency standards, designed for incorporation into the UNCITRAL Arbitration Rules (just recently revised for the first time in three decades), is more than a technical exercise. UNCITRAL must factor in weighty policy considerations and balance the law of treaties respecting party consent with the objective of achieving greater transparency in investment arbitrations. Any new transparency standard in investor-State arbitration must be drafted in a way that will have wide traction and acceptance by State-parties to

[181] *See* 2010 UNCITRAL Arbitration Rules, *supra* note 13, art. 1.2.
[182] *Id.*

disputes, both with regards to existing and future treaties. At the same time, UNCITRAL must be guided by the basic arbitration principle of party consent: the new standards endorsing greater transparency should remain within the boundaries set by the international law of treaties.

When considering the form in which the transparency standards should be drafted, UNCITRAL should fashion binding rules as opposed to nonbinding guidelines. This choice will have significant implications on the instrument's drafting style and force of application on disputing parties. A legal instrument taking the form of an annex to the existing UNCITRAL Rules will help establish the legitimacy of transparency among the international community, create a uniform application, and promote greater adoption of the transparency standards while mostly leaving unaltered the original purpose of UNCITRAL Rules governing commercial arbitrations.

Moreover, given that the UNCITRAL Commission has reached broad consensus on the "importance of ensuring transparency in treaty-based investor-State arbitration,"[183] and has stated that achieving greater transparency is "a desirable objective,"[184] the Commission should adopt a provision that promotes the broadest application of legal transparency standards. Among the menu of potential solutions, the Commission should adopt a provision that requires the express consent of parties to an existing treaty in order for the new transparency standards to apply. For future treaties, the new transparency standards should be the default set of applicable UNCITRAL Rules, unless the treaty parties expressly opt-out by referencing a prior version of the Rules.

Foisting new rules onto investment arbitrations have more open-ended implications on governments than private commercial parties. Whereas commercial parties select their counterparties when entering into an arbitration agreement, sovereigns become a party to investment arbitrations without directly agreeing with the other side. The introduction of new standards governing investor-State arbitrations thus leaves sovereign parties with greater uncertainty about the impact the new rules will have on present and future treaties. Therefore, UNCITRAL should pay tribute to the principle of party consent by not imposing new transparency standards as the default applicable rules to existing treaties without the express permission of the parties.

This Comment recommends these measures of form and application of transparency standards in hopes that they only augment the force of effectiveness and legitimacy of the original UNCITRAL Arbitration Rules—which today remains one of the most widely recognized set of rules in the context of international arbitration.

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[183] Report of the Working Group Fifty-Fourth Session, *supra* note 3, ¶ 1.
[184] *Id.*