Notes

Resolving “Dynamic Interpretation”:

An Empirical Analysis of the UNCITRAL Rules on Transparency

The United Nations Commission on International Trade Law (UNCITRAL) recently adopted Rules on Transparency with the goal of ensuring greater transparency in investor-state dispute resolution. However, the Rules on Transparency presumptively will not apply to any bilateral investment treaties (BITs) that were enacted prior to the Rules’ effective date, unless the parties to the relevant BIT agree otherwise. In drawing up this line of demarcation, UNCITRAL has greatly limited the Rules’ effectiveness and impact—in the vast majority of future cases, the Rules will not apply. UNCITRAL’s analysis has been overly focused on a theoretical analysis of dynamic interpretation and not focused enough on the empirical reality of the BITs to which the Rules on Transparency apply. The Rules on Transparency could easily have been tailored to the language of the dispute resolution clauses of existing BITs. Given the importance of public disclosure as a matter of policy, the Working Group’s decision not to do so is perplexing. This Note analyzes the flaws of the Rules on Transparency in their current form and highlights the benefits of alternative proposals.

INTRODUCTION

Traditionally, confidentiality has been an important feature of international arbitration. Over the last decade, however, various in-
interested parties have promoted the benefits of transparency in arbitral proceedings. This swell of academic and public thought has focused in particular on sovereign investment treaties. In response to this tide of opinion, the United Nations Commission on International Trade Law’s (UNCITRAL’s) Working Group II on Arbitration and Conciliation adopted new Rules on Transparency, which will come into effect on April 1, 2014, amending the UNCITRAL Arbitration Rules.1

After much debate, the Working Group determined that the Rules on Transparency would not apply to any bilateral investment treaties (“BITs”) that had been enacted prior to the effective date of the Rules on Transparency.2 In creating this line of demarcation, the Working Group chose not to apply the Rules on Transparency to BITs that contemplate the amendment of the UNCITRAL Rules from time to time. By doing so, the Working Group has greatly limited the effectiveness and impact of the Rules on Transparency despite the language of many existing BITs and the public interest in transparency.

This problem of “dynamic interpretation” with regard to the Rules’ applicability was one of the primary issues confronted by the Working Group. State representatives in the Working Group disagreed about whether the new rules on transparency would be applicable under existing investment treaties.3 The problem of dynamic interpretation arises:

where the treaty, interpreted in accordance with applicable rules of treaty interpretation, provides for the application of the UNCITRAL Arbitration Rules as they might evolve over time, and thus a version of the UNCITRAL Arbitration Rules [adopted] [that becomes effective] on a date after the conclusion of the treaty could apply under that treaty . . . .4

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Dynamic interpretation issues under the UNCITRAL Rules on Transparency arise in the context of investor-state dispute resolution proceedings from BITs. BITs serve to promote and protect investors from one contracting party in the territory of the other contracting party. The Working Group wrestled with the question of whether the newly drafted UNCITRAL Rules on Transparency would apply to BITs that include a reference to “the UNCITRAL Arbitration Rules” or “the UNCITRAL Arbitration Rules as amended from time to time.”

The Working Group’s analysis has been overly focused on a theoretical analysis of dynamic interpretation and not focused enough on the empirical reality of the BITs to which the Rules on Transparency apply. This problem is especially acute given the finite number of BITs in existence and the relatively limited number of BITs that are currently being negotiated or will be negotiated in the future. The Rules on Transparency could easily have been tailored to the language of the dispute resolution clauses of existing BITs. Given the importance of public disclosure as a matter of policy, the Working Group’s decision not to do so is perplexing.

Part I of this Note will examine the current state of transparency in international investment arbitration. Greater transparency in international arbitral proceedings may be beneficial for the parties to that individual arbitration and certainly has benefits for the system of international investment arbitration as a whole. Greater transparency leads to greater consistency and uniformity, which reduces risk and creates reasonable expectations for all interested parties. Transparency also confers legitimacy on UNCITRAL arbitration as a form of dispute resolution. In addition, transparency is especially important when vital public interests are at stake, as often is the case in international investment arbitration proceedings. Transparency is also a


6. For example, contract law should be drafted to reflect the fact that an infinite number of contracts can be written on an infinite number of topics. Looking at existing contracts to determine new contract law is therefore only of limited use. However, the vast majority of BITs that can be concluded already have been. The universe of future BITs is limited to treaties between parties that have not yet found it necessary to form a BIT based on their limited bilateral trade (e.g. Tonga and Trinidad & Tobago), treaties consisting of one or more States that do not yet exist or recently declared independence (e.g. South Sudan), and a few treaties between major trading partners that have been unable to negotiate a treaty.
prototypical “U.N. value.” Increasing transparency without adequate safeguards and protections could have drawbacks as well. But, on the whole, as the Working Group apparently concluded in adopting rules on transparency in any form, greater transparency is beneficial for UNCITRAL arbitration, which has historically lagged behind many of its peer institutions on this issue.

Part II will focus on UNCITRAL’s Rules on Transparency and the extent to which these Rules are effective. This Part will examine the 1976 UNCITRAL Arbitration Rules, the 2010 Amendments to these Rules, and the UNCITRAL Rules on Transparency. The three key substantive provisions on transparency address the publication of documents, amicus submissions, and open hearings. Article I of the Rules on Transparency on the Scope of Application governs when these substantive provisions will apply. Analyzing the dispute resolution clauses in various specific BITs will highlight the weaknesses of the proposed Rules on Transparency.

There are four general categories of references to the UNCITRAL Rules in existing BITs. Two of these categories seem to contemplate application of the Rules on Transparency; two do not. The Rules on Transparency do not apply to BITs within any of these four categories of references. The Dispute Resolution Clauses of the BITs for Singapore, Cuba, and the United States reveal the extent of the diversity of these references on a case-by-case basis and demonstrate the weakness of a one-size-fits-all approach to the applicability of the Rules on Transparency.

Part III will focus on alternative proposals for the Rules and the future prospects of transparency in investment arbitration. This analysis will demonstrate the flaws of a purely theoretical approach to dynamic interpretation. Many of these problems could be readily addressed in the near future.

I. TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION

A. The Value of Transparency

There is an inherent tension between confidentiality and transparency in international investment arbitration. Confidentiality

7. See infra notes 29-30 and accompanying text.
8. See generally Cindy G. Buys, The Tensions Between Confidentiality and Transparency in International Arbitration, 14 AM. REV. INT’L ARB. 121 (2003); Gu Weixia, Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?, 15
has traditionally been considered one of the most important distinguishing features of international arbitration.\(^9\) Recently, scholars have taken part in a vigorous debate over the continuing value of confidentiality as a hallmark of international arbitration, with many suggesting that greater transparency would benefit the system.\(^{10}\) Many of the arbitral procedural rules reflect this shift in opinion away from confidentiality and toward greater transparency—more so in international investment arbitration than in international commercial arbitration.\(^{11}\) The presence of state actors and issues of public nature in international investment arbitration differentiate it from international commercial arbitration, which is often used to resolve purely private disputes.\(^{12}\)

States and NGOs have both stressed that the unique public demands of international investment arbitration require greater transparency and accountability. In 2005, the OECD Investment Committee released the following statement in support of greater transparency on behalf of its thirty-four member states:

There is a general understanding among the Members of the Investment Committee that additional transpar-

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\(^11\) See infra Part I.B.

ency, in particular in relation to the publication of arbitral awards, subject to necessary safeguards for the protection of confidential business and governmental information, is desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence. Members of the Investment Committee generally share the view that, especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation, subject however to clear and specific guidelines.\textsuperscript{13}

Similarly, many NGOs have criticized the confidentiality regime in international investment arbitration, particularly with regard to disputes arising in areas of public concern.\textsuperscript{14} For example, Luke Peterson, of the International Institute for Sustainable Development, argued:

While it is reasonable for investors to expect a transparent decision-making process in host countries, it is also reasonable for the public to expect that disputes which arise out of this process will be resolved in an equally open and transparent fashion. Dispute resolution procedures should permit the public and affected parties to have access to the process . . . \textsuperscript{15}

In the last decade, arguments like these made by States and NGOs have gained ground in the transparency debate.\textsuperscript{16} The numerous arguments in favor of transparency include that transparency promotes consistency, furthers democratic principles, decreases party uncertainty, and increases external legitimacy.\textsuperscript{17}

In particular, the publication of arbitral awards would lead to greater consistency in the law of arbitration and decrease party uncer-
tainty.\textsuperscript{18} While the precedential value of arbitral awards is not analogous to court decisions in the common law tradition,\textsuperscript{19} scholars have convincingly argued that arbitral awards have persuasive value and can “coalesce into a collective arbitral wisdom.”\textsuperscript{20} Published arbitral awards also serve an important “informational function,” providing prospective parties to arbitration with an indication of how arbitrators might view their dispute.\textsuperscript{21}

Several scholars and analysts have also pointed to a growing legitimacy crisis in international investment arbitration.\textsuperscript{22} Legitimacy in investment arbitration depends on whether a neutral arbitral tribunal composed of private individuals can fairly and objectively determine investors’ rights vis-à-vis states’ interests.\textsuperscript{23} Further, it is arguable that legitimacy rests not just in the stakeholders but also with the public at large, since “the vitality of the investor-state arbitration process, and its continued utility as a catalyst for investment flows, to some degree depends on solid legitimacy in the court of public opinion.”\textsuperscript{24} Increasing transparency in international investment arbitration can promote legitimacy by enhancing the perception that tribunals engage in just and honest decision-making and by cre-

\begin{itemize}
\item \textsuperscript{18} Id. at 136.
\item \textsuperscript{19} Arbitral awards are only binding on the parties to the agreement to arbitrate. See 2 Gary B. Born, International Commercial Arbitration 2951–71 (3d ed. 2009) (discussing the precedential value of international commercial arbitral awards); see also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 946 (1995) (determining that an arbitration agreement is only binding on parties without independent review by a court when the parties clearly agree to arbitrate the issue of arbitrability).
\item \textsuperscript{21} Id.
\item \textsuperscript{23} See Franck, supra note 22, at 1584–85.
\item \textsuperscript{24} Dugan et al., supra note 12, at 707.
\end{itemize}
ating reasonable expectations of investment stability.25

The lack of transparency in international investment arbitration is especially problematic when disputes under BITs implicate vital public interests, such as the environment, energy, and health.26 Investor-state disputes often arise when the application of government regulation regarding one of these public interests adversely affects a foreign investor.27 The importance of public policy in these disputes has therefore inspired criticism over the lack of transparency, leading one scholar to comment, “this system [of international investment arbitration] . . . is deeply unsatisfactory in an era when investment agreements are starting to be wielded as trump cards against sensitive public policies.”28

In addition, transparency would appear to be a prototypical “U.N. value.” Transparency is a dominant theme of many U.N. projects, from the operations of the United Nations Development Programme to the United Nations’ internal procurement process.29 At


27. DUGAN ET AL., supra note 12, at 706.

28. See Peterson, supra note 26, at 12.

29. The United Nations Development Programme has developed and published an Information Disclosure Policy that makes information about their programs and operations available to the public, has implemented the transparency standard adopted by the International Aid Transparency Initiative, and has led outreach efforts to champion the new aid transparency standards. See generally Transparency, U.N. DEV. PROGRAMME, http://www.undp.org/content/undp/en/home/operations/transparency/overview.html (last visited Mar. 1, 2013). In the wake of allegations of fraud and corruption relating to the Oil-for-Food Programme, the United Nations has taken up a special focus on transparency in its
the U.N. 2005 World Summit, world leaders focused on transparency and accountability reforms, leading to a number of resolutions, including creating internal oversight bodies, publicizing internal audits, and working towards greater accountability in the U.N. Secretariat. As a body of a larger organization that is dedicated to increasing transparency and accountability, the United Nations Commission on International Trade Law should have a substantial commitment to transparency. In fact, however, UNCITRAL has lagged behind its peer institutions with regard to adopting transparency provisions.

Despite the many arguments in favor of transparency, there are compelling reasons why investors and states resist open hearings, published awards, and amicus participation. Investors fear the forced disclosure of confidential business information, trade secrets, investment strategies, and other sensitive information that could harm their business. In fact, however, virtually every system of domestic and international arbitration and litigation has additional safeguards for protecting privileged information, such as confidentiality orders focused on the nondisclosure of trade secrets. Similarly, states are often reluctant to reveal the inner workings of their administrative and regulatory structures; they worry that doing so has the potential to adversely affect their reputation as a host for foreign investment and to create potential political liabilities in their country. On the other hand, exposing the inner workings of government may serve the


32. DUGAN ET AL., supra note 12, at 707. Investors’ reasons for wanting to maintain the current system of confidentiality in investor-state arbitration largely mirror the arguments in favor of maintaining confidentiality in international commercial arbitration. See generally Oakley-White, supra note 9.

33. See, e.g., FED R. CIV. P. 26(c).

34. DUGAN ET AL., supra note 12, at 707 (arguing in particular that the extent to which narrow interest groups have captured these administrative and regulatory structures may affect future foreign investment).
function of providing an incentive for states to act in a more responsible manner with regard to foreign investment. This exposure may also create an influx of foreign investment in states whose administrative and regulatory procedures prove to be consistent with international norms of good governance.

On balance, greater transparency appears to be more beneficial than detrimental. Increasing transparency in international investment arbitration would promote the consistency, uniformity, and legitimacy of the system. This interest is particularly acute for UNCITRAL, since transparency is a “U.N. value.” States and investors have compelling reasons for resisting initiatives that would increase transparency, but these individualized reasons often ignore both the availability of procedural protections for confidentiality as well as important third party interests. In particular, the public policy interests implicated by many investor-state disputes dictate that more information regarding these proceedings should be provided to the public.

B. The Current State of Transparency in International Investment Arbitration

The presumption in international commercial arbitration is generally that proceedings are confidential. In international investment arbitration, the recent trend has been toward greater transparency, though the UNCITRAL rules have lagged behind other arbitral rules in this regard. This section will describe in detail the existing rules on transparency and confidentiality in the most frequently used rules for international investment arbitration, including UNCITRAL, ICSID, and NAFTA, as well as an overview of the in-


36. See DUGAN ET AL., supra note 12, at 707.
ternational commercial arbitration rules.

The UNCITRAL Arbitration Rules, as amended in 2010, provide for very little transparency in arbitral proceedings.\(^3^7\) Parties generally may not disclose the terms of an arbitral award, hearings are closed to the public, and amicus submissions are not generally permitted.\(^3^8\) Article 34.5 of the 2010 UNCITRAL Arbitration Rules states, "[a]n award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority."\(^3^9\) That is, a party cannot unilaterally make an award public if any other party objects, unless disclosure is required by law. Further, there is no repository or official reporter to compile and publish the few awards that parties may disclose.\(^4^0\)

Article 28.3 of the UNCITRAL Arbitration Rules states:

Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.\(^4^1\)

Like Article 34, this provision creates a presumption of confidentiality that can only be overcome if all parties agree otherwise.\(^4^2\) Thus, transparency is the exception rather than the rule in these key aspects of UNCITRAL arbitrations.

There is no provision in the 2010 UNCITRAL Rules that al-

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38. UNCITRAL Arbitration Rules, arts. 28.3, 34.5 (2010).

39. Id. art. 34.5.


41. UNCITRAL Arbitration Rules, art. 28.3 (2010).

42. Id.
allows for the submission of amicus briefs. Article 17.5 of the UNCITRAL Rules states that one or more third persons may be joined as a party to an arbitration, but only if the third person is a party to the arbitration agreement. The contrapositive of this provision suggests that a third party that is not a party to the arbitration agreement may not participate in the arbitration, even as an amicus.

Thus, awards are presumptively secret, hearings are presumptively closed, and amicus submissions are limited under the current UNCITRAL Arbitration Rules. Arbitrations under the UNCITRAL rules therefore typically lack transparency in any meaningful sense.

The Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) provide for substantially more transparency. A series of amendments enacted in 2006 updated the ICSID Arbitration Rules to provide for more transparent hearings. The 2006 Amendments provide for the possibility of open hearings, the submission of amicus briefs, and the publication of awards. The amendments were enacted to make ICSID proceedings more streamlined and transparent, while instilling greater confidence in the arbitral process.

ICSID Rule 32 authorizes arbitral tribunals to allow third parties to attend hearings, but only if none of the parties to the proceedings object. This Rule puts the ICSID Arbitration Rules in parity with the UNCITRAL Rules for open hearings. Unlike the UNCITRAL Rules, however, ICSID Rule 37 creates standards by which third parties can submit briefs to address issues that may not adequately be addressed by the parties to the arbitration. The tribunal is required to consult both parties before ruling on the amicus request, but may accept an amicus submission if one or both parties ob-

43. WGII Report, Oct. 2011, supra note 40, ¶¶ 68–77 (proposing that the Draft Rules on Transparency incorporate provisions allowing for amicus briefs or "submissions by third persons.").

44. UNCITRAL Arbitration Rules, art. 17.5 (2010).

45. The previous iteration of ICSID Arbitration Rules was functionally similar to the current UNCITRAL Arbitration Rules in terms of its provisions on transparency. See ICSID Arbitration Rules (2003).

46. See ICSID Arbitration Rules, rules 32, 37, and 48.


48. ICSID Arbitration Rules, rule 32.

49. Id. rule 37.
ject. Rule 48 requires ICSID to publish excerpts of the legal reasoning of every award promptly. Rules 37 and 48 thus surpass the analogous provisions of the UNCITRAL Rules for amicus briefs and publication of awards with regard to transparency.

The 2006 Amendments to the ICSID Arbitration Rules have been tested in several recent disputes where one party sought to disclose information and the other party wanted to preserve its confidentiality. In Amco v. Indonesia, which preceded the 2006 Amendments, the claimant published its version of the facts of the dispute in a Hong Kong newspaper, which led Indonesia to request provisional measures to preserve the confidentiality of the proceedings. The ICSID tribunal rejected Indonesia’s motion, finding that the published material could not have aggravated or exacerbated the dispute. In contrast, the claimant in Biwater v. Tanzania argued that Tanzania’s releasing minutes of a session of the hearing to a third party, without requesting permission from the tribunal or the claimant, undermined the procedural integrity of the arbitral process. The tribunal agreed, stating that in the context of this dispute and given the 2006 Amendments, the publication of these minutes could aggravate or exacerbate the dispute. On the whole, the 2006 Amendments have provided for more transparency in ICSID arbitral proceedings.

The North American Free Trade Agreement (NAFTA), unlike UNCITRAL or ICSID, is itself an investment treaty between sovereign states. According to NAFTA Article 1120, an aggrieved investor can submit a claim for a Chapter 11 tribunal under either the ICSID or UNCITRAL Rules. NAFTA Chapter Eleven tribunals therefore must consult both the terms of the treaty itself and the rules chosen by the investor when making determinations about confiden-

50. Id.
51. Id. rule 48.
52. See DUGAN ET AL., supra note 12, at 142–43.
54. Id.
56. Id.
NAFTA, like most investment treaties, contains no explicit duty of confidentiality for dispute settlement under Chapter 11.\(^{60}\) To the contrary, the accompanying Notes on Interpretation to NAFTA state, “[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties ... [and] nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter 11 tribunal.”\(^{61}\) Indeed, some NAFTA arbitral decisions have been on the forefront of promoting transparency in international investment arbitration.\(^{62}\)

In *Metalclad Corp. v. United Mexican States*, for example, the NAFTA tribunal decided that nothing in the NAFTA, ICSID or UNCITRAL rules contained an express restriction on publicizing information related to the arbitration. Accordingly, the tribunal rejected a motion made by the Mexican government for an order that the proceedings be confidential or enforcing sanctions if the order were violated.\(^{63}\) In *Methanex Corp. v. United States of America*, an NGO sought to intervene in support of a California law that banned a chemical additive to gasoline.\(^{64}\) While the NAFTA Tribunal denied the request to intervene, it permitted the NGO to submit an amicus brief.\(^{65}\) The NAFTA member states subsequently “issued an interpretive declaration permitting third-party amicus briefs” in Chapter 11 tribunal hearings.\(^{66}\) Note that NAFTA issued this declaration regarding third-party amicus briefs despite the fact that the underlying arbitration was conducted under the UNCITRAL rules, which, as mentioned above, do not favor amicus submissions.\(^{67}\) The NAFTA tribunals in both *Metalclad* and *Methanex* were careful to say that

\(^{59}\) See Fracassi, *supra* note 57, at 218; Buys, *supra* note 8, at 132.

\(^{60}\) Buys, *supra* note 8, at 132.


\(^{63}\) Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1 (Award), ¶ 13 (Aug. 30, 2000).


\(^{65}\) Id.

\(^{66}\) Bishop et al., *supra* note 62, at 17.

\(^{67}\) See UNCITRAL Arbitration Rules, art. 17.5 (2010).
there is nothing in the UNCITRAL rules that expressly restricts disclosure, rather than engaging in analysis about whether those rules favor or disfavor confidentiality under the circumstances. Article 17.5 of the UNCITRAL Arbitration Rules seems to limit amicus submissions, as mentioned above, but does not explicitly restrict all amicus briefs.

More recently still, in *UPS v. Canada*, in which the claimant selected the UNCITRAL Arbitration Rules, the NAFTA tribunal allowed an amicus submission and also enforced the disputing parties’ agreement to make the entire arbitration open to the public. UPS requested that the entire arbitration be made open to the public and Canada agreed. The language of Article 28.3 of the UNCITRAL Arbitration Rules, which provides that hearings are private unless the parties agree otherwise, necessitated that the NAFTA tribunal allow the public hearings.

The proceedings and awards in international commercial arbitrations are presumptively confidential. Most of the major arbitral tribunals provide for private proceedings unless the parties agree otherwise. The International Chamber of Commerce ("ICC") rules provide a presumption of confidentiality for proceedings and awards, and protect confidential business information and trade secrets. The American Arbitration Association ("AAA") International Arbitration Rules also have a presumption of confidentiality for hearings, but may publish selected awards that are "edited to conceal the names of the parties."

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68. See Metalclad, *supra* note 63; *Methanex*, *supra* note 64.
69. See *UNCITRAL Arbitration Rules*, art. 17.5 (2010).
70. United Parcel Serv. of Am. v. Govt. of Can., Award on the Merits, 46 ILM 922 (2007). The language of UNCITRAL Arbitration Article 28.3, which provides that hearings are private unless the parties agree otherwise, necessitates that the NAFTA tribunal allow the public hearings.
72. See *UNCITRAL Arbitration Rules*, art. 28.3 (2010).
74. See *AAA International Arbitration Rules*, art. 20.4; CIETAC Arbitration Rules, art. 36; ICC Rules of Arbitration, art. 26; JCAA Commercial Arbitration Rules, rule 40; LCIA Arbitration Rules, art. 19.4.
76. AAA International Dispute Resolution Procedures, arts. 20.4, 27.4, 27.8, 34
of International Arbitration ("LCIA") and The China International Economic and Trade Arbitration Commission ("CIETAC") Rules both establish presumptions in favor of confidentiality for hearings and awards.\textsuperscript{77} The LCIA Arbitration Rules allow either the tribunal or the parties to waive confidentiality with regard to hearings, while the CIETAC Rules require that hearings are confidential unless all parties to the arbitration waive their right to confidentiality \textit{and} the tribunal agrees.\textsuperscript{78} The Japan Commercial Arbitration Association ("JCAA") Commercial Arbitration Rules also provide for confidentiality of the proceedings, specifying that the parties shall not disclose any facts related to the arbitration unless given the consent of the tribunal.\textsuperscript{79}

While the overwhelming weight of authority in commercial disputes favors confidentiality, the rules are hardly uniform. Maritime arbitration rules are notable for reversing the presumption of confidentiality with regard to awards.\textsuperscript{80} For example, the Society of Marine Arbitrators ("SMA") rules state that awards are published unless both parties request in advance that they not be published.\textsuperscript{81}

In sum, before the adoption of the UNCITRAL Rules on Transparency, UNCITRAL lagged behind its peer institutions, including ICSID and NAFTA, in terms of provisions for transparency in its procedural rules. Prior to the amendments, the transparency provisions of the UNCITRAL Rules more closely resembled international commercial arbitration procedural rules, which are designed to promote confidentiality.

\textsuperscript{(2003)}.


78. \textit{Id.}

79. JCAA Commercial Arbitration Rules, rules 3, 40 (2008). Rule 40 states that arbitral proceedings and records "shall be closed to the public;" rule 3 is a catch-all provision that provides, "the parties may agree differently from the provisions of these Rules subject to the consent of the arbitral tribunal."


81. \textit{Id}; Society of Maritime Arbitrators, Inc. Maritime Arbitration Rules, § 1. The Society of Maritime Arbitrators explains their policy as follows: "Such reasoning [used by the panel to support their decisions] is of great value as it provides insights into the practices and customs of the trade . . . arbitrators are not absolutely bound by arbitral precedents, . . . panels do take prior awards into consideration." \textit{See} Buys, \textit{supra} note 8, at 129. Cindy Buys argues that reversing the presumption with regard to the publication of awards is the most valuable step towards transparency that an arbitral body can make without sacrificing party autonomy and therefore argues "the maritime arbitration societies . . . have got it right . . . ." \textit{Id.} at 137.
II. THE UNCITRAL RULES ON TRANSPARENCY

A. UNCITRAL and the UNCITRAL Arbitration Rules

UNCITRAL is "the core legal body of the United Nations system in the field of international trade law."\(^{82}\) The U.N. General Assembly created UNCITRAL in 1966 for the purpose of "the promotion of the progressive harmonization and unification of the law of international trade."\(^{83}\) In 1976, UNCITRAL issued the UNCITRAL Arbitration Rules, which have been adopted for a broad range of disputes, including between private commercial parties, between investors and states, and between states and other states.\(^{84}\)

The UNCITRAL Rules can be used for ad hoc arbitrations as well as administered proceedings.\(^{85}\) In 1976, concurrently with the publication of the original UNCITRAL Arbitration Rules, the U.N. General Assembly passed a resolution that recommended the use of the Rules for ad hoc arbitration.\(^{86}\) Subsequently, the Rules have been adopted for a wide variety of uses that could not have been anticipated by their drafters.\(^{87}\)

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83. G.A. Res. 2205 (XXI), art. 1, U.N. GAOR, 21st Sess., U.N. Doc. A/6396 (December 17, 1966). Article II(8) of the Resolution creating UNCITRAL lists eight ways in which UNCITRAL should achieve this purpose, including:

b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws; c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field; d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade.

See supra Part I.A for a discussion of how transparency promotes uniformity.


87. For example, the UNCITRAL Rules were used at the Iran-U.S. Claims Tribunal (founded in 1981) and have been used for disputes that have arisen under Chapter 11 of NAFTA (which was enacted in 1992). There is a persuasive argument that the Rules “were
Each of the three largest international commercial arbitration associations (the AAA, ICC, and LCIA) allows parties to an arbitration to adopt the UNCITRAL rules.\textsuperscript{88} The UNCITRAL Arbitration Rules have been used in many investor-state arbitrations arising out of BITs.\textsuperscript{89} They have also been used for investment disputes arising under the Iran-US Claims Tribunal, Chapter 11 of NAFTA, the Energy Charter Treaty of 1994, and mass-claims settlement procedures.\textsuperscript{90}

The General Assembly adopted revisions to the UNCITRAL Arbitration Rules in 2010, modernizing the procedural rules by providing for arbitration between multiple parties, creating procedures for joinder, revising procedures for replacing an arbitrator, and establishing more detailed provisions on interim measures.\textsuperscript{91} In 2008, while negotiating the revisions to the UNCITRAL Arbitration Rules, the Commission decided that the topic of transparency in treaty-based investor-state arbitration should be next on its agenda as a

\textsuperscript{88} See, e.g., UNCITRAL Arbitration Rules, 1 ALTERNATIVE DISP. RESOL. PRAC. GUIDE § 19:3 (2012); Commercial Laws/Conventions/Codes, 2 L. OF INT’L TRADE § 69:1 (2012); International Arbitration, 1 LEGAL ASPECTS OF INT’L SOURCING § 6.6 (2012); International Arbitration, CORPORATE COUNSEL’S GUIDE TO ALTERNATIVE DISP. RESOL. TECHNIQUES § 9.6 (2012). Therefore, while this paper focuses on the effect of the UNCITRAL Draft Rules on Transparency on international investment arbitration, the Rules on Transparency will also have some effect on ad hoc and administered international commercial arbitration. Note that it is relatively rare for an arbitration to be submitted to an arbitral authority and not adopt the rules of that arbitral authority (i.e. using the ICC facilities but adopting the UNCITRAL Rules instead of the ICC rules). However, the AAA, ICC, and LCIA all have specific provisions for using the UNCITRAL Rules. The AAA recommends the following language for adopting the UNCITRAL Rules: “Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules in effect on the date of this contract.” AMERICAN ARBITRATION ASSOCIATION, PROCEDURES FOR CASES UNDER THE UNCITRAL ARBITRATION RULES 4 (2005).

\textsuperscript{89} A 2006 study found that approximately 30% of all investor-State arbitrations were conducted using the UNCITRAL Arbitration Rules (making them the second most frequently used set of rules behind the ICSID Arbitration Rules). UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, INVESTOR-STATE DISPUTES ARISING FROM INVESTMENT TREATIES: A REVIEW 5 (2006).

\textsuperscript{90} See generally JAN PAULSSON & GEORGIOS PETROCHILOS, REVISION OF THE UNCITRAL ARBITRATION RULES (2006).

march of priority. The Commission agreed as a matter of consensus on the importance of ensuring transparency in investor-state dispute resolution. The Commission reaffirmed this goal in similar terms during meetings in 2010 and 2011. In June of 2012, the Commission urged the Working Group on Arbitration and Conciliation to complete the Rules on Transparency by its next session. In February 2013, the Commission agreed to terms on the Rules on Transparency, which were adopted at the July 2013 meeting of UNCITRAL in Vienna.

B. The UNCITRAL Rules on Transparency

The Rules on Transparency address three major substantive topics: the publication of documents, the standards for amicus submissions, and mandatory open hearings. The most controversial aspect of the negotiations has been about the scope of these rules’ application—under which bilateral investment treaties will these


93. Id. (“As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution.”).


rules apply?

1. Publication of Documents

Article 3 of the Rules provides that the following documents must be made available to the public:

[T]he notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons; transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.100

Previously, “witness statements and expert reports” were included within the ambit of this list,101 but at the October 2012 meeting in Vienna, the Working Group decided to create a separate standard for these documents.102 Witness statements and expert reports are not automatically provided to the repository, but may be made available upon request by any person under the terms of Article 7.103 Thus, parties to a UNCITRAL arbitration cannot invoke the rules of confidentiality that previously cloaked most such proceedings. Article 2 adds that at the commencement of arbitral proceedings, the parties must disclose to the public “the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being made.”104

2. Amicus Submissions

Articles 4 and 5 of the Rules address amicus submissions.105

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100. See Working Paper 176, supra note 97, ¶ 25.
104. Id. ¶ 22.
105. Id. ¶¶ 36–43.
Article 4 creates a standard for non-disputing parties that are also not parties to the treaty that is within the scope of the dispute, while Article 5 creates a separate standard for parties that are not part of the dispute, but are parties to the treaty within the scope of the dispute.106

In general, amicus submissions may be allowed at the discretion of the arbitral tribunal.107 The tribunal has less discretion when the submitting party is a party to the treaty under consideration in the arbitration.108 The tribunal shall accept a submission from a non-disputing party to a treaty as long as the "submission [does] not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party."109 This standard reflects the theory that the rights of a party to a treaty are more fundamentally implicated by an arbitration regarding that treaty than the rights of a third-party that is not a party to the treaty.110

3. Open Hearings

Article 6 of the Rules creates a default rule that all hearings are public.111 Arbitrators have the discretion to hold hearings in camera if there is a need to protect confidential information or maintain the integrity of the arbitral process.112 The tribunal must make arrangements to facilitate public access to hearings unless it is necessary to hold private hearings for logistical reasons.113

Some states argued that a disputing party should have the unilateral right to request a closed hearing.114 In practice, this approach would reverse the default rule; hearings would only be open to the public when both parties wanted them to be. Other states argued that

106. Id. ¶¶ 36, 38.
107. Id. ¶ 36 ("After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party and not a non-disputing Party to the treaty ('third person(s)') to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.").
109. Id. ¶ 47.
111. WGII Report, Feb. 2013, supra note 2, ¶ 75.
112. Id.
113. Id.
114. Id. ¶ 54.
hearings should be private with the agreement of both disputing parties. In the end, the Working Group did not approve either of these proposals. The decision to have stronger provisions on open hearings was part of a compromise wherein some of the substantive provisions of the Rules on Transparency were strengthened because of concessions by pro-transparency states on the application of the Rules.

4. The Scope of Application of the Rules on Transparency

The Working Group agreed on the following language for Article 1 of the Rules on Transparency regarding the scope of application: “The UNCITRAL Rules on Transparency . . . shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (‘treaty’) concluded on or after April 1, 2014 unless the Parties to the treaty have agreed otherwise.” This paragraph states that the Rules will not apply to BITs concluded before the effective date of the Rules on Transparency.

The second paragraph creates an exception only when the disputing parties agree to the application of the Rules for a specific arbitration or when the parties to a treaty agree after the enactment of the Rules that the Rules on Transparency will apply to that treaty. This provision precludes any possibility of the dynamic interpretation of the Rules. The provision on the scope of application in the Rules on Transparency is the most restrictive of several proposals that had been considered by the Commission. Under other proposals, the Rules on Transparency would apply to many more existing BITs.

115. Id.
116. Id. ¶ 68-69, 71, 75.
117. Id. ¶ 68.
118. Id. ¶ 20.
119. Id. ¶ 28-29.
C. Empirical Reality of Dynamic Interpretation

The Rules on Transparency were developed without sufficient consideration of the terms of the BITs to which they will apply. This section will address the issue of dynamic interpretation in the context of the empirical reality of these treaties.

1. References to the UNCITRAL Rules in BIT Dispute Resolution Clauses

There are four principal types of references to the UNCITRAL Rules in BITs’ Dispute Resolution Clauses, each of which has several variations. There may be no reference at all to the UNCITRAL Rules, there may be a reference to a specific iteration of the UNCITRAL Rules, there may be an ambiguous reference to the UNCITRAL Rules, or there may be a reference to the UNCITRAL Rules as amended.

If there is no reference whatsoever to the UNCITRAL Rules in a BIT, it follows that the Rules on Transparency will not apply. There are two types of cases where there is no reference to the UNCITRAL Rules. Some BITs do not contain any provision for dispute resolution.\(^{121}\) These “toothless” BITs are generally older, although some states continue to this day to negotiate BITs that do not provide for a settled method of dispute resolution.\(^{122}\) Other BITs specify that any dispute must be resolved exclusively under the ICSID Rules.\(^{123}\)

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121. For example, the BIT between Germany and Singapore provides that disputes should be resolved diplomatically, or, if necessary, by an arbitral tribunal consisting of one arbitrator appointed by each state and a third arbitrator (who must be a national of a third state) appointed by these two arbitrators. Treaty Concerning the Promotion and Reciprocal Protection of Investments, Ger.-Sing., Oct. 3, 1973, 1008 U.N.T.S. 228 [hereinafter Germany-Singapore BIT].

122. See Han-Wei Liu, A Missing Part in International Investment Law: The Effectiveness of Investment Protection of Taiwan’s BITs Vis-à-Vis ASEAN States, 16 U.C. DAVIS J. INT’L L. & POL’Y 131, 164 (2009) (“The investor-to-state dispute settlement clauses under Taiwan’s BITs are, generally speaking, ‘toothless.’ First, as mentioned earlier, with the exception of the Taiwan-Vietnam BIT, none of these BITs prescribe specific arbitration rules. Rather, any arbitration is subject to the terms and conditions to which parties to the dispute mutually agree.”).

123. For example, the BIT between Hungary and Singapore states, “[The dispute] shall, upon the request of either party . . . be submitted to conciliation or arbitration by the International Centre for Settlement of Investment Disputes . . . . For this purpose, each Contracting Party hereby irrevocably consents in advance under Article 25 of the Convention to submit any dispute to the Centre.” Agreement Between the Republic of
If a BIT's dispute resolution clause refers to a specific iteration of the UNCITRAL Rules, the presumption is also that the Rules on Transparency will not apply. For example, the BIT between Singapore and Vietnam provides, "[T]he investor concerned shall refer the dispute to either conciliation in accordance with the [UNCITRAL] Rules of Conciliation, 1980 or to arbitration in accordance with the [UNCITRAL] Rules of Arbitration, 1976." 124 By referencing the UNCITRAL Rules as they existed in 1976, the parties to this BIT presumptively did not intend to resolve their disputes under any version of the UNCITRAL Rules that was amended after 1976.

The classic dynamic interpretation issue arises when a BIT's dispute resolution clause makes an ambiguous reference to the UNCITRAL Rules. For example, the BIT between Cuba and Indonesia states, "[T]he investor will be entitled to submit to [sic] case to: ... [a]n arbitrator or Ad Hoc Arbitral Tribunal set up under the arbitral tribunal rules of the United Nations Commission on International Trade Law (UNCITRAL)." 125 Unlike the previous example, this BIT does not refer to a specific set of the UNCITRAL Rules as they existed at a specific time. Much of the debate surrounding the issue of dynamic interpretation is based on the assumption that BITs with an ambiguous reference to the UNCITRAL Rules are prevalent. That assumption does not appear to be the case in fact with regard to many of the BITs currently in existence. 126

The fourth possibility is that a BIT refers to the UNCITRAL Rules as amended. For example, the BIT between Croatia and Cuba states, "[T]he dispute shall be upon the request of the investor settled ... by arbitration by three arbitrators in accordance with the Arbitration Rules of [UNCITRAL], as amended by the last amendment accepted by both Contracting Parties at the time of the request for initiation of the arbitration procedure." 127 Under this provision, it

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126. See supra Part II.B.ii–iv.

127. Agreement Between the Government of the Republic of Croatia and the Government of the Republic of Cuba on the Promotion and Reciprocal Protection of
seems as if the Rules on Transparency should apply, assuming both Croatia and Cuba ratified the Rules on Transparency. A provision that refers to the UNCITRAL Rules as amended allows for the possibility that the UNCITRAL Rules might be modified from time to time and that parties are more likely to want to follow these updated rules rather than an antiquated version of the Rules.

In summary, there are four different types of references to the UNCITRAL Rules in BITs. The first two types—no reference to the UNCITRAL Rules or a reference to a specific iteration of UNCITRAL Rules—preclude dynamic interpretation on their face. An ambiguous reference to the UNCITRAL Rules potentially implicates the dynamic interpretation of the UNCITRAL Rules on Transparency. A reference to the UNCITRAL Rules as amended seems to anticipate that the underlying treaty will be given dynamic interpretation. However, under the UNCITRAL Rules on Transparency, each of these references will be treated the same. The Rules on Transparency will not apply in any of these cases barring a subsequent agreement.

2. Case Study: Singapore

By the criteria mentioned above, Singapore has few potential dynamic interpretation issues in its BITs. Thirteen of Singapore’s eighteen BITs make no reference to UNCITRAL. Of those, ten refer to the ICSID rules128 and three do not provide for investor-state dis-

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pute settlement.\textsuperscript{129} Three BITs make reference to a specific set of UNCITRAL rules.\textsuperscript{130}

Two of Singapore’s BITs, with Cambodia and Indonesia, refer to the UNCITRAL rules without referring to a specific version of the rules. The dynamic interpretation issue, however, is not so acute for these specific state-to-state agreements. These BITs both also allow for ICSID arbitration, where the hearings are presumptively transparent. In addition, Singapore, Cambodia, and Indonesia are all signatories to the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, under which the hearings are presumptively not transparent.\textsuperscript{131} That is, independent from any issue of dynamic interpretation in the UNCITRAL, the aggrieved party in an investment dispute between Singapore and Cambodia or Singapore and Indonesia will have the opportunity to choose to file in a forum that favors transparency (ICSID) or a forum that favors confidentiality (ASEAN). To the extent that transparency is an important factor in a particular case, the claimant will have the ability to forum shop.


3. Case Study: Cuba

Cuba’s treaties would be more substantially affected by the adoption of Rules on Transparency. Several of Cuba’s BITs refer to the UNCITRAL rules without referring to a specific version of the rules, potentially implicating issues of dynamic interpretation.132 Further, some of its BITs refer to “the Arbitration Rules of UNCITRAL as amended” or “as then in force,” implying that the Rules on Transparency would automatically be contemplated by the treaty if adopted.133 Therefore, Cuba had a lot at stake in these negotiations. If a broader provision favoring dynamic interpretation had been adopted, Cuba would have to adhere to the Rules on Transparency under the terms of most of its BITs; under the current Rules on Transparency, Cuba will not have to adhere to the Rules on Transparency under any of its existing BITs.


4. Case Study: United States

Many of the BITs and Free Trade Agreements negotiated by the United States have transparency provisions that provide for transparent proceedings regardless of the application of the Rules on Transparency. The United States negotiates BITs on the basis of a model text. Both the 2004 and 2012 U.S. Model BITs contain a comprehensive “Transparency of Arbitral Proceedings Clause” in Article 29 of the Treaty. The 2004 version of Article 29 states:

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:
   (a) the notice of intent;
   (b) the notice of arbitration;
   (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [Amicus Submissions] and Article 33 [Consolidation];
   (d) minutes or transcripts of hearings of the tribunal, where available; and
   (e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

Section 1 of this clause covers many, though not all, of the documents discussed in Article 3 of the Draft Rules on Transparency regarding the publication of documents. Section 2 provides a simi-
lar standard for open hearings.138 Article 28, which is referred to in Article 29 above, addresses—and largely authorizes—amicus submissions.139

Many of the United States' recent BITs contain Article 29 or a similar version thereof. For example, the United States' BIT with Uruguay, which was concluded in 2005, contains this Article 29 language verbatim.140 Consequently, the proposed Transparency Rules will have little impact on investment arbitrations involving the United States arising under recent U.S. BITs.

III. CRITICAL ANALYSIS OF THE UNCITRAL RULES ON TRANSPARENCY

A. Alternate Proposals for the Scope of Application of the Rules on Transparency

Before coming to a consensus on the final draft of the UNCITRAL Rules on Transparency, the Working Group debated three other options for the Scope of Application of the Rules on Transparency.141 Since the purpose of the Rules is to increase transparency in UNCITRAL arbitration and the current rules do not apply to some BITs that contemplate dynamic interpretation, each of these proposals (though flawed) would have been preferable to the current solution.

One alternative, known by the Working Group as the "first proposal," was that the Rules would apply when the underlying treaty provided for the application of the UNCITRAL Rules as amended.142 One alternative, known by the Working Group as the "first proposal," involved application of the amended Rules when the underlying treaty so provided.143 Another possible alternative was the opt-out approach, in which the Rules on Transparency would apply to future investment treaties unless the parties contracted to exclude

138. Id.
139. Id.
141. See Working Paper 176, supra note 97, ¶¶ 7–12.
143. Id.
the Rules' application.144 The third option would allow for dynamic interpretation of the Rules on Transparency, so that the Rules would apply to existing investment treaties when the underlying treaty made an ambiguous reference to the UNCITRAL Rules.145 Scholars also developed a fourth alternative, the Hybrid Approach, which sought to find a middle ground between these proposals and the provision ultimately selected by the Working Group.146

1. Option 1: The “First Proposal”

Under the so-called “first proposal,” the Rules on Transparency would apply to any treaties concluded after the Rules are enacted or to any existing treaties that “provide for application of the UNCITRAL Arbitration Rules ‘as amended,’ ‘as revised,’ or ‘as in force at the time a claim is submitted,’ or use words with similar meaning and effect.”147 In other words, the rules would apply to the fourth category of reference mentioned above—the UNCITRAL Rules as amended—but not to an ambiguous reference, a specific reference, or no reference.

This proposal reflects the fact that when parties have agreed that the UNCITRAL Rules apply “as amended” or “as revised,” they mean to apply the UNCITRAL Rules as they may evolve over time.148 However, this proposal was potentially flawed due to the ambiguous catch-all provision, “use words with similar meaning and effect.”149 In practice, applying the UNCITRAL Rules to BITs with “similar meaning” would be difficult given the diverse language in various BITs. Arbitral tribunals would be forced to draw a line at what language would be sufficiently similar to “as amended.” The Working Group may have found that this approach gave too much interpretive power to the tribunal, thereby leaving states with a great degree of uncertainty about whether the Rules on Transparency would apply to their BITs.

144. Id.
145. See Working Paper 174, supra note 120.
148. Id. ¶ 23.
149. Id. ¶ 20.
2. Option 2: The Opt-out Approach

Under the opt-out approach, the Rules on Transparency would apply to treaties initiated after a certain date unless the treaty provides that the Rules on Transparency do not apply.150 At the Working Group II meeting in February 2012, the opt-out proposal for Article I on the Scope of Application of the Rules stated,

The Rules on Transparency shall apply to investor-State arbitration initiated under the [applicable version of the] UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investment or investors ("treaty") concluded after [date of adoption of the Rules on Transparency], unless the treaty provides that the Rules on Transparency do not apply.151

Some delegations argued that this proposal, as drafted in this form, would allow for the dynamic interpretation of the Rules on Transparency in some circumstances.152 Therefore, the Working Group modified this proposal at their next meeting in October 2012, amending the proposal as follows:

The Rules on Transparency shall apply to investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors ("treaty") when the Parties to the treaty [or all parties to the arbitration (the "disputing parties")] have agreed to their application. In a treaty concluded after [date of coming into effect of the Rules on Transparency], a reference in the treaty to the UNCITRAL Arbitration Rules shall be presumed to incorporate the Rules on Transparency, unless the Parties to the treaty have agreed otherwise, such as through a reference to a particular version of the UNCITRAL Arbitration Rules [that does not refer to the Rules on Transparency].153

150. Working Paper 169, supra note 97, ¶ 8 (providing that the Rules shall apply to treaties initiated after a certain date "unless the treaty provides that the Rules on Transparency do not apply.").
151. Id.
The second sentence of this proposal reflected the Working Group’s desire to more clearly establish a presumption in favor of the applicability of the Rules on Transparency for treaties concluded after the effective date of the Rules.\textsuperscript{154} This revised proposal, however, may not have alleviated the concerns about dynamic interpretation. This proposal, though meant to have a similar effect as the provision for the scope of application in the Rules on Transparency, would have provided more flexibility for an arbitral tribunal to determine that parties contemplated amendments of the Rules from time to time.

3. Option 3: Dynamic Interpretation Approach

A group of countries that favor dynamic interpretation,\textsuperscript{155} with the support of NGOs such as the Center for International Environmental Law and the International Institute for Sustainable Development, proposed an alternative approach to the scope of the application of the Rules on Transparency:

If a treaty concluded prior to [date of adoption/effective date of the Rules on Transparency] refers to the UNCITRAL Arbitration Rules, that reference means the version of the UNCITRAL Arbitration Rules that incorporates these Rules on Transparency if the treaty, as interpreted in accordance with international law, reflects the treaty Parties’ agreement to the application of that version of the UNCITRAL Arbitration Rules. The Parties may also agree, after [date of adoption/effective date of the Rules on Transparency], to apply these Rules on Transparency under a treaty concluded prior to that date.\textsuperscript{156}

According to this proposal, an ambiguous reference to the UNCITRAL Rules in an existing treaty would presumptively incorporate the Rules on Transparency.

\textsuperscript{154}\textsuperscript{ Working Paper 176, supra note 97, ¶ 10.}

\textsuperscript{155} Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States.

\textsuperscript{156} See Working Paper 174, supra note 120, ¶ 6.
4. Option 4: Hybrid Approach

The Hybrid Approach would allow for the application of a limited subset of the provisions of the Rules of Transparency to investment treaties enacted before the date of adoption of the UNCITRAL Rules on Transparency.157 Lise Johnson of the Vale Columbia Center for Sustainable International Investment proposed this approach as a possible compromise to the options discussed above.158 Under this approach, if the parties to an investment treaty concluded their agreement before the effective date of the Rules on Transparency and the treaty includes an ambiguous reference to the UNCITRAL Rules, Article 2, 4, and 5 of the Rules on Transparency (on the publication of information at the commencement of arbitral proceedings and the amicus submission provisions on submission by a third person and submission by a non-disputing Party to the treaty) would apply, but Article 3 on the publication of documents and Article 6 on open hearings would not apply.159 This approach addresses many of the criticisms of dynamic interpretation by certain delegations, while also fulfilling the Working Group’s intention of increasing transparency in investor-state dispute resolution.160

B. The Rules on Transparency: Looking Forward

The Rules on Transparency enter into effect on April 1, 2014, approximately two months after the publication of this Note. In the end, though UNCITRAL considered several alternate proposals, it adopted rules that presumptively do not apply to BITs concluded before that effective date.

As this Note goes to press, the Working Group is in the process of drafting a convention on the application of the Rules on Transparency to existing treaties.161 This convention, if enacted, will create an efficient mechanism for states that want to apply the Rules

157. See Johnson, supra note 146.
158. Id.
159. Id.
on Transparency to their existing treaties. While it is possible that more states may be encouraged to become parties to the convention than would otherwise have applied the Rules on Transparency to their existing treaties, the net effect will be the same: the Rules on Transparency still will not apply to BITs unless the parties to the treaties agree otherwise.

Though this Note has been critical of some provisions of the Rules on Transparency, and the proposed convention is unlikely to be a panacea for the problems identified, the Rules as a whole represent a positive development for advocates of transparency in UNCITRAL arbitration.

First, there will be greater transparency in UNCITRAL arbitration going forward than there was before. While many UNCITRAL arbitrations will likely remain behind closed doors, the public will have greater access to certain aspects of certain proceedings. As drafted, the Rules on Transparency may still be too limited, but this initial step forward may be all that was feasible given the differing views within the Working Group.

Second, the UNCITRAL Rules on Transparency may represent another step in a “race to the top” for transparency in international investment arbitration. The UNCITRAL Rules compete with the ICSID Rules and others as the procedural basis for investment arbitration. Most BITs give the aggrieved party the choice of several different fora in which to bring their claims. Many dispute resolution clauses list both the UNCITRAL and ICSID Arbitration Rules as options for arbitral proceedings arising from an alleged breach of the terms of the relevant BIT. There is little doubt that the UNCITRAL Rules on Transparency have been proposed at least in part as a response to amendments that provided for greater transparency under the ICSID Rules. With these new Rules on Transparency, UNCITRAL has surpassed ICSID in certain respects. The UNCITRAL Rules now provide for the public release of exhibits and transcripts as well as open hearings. ICSID may respond by matching these provisions or developing even stronger provisions in order to maintain its status as the most transparent option for investment arbitration. In turn, UNCITRAL may once again reconsider its position on transparency and work towards amending its rules. Further, the trend towards transparency in the UNCITRAL and ICSID rules may lead other arbitral institutions, such as the International Chamber of Commerce, Stockholm Chamber of Commerce, and the Permanent Court of Arbitration, to follow suit and adopt analogous rules.

162. *Id.*
Both UNCITRAL and ICSID have amended their procedural rules several times in recent years. In both cases, the trend towards greater transparency is unidirectional. There is no indication that these trends are likely to reverse. While certain states may continue to object to certain transparency provisions, every state in the UNCITRAL negotiations came to a consensus that increasing transparency, however incrementally, would be a positive development.

By focusing on the empirical reality of transparency and its effect on existing BITs, as well as attempting to delineate the benefits of transparency, this Note attempts to illuminate the limitations of the UNCITRAL Rules on Transparency. Currently, the overwhelming majority of the published literature on the UNCITRAL Rules on Transparency stresses the need for more transparency in investor-state arbitration. This weight of authority reflects the consistency, legitimacy and protection of the public interest that derive from increased transparency. The trend also reflects the fact that the authors of this literature are for the most part academics and NGOs who benefit from more publicly available information, and may be less concerned about the adverse effect on one or more of the parties to an arbitration. But if the benefits of transparency do in fact substantially outweigh the risks, then the debate on the Rules on Transparency needs to focus on the language of the BITs to which the Rules will apply.

CONCLUSION

The empirical reality of dynamic interpretation differs greatly on a case-to-case basis. Recognizing these differences will facilitate further developments for increasing transparency in UNCITRAL arbitration. While the theoretical implications of dynamic interpretation are important, UNCITRAL Working Group II’s negotiations should have focused more on the empirical reality of the underlying

BITs. This empirical approach is especially relevant given that there is a finite and reviewable set of existing BITs. Mathematical and practical constraints limit theoretical BITs; the majority of BITs that will exist have already been concluded.

The importance of transparency in international investment arbitration and the empirical reality of dynamic interpretation together demonstrate the flaws in the UNCITRAL Rules on Transparency. The language of Article 1 of the Rules on Transparency on the Scope of Application should have reflected the empirical reality rather than the theoretical discussion that dominated the negotiations. As such, the Rules on Transparency should apply to BITs that contemplate arbitration under the UNCITRAL Rules “as amended” as well as BITs with an ambiguous reference to the UNCITRAL Rules.

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