Investment Claims

Looking in on Transparency: A 2020 Review of States' Reactions to the UNCITRAL Rules on Transparency and the Mauritius Convention

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Content type: Yearbook articles
Citation(s): Yearbook on International Investment Law & Practice 2020 (Other Reference)
Product: Investment Claims [IC]

Subject(s):

International investment law — Settlement of disputes

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A. Introduction

19.01 On 17 September 2020, Australia became the sixth state to ratify the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration,[1] better known as the Mauritius Convention on Transparency.[2] A month later, Bolivia did the same, renewing an interest in the topic of transparency within the investment arbitration system.[3] The aim of the Mauritius Convention on Transparency is to ensure the widest possible application of the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration (the Rules or Rules on Transparency).[4] Those Rules, in turn, set out strict transparency standards to ensure that investor-state arbitrations are accessible to the public.[5]

19.02 While these endorsements are positive steps towards greater transparency, they are relatively small steps. The Rules themselves have not been widely used in arbitration since they were adopted in 2013, while the Mauritius Convention on Transparency has only garnered seven ratifications in six years. And yet, despite their infrequent use, the Rules are currently serving as a model for other arbitration forums, such as the International Centre for the Settlement of Investment Disputes (ICSID),[6] which are currently debating whether to increase transparency within their own proceedings.

19.03 These two trends are curious—arbitral institutions are actively creating new transparency tools based on models that remain untested.[7] As such, it is fair to ask whether states actually accept the Rules themselves, or whether there are fundamental problems with the Rules that other institutions should be wary of.

19.04 Until now, the writings have only focused on the particulars of the Rules and the overall trend towards transparency.[8] No writings have ever taken the states' temperature on the Rules since they were adopted, or reached any conclusions about possible changes in the future.

19.05 This chapter aims to do just that. Section B of this chapter discusses the rise of transparency in investor-state arbitration and its development within different arbitral settings, for instance in the North American Free Trade Agreement (NAFTA) and at ICSID. Section B also offers an in-depth look into the most salient features of the Rules and the Mauritius Convention on Transparency. Section C attempts to gauge states' attitudes towards the Rules and the Mauritius Convention on Transparency by assessing the extent to which states (i) are incorporating the Rules into their investment treaties with other states, and (ii) are signing and ratifying the Mauritius Convention on Transparency. Each assessment produces surprisingly different results, as we will see. Finally, based on these assessments, Section D offers conclusions about states' attitudes towards transparency.

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B. Background

19.06 Over the past four decades, the international community has witnessed a radical shift in the realm of international investment law.[9] The rapid growth of foreign direct investment (FDI)[10] that began in the 1990s prompted states to create a web-like framework of treaties to govern those investments.[11] An explosion of treaties were crafted to help protect investors,[12] including bilateral investment treaties (BITs), free trade agreements (FTAs), special purpose accords,[13] and regional charters.[14] In the last decade, these agreements 'have become the dominant vehicle through which investment is regulated under international law'.[15]

19.07 These treaties typically rely on arbitration to redress any disputes between investors and the host state.[16] As their popularity grew, so did the number of treaty-based arbitrations initiated by the investor.[17] Today, investor-state arbitration (or investment arbitration) has become the dominant forum to resolve investment disputes.[18] There were eighty-four investment arbitrations filed in 2018, up from forty in 2005, and thirteen in 2000.[19]

19.08 Notwithstanding this growth, investment arbitration faces a 'widespread consensus for the need of reform'.[20] The issue of transparency is one of the central components of this reform. Prior to investment arbitration, the international arbitration system was almost universally confidential. However, investment arbitration was perceived as something different because of the state's participation in the dispute.[21] '[I]mportant domestic issues such as environmental and health protection, exploitation of minerals, forests, water and other natural resources' come centre stage in these disputes;[22] and accordingly, the public must be able to hold their governments accountable, as it is the public who ultimately pays for any award rendered against the state.[23]

19.09 In addition to accountability, transparency also ensures a level of credibility in the investment arbitration system.[24] In particular, transparency accomplishes the following: (1) promotes 'good governance in the host state'; (2) 'provide[s] important information on conduct of multinational enterprises in their activities abroad'; (3) 'serves to enhance the legitimacy of the mechanism of investment arbitration'; (4) 'provides knowledge to investors about claims raised against host states with respect to the state's regulations'; (5) 'addresses issues of fairness and efficiency in the resolution of investor-state disputes through arbitration'; and (6) 'leads to improved treaty making by states'.[25] Greater scrutiny over the proceedings produces a greater amount of trust in the process, which in turn leads to a greater degree of foreign investment.[26] Public awards also help to develop a more consistent body of case law.[27]

19.10 While there are obvious benefits to both—confidentiality and transparency—they are commonly believed to produce polar opposite results.[28] As Bernardo M Cremades put it: 'In arbitrations in which the state and its public bodies intervene, confidentiality ceases to be an absolute value and consideration is given to the concerns [of] public interest.'[29] In this way, confidentiality and transparency conflict in that they cannot fully co-exist at the same time. The key is finding the right balance.[30] Determining this 'right' balance, however, is beyond the remit of this chapter. For purposes of this chapter, it suffices to note that confidentiality and transparency are competing principles in today's investment arbitration environment, with transparency gaining serious traction.[31]

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1. NAFTA

19.11 The transparency movement took off via the NAFTA between Canada, Mexico, and the US. In 2001, these three NAFTA states issued a 'Note of Interpretation', making greater transparency the norm in all investor-state disputes brought under Chapter 11.[32] The central text of the Note reads:

> Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.[33]

19.12 Two years later, these three states issued a second note allowing tribunals to accept submissions from non-disputing third parties—another classic tenant of transparent proceedings.[34] One year later, the states also agreed to open arbitration hearings to the public.[35]

2. ICSID

19.13 These advances quickly spread into other investor-state arbitration institutions. In 2006, ICSID revised its Arbitration Rules to increase transparency, among other reforms.[36] Under its new rules, the Secretariat was required to publish parts of the award if the parties did not consent to full publication.[37] Tribunals could also hold public hearings if neither party objected,[38] and they could receive third-party submissions.[39]

19.14 Compared to the older arbitration rules, under which ICSID hearings were traditionally closed and the awards were kept confidential, these amendments were certainly a step towards greater transparency within the ICSID system. Compared with NAFTA, however, ICSID's changes were rather modest, since other case materials (besides the award) could still remain confidential, and hearings could still be closed at the discretion of the parties.[40]

3. UNCITRAL Rules on Transparency

19.15 UNCITRAL lagged behind both ICSID and NAFTA in terms of transparency.[41] The delay is not surprising however, given that UNCITRAL is not exclusively an investor-state forum, like ICSID and NAFTA. Its rules are not as fine-tuned to issues affecting states, which means UNCITRAL is less concerned with public access to the proceedings.[42]

19.16 Nonetheless, calls to increase transparency at UNCITRAL began to emerge shortly after the ICSID arbitration rules were revised in 2006. Organizations such as the Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD), together with the Canadian government, pushed the issue on to the UNCITRAL working group's agenda.[43] Despite their efforts, the discussions were initially delayed so that UNCITRAL could finish its work on their arbitration rules (the UNCITRAL Arbitration Rules), which were undergoing revision at the time. The goal was to keep the two discussions separate.[44]

19.17 After that work concluded in late 2010,[45] the topic of transparency was scheduled for discussion 'as a matter of priority'.[46] The urgency came from the Canadian delegation, who wrote to the UNCITRAL Commission ('Commission'), stating:

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> The failure to send an unequivocal signal that the Commission supports updating the Rules to include provisions allowing for transparency in investor-state arbitration, will be seen by states as effectively supporting holding investor-state arbitration behind closed doors, away from public participation and scrutiny. The Commission should be loathe to adopt a set of rules that fosters a climate of secrecy and denies public accountability …[47]

19.18 The Commission agreed and quickly tasked Working Group II (Working Group) with preparing a legal standard for transparency in investor-state arbitration.[48] The Secretariat first collected written comments from member states on their own transparency norms.[49] Strong views were received from both sides of the debate. Canada, Australia, and the US, for instance, expressed very positive views towards transparency, whereas Bahrain, China, Poland, and Russia expressed strong views against.[50] There was no clear majority opinion one way or the other.

19.19 Over the next few years, the Working Group developed the Rules on Transparency. These Rules do not replace the UNCITRAL Arbitration Rules or supplant them in any way. They complement the UNCITRAL Arbitration Rules when states agree to apply them; or they can complement any other set of arbitration rules if the states or the parties to a dispute so agree.

19.20 The final version of the Rules primarily addresses the same topics previously undertaken by NAFTA and ICSID, namely, the publication of case materials, exceptions to publication, holding open hearings, and accepting third-party submissions. The Working Group's discussion of each topic offers a first glimpse into states' attitudes towards each rule.[51] The main parts of these discussions are summarized below.

(a) Guidelines versus rules

19.21 Before addressing the substantive parts of the Rules on Transparency, it is important to highlight how they came about to be rules. One of the first decisions that the Working Group had to make was whether transparency should be addressed through specific mandatory rules or more flexible guidelines.[52] A number of states spoke out in favour of guidelines as they would be 'more discursive, detailed, provid[e] explanations to parties and could lay out various options that parties could choose'.[53] The German delegation, in particular, believed that non-binding guidelines were 'the best means' to 'establish the widest possible acceptance of transparency' and would be 'more likely to favour rapid and successful reform within UNCITRAL'.[54]

19.22 On the other hand, some delegations pushed hard for specific mandatory rules in order to achieve the 'highest standards on transparency'.[55] In their view, transparency promoted 'the rule of law, good governance, due process and rights to access information', all of which were best served by obligatory rules rather than discursive guidelines.[56] Rules, according to these states, provided the 'certainty contemplated by the objective of UNCITRAL to harmonize international trade law'.[57]

19.23 The first of many compromises was thus reached, whereby the pro-guideline delegations agreed to proceed under the rules format. They agreed on the 'strict understanding' that their preference for guidelines was motivated by a desire to limit the application of the transparency standards to when there was a clear and specific reference to them.[58] In other words, the Working Group decided to draft rules over guidelines on the

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condition that the rules would only apply where states had expressly agreed to their application.

(b) Publication of awards and other case documents

19.24 The Canadian and US delegations took the lead on this topic by conveying their own experiences within NAFTA.[59] Both governments had open disclosure policies regarding case documents, as did NAFTA itself.[60] In contrast, ICSID had no disclosure policy when it came to case materials. In fact, the ICSID Rules did not discuss this topic at all.

19.25 UNCITRAL ultimately adopted an approach similar to the policies of Canada, the US, and NAFTA. Article 3 of the Rules on Transparency (hereafter referred to as 'rules' instead of 'articles')[61] subjects all case documents to disclosure: either (i) automatically (Paragraph 1); (ii) upon request (Paragraph 2); or (iii) at the discretion of the arbitrators (Paragraph 3).[62] Rule 3 denies states any real authority over which documents may be withheld and thereby assumes that the public has a right to access all of this information.[63] State discretion in this instance was viewed as '[in]sufficient to enhance transparency'.[64]

19.26 Under Paragraph 1, the main documents of a case (eg submissions, pleadings, decisions) are to be disclosed automatically via a repository operated by UNCITRAL (Transparency Registry).[65] Most of these materials were not controversial.[66] Awards were to be published 'even if no other documents were to be published'.[67] Pleadings, submissions, and minor decisions were included with ease as well. However, some states were hesitant to subject exhibits, witness statements, and expert reports to the same automatic disclosure.[68] A compromise was reached whereby these documents would be subject to disclosure on a less automatic basis.

19.27 Under Paragraph 2, witness statements and expert reports *must be* disclosed once any person makes a request.[69] If no request is made, then presumably, the witness statements and expert reports remain undisclosed. On the other hand, Paragraph 3 puts the authority over exhibits within the hands of the tribunal alone. The parties do not have final say on whether their evidence is published or not. They may indicate a preference for publishing evidence or not, but the tribunal has no obligation to adopt the parties' positions.[70]

(c) Exceptions to transparency

19.28 The corollary to Rule 3 is Rule 7, which carves out certain types of information that may be redacted or otherwise kept confidential. These 'carve-outs' were drafted generically in order to give tribunals—not the parties—a large degree of discretion when applying them.[71] The *travaux preparatoires*, in fact, show a 'salient distrust' towards the parties here, leaving the job of balancing both transparency and confidentiality to tribunals.[72]

19.29 Some of the carve-outs were uncontroversial. For instance, there was broad consensus that confidential business information should not be published.[73] The Working Group also agreed to carve out any information that would jeopardize the integrity of the arbitral proceedings.[74] Both of these exceptions are undoubtedly common. The Model BITs of Canada and the US,[75] as well as NAFTA and the Central America–Dominican Republic Free Trade Agreement (CAFTA–DR),[76] all have similar exceptions to transparency.[77]

19.30 One point of tension, however, was whether a state's domestic law could limit its obligation to disclose documents under the Rules on Transparency. In other words, could a state rely on its own internal law to avoid disclosure?[78] Some delegations argued that states were primarily bound by their internal law and could not be forced to disclose information in violation of that law.[79] Others were concerned with states using their own laws as a shield and 'dilut[ing] the objective of the rules'.[80] These latter delegations argued, once

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again, that the best solution was to allow the tribunal to decide whether a state's internal laws applied.[81]

19.31 A compromise[82] was reached whereby a state's domestic law would govern its own disclosure, whilst all other information (submitted by the claimant or a third party) would be disclosed according to the law applicable to the arbitration.[83] An 'essential security' carve-out was also added, whereby a state could refuse to disclose information that it considered contrary to its essential security interests.[84] This latter exception, unlike other parts of Rule 7, is self-judging, meaning that the parties can decide for themselves when the exception applies.[85]

19.32 The compromise was considered a win for states that were opposed to transparency. According to one practitioner, the compromise 'changed the spirit of [Rule] 7' since 'the respondent state now [had] considerable influence on their scope and content'.[86]

19.33 Around the same time, however, other provisions were added to Rule 1 (titled 'Scope of Application'), designed to strengthen the Rules' authority over states.[87] For instance, states agreed not to derogate from the Rules in any one particular arbitration if the state had previously agreed to apply the Rules by treaty, even if the investor consents.[88] As a result, the Rules on Transparency cannot be rejected or amended on an after-the-fact, case-by-case basis,[89] a notable difference from the UNCITRAL Arbitration Rules, which permit party modification.[90]

19.34 Nonetheless, the Rules may be amended on a treaty-by-treaty basis. States are free to amend the Rules through the use of BITs;[91] according to Rule 1(7), the treaty will prevail over the Rules when they conflict. Once the Rules are adopted in a particular treaty, however—with or without modification—the signatories are bound to follow them as agreed.[92]

(d) Public hearings

19.35 Rule 6 makes all evidential and legal hearings public. It then identifies three circumstances in which hearings could be closed: (i) to protect confidential information; (ii) to protect the integrity of the arbitral process; and (iii) for logistical reasons.[93] Early on, the Working Group was generally open to the idea of public hearings, but as with the other rules, states disagreed on who should have the final say.[94] Some delegates argued that the state should have the ability to close a hearing, in order to protect national security and confidential information.[95] Others felt that this would be incompatible with the Working Group's mandate, and inherently conflict with the notion of transparency.[96]

19.36 An early compromise was reached, whereby hearings would—in principle—be public, with the final decision ultimately left to the tribunal in consultation with the parties.[97] This compromise was abandoned, however, as part of the compromise on Rule 7 discussed above. Public hearings became the default practice, with no vetoes or comments from the parties.[98]

19.37 Here again, the gains made by states in the Rule 7 negotiations came at a cost. Prior to the Rules on Transparency, no other rules had allowed automatic public hearings. The parties had always retained a veto, even at NAFTA. Now, however, states had no veto, and only the tribunal could close hearings in a limited set of circumstances.[99]

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(e) Third-party submissions

19.38 Rule 4 allows for third-party submissions after consulting with the parties[100] and considering a non-exhaustive list of factors.[101] The topic was not very controversial amongst the Working Group, although there was some disagreement over the factors to be considered.[102] The state delegates generally agreed to permit third-party submissions, given that those submissions would assist the tribunal and promote the legitimacy of the arbitral process.[103] The draft Rule 4 drew largely from ICSID Rule 37(2) and the NAFTA Statement on non-disputing parties, both of which allowed third-party submissions. The final Rule 4 was accepted with few changes.[104]

19.39 Issues nonetheless arose around a related topic: submissions by a non-disputing *treaty party*, which is oftentimes the investor's home state. Non-disputing treaty parties oftentimes have valuable information related to the treaty's drafting, which, if presented, helps prevent a 'one-sided treaty interpretation'.[105] On the other hand, some delegates feared that such submissions could raise issues of diplomatic protection, especially if the treaty party were to comment on issues outside the language of the treaty.[106]

19.40 The Working Group decided that for matters of treaty interpretation, the non-disputing treaty party could automatically offer its views.[107] Rule 5(1) reads as such: 'The arbitral tribunal *shall*, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.' In other words, the treaty party is entitled to submit its views,[108] even though the tribunal need not give them deference.[109]

19.41 For other matters—that is questions of fact—submissions are not automatically accepted. The tribunal may permit such submissions after consultation with the parties like other third-party submissions. Here again, the tribunal acts as a gatekeeper—but only in this particular instance—so as to ensure that such submissions do not amount to diplomatic protection.[110]

(f) Application of the rules

19.42 One of the most complex features of the Rules on Transparency—and one very pertinent to this chapter—is the way in which they apply to each individual arbitration. Under Rule 1(1), the Rules will apply *in tandem* with the most recent version of the UNCITRAL Arbitration Rules (2013 or later versions) whenever an investment treaty, concluded on or after 1 September 2014, offers that most recent version as an option for the proceedings.[111] Under Rule 1(1), the Rules on Transparency are presumed to apply unless there is language to the contrary.

19.43 States can avoid this presumption by removing UNCITRAL as a potential rule set in the treaty. Or they can retain the UNCITRAL option but exclude the Rules on Transparency by expressly 'opting out' of them in one of two ways: by either (i) expressly rejecting the Rules (ie 'the Transparency Rules shall not apply'); or (ii) offering older versions of the UNCITRAL Arbitration Rules (eg the 2010 Arbitration Rules) as a potential rule set, which do not automatically attach the Rules.[112] These 'opt-out' measures are designed to 'nudge' states towards transparency.[113] By making the Rules applicable by default, the drafters hoped that the Rules would 'attract more adherents than if states had to undertake a positive step to accept them'.[114]

19.44 Rule 1(2) offers a different approach to the Rules' application for treaties concluded *before 1 April 2014*. Some drafters believed that it was unfair to subject disputing parties to rules that were not in existence when the investment treaty was signed.[115] Given the consensual nature of arbitration, the Working Group determined that some *additional* expression of consent would be required before the Rules would apply to older treaties.

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Thus, Rule 1(2) provides an 'opt-in' option whereby states can agree, through a multilateral treaty, to insert the Rules into older treaties concluded *before* 1 April 2014. To facilitate this 'opt-in' approach,[116] UNCITRAL developed the Mauritius Convention on Transparency.[117]

4. UNCITRAL—The Mauritius Convention on Transparency

19.45 The Mauritius Convention on Transparency was adopted by the UN General Assembly on 10 December 2014.[118] It is the instrument 'by which states c[an] express their agreement according to [Rule] 1(2) of the Transparency Rules'.[119] Work on the Mauritius Convention began immediately after the Rules were finalized. The drafters, which was the Working Group, aimed to increase 'transparency and accessibility' by facilitating 'a more widespread application' of the Rules.[120]

(a) Scope of application

19.46 Under the Mauritius Convention on Transparency, the Rules on Transparency shall apply when the following three conditions are met: (1) 'both the claimant's home state and the respondent in the arbitration are parties to the Mauritius Convention'; (2) 'neither of those parties to the Convention has taken a reservation carving out the specific investment treaty under which the arbitration arises from the Convention's scope'; and (3) 'if a set of rules or procedures other than the UNCITRAL Arbitration Rules governs the arbitration, the respondent has not taken a reservation with respect to such rules or procedures'.[121] Simply stated, the Rules will apply in any arbitration—whether initiated under the UNCITRAL Arbitration Rules or not—where both states connected to the dispute (claimant's home state and the respondent state) have ratified the Mauritius Convention on Transparency. In such circumstances, the Rules are mandatory.[122]

19.47 Alternatively, the Rules can apply even if both states have not yet ratified the Mauritius Convention on Transparency. Under Article 2(2) of the Convention, each ratifying state makes a 'unilateral offer' to apply the Rules in all future arbitrations.[123] Assuming the claimant accepts the state's unilateral offer to apply the Rules on Transparency—even if the claimant's home state has not ratified the Convention—the Rules will apply.[124]

19.48 Notably, the Mauritius Convention on Transparency does not allow states to modify or amend the Rules like they otherwise can in treaties concluded post-2014.[125] Article 2(4) of the Convention removes the final sentence of Rule 1(7),[126] so that states cannot develop their own transparency standards to govern the arbitration.[127] The effect is to enhance the Rules' authority over the vast number of treaties concluded before 1 April 2014.[128] As explained below, Article 2(4) turns out to be a key factor in how states approach the Mauritius Convention on Transparency.

(b) Reservations

19.49 Article 3 of the Mauritius Convention on Transparency permits states to make certain reservations,[129] in order to 'limit the application of the Mauritius Convention to certain investment treaties or investor-[S]tate arbitration under certain arbitration rules'.[130] A state can either: (i) carve out specific investment treaties or sets of rules other than the UNCITRAL Arbitration Rules to which the Rules will not apply; (ii) opt out of the unilateral offer option under Article 2(2); or (iii) opt out of later versions of the Rules, should they ever be revised.[131] 'All reservations may be withdrawn at any time and such withdrawals take effect upon deposit.'[132] In addition, the reservations apply only to future arbitrations, meaning that they cannot be applied retroactively.[133]

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19.50 Notably, Article 3 does not allow states to opt out of a particular rule.[134] The delegates of the Working Group unanimously agreed that it would be 'unacceptable' if a state were to accept the Rules on Transparency, only to then carve out their entire content by the use of reservations.[135] Once again, the Mauritius Convention on Transparency reinforces the authority of the Rules: if the Rules apply through the Mauritius Convention on Transparency, then they apply as they are written.

(c) Implications of the Mauritius Convention on Transparency

19.51 The implications of this new regime are significant.[136] With the aim of establishing transparency as a general principle of international investment law,[137] the Mauritius Convention on Transparency implements 'a systemic reform approach and confronts the fragmented structure of the international investment regime by proposing a legal principle (transparency) that applies to all existing bilateral, regional, and multilateral investment treaties'; and is available in all arbitral fora.[138]

C. Research

19.52 This brings us to the focus of this chapter, which is to assess states' reactions to the Rules and the Mauritius Convention on Transparency. Only seven states have ratified the Convention since it was open for signature in March 2015; and very few disputes have put the Rules into practice. It is thus worth considering whether states are comfortable with the Rules as they stand, or if there are areas of disagreement. These considerations are important, especially in light of the current debate at ICSID as to whether their rules on transparency should be changed based on the UNCITRAL model.

19.53 To that end, the research looks at all the publicly available investment treaties signed since the Rules on Transparency were finalized in 2013, and the extent to which those treaties incorporate the Rules. For the purposes of this chapter, we refer to this group of treaties as the 'newer treaties'. Next, the research looks at the Mauritius Convention on Transparency and the extent to which states are 'opting in' to the Rules by signing/ratifying the Convention.

19.54 As explained below, the results of each inquiry are considerably different. States appear to be incorporating the Rules into a large number of newer treaties, but they are not ratifying the Mauritius Convention on Transparency. Possible reasons for this difference are set out after the findings.

1. Investment Treaties

19.55 Most of the newer treaties reviewed for this research were taken from the International Investment Agreements Navigator of the United Nations Conference on Trade and Development (UNCTAD);[139] a few others were found through the Jus Mundi Search Engine.[140] All treaties concluded after 1 September 2014 were identified and catalogued. Treaties signed before that date, and those that do not refer to investor-state arbitration, were removed, as they fall outside the scope of the Rules.[141]

19.56 The remaining publicly available treaties—approximately 124—were divided into three categories: (i) those that reject the Rules either expressly or by offering an older version of the UNCITRAL Arbitration Rules for any potential dispute;[142] (ii) those that purposely adopt the Rules for all disputes; and (iii) those that offer the most recent version of the UNCITRAL Arbitration Rules without making any direct reference to the Rules themselves. Note that under this third category, unlike the second, the Rules would only

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apply when the arbitration proceeds under the UNCITRAL Arbitration Rules—not under any other set of rules.

19.57 Two disclaimers must be made about our methodology. *First*, the research was limited by the number of publicly available treaties. Over 120 treaties were catalogued for this study, but approximately fifty others were not available because they could not be retrieved through open sources. Though it is possible that many of these treaties do not refer to investment arbitration at all and thus would fall outside the scope of this research, it is not possible to conclusively make this determination until these treaties are made public.

19.58 *Second*, the treaties themselves are not consistent in their references to the UNCITRAL Arbitration Rules. Some reference the UNCITRAL Arbitration Rules with dates (ie 2010), which helps to easily identify which treaties incorporate the Rules on Transparency, whilst others use vague phrases such as 'as last amended by the parties'.[143] In such situations, the authors had to decide for themselves which treaties referred to the 2013 UNCITRAL Arbitration Rules and which did not.[144]

(a) Categories One and Two

19.59 Of the 124 treaties reviewed, 31 of them (25 per cent) reject the Rules altogether—either expressly or by reference to older versions of the UNCITRAL Arbitration Rules (Category One).[145] The Republic of Korea is particularly notable for discarding the Rules on Transparency in every one of its new investment treaties.[146] The United Arab Emirates (UAE) and Singapore often reject the Rules on Transparency as well, but on a less consistent basis.[147] A few other states take a softer approach by contemplating future negotiations on the Rules on Transparency,[148] or by applying them on a case-by-case basis.[149] As written, however, these treaties do not adopt the Rules on Transparency *per se*.

19.60 This does not necessarily mean that no transparency exists. A few of the treaties in Category One offer their own transparency standards.[150] These standards range from simple requirements of publishing the awards and decisions, like in the ASEAN–India Investment Agreement,[151] to requiring a wide range of transparency mechanisms, including document disclosure, exceptions to disclosure, public hearings, and third-party submissions, much like the Rules themselves, as can be seen in the Central American–Republic of Korea FTA.

19.61 By contrast, eleven treaties expressly adopt the Rules on Transparency for all investor-state disputes—regardless of whether they are UNCITRAL disputes or at some other forum (Category Two).[152] Eight out of the eleven treaties adopt the Rules on Transparency without modifications.[153] The remaining three make slight variations to the Rules on document disclosure, particularly with regard to the evidence presented in the arbitration.[154] These changes are common among many of the newer treaties, as discussed in greater detail below.

19.62 Three other treaties do not fall into either category. Two of them—both signed by Slovakia—neither reject nor adopt the Rules outright. While Slovakia has agreed to apply the Rules in all proceedings, its counterpart to each treaty—the Islamic Republic of Iran and the UAE, respectively—has rejected the Rules as a default position.[155] A third treaty between the Czech Republic and Iran splits along similar lines. The Czech Republic agrees to apply the Rules to all proceedings, while Iran rejects the rules as an initial matter.[156]

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(b) Category Three

19.63 The treaties above make up one-third of the entire data set. The others—approximately seventy-nine—take a middle approach, adopting the Rules on Transparency in tandem with the UNCITRAL Arbitration Rules, but no other set of rules (Category Three).[157] For fifty-one of these treaties, the analysis ends here, as they neither reference the Rules expressly nor otherwise create their own independent transparency standards. They simply offer the most recent version of the UNCITRAL Arbitration Rules, which brings along the Rules on Transparency in accordance with Rule 1.

19.64 The other twenty-eight treaties offer a more complex picture—one that is more helpful to this research. They too offer the most recent version of the UNCITRAL Arbitration Rules generally, without mentioning the Rules on Transparency specifically, but they also craft their own transparency standards directly in the treaty, like the treaties from Categories One and Two. Oftentimes, these treaty standards mirror those of the Rules on Transparency. Other times, however, they make slight variations to the Rules, as permitted under the last sentence of Rule 1(7),[158] and offer states a chance to change the Rules in ways preferable to their interests. These changes in turn provide a plethora of insight into states' attitudes towards each rule.

(i) Document disclosure

19.65 The treaties signed by Canada and Japan (separately) are good examples of how states have changed the rules regarding document disclosure. Japan has a standard clause in most of its treaties that reads:

> The *disputing Party may* make available to the public in a timely manner all documents, including an award, submitted to, or issued by, an arbitral tribunal, subject to redaction of: (a) confidential business information (b) information which is privileged or otherwise protected from disclosure under the applicable laws and regulations of either Contracting Party; and (c) information which shall be withheld pursuant to the relevant arbitration rules.[159]

19.66 The phrase 'disputing Party' means that the state—not the tribunal—has the final say over whether case materials will be disclosed—an arguably notable departure from Rule 3, which subjects all documents to disclosure either automatically or at the tribunal's discretion.[160]

19.67 Conversely, Canada's treaties take the opposite approach. All case documents are published automatically under those treaties 'unless the disputing parties otherwise agree'.[161] While the state appears to retain some level of input over disclosure, that input is shared with the investor. If the state and investor cannot agree on whether to disclose the documents, then they will be published.

19.68 Other states take a third approach: disclosing some documents but not others. For instance, under the Australia–Hong Kong Investment Agreement, the parties must disclose all pleadings, submissions, and decisions (similar to Rule 3(1)); but witness statements, exhibits, and expert reports are not mentioned,[162] which means that they need not be disclosed.[163]

19.69 As discussed in Section B.3(b) above, the topic of disclosing exhibits created tension amongst the Working Group, particularly on the issue of who makes the final decision.[164] Ultimately, Rule 3(3) gave tribunals—not states—the final say. However, some states are now reversing that decision through their treaty-based standards, and retaining more control over the disclosure process. States are even limiting the types of documents that

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can be disclosed (eg submissions and decisions) and those that cannot (eg exhibits, witness evidence).

19.70 As far as the exceptions or 'carve-outs' made for confidential business information are concerned, the treaties generally follow Rule 7. This is true for all treaties that address the issue, not just for those signed by Japan or Canada. Like with Rule 7(5), many of the treaties preserve a state's ability to withhold information that either threatens essential security interests or impedes law enforcement. They also preserve the ability for states to withhold information in accordance with their own law.

19.71 Nonetheless, some treaties take it one step further by adding a public interest exception, whereby states can withhold documents that threaten their public or security interests.[165] Note that this same exception was considered and rejected by the Working Group for being 'overly broad' and meaningless.[166] But here again, states are using the treaties to reassert control.

(ii) Public hearings

19.72 Almost universally, hearings are being made public by default in the newer treaties —a notable achievement for pro-transparency states. The only exception appears to be in the Argentina–Chile FTA, which authorizes the parties to *open* the hearing by agreement.[167] Likewise, the Australia–China FTA allows the proceedings to be opened by agreement of the respondent state.[168] If the parties do not agree, or the respondent state does not agree, respectively, then the hearing is presumably closed.

19.73 Like with Rule 6, the treaties offer a limited set of circumstances for when a hearing may be closed. But unlike Rule 6, the treaty-based exceptions are more limited. For instance, none of the treaties permit a closed hearing to protect the 'integrity of the arbitral process' as provided for in Rule 6.[169] In addition, none of the treaties give states any control over the decision.[170] Nevertheless, given the consistency among the different treaties, and the overall consistency with Rule 6, it appears that states generally agree to the idea of having public hearings, with a few exceptions.

(iii) Third-party submissions

19.74 Across the board, the treaties carefully adhere to the standards for third-party submissions set by Rules 4 and 5, which are modelled after the NAFTA and ICSID. The standard can be summarized as follows:

> The non-disputing [treaty] Party may make oral and written submission to the tribunal regarding the interpretation of this Agreement.
>
> After consultation with the disputing parties, the tribunal may accept and consider written amicus curiae submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings.[171]

19.75 This language is repeated in many of the treaties without any real substantive change. As such, there appears to be a consensus that non-disputing treaty parties have a right to comment on the proper interpretation of the treaty, while all other persons wishing to comment on any other aspect of the dispute must first seek leave from the tribunal.

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(c) Conclusions

19.76 For the most part, states have expressed a positive attitude towards the Rules on Transparency in their recent treaty practice. Less than one-fifth of the treaties 'opt out' or reject the Rules. In fact, most of them adopt the Rules on Transparency with no changes (in tandem with the UNCITRAL Arbitration Rules). Where changes have been made, they largely pertain to document disclosure. Many states want to decide for themselves whether to disclose evidence or not, whilst others remove the possibility of disclosing evidence altogether. As for public hearings, states generally agree to open the hearings to the public. However, like with the debate about exhibits, some states want a say in when hearings can be closed. Finally, there is little doubt that third-party submissions are both a useful feature and an acceptable element of investment arbitration.

19.77 Despite these trends in favour of the Rules on Transparency, they have had little effect on real-life access to investment arbitration proceedings. This is in part a fault of the Rules themselves since they were designed—per Rule 1(2)—to have a forward-looking application (at least until states affirmatively opt into the Rules through the Mauritius Convention on Transparency). In addition, very few, if any, arbitrations have been filed under the newer treaties. As time goes on, and as investment disputes continue to arise, we will presumably begin to see a rise in cases utilizing the Rules on Transparency. For now, they remain relatively untested.

2. The Mauritius Convention on Transparency

19.78 The Mauritius Convention on Transparency tells a different story. It opened for signature on 17 March 2015 in Port Louis, Mauritius,[172] but was not enacted until 18 October 2017.[173] As of today—six years after its adoption—twenty-three states have signed the Mauritius Convention on Transparency, but only seven (Australia, Bolivia, Cameroon, Canada, Gambia, Mauritius, and Switzerland) have ratified it.[174]

19.79 Mauritius and Canada were the first to ratify the Mauritius Convention on Transparency, respectively.[175] Switzerland submitted the third ratification and formally enacted the Convention on 18 October 2017.[176] Cameroon and Gambia were the fourth and fifth states to ratify in 2018.[177] Recently, in 2020, Australia and Bolivia ratified the Mauritius Convention on Transparency, bringing the number to seven.[178]

19.80 This is a relatively slow start compared with other multilateral instruments drafted in recent years. The Singapore Convention on Mediation, for example, was adopted by the United Nations on 20 December 2018. In just over two years, the Singapore Convention has received over double the number of signatures, five ratifications, and one approval, with all the ratifications and approvals occurring in the year 2020.[179]

19.81 One reason for the difference might be the increasing backlash against globalization. 'Political events of the past few years have called into question the future of an integrated international economy.'[180] The mood towards globalization has changed. As former WTO Secretary-General, Mike Moore put it:

> The financial crisis that engulfed first Asia, then Russia, then the world in 1997–98 led many people to question the merits of free markets. The collapse of negotiations at the OECD on a Multilateral Agreement on Investment gave new heart to critics of globalization. And the failure to launch a new WTO round in Seattle emboldened some globaphobes to think that they could put a halt to globalization and rewrite the rules of the world economy on their own terms.[181]

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19.82 Globalization has also had a direct 'impact upon [state] sovereignty by challenging the competence of the state to exercise autonomous powers where the exercise of those autonomous powers directly impact[s] upon the globalized framework within which that state operates'.[182] While these impacts are far from new, they offer some insight as to why states seem uninterested in ratifying the Mauritius Convention and adhering to stricter norms governing transparency.

19.83 In any event, with only seven ratifications, the Mauritius Convention on Transparency has had very little reach. As discussed above, the Convention inserts the Rules into a dispute when either: (i) both states connected to a dispute (claimant's home state and the respondent state) have ratified the Mauritius Convention on Transparency; or (ii) when the respondent state has ratified the Mauritius Convention on Transparency, and the claimant agrees (the 'unilateral offer').[183] As for the former option, no investment arbitrations have been initiated amongst the seven ratifying states. Moreover, only three BITs exist among the seven countries.[184] Thus, while the recent ratifications by Australia and Bolivia are encouraging, the Mauritius Convention on Transparency will most likely have little effect until more states choose to ratify it.[185]

19.84 As for the latter option, that of the unilateral offer, only one ratification is needed, which means all seven ratifying states have made a unilateral offer to apply the Rules. However, for reasons unknown, only a handful of disputes involving one of these seven states have applied the Rules since the Mauritius Convention on Transparency entered into force. Perhaps the claimant refused the state's unilateral offer to apply the Rules; or perhaps the state never raised its unilateral offer during the proceedings. Either way, the Rules were available, yet the parties chose not to incorporate them.

19.85 Switzerland, for one, does not have—nor has it had—any investor-state disputes initiated against it.[186] Its ratification therefore does not carry as much weight.[187] Mauritius has had one arbitration initiated against it since the entry into force, and the parties agreed to apply the Rules in that case.[188] In the two other arbitrations initiated against Mauritius, prior to entry into force,[189] the Rules were not adopted even though Mauritius had already ratified the Convention.

19.86 Canada has had two arbitrations initiated against it since the Mauritius Convention on Transparency came into force; three since Canada signed it in March 2015.[190] None of them adopt the Rules, which is surprising given Canada's lead role in their formation. While the parties to each dispute adopted a confidentiality order that largely follows the Rules on Transparency,[191] the Rules themselves were notably not adopted.

19.87 Canada's use of the Rules here as guidelines for its own confidentiality orders is curious given that the Working Group specifically chose to draft rules over guidelines. Rules were thought to provide a level of certainty that was needed to achieve the 'highest standards of transparency'.[192] It is not clear why the disputing parties here chose to craft their own rules rather than adopt the Rules. At the very least, these cases serve as examples where states (and perhaps investors) are straying from the Rules to suit their needs.

19.88 As for Cameroon, only one ICSID arbitration has been filed against the state since the Convention came into force for the state.[193] However, the Rules on Transparency were not adopted in that arbitration. The situation is similar for Gambia. Two ICSID cases were filed against Gambia after it ratified the Mauritius Convention on Transparency, but no public information is provided, suggesting that the Rules were not applied.[194] Note that in the case of Gambia, the Convention had not yet come into force for the state when the cases were filed. So, Gambia was under no legal obligation to apply the Rules, and indeed, could

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not cause application of the rules unless the claimants agreed or their home state similarly ratified the Convention.

19.89 Australia only recently ratified the Convention in September of 2020, and no disputes have been filed against the state since then. The Mauritius Convention on Transparency entered into force for Australia on 17 March 2021.[195] Likewise, Bolivia signed in late 2020, and no disputes have been filed against the state since. The Mauritius Convention on Transparency entered into force for Bolivia on 13 April 2021.

19.90 In summary, nine disputes have been initiated against four of the seven ratifying states since they signed the Mauritius Convention on Transparency. Only one of those nine disputes adopted the Rules.

19.91 The signatory states —that is the non-ratifiers—show the same lackluster acceptance of the Mauritius Convention on Transparency and the Rules. While the latter are not yet binding on those states because they have only signed, but not ratified, the Mauritius Convention on Transparency, their signatures nonetheless suggest a willingness towards the Mauritius Convention on Transparency and the Rules. And yet, state practice within this small group of signatories does not demonstrate such willingness. The Kingdom of Belgium, for instance, has an ICSID case currently pending that was initiated after Belgium signed the Mauritius Convention on Transparency,[196] which has not incorporated the Rules. Additionally, Benin,[197] Gabon,[198] Germany,[199] Iraq,[200] Italy,[201] and Madagascar[202] have all had arbitrations initiated against them since they signed the Mauritius Convention on Transparency, but none of the disputes adopted the Rules.[203]

19.92 Bolivia—before it ratified the Mauritius Convention on Transparency—applied the Rules in one arbitration, which ended prior to Bolivia's signing of the Mauritius Convention on Transparency.[204] After signing but prior to ratification, Bolivia was involved in two other arbitrations. One arbitration did not apply the Rules (*Banco Bilbao*);[205] whereas the other applied its own transparency standard, but not the formal Rules (*The Estate of Julio*).[206] Overall, including the cases initiated against the seven ratifying states, a total of twenty-six cases have been initiated against the signatories of the Mauritius Convention on Transparency; yet only two cases have adopted the Rules.

19.93 Lastly, it is not fair to place all the blame on the states automatically. All the cases referenced above fall under the unilateral offer option, and as already noted, it could be the case that the claimant-investor rejected the state's offer to apply the Rules. The cases against Gambia and Cameroon are good examples. While these states had ratified the Convention by the time the cases were filed against them, and thereby expressed their acceptance of the Rules, the investors were still free to reject the Rules and prevent their application. But even if that were the case, however, the Rules were rejected one way or another. While this chapter only focuses on the attitudes of states, investors' attitudes towards the Rules are a topic worth considering.[207]

D. Conclusions

19.94 These two sets of findings stand in stark contrast to one another. By and large, many states have inserted the Rules on Transparency into their newer treaties, some of which were signed as late as 2020;[208] but few states have expressed the same commitment through the Mauritius Convention on Transparency. States seem to be comfortable with the Rules in one context, but uncomfortable with them in another. This begs the question: why

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is there such a difference? What is it about the Rules or the Mauritius Convention on Transparency that make states more or less uncomfortable?

19.95 Before answering those questions, it is important to highlight the tools that aided this research because they themselves are testaments to the vast increase in transparency. Tools like UNCTAD's *Investment Policy Hub*, *Jus Mundi* and UNCITRAL's *Transparency Registry* offer practitioners, scholars, government leaders, and the public a greater level of access to the field of international investment arbitration. The *Investment Policy Hub* and *Jus Mundi* offer an organized database of investment disputes, investment laws, and—most importantly for this chapter—investment treaties. The Transparency Registry allows users to locate and access all of documents disclosed pursuant to the Rules. These tools made this chapter possible, and that alone is a testament to the positive trend towards transparency.

1. Conclusion 1: State Practice towards the Rules Reflects a Significant Willingness to Insert Greater Transparency into the Proceedings, but Some Differences Still Remain

19.96 The research confirms the positive trend towards transparency. An increasing number of states are adopting the Rules on Transparency into their newer treaties, most of them without modification.

19.97 The modifications that are being made, however, are notable as they concern the state's ability to control the publication of its own evidence (eg exhibits, expert reports, and witness statements) and to open or close a hearing. These changes are unsurprising. Document publication was a major sticking point when the Rules were being drafted,[209] with many states arguing that too much disclosure would be overly prejudicial,[210] while others pushed to have as many documents published as possible to ensure the greatest level of transparency.[211] The push for non-disclosure were very much at odds with the goal of full transparency; and what became the text of Rule 3 is very much a compromise.

19.98 That same debate continues to this day. States are having the same discussions within the ICSID system. Some have taken the position that evidentiary documents need not be disclosed at all,[212] whereas others insist that the party presenting the evidence should decide whether to publish it,[213] or that both parties should consent.[214] In its most current form, the draft ICSID arbitration rules for its reform (Draft ICSID Rule), specifically Rule 64, requires both parties' consent before evidence can be disclosed—a notable difference from Rule 3.[215]

19.99 Third-party participation and public hearings are also up for discussion. For third-party participation, the current Draft ICSID Rules follow Rules 4 and 5 closely, suggesting that states are comfortable with the UNCITRAL model. Under both rule sets, the tribunal may consider submissions by third parties, after considering a non-exhaustive list of factors. Non-disputing treaty parties also have the right to submit views on how the treaty is to be interpreted.

19.100 For public hearings, the situation is different. The ICSID states have not reached agreement on the authority to close a hearing, something also debated by the Working Group.[216] While the Rules deny states a veto power and leave the decision with the tribunal, the current Draft ICSID Rules do the opposite. They provide that the hearing shall be open unless either party objects.[217] Here, states are regaining authority they lost in the UNCITRAL context.

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19.101 This brings us to the issue of authority, which seems to be a common subject within the discussion on transparency. The trends in treaty language, coupled with the debates at ICSID, demonstrate a desire by states to maintain some level of control over matters of transparency. Where the UNCITRAL Arbitration Rules gave *the tribunal* a lot of discretion, the treaties and Draft ICSID Rules give some of that power back to the states. Thus, we can say for certain that the issue of authority is very much undecided.

2. Conclusion 2: The Mauritius Convention on Transparency Does Not Afford States their Desired Level of Authority

19.102 There are a few areas where the Mauritius Convention on Transparency changes the relationship between the states and the Rules on Transparency, perhaps to the Convention's own detriment. In each of these areas, the state loses some authority vis-à-vis the Rules. Many states, for instance, prefer the ability to modify the Rules by treaty. This is evident from the many treaties that set their own unique transparency standards. This option does not exist under the Mauritius Convention on Transparency, however. States may only apply UNCITRAL's version of the Rules as written when the Mauritius Convention is involved. It is reasonable to conclude, based on the above, that states have turned away from the Mauritius Convention on Transparency for this very reason. They do not want to commit themselves to an unmodified and untested version of the Rules on Transparency that may be too transparent in their view.

19.103 Separately, the Mauritius Convention on Transparency applies the Rules to any dispute under the treaty, regardless of the forum. Article 2 states that the Rules on Transparency will apply 'whether or not initiated under the UNCITRAL Arbitration Rules'. Here, again, states lose some authority over the Rules on Transparency, in this case, the authority to decide their scope. It may be said that states are unwilling to sign on to the Mauritius Convention on Transparency because they do not want the Rules to apply 'too far too fast'. The research above supports this hypothesis, in fact, since less than 10 per cent of the treaties reviewed apply the Rules to all disputes.[218]

19.104 It may also be said that states are taking a cautious approach by incorporating the Rules into future treaties only, while keeping the vast number of older treaties unaffected by the untested Rules. Treaty disputes usually do not occur immediately after a treaty is signed. Rather, it takes time for investments to be made and disagreements to arise. States may be taking advantage of this 'honeymoon period' so as to avoid a situation where the untested Rules suddenly and immediately apply to every treaty dispute against the state.

3. Conclusion 3: The Rules Should Be Used as Guidelines Rather than Mandatory Rules

19.105 As discussed in Section B.3(a), one of the Working Group's first debates was whether to shape the transparency standards in the form of discursive guidelines or mandatory rules. Some favoured the former because they would ensure the widest possible application of the transparency standards, whilst others argued for the latter, to secure the highest levels of transparency in the investment arbitration system. Rules were ultimately chosen out of compromise, but only on the understanding that the Rules on Transparency would only apply where a state made specific reference to them.[219]

19.106 The final scope of the Rules on Transparency is a bit different. For older treaties, the Rules only apply when the state has consented to them (either through the Mauritius Convention on Transparency or some other expression of consent), but for newer treaties, the Rules are presumed to apply even absent specific reference to them (Category Three). In the former case, few states have given this consent via the Mauritius Convention on Transparency or some other agreement. In the latter case, where the Rules can apply by

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presumption, states are going to great efforts to amend the rules to accord with their particular interests.

19.107 In this regard, perhaps the Rules on Transparency would better serve as guidelines rather than mandatory rules. Many states are already using the Rules in this way by drafting their own transparency standards that align closely with the Rules. Other states, like Canada—one of the major proponents of the Rules—are using them to create case-specific confidentiality orders that only the investor need to sign on to. As guidelines, the Rules would help ensure that transparency enjoys the widest possible application within the investment arbitration system, whilst at the same time giving states the authority and the flexibility to move towards, and not away from, transparency at their own pace.

E. Appendix

1. Category One Treaties

Georgia—Japan BIT (2021)

Australia—Indonesia CEPA (2019)

Belarus—Hungary BIT (2019)

Burkina Faso—Turkey BIT (2019)

Hong Kong, China SAR—UAE BIT (2019)

Korea—Uzbekistan BIT (2019)

Myanmar—Singapore BIT (2019)

Armenia—Korea BIT (2018)

Belarus—Turkey BIT (2018)

Central America—Korea FTA (2018)

Kazakhstan—Singapore BIT (2018)

Kazakhstan—UAE BIT (2018)

Singapore—Sri Lanka FTA (2018)

Belarus—Georgia BIT (2017)

Colombia—UAE BIT (2017)

Ethiopia—Qatar BIT (2017)

Israel—Japan BIT (2017)

Moldova—UAE BIT (2017)

Singapore—Qatar BIT (2017)

Nigeria—Singapore BIT (2016)

Australia—China FTA (2015)

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China—Korea (2015)

Honduras—Peru FTA (2015)

Korea—New Zealand FTA (2015)

Korea—Turkey Invest. Agreement (2015)

Korea—Viet Nam FTA (2015)

Singapore—Turkey FTA (2015)

ASEAN—India Invest. Agreement (2014)

Canada—Korea (2014)

Kenya—UAE BIT (2014)

Israel—Myanmar BIT (2014)

2. Category Two Treaties[220]

Hungary—Kyrgyzstan BIT (2020)

Australia—Uruguay BIT (2019)

Cabo Verde—Hungary BIT (2019)

EU—Viet Nam Invest. Agreement (2019)

Iran—Nicaragua BIT (2019)

Austria—Kyrgyzstan BIT (2016)

Canada—EU CETA (2016)

Canada—Hong Kong, China SAR BIT (2016)

Colombia–France BIT (2014)

Georgia–Switzerland BIT (2014)

Greece—UAE BIT (2014)

3. Category Three Treaties

Japan—Morocco BIT (2020)

Armenia—Singapore Agreement (2019)

Australia—Hong Kong Invest. Agreement (2019)

Belarus—Uzbekistan BIT (2019)

India—Kyrgyzstan BIT (2019)

Argentina—Japan BIT (2018)

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Argentina—UAE BIT (2018)

Armenia—Japan BIT (2018)

Australia—Peru FTA (2018)

Azerbaijan—Turkmenistan BIT (2018)

Belarus—India BIT (2018)

Cambodia—Turkey BIT (2018)

Canada—Moldova BIT (2018)

CPTPP (2018)

EU—Singapore Invest. Agreement (2018)

Japan—Jordan BIT (2018)

Japan—UAE BIT (2018)

Mali—Turkey BIT (2018)

Mali—UAE BIT (2018)

Morocco—Congo BIT (2018)

Paraguay—UAE BIT (2018)

Serbia—Turkey BIT (2018)

UAE—Uruguay BIT (2018)

Ukraine—Qatar BIT (2018)

USMCA (2018)

Argentina—Chile FTA (2017)

Belarus—Sudan BIT (2017)

Burundi—Turkey BIT (2017)

Hungary—Tajikistan BIT (2017)

Jordan—Saudi Arabia BIT (2017)

Rwanda—UAE BIT (2017)

Turkey—Ukraine BIT (2017)

Turkey—Uzbekistan BIT (2017)

Armenia—UAE BIT (2016)

UAE—Angola BIT (2017)

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Argentina—Qatar BIT (2016)

Cambodia—Hungary BIT (2016)

Canada—Mongolia BIT (2016)

Chile—Hong Kong, China SAR BIT (2016)

Côte d’Ivoire—Turkey BIT (2016)

Ethiopia—UAE BIT (2016)

Ghana—Turkey BIT (2016)

Iran—Japan BIT (2016)

Iran—Singapore BIT (2016)

Japan—Kenya BIT (2016)

Jordan—Turkey BIT (2016)

Mexico—UAE BIT (2016)

Morocco—Nigeria BIT (2016)

Morocco—Russia BIT (2016)

Morocco—Rwanda BIT (2016)

Nigeria—UAE BIT (2016)

Palestine—Russia BIT (2016)

Rwanda—Turkey BIT (2016)

TPP (2016)

Albania—UAE BIT (2015)

Andorra—UAE BIT (2015)

Azerbaijan—San Marino BIT (2015)

Burkina Faso—Canada BIT (2015)

Cambodia—Russia BIT (2015)

Canada—Guinea BIT (2015)

Denmark—Macedonia BIT (2015)

Eurasian Econ. Union—Viet Nam FTA (2015)

Iran—Russia BIT (2015)

Japan—Mongolia EPA (2015)

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Japan—Oman BIT (2015)

Japan—Ukraine BIT (2015)

Japan—Uruguay BIT (2015)

Kuwait—Kyrgyzstan BIT (2015)

Mauritius—UAE BIT (2015)

Thailand—UAE BIT (2015)

Armenia—Jordan BIT (2014)

Azerbaijan—Russia BIT (2014)

Canada—Côte d’Ivoire BIT (2014)

Canada—Mali BIT (2014)

Canada—Senegal BIT (2014)

Canada—Serbia BIT (2014)

Japan—Kazakhstan BIT (2014)

Kyrgyzstan—Qatar BIT (2014)

Kyrgyzstan—UAE BIT (2014)

Footnotes:

1 See UNCITRAL, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, GA Res 69/116, UN Doc A/69/496 (10 December 2014) (entered into force 18 October 2017) (hereafter Mauritius Convention on Transparency).

2 Press Release, United Nations Information Service, *Australia ratifies the United Nations Convention on Transparency in Treaty-based Investor State Arbitration*, UN Press Release UNIS/L/304 (18 September 2020) <https://unis.unvienna.org/unis/en/pressrels/2020/unisl304.html> accessed 28 November 2020; Brenda Horrigan and Guillermo García-Perrote, *Australia ratifies the Mauritius Convention on Transparency in Investor-State Arbitration*, Herbert Smith Freehills LLP (23 September 2020) <https://hsfnotes.com/arbitration/2020/09/23/australia-ratifies-the-mauritius-convention-on-transparency-in-investor-state-arbitration/#page=1> accessed 28 November 2020.

3 Press Release, United Nations Information Service, *Bolivia ratifies the United Nations Convention on Transparency in Treaty-based Investor State Arbitration*, UN Press Release UNIS/L/307 (19 October 2020) <https://unis.unvienna.org/unis/en/pressrels/2020/unisl307.html> accessed 24 April 2021.

4 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, United Nations (entered into force 1 April 2014) (hereafter Rules or Rules on Transparency).

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5 As Dimitrij Euler and his colleagues note, the Rules ('facilitate public access to investment arbitration proceedings, and provide certain tools for doing so'); in Dimitrij Euler, Markus Gehring, and Maxi Scherer (eds), Transparency in *I*nternational *I*nvestment *A*rbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (Cambridge University Press 2015) 5 (hereafter Euler and others, *Guide to the UNCITRAL Rules on Transparency*).

6 See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (entered into force 14 October 1966) 575 UNTS 159 (hereafter ICSID Convention); ICSID, *Guide to Membership in the ICSID Convention* <https://icsid.worldbank.org/sites/default/files/Guide_to_Membership_in_the_ICSID_Convention_2020.pdf> accessed 5 March 2021: ('ICSID is the world's leading facility for the arbitration and conciliation of disputes between [s]tates and foreign investors, having administered about 70% of all known cases globally').

7 See Susan D Franck, Arbitration Costs: Myths and Realities in Investment Treaty Arbitration (Oxford University Press 2019) 125 (hereafter Franck, *Arbitration Costs*) ('doctrinally, arbitration rules at ICSID, SCC, and UNCITRAL ad hoc arbitration are relatively similar') and at 272, explaining that ('tests failed to reveal meaningful differences in arbitration forums'); see also Mohamed Abdel-Raouf, 'Emergence of New Arbitral Centres in Asia and Africa: Competition, Cooperation and Contribution to the Rule of Law' in Stavros L Brekoulakis, Julian DM Lew, and Loukas Mistelis (eds), The Evolution and Future of International Arbitration (Wolters Kluwer 2016) 321, 324: ('the available arbitration rules adopted by most of the existing arbitration institutions have several features in common').

8 See generally Euler and others, *Guide to the UNCITRAL Rules on Transparency* (n 5); Jan Paulsson and Georgios Petrochilos, UNCITRAL Arbitration (Kluwer Law International 2018) 397–477 (hereafter Paulsson and Petrochilos, *UNCITRAL Arbitration*).

9 See generally Franck, *Arbitration Costs* (n 7) 1; Andrew T Guzmán, 'Why LDCs Sign Treaties that Hurt them: Explaining the Popularity of Bilateral Investment Treaties' (1997–98) 38 Virginia Journal of International Law 639, 652–53 (hereafter Guzmán).

10 J Anthony VanDuzer, 'Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation' (2007) 52 McGill Law Journal 681, 688 (hereafter VanDuzer).

11 See Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries' (1990) 24 International Lawyer 655, 657 (hereafter Salacuse, 'BIT by BIT'); see also Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1524 (hereafter Franck, 'Legitimacy Crisis') wherein it is emphasized that FDI is ('a vital tool for economic development and global prosperity').

12 See Franck, *Arbitration Costs* (n 7) 14, explaining that the objective of investment agreements ('was to entice inbound foreign investment and to protect a state's own investors abroad, while minimizing the risk of state liability when foreign investors unilateral international economic rights'); see also Jeswald W Salacuse, 'Is there a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution' (2007) 31 Fordham International Law Journal 138, 139 (hereafter Salacuse, 'Is there a Better way?'), noting that these agreements were often concluded between developing nations and

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industrialized countries; Franck, 'Legitimacy Crisis' (n 11) 1527–28, highlighting that investments circulated between developed and developing states.

13 See eg Energy Charter Treaty (entered into force 16 April 1998) art 26 para 1, 280 UNTS 36116 (hereafter ECT).

14 See generally Salacuse, 'Is there a Better Way?' (n 12) 138–39.

15 See Franck, *Arbitration Costs* (n 7) 15: ('The net objective of the treaties was to entice inbound foreign investment and to protect a state's own investors abroad, while minimizing the risk of state liability when foreign investors receive unilateral international economic rights.'); see also Guzmán (n 9) 642: ('When a BIT is in force between a host state and a home state, an agreement made between the home state investor and the host is binding on both.').

16 See Franck, 'Legitimacy Crisis' (n 11) 1536, observing that: ('arbitration is now the preeminent method for resolving complex international disputes'); see also Franck, *Arbitration Costs* (n 7) 16 ('If a foreign investor believes a host state violated its substantive treaty rights, treaties permit direct redress against the state through treaty-based dispute resolution.').

17 See Shahla F Ali and Odysseas G Repousis, 'Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat?' (2017) 45 Denver Journal of International Law and Policy 225, 226 (hereafter Ali and Repousis, 'Opportunity or Threat?'); Susan D Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2006) 19 Pacific McGeorge Global Business and Development Law Journal 337, 342: ('investment treaties promise that host governments will not subject investors and their investments to inappropriate risk'); see eg VanDuzer (n 10) 691: ('The growth in claims is likely the result of the increasingly dense international network of treaties providing for investor-state arbitration combined with growth in international investment activity.').

18 Franck, *Arbitration Costs* (n 7) 14; Salacuse, 'Is there a Better Way?' (n 12) 139. See generally Jean Kalicki, 'Mediation of Investor-States Disputes: Revisiting the Prospects' (Kluwer Arbitration Blog, 14 June 2013) <http://arbitrationblog.kluwerarbitration.com/2013/06/14/mediation-of-investor-state-disputes-revisiting-the-prospects/?doing_wp_cron=1598429385.1923389434814453125000> accessed 28 November 2020: ('Investor-state arbitration has developed and matured significantly in the past few decades, and has established itself as an independent mechanism for resolution of complex public-private disputes.').

19 UNCTAD, *Investment Dispute Settlement Navigator* <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 28 November 2020.

20 Ali and Repousis, 'Opportunity or Threat?' (n 17) 226.

21 Euler and others, *Guide to the UNCITRAL Rules on Transparency* (n 5) 2.

22 Center for International Environmental Law, and International Institute for Sustainable Development, *Revision of UNCITRAL Rules and investment arbitration: An update on the ongoing process to increase transparency in investment arbitration* <https://www.ciel.org/wp-content/uploads/2015/06/UNCTAD_meeting_Jan09.pdf> accessed 28 November 2020 (hereafter CIEL and IISD, *Revision of the UNCITRAL Rules*). See also Ali and Repousis, 'Opportunity or Threat?' (n 17) 227, discussing that many ('investment arbitration cases involve investment in public service sectors and public utilities; investment claims arising

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out of emergency economic measures or civil unrest; and cases that revolve around issues of public health, environmental regulation, and human rights').

23 CIEL and IISD, *Revision of the UNCITRAL Rules* (n 22). See also Ali and Repousis, 'Opportunity or Threat?' (n 17) 227, explaining that ('the payment of compensation in connection with any arising arbitration awards is borne by the taxpayers of the host state'.)

24 See Luke Peterson, 'Challenges under Bilateral Investment Treaties Give Weight to Calls for Multilateral Rules' (*World Trade Agenda*, 21 October 2001) 14.

25 N Jansen Calamita, 'Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy: Adopting the UNCITRAL Transparency Rules Approach' (2014) 15 Journal of World Investment and Comparative Law 645, 650–53, discussing the various benefits of increased transparency within investment arbitration proceedings. Transparency can also be attractive to investors because it can expose bad governance in host states. See Micah Burch, Luke R Nottage, and Brett G Williams, 'Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century' (2012) 35(3) University of New South Wales Law Journal 1013, 1043. Transparency can also help address information asymmetries in the service market for arbitrators and lawyers, which arguably drive up costs and delay. Confidentiality on the other hand allows arbitrators to be more robust and hence promote less formalization, costs, and delays. Luke Nottage, 'In/formalisation and Glocalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia,' in Joachim Zekoll, Moritz Bälz, and Iwo Amelung (eds), Formalisation and Flexibilisation in Dispute Resolution (Brill 2014) 211.

26 Samuel Levander, 'Resolving "Dynamic Interpretation": An Empirical Analysis of the UNCITRAL Rules on Transparency' (2014) 52 Columbia Journal of Transnational Law 506, 512 ('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') (citing Christopher F Dugan and others, Investor-State Arbitration (Oxford University Press 2008) 706, 707) (hereafter Levander, 'Resolving "Dynamic Interpretation"').

27 Christina Knahr and August Reinisch, 'Transparency versus Confidentiality in International Investment Arbitration—The Biwater Gauff Compromise' (2007) 6 Law and Practice of International Courts and Tribunals 97, 111. (hereafter Knahr and Reinisch, 'Transparency versus Confidentiality'). See generally Cindy Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration' (2003) 14 American Review International Arbitration 121, 134–35.

28 Knahr and Reinisch, 'Transparency versus Confidentiality' (n 27) 109.

29 Bernardo M Cremades and Rodrigo Cortés, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' (2013) 23 Journal of Arbitration Studies 25, 30.

30 See, eg OECD, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures: Statement by the Investment Committee* <https://www.oecd.org/investment/internationalinvestmentagreements/transparencyandthirdpartyparticipationininvestor-statedisputesettlementproceduresstatementbytheinvestmentcommittee.htm> accessed 24 April 2021: ('There is a general understanding among the Members of the Investment Committee that additional transparency, 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

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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.').

31 See Franck, 'Legitimacy Crisis' (n 11) 1524, advocating for enhanced transparency in the arbitral process in order to avoid inconsistent decisions); See also Barton Legum, 'Trends and Challenges in Investor-State Arbitration' (2003) 19 Arbitration International 143, 144–46, explaining the transition from confidentiality to transparency in investment arbitration.

32 NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001) <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp> accessed 28 November 2020.

33 ibid para A(1).

34 NAFTA Free Trade Commission, Statement of the Free Trade Commission on Non-disputing Party Participation (7 October 2003) <http://www.sice.oas.org/TPD/NAFTA/Commission/Nondispute_e.pdf> accessed 28 November 2020 (hereafter NAFTA Statement).

35 NAFTA Free Trade Commission, Joint Statement: Decade of Achievement (16 July 2004) <http://www.sice.oas.org/TPD/NAFTA/Commission/Statement2004_e.asp> accessed 28 November 2020.

36 ICSID, *Proposals for Amendment of ICSID Rules, Volume 3* (2 August 2018) sch 8, para 7, discussing the 2006 amendments; Andrea K Bjorklund, 'NAFTA Chapter XI's Contribution to Transparency in Investment Arbitration' [2016] Austrian Yearbook on International Arbitration 291, 297: ('It is quite likely that these changes were sparked by the NAFTA experience.').

37 ICSID Arbitration Rule 48(4): ('The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.').

38 ibid Rule 32(2): ('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, subject to appropriate logistical arrangements.').

39 ibid Rule 37(2): ('After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'non-disputing party') to file a written submission with the Tribunal regarding a matter within the scope of the dispute.').

40 Jarrod Wong and Jason Yackee, 'The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns' in Karl P Sauvant (ed), Yearbook on International Investment Law & Policy (Oxford University Press 2010) 234, describing ICSID's amendments as ('modest, incremental and conservative').

41 Levander, 'Resolving "Dynamic Interpretation"' (n 26) 521; Florentino Feliciano, 'The ordre public Dimensions of Confidentiality and Transparency in International Arbitration' (2013) 87 Philippine Law Journal 1, 6: ('The 1976 Arbitration Rules of the UNCITRAL seem to contain the most restrictive confidentiality provisions, where it is often

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impossible to gain access to documents, while awards and other arbitration-related documents are rarely made public.').

42 CIEL and IISD, *Revision of the UNCITRAL Rules* (n 22).

43 They framed the issue in terms of human rights, which demands ('access to information and public participation'.) CIEL, Press Release, *CIEL Spearheads Efforts for Transparency in UN Arbitration Body* (11 February 2011). <https://www.ciel.org/news/ciel-spearheads-efforts-for-transparency-in-un-arbitration-body/> accessed 24 April 2021. Confidentiality on the other hand was said to ('undermine democratic values and thwart … the human right to access to information'). The UN Secretary General's Special Representative for Business and Human Rights even spoke at one of the Working Group meetings, where he said that ('transparency lies at the very foundation of … the precepts of good governance'). See Markus Gehring and Dimitrij Euler, 'Public Interest in Investment Arbitration' in Euler and others, *Guide to the UNCITRAL Rules on Transparency* (n 5) 19.

44 As one delegate put it, ('the issue [was] not whether to include an additional section governing transparency'), as the amended ICSID Rules had done, but rather to address in-depth ('the scope and level of this transparency and access to information') involving the state. See Ignacio Torterola, 'The Transparency Requirement in the New UNCITRAL Arbitration Rules: A Premonitory View' (*Investment Treaty News*, September 2010) 8, 12; see also Krista Nadakavukaren Schefer, 'Article 1. Scope of Application' in Euler and others, *Guide to the UNCITRAL Rules on Transparency* (n 5) 32: ('The UNCITRAL WG establishes only the procedural rules that parties can select to govern arbitration. These rules, moreover, were designed (and continue) to apply to commercial arbitration but they also can be (and are) called upon to apply to investor-state dispute resolution in any number of for a or before ad hoc tribunals.') (hereafter Schefer, 'Article 1').

45 The revisions did little, if anything, to bring greater transparency. Awards were still ('presumptively secret'), hearings were ('presumptively closed'), and amicus submissions were ('limited'). Levander, 'Resolving "Dynamic Interpretation"' (n 26) 517.

46 UNCITRAL, 'Report of the international trade law commission, Forty-first Session, 16 June–3 July 2008' A/63/17, para 314; GAOR 63d Sess, Supp No 17 and corrigendum: ('As to timing, the Commission agreed that the topic of transparency in treaty-based investor-state arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules.').

47 UNCITRAL, 'Observations by the Government of Canada, Forty-first Session, 16 June–3 July 2008' A/CN.9/662, para 515. Canada further urged the Commission to ('stand against giving investors the power to force investor-state arbitrations to be conducted in secret').

48 UNCITRAL Secretariat, 'Preparation of rules of uniform law on transparency in treaty-based investor-state dispute settlement Fifty-third Session, 4–8 October 2010' A/CN.9/WG.II/WP.160, para 2.

49 UNCITRAL Secretariat, 'Compilation of comments by governments Fifty-third Session, 4–8 October 2010' A/CN.9/WG.II/WP.159; see also 'Addendum 1' A/CN.9/WG.II/WP.159/Add.1; 'Addendum 2' A/CN.9/WG.II/WP.159/Add.2; 'Addendum 3' A/CN.9/WG.II/WP.159/Add.3; 'Addendum 4' A/CN.9/WG.II/WP.159/Add.4.

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50 ibid. Canada, the US, and Australia rank higher on democracy indices, whereas Bahrain, China, Poland, and Russia are more authoritarian states. See generally The Economist Intelligence Unit, *Democracy Index 2020: In sickness and in health?* <https://www.dnevnik.bg/file/4170840.pdf> accessed 10 March 2021.

51 For a more in-depth exploration of each rule and its genesis, see generally Euler and others, *Guide to the UNCITRAL Rules on Transparency* (n 5); Paulsson and Petrochilos, *UNCITRAL Arbitration* (n 8).

52 UNCITRAL 'Report of the Working Group II on the work of its fifty-fourth session' (2011) A/CN.9/717, para 23. (hereafter UNCITRAL, A/CN.9/717).

53 ibid para 24.

54 UNCITRAL, Note by the Secretariat, 'Proposals by Governments and International Organizations' (2011) A/CN.9/WG.II/WP.164, 2–3.

55 UNCITRAL, A/CN.9/717 (n 52) para 58.

56 ibid para 26; Schefer, 'Article 1' (n 44) 41.

57 UNCITRAL, A/CN.9/717 (n 52) para 26.

58 ibid.

59 UNCITRAL, '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 (NAFTA)' (2011) A/CN.9/WG.II/WP.163; (hereafter UNCITRAL, A/CN.9/WG.II/WP.163); UNCITRAL, 'Report of Working Group II on the work of its fifty-third session' A/CN.9/712, para 41 ('An order in the case *Chemtura Corporation v. Government of Canada* and the Canada Model Foreign Investment Protection Agreement were given as examples of documents containing provisions on publication.') (hereafter UNCITRAL, A/CN.9/712).

60 UNCITRAL, A/CN.9/WG.II/WP.163 (n 59) 3, 10.

61 The Rules on Transparency use the word 'Article' instead of 'Rule', but for purposes of this chapter, 'Rule' will be used.

62 See Rules on Transparency (n 4) Rule 3; see also UNCITRAL, 'Report of Working Group II on the work of its fifty-fifth session' (2012) A/CN.9/736, para 58: ('That proposal was seen as establishing a good balance between the documents to be published and the exercise by the arbitral tribunal of its discretion in managing the process.') (hereafter UNCITRAL, A/CN.9/736); Rule 2 also addresses the disclosure of information, specifically ('information at the commencement of the proceedings'). For more, see generally Giuseppe Bianco, 'Article 2. Publication of Information at the Commencement of Arbitral Proceedings' in Euler and others, *Guide to the UNCITRAL Rules on Transparency* (n 5) (hereafter Bianco, 'Article 2').

63 Christopher Kee, 'Article 3. Publication of Documents' in Euler and others, *Guide to the UNCITRAL Rules on Transparency* (n 5) 92 (hereafter Kee, 'Article 3').

64 UNCITRAL, A/CN.9/717 (n 52) para 86 ('In support of that proposal, it was said that the arbitral tribunal would be best placed to determine the documents that should be published, as well as issues of public interest that should be brought to the attention of civil

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society.’); UNCITRAL, A/CN.9/736 (n 62) para 56 (‘providing the parties with a veto … would not promote transparency’).

65 See Rules on Transparency (n 4) Rule 3(1) (‘Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; … 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.’); see also Rule 8.

66 Bianco, ‘Article 2’ (n 62) 109.

67 UNCITRAL, A/CN.9/712 (n 59) para 62: some viewed it as a (‘decisive step towards enhancing the legitimacy of the process’); para 63: a few delegations suggested a rule in line with ICSID, whereby parties could veto publication of the award; but that suggestion was quickly shot down, as such veto by the parties (‘would raise suspicion in the public’); for statistics concerning the transparency of awards and their outcomes, see eg Luke R Nottage and Ana Ubilava, ‘Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry’ (2018) The University of Sydney Law School Legal Studies Research Paper Series No 18/46, 11–12 <https://ssrn.com/abstract=3227401> accessed 10 March 2021.

68 Some thought these documents were critical to understanding the background of the case. UNCITRAL, A/CN.9/717 (n 52) para 81: (‘It was said that providing access to all documents … was an optimal solution, ensuring that the public would have sufficient access to documents.’). Others felt they would do more harm than good and cause undue burden on the publishing party: UNCITRAL ‘Report of Working Group II on the work of its fifty-seventh session’ (2012) A/CN.9/760, para 15 (hereafter UNCITRAL, A/CN.9/760); paras 17–18: (‘Some delegations expressed the concern that the “automatic” production of the exhibits themselves under article 3(1) would be unduly cumbersome, bearing in mind the potentially voluminous nature of exhibits and additionally that redactions may be required.’). See also CIEL and IISD, Lise Johnson and Nathalie Bernasconi-Osterwalder, New UNCITRAL Arbitration Rules on Transparency: Application, *Cont*ent and *Next Steps* (2013) 15, (hereafter CIEL and IISD, *New UNCITRAL Arbitration Rules on Transparency*) <http://ccsi.columbia.edu/files/2014/04/UNCITRAL_Rules_on_Transparency_commentary_FINAL.pdf> accessed 28 November 2020.

69 Rules on Transparency (n 4) Rule 3(2): (‘Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.’) Paulsson and Petrochilos, *UNCITRAL Arbitration* (n 8) 435 aptly describes the contrasting viewpoints on the issue: (‘On the one hand, these documents form a critical part of the evidential record and are key to understanding the documentary evidence, the issues, arguments and outcomes of a dispute … On the other hand, there is an argument that the public “should not be put on the same footing as the parties”, and that reasonably detailed information regarding the subject of the dispute will suffice. Moreover, and equally importantly, publicizing expert reports and witness statements may lead to witness or expert intimidation and threaten the intellectual property protection of experts’ work.’).

70 Bianco, ‘Article 2’ (n 62) 116.

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71 See UNCITRAL, A/CN.9/712 (n 59) para 67; see also Thierry Augsburger, 'Article 7: Exceptions to Transparency' in Euler and others, *Guide to the UNCITRAL Rules on Transparency* (n 5) 259 (hereafter Augsburger, 'Article 7'); Rules on Transparency (n 4) Rule 7(3): ('Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.') See generally Zachary Douglas QC, 'International Arbitration: A Response to DFAT's Review of Australia's Bilateral Investment Treaties' The 2020 Clayton Utz/University of Sydney International Arbitration Lecture, arguing that the formal exceptions to transparency, like the Rules more generally, add to the already escalating costs of investor-state arbitration (14 October 2020) 30:00 <https://www.claytonutz.com/ialecture> accessed 24 April 2021; Luke R Nottage, 'Book in Press with Elgar: "International Commercial and Investor-State Arbitration—Australia and Japan in Regional and Global"' (The University of Sydney—Japanese Law and the Asia-Pacific, 25 August 2020), discussing problems of the (over)formalization of investment treaty arbitration <https://japaneselaw.sydney.edu.au/2020/08/book-in-press-with-elgar/> accessed 11 March 2021.

72 Augsburger, 'Article 7' (n 71) 283.

73 Rules on Transparency (n 4) Rule 7(1): ('Confidential or protected information, as defined in paragraph 2 … shall not be made available to the public … (2) Confidential or protected information consists of: (a) Confidential business information; (b) Information that is protected against being made available to the public under the treaty.') See also UNCITRAL, A/CN.9/736 (n 62) paras 125–26; UNCITRAL, A/CN.9/760 (n 68) para 99. Paulsson nevertheless suggests that the categories set by NAFTA might be of some guidance. See Paulsson and Petrochilos, *UNCITRAL Arbitration* (n 8) 467; see also Augsburger, 'Article 7' (n 71) 263–64, discussing prior definitions of 'confidential business information'.

74 Rules on Transparency (n 4) Rule 7(6): ('Information shall not be made available to the public … where the information … would jeopardize the integrity of the arbitral process … '). See also Augsburger, 'Article 7' (n 71) 292–93, discussing issues that may fall within the scope of Rule 7(6).

75 US Model Bilateral Investment Treaty (2012) art 19; Canada Model Bilateral Investment Treaty (2014) art 31.

76 North American Free Trade Agreement (signed 17 December 1992) art 1111, 32 International Legal Materials 289 (1993); Central American Free Trade Agreement (signed 28 May 2004) art 21.10, 43 International Legal Materials 514.

77 Augsburger, 'Article 7' (n 71) 252–56.

78 This is an important issue for states, particularly when it comes to data privacy. States are increasingly enacting expansive data privacy laws to protect the personal of information of their citizens, such as Korea's Personal Information Protection Act (entered into force 30 September 2011, and the amended version became effective on 5 August 2020) and the General Data Protection Regulation (entered into force 24 May 2016). These laws seem to conflict with or otherwise obstruct the aims of full transparency in investment arbitration. The Rules on Transparency thus seek to balance the two conflicting positions.

79 UNCITRAL, 'Report of Working Group II on the work at the fifty-eighth session' (2013) A/CN.9/765, para 61 (hereafter UNCITRAL, A/CN.9/765).

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80 UNCITRAL, A/CN.9/760 (n 68) para 103; UNCITRAL, A/CN.9/765 (n 79) para 62.

81 UNCITRAL, A/CN.9/765 (n 79) para 60.

82 ibid paras 59–62; 67–78. The compromise was noted in the draft rules as sent to the Commission for approval. UNCITRAL, 'Report of the United Nations Commission on International Trade Law, Forty-sixth Session 2013' A/68/17, para 69 (hereafter UNCITRAL, A/68/17).

83 Rules on Transparency (n 4) Rule 7(2)(c): ('Confidential or protected information consists of: … (c) Information that is protected against being made available to the public, in the case of the information of the respondent, under the law of the respondent, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information.').

84 ibid Rule 7(5): ('Nothing in these Rules requires a respondent state to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.').

85 Augsburger, 'Article 7' (n 71) 287. At 289, Augsburger maintains that the ('essential security') exception is still subject to a ('good faith') review by the tribunal; see also James Claxton, Luke R Nottage, and Brett Williams, 'Litigating, Arbitrating and Mediating Japan-Korea Trade and Investment Tensions' in Shahla F Ali and others (eds), New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution (Wolters Kluwer 2021) 257 (hereafter Claxton and others, *New Frontiers in Asia-Pacific*).

86 Augsburger, 'Article 7' (n 71) 261.

87 See UNCITRAL, A/CN.9/765 (n 79) paras 16–40, 75.

88 Rules on Transparency (n 4) Rule 1(3): ('In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty: (a) The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty.') For its original draft form, see UNCITRAL, A/CN. 9/765 (n 79) paras 34–36, 75.

89 In simple terms, the Rules were adopted as a negotiated package, and there was understandably a desire to ensure that all elements of it, including qualifications and exceptions, would apply en bloc where the Rules apply by virtue of an interstate agreement. See Paulsson and Petrochilos, *UNCITRAL Arbitration* (n 8) 413.

90 See Schefer, 'Article 1' (n 44) 54; see also UNCITRAL Arbitration Rules (entered into force 2013) Rule 1(1): ('[UNCITRAL] disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.').

91 Rules on Transparency (n 4) Rule 1 (3)(a): ('In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that Treaty: (a) the disputing parties may not derogate from these Rules … unless permitted to do so by the treaty'.)

92 The policy rationale is that the Rules were intended to benefit the general public as well as the host state and investor. Paulsson and Petrochilos, *UNCITRAL Arbitration* (n 8) 411.

93 See Rules on Transparency (n 4) Rule 6.

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94 Several different proposals were put forth: (i) that the parties should have the power to veto public hearings; (ii) that the tribunal should have the discretion to decide; or (iii) that hearings should be public by default, subject to certain accommodations made for confidential information and logistical concerns. UNCITRAL, A/CN.9/717 (n 52) para 114.

95 UNCITRAL, A/CN.9/760 (n 68) para 79.

96 Paulsson and Petrochilos, *UNCITRAL Arbitration* (n 8) 459.

97 This proposal was said to provide an ('appropriate balance, including by those that had expressed preference for … a veto right'); UNCITRAL, A/CN.9/736 (n 62) para 100.

98 Rules on Transparency (n 4) Rule 6(1): ('Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ("hearings") shall be public.') See eg Rule 3(1) which provides for the automatic disclosure of hearing transcripts.

99 ibid Rule 6(2): ('Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.') According to Paulsson, Rule 6 nevertheless addresses the concerns raised by the states advocating for a veto. By referring to Rule 7, which defines ('confidential or protected information'), Rule 6(2) thus governs the circumstances in which portions of the hearing should be held in private. See Paulsson and Petrochilos, *UNCITRAL Arbitration* (n 8) 460.

100 Dr Dimsey notes that party involvement under Article 4 is limited to consultation rather than consent. The Working Group felt that leaving the decision to the parties would not be advisable due to the often one-sided nature of third-person submissions. The tribunal thus plays the role as 'gate-keeper'. See Mariel Dimsey, 'Article 4: Submission by a Third Person' in Euler and others, *Guide to the UNCITRAL Rules on Transparency* (n 5) 161 (hereafter Dimsey, 'Article 4').

101 Rules on Transparency (n 4) Rules 4(1), 4(3). Rule 4 is meant to be ('facilitative') rather than ('limiting'). It is intended to give ('active guidance') rather than simply leaving the decision to the tribunal and the parties, see Dimsey, 'Article 4' (n 100) 133.

102 Some states advocated for a rule similar to the NAFTA Statement on non-disputing parties, which provides a detailed list of factors a tribunal must consider before accepting a third-party submission, including whether the submission would assist the tribunal, whether it would address matters within the scope of the dispute, the non-disputing party's interest in the arbitration, and the public interest in the arbitration. UNCITRAL, A/CN.9/717 (n 52) para 119; see also NAFTA Statement (n 34). Others advocated for a less detailed list like the one provided by ICSID for the same purpose, see UNCITRAL, A/CN.9/717 (n 52) para 121; see also ICSID Arbitration Rule 37(2). The drafters ultimately compromised between these two different rules in an attempt to give tribunals both guidance and flexibility, see Dimsey, 'Article 4' (n 100) 178.

103 UNCITRAL, A/CN.9/717 (n 52) para 116.

104 UNCITRAL, A/CN.9/736 (n 62) paras 70–77.

105 ibid para 78.

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106 ibid para 87. See ILC, *Report of the International Law Commission*, 58th Sess (2006) A/61/10, 16, Chapter IV, art 1: ('diplomatic protection consists of the invocation by a state, through diplomatic action or other means of peaceful settlement, of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a natural or legal person that is a national of the former state with a view to the implementation of such responsibility'.).

107 UNCITRAL, A/CN.9/765 (n 79) para 44; see also UNCITRAL, A/CN.9/760 (n 68) para 60: ('[S]ince the non-disputing Party had concluded the treaty, the interpretation thereof might affect its rights thereunder in future proceedings; [plus] the Party's interventions could be helpful to the tribunal's understanding of the treaty.').

108 Paulsson and Petrochilos, '*UNCITRAL Arbitration*' (n 8) 452–53.

109 ibid.

110 Rules on Transparency (n 4) Rule 5(2).

111 ibid Rule 1(1): ('The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") shall apply to investor-state arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("'treaty") concluded on or after 1 April 2014 unless the Parties to the treaty have agreed otherwise.') See CIEL and IISD, *New UNCITRAL Arbitration Rules on Transparency* (n 68) 10.

112 States can indicate whether they choose to apply either the 1976 version or the 2010 revision of the UNCITRAL Arbitration Rules—neither of which incorporate the later-in-time Rules. See Paulsson and Petrochilos, *UNCITRAL Arbitration* (n 8) 400–01: ('[R]eference to the UNCITRAL Arbitration Rules as adopted in 1976 or as revised in 2010 in a treaty concluded after the coming into force of the Transparency Rules would have the effect of "precluding the application of the rules on transparency"'), citing UNCITRAL, A/68/17 (n 82) para 104.

113 Schefer, 'Article 1' (n 44) 51.

114 ibid.

115 ibid 52.

116 Umair Ghori, 'Investment Court System or Regional Dispute Settlement: The Uncertain Future of Investor-State Dispute Settlement' (2018) 30 Bond Law Review 83, 103: ('Obviously, this exercise is not just cumbersome—it may also lead to inconsistencies where certain parties were willing to opt for transparency in some instances while resisting the call for transparency in others. The dichotomy of approaches led to the adoption of the *Mauritius Convention* by UNCITRAL.') (hereafter Ghori, 'Investment Court System or Regional Dispute Settlement').

117 See Mauritius Convention on Transparency (n 1), specifically art 6, which designates the Secretary-General of the United Nations as the Convention's depositary.

118 ibid art 2(1); Neale H Bergman, 'Introductory Note to the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration' (2015) 54 International Legal Materials 747, 747 (hereafter Bergman, 'Introductory Note'); see also UNCITRAL, *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (New York 2014) <https://uncitral.un.org/en/texts/arbitration/conventions/transparency> accessed 28 November 2020: the Mauritius Convention on Transparency is ('an instrument by which

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Parties to investment treaties concluded before 1 April 2014 express their consent to apply the UNCITRAL Rules on Transparency'); see also Lise Johnson, 'The Mauritius Convention on Transparency: Comments on the Treaty and its Role in Increasing Transparency of Investor-State Arbitration' (Columbia Center on Sustainable Investment, September 2014) <http://ccsi.columbia.edu/files/2013/08/Mauritius-Convention-Transparency-Paper-formatted-FINAL.pdf> accessed 28 November 2020: ('This treaty establishes a mechanism through which all parties to existing investment treaties can efficiently and effectively update the procedural rules governing investor-state arbitrations under those treaties so as to effectively implement the Transparency Rules and better take into account the public interest nature of these disputes.') (hereafter Johnson, 'The Mauritius Convention on Transparency').

119 Mauritius Convention on Transparency (n 1) art 2(1). See generally Fietta LLP, 'Mauritius Convention on Transparency in Investor-state arbitration enters into force' <https://www.fiettalaw.com/pil_news/mauritius-convention-on-transparency-in-investor-state-arbitration-enters-into-force> accessed 28 November 2020 (hereafter Fietta, 'Mauritius Convention'); Stephan W Schill, 'The Mauritius Convention on Transparency' (2015) 16 Journal of World Investment and Trade 201, 201–02 (hereafter Schill, 'The Mauritius Convention on Transparency'). Simply put, the Mauritius Convention on Transparency provides ('for transparency of submissions to arbitral tribunals, arbitration hearings, and decisions by arbitral tribunals, and give[s] more room for third-party participation under a uniform set of rules'), irrespective of whether the arbitration in question is governed by the ICSID Convention, the UNCITRAL Arbitration Rules, the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, or the Arbitration Rules of the International Chamber of Commerce; see also Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention serve as a model for the reform of investor-state arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap' (CIDS Research Paper, Geneva Centre for International Dispute Settlement, 3 June 2016) 28 <https://lk-k.com/wp-content/uploads/2016/05/KAUFMANN-KOHLER-POTESTA-CIDS-Research-Paper-Reform-of-Investor-State-Arbitration-2016.pdf> accessed 24 April 2021 (hereafter Kaufmann-Kohler and Potestà, 'Can the Mauritius Convention serve as a model'); see also Ghori, 'Investment Court System or Regional Dispute Settlement' (n 116) 103 ('The effect of the *Mauritius Convention* is that all signatory countries update their procedural rules to that of the *Transparency Rules* within FTAs or BITs concluded before the effective date.').

120 See Bart Wasiak, 'The Mauritius Convention on Transparency Enters into Force' (Oxford University Press, 19 October 2017) <https://oxia.ouplaw.com/page/Mauritius-Convention> accessed 28 November 2020 (hereafter Wasiak, 'The Mauritius Convention'); Fietta, 'Mauritius Convention' (n 119); see also Esmé Shirlow, 'A Step Toward Greater Transparency: The UN Transparency Convention' (Kluwer Arbitration Blog, 30 March 2015) <http://arbitrationblog.kluwerarbitration.com/2015/03/30/a-step-toward-greater-transparency-the-un-transparency-convention/?doing_wp_cron=1590221718.2186729907989501953125> accessed 28 November 2020: ('The Convention is designed to provide additional scope for the application of the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration.').

121 See Bergman, 'Introductory Note' (n 118) 748; Mauritius Convention on Transparency (n 1) arts 2(1), 3(1)(a) and (b).

122 Wasiak, 'The Mauritius Convention' (n 120).

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123 Mauritius Convention on Transparency (n 1) art 2(2).

124 Wasiak, 'The Mauritius Convention' (n 120). See also Mauritius Convention on Transparency (n 1) arts 2(2), 3(1); Bergman, 'Introductory Note' (n 118) 748 ('[T]he Rules are to apply even when the claimant's home state is not a party to the Convention or, if it is a party, has taken a reservation with respect to the specific investment treaty under which the arbitration arises, provided that: the respondent in the arbitration has not taken a reservation opting out of the unilateral offer, carving out the specific investment treaty under which the arbitration arises, or carving out the set of rules or procedures, if other than the UNCITRAL Arbitration Rules, governing the arbitration; and the claimant accepts the respondent's unilateral offer.').

125 Arbitration Institute of the Stockholm Chamber of Commerce, *Mauritius Convention and UNCITRAL Rules on Transparency in SCC cases* <https://sccinstitute.com/media/221866/updated-application-of-mauritius-convention-and-uncitral-rules-on-transparency-to-scc-treaty-arbitration_red.pdf> accessed 28 November 2020: ('In case of a conflict between the UNCITRAL Rules on Transparency and the underlying investment treaty, the treaty applies. However, when the UNCITRAL Rules on Transparency apply because both respondent state and the home state of the claimant are parties to the Mauritius Convention (and have not made any relevant reservations), if there is a conflict between the UNCITRAL Rules on Transparency and the underlying investment treaty, the UNCITRAL Rules on Transparency apply'); see also Rules on Transparency (n 4) Rule 1(7); Mauritius Convention on Transparency (n 1) art 2(4).

126 Mauritius Convention on Transparency (n 1) art 2(4): ('The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to investor-state arbitrations under paragraph 1.').

127 Rules on Transparency (n 4) Rule 1(7): ('Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.').

128 Paulsson and Petrochilos, *UNCITRAL Arbitration* (n 8) 47.

129 Mauritius Convention on Transparency (n 1) art 3(4).

130 Ali and Repousis, 'Opportunity or Threat?' (n 17) 246.

131 Bergman, 'Introductory Note' (n 118) 748; see also Mauritius Convention on Transparency (n 1) arts 3(1)(a) and (b), 3(1)(c), and 3(2); see also Fietta, 'Mauritius Convention' (n 119) ('[I]n the event of a revision of the UNCITRAL Rules on Transparency, a party may, within six months, of the adoption of such revision, declare that it will not apply such revised provision.').

132 Bergman, 'Introductory Note' (n 118) 748.

133 ibid 750 fn 33, citing Mauritius Convention on Transparency (n 1) arts 4(6) and 5.

134 Mauritius Convention on Transparency (n 1) art 3(4): ('No reservations are permitted except those expressly authorised in this article.').

135 See UNCITRAL, 'Report of Working Group II at its fifty-nineth session' (2013) A/CN.9/794, para 132; see also Johnson, 'The Mauritius Convention on Transparency' (n 118) 11.

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136 Sadie Buls, ‘Mauritius Convention on Transparency Enters into Force’ (ArbitrationLinks Blog, 25 January 2018) <https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2018/january/mauritius-convention-on-transparency-enters-into-force> accessed 28 November 2020 (hereafter Buls, ‘Mauritius Convention’).

137 Schill, ‘The Mauritius Convention on Transparency’ (n 119) 202.

138 See ibid 203: (‘In this sense, the “Mauritius approach” may become a model for how certain issues of international investment law can be reformed multilaterally without the need to enter into comprehensive multilateral negotiations.’); see also Ghori, ‘Investment Court System or Regional Dispute Settlement’ (n 116) 103, summarizing the approach adopted in the Mauritius Convention on Transparency (‘as involving drafting of “substantive” transparency rules, followed by a multilateral treaty that elaborates on extending those rules to existing FTAs/BITs’), which cites Kaufmann-Kohler and Potestà, ‘Can the Mauritius Convention serve as a model’ (n 119) 27–30 [57]–[68], 94 [275].

139 UNCTAD, *Investment Policy Hub: International Investment Agreements* <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 28 November 2020, provides a comprehensive database of investment treaties and model agreements.

140 Jus Mundi <https://jusmundi.com/en/> accessed 28 November 2020.

141 All of the investment agreements signed by Brazil rely on dispute prevention measures, followed by state-to-state arbitration if necessary. See, eg Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation (signed 11 April 2018) arts 23–24; see also Geraldo Vidigal and Beatriz Stevens, ‘Brazil’s New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future’ (2018) 19 Journal of World Trade 475.

142 As noted above in Section B.3(f), reference to the 1976 UNCITRAL Arbitration Rules or the 2010 UNCITRAL Arbitration Rules preclude application of the Rules on Transparency. Paulsson and Petrochilos, *UNCITRAL Arbitration* (n 8) 18, citing UNCITRAL, A/68/17 (n 82) para 104.

143 Compare Agreement between the Republic of Moldova and the United Arab Emirates for the Reciprocal Promotion and Protection of Investments (signed 10 July 2017, not yet in force) art 14(3)(d), which provides for arbitration under the UNCITRAL Rules (‘as amended in 2010’) (Moldova–UAE BIT) with Agreement between the Government of the United Arab Emirates and the Government of the Republic of Mauritius for the Promotion and Reciprocal Protection of Investments (entered into force 28 December 2017) art 10, which provides for arbitration under the UNCITRAL Rules (‘as amended by the last amendment accepted by both Contracting Parties’). The former does not attach the Rules on Transparency, whilst the latter does.

144 For completeness, treaties that reference older versions of the UNCITRAL Arbitration Rules include statements such as:

- (‘Subject to the above, the Tribunal shall follow the Arbitration Rules of the United Nations Commissions for International Trade Law (UNCITRAL) 1976’), in Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Qatar for the Promotion and Reciprocal Protection of Investments (signed 14 November 2017) art 16;

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- ('UNCITRAL Arbitration Rules means arbitration rules of the United Nations Commission on International Trade Law, as adopted by the United Nationals General Assembly on 15 December 1976, as revised in 2010'), in Free Trade Agreement between Sri Lanka and Singapore (entered into force 1 May 2018) art 10.1.

Treaties that reference the 2013 version of the UNCITRAL Arbitration Rules use statements such as:

- ('"UNCITRAL Arbitration Rules" means, with respect to a claim submitted to arbitration under Section C, the arbitration rules of the United National Commission on International Trade Law in effect on the date on which the claim is submitted'), in Investment Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Chile (entered into force 14 July 2019) art 1 (Chile–Hong Kong SAR BIT);

- ('UNCITRAL Arbitration Rules means the Arbitration Rules of the United Nations Commission on International Trade Law, in their most recent form'), in Agreement Between Canada and Mali for the Promotion and Protection of Investments (entered into force 8 June 2016) art 1 (Canada—Mali BIT);

- ('UNCITRAL Arbitration Rules means the arbitration rules of the United National Commission on International Trade Law,') in Trans-Pacific Partnership (signed 4 February 2016) art 9.1 (TPP).

- ('The arbitration rules applicable under paragraph 4 that are in effect on the date the claim or claims were submitted to arbitration under this Section shall govern the arbitration except to the extent modified by this Agreement'), in TPP art 9.19(6).

145 See Appendix. Three of these treaties make no reference to UNCITRAL whatsoever. See Agreement between the Government of the Republic of Kazakhstan and the Government of the United Arab Emirates on Promotion and Reciprocal Protection of Investments (signed 24 March 2018); Bilateral Agreement for the Promotion of Investments between the Government of the Republic of Colombia and the Government of the United Arab Emirates (signed 12 November 2017); Agreement between the Government of Kenya and the Government of the United Arab Emirates on the Promotion and Reciprocal Protection of Investments (entered into force 5 June 2017).

146 See eg Free Trade Agreement between the Government of the Republic of Korea and the Government of the Socialist Republic of Viet Nam (entered into force 20 December 2015) fn 25: ('For greater certainty, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall not be applied in this Chapter'); see also Agreement on Investment under the Framework Agreement establishing a Free Trade Area between the Republic of Korea and the Republic of Turkey (entered into force 20 August 2018) section A, which provides for arbitration under the UNCITRAL Rules ('as amended in 2010').

147 See eg Free Trade Agreement between Singapore and Turkey (entered into force 1 October 2017); and Moldova—UAE BIT (n 143).

148 See Agreement between the Government of the Republic of Uzbekistan and the Government of the Republic of Korea for the reciprocal promotion and protection of investments (signed 19 April 2019) fn 5 ('Unless the Contracting Parties otherwise agree, the United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration (UN Doc A/CN.9/783) (the "UNCITRAL Transparency Rules") shall not apply to arbitrations initiated pursuant to paragraph 2(b)(iii) of Article 11. The Contracting Parties shall enter into consultations on the future application

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of the UNCITRAL Transparency Rules to arbitrations initiated pursuant to paragraph 2(b)(iii) of Article 11, upon request of a Contracting Party'); Australian Government, *FTA text and tariff schedules*, Side Letter on Transparency Rules Applicable to Investor-State Dispute Settlement (2015) <https://www.dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Pages/official-documents> accessed 24 April 2021, which contemplated future negotiations on the Rules.

149 Agreement between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments (entered into force 28 September 2019) art 11: ('The Contracting Parties will to the extent possible and in a manner not disruptive to orderly conduct of international arbitration proceedings ensure transparency of such proceedings taking into account best practices in this area, including the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.').

150 Australia–Indonesia Comprehensive Economic Partnership Agreement (entered into force 5 July 2020) art 14.31; Free Trade Agreement between the Republic of Korea and the Republics of Central America (entered into force 1 November 2019) art 9.22 (Central America–Korea FTA); Agreement between the State of Israel and Japan for the Liberalization, Promotion and Protection of Investment (entered into force 5 October 2017) art 24.14 (Israel–Japan BIT); Free Trade Agreement between the Government of the Republic of Peru and the Government of the Republic of Honduras (entered into force 1 January 2017) art 12.22 (Honduras–Peru FTA); Free Trade Agreement between Korea and New Zealand (signed 23 March 2015) art 10.27 (Republic of Korea–New Zealand FTA); Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India (signed 12 November 2014) art 20 (ASEAN–India Investment Agreement); Free Trade Agreement between Canada and the Republic of Korea (entered into force 1 January 2015) art 8.31 (Canada–Republic of Korea FTA).

151 ASEAN–India Investment Agreement (n 150) art 17.

152 See Appendix.

153 Agreement between the Government of Hungary and the Government of the Kyrgyz Republic for the Promotion and Reciprocal Protection of Investments (signed 29 September 2020) art 11; Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments (signed 5 April 2019) art 14; Agreement between the Government of Hungary and the Government of the Republic of Cabo Verde for the Promotion and Reciprocal Protection of Investments (signed 28 March 2019) art 11; Agreement for the reciprocal promotion and protection of investments between Colombia and France (entered into force 14 October 2020) art 15; Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments (entered into force 17 April 2015) art 10.3; Agreement between the Government of the Hellenic Republic and the Government of the United Arab Emirates on the Promotion and Reciprocal Protection of Investments (entered into force 6 March 2016) art 10.4; Agreement for the Promotion and Protection of Investments between the Republic of Austria and the Government of the Kyrgyz Republic (entered into force 1 October 2017) art 14(3); The Reciprocal Promotion and Protection of Investments between the Republic of Nicaragua and the Islamic Republic of Iran (signed 10 August 2019); The Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar (signed 6 November 2016).

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154 Art 3.46 of the EU–Viet Nam Investment Protection Agreement (signed 30 June 2019) for instance gives the state rather than the tribunal the discretion to publish exhibits. The other two treaties—both signed by Canada—take the opposite approach and dispose of exhibits like expert reports under art 3(2). Foreign Investment Promotion and Protection Agreement between Canada and Hong Kong (entered into force 6 September 2016) art 27; Canada and EU Comprehensive Economic and Trade Agreement (provisional entry into force 21 September 2017) art 8.36. That is, exhibits will be disclosed automatically if ('any person') so requests, thus removing all discretion over the issue.

155 Iran agreed to ('duly consider') the Rules, presumably on a case-by-case basis. Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (entered into force 30 August 2017) art 14: ('The UNCITRAL rules on transparency in treaty-based investor-state arbitration shall apply to any international arbitration proceedings initiated against the Slovak Republic pursuant to this Agreement. The Islamic Republic of Iran shall duly consider the application of the UNCITRAL rules on transparency in treaty-based investor-state arbitration to any international arbitration proceedings initiated against the Islamic Republic of Iran pursuant to this Agreement') (Slovakia–Iran BIT). The UAE ('reserve[d] the right not to apply') the Rules on a case-by-case basis as well. Agreement between the Slovak Republic and the United Arab Emirates for the Promotion and Reciprocal Protection of Investments (entered into force 5 February 2018) art 24: ('The UNCITRAL Rules on Transparency in treaty-based investor-state arbitration shall apply to any international arbitration proceedings initiated against the Slovak Republic pursuant to this Agreement. However, the United Arab Emirates reserves the right not to apply UNCITRAL Rules on Transparency in treaty-based investor-state arbitration to any international arbitration proceedings initiated against the United Arab Emirates pursuant to this Agreement') (Slovakia–UAE BIT).

156 Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Czech Republic and the Government of the Islamic Republic of Iran (signed 18 December 2017) art 11: ('The UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration shall apply to any international arbitration proceedings initiated against the Czech Republic pursuant to this Agreement. The Islamic Republic of Iran may consider the application of the UNCITRAL rules on transparency to any international arbitration proceedings initiated against the Islamic Republic of Iran pursuant to this agreement') (Czech Republic–Iran BIT).

157 See Appendix.

158 Rules on Transparency (n 4) Rule 1(7) ('Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.').

159 See Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment (signed 8 January 2020) art 16(11) (Japan–Morocco BIT); Agreement between Japan and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investment (entered into force 1 August 2020) art 23; Agreement between Japan and Mongolia for an Economic Partnership (entered into force 7 June 2016) art 10.13.19; Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment (entered into force 14 April 2017) art 20.18; Agreement between Japan and the Sultanate of Oman for the Reciprocal Promotion and Protection of Investment (entered into force 21 July 2017) art 15.12; Agreement between Japan and the United Arab Emirates for the Promotion and Protection of Investment (entered into force 26 August 2020) art 20; Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and

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Protection of Investment (entered into force 14 September 2017) art 15.13; Israel–Japan BIT (n 150) art 24.14; Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment (signed 1 December 2018) art 19; Art 22.3 of the Treaty between the Republic of Belarus and the Republic of India on Investments (signed 24 September 2018) sets a similar standard: ('An award of a Tribunal rendered under this Chapter shall be made publicly available, subject to the redaction of confidential information. Where a Defendant Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, all other documents submitted to, or issued by, the Tribunal shall also be publicly available, subject to the redaction of confidential information') (Belarus–India BIT).

160 There is another way to read this clause such that, in addition to the disclosure requirements mandated by Rule 3 the disputing party is free to disclose any additional materials unilaterally, without any additional approval from the tribunal.

161 Agreement between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments (entered into force 23 August 2019) art 30(1): ('All other documents submitted to, or issued by, the Tribunal shall be publicly available unless the disputing parties otherwise agree, subject to the redaction of confidential information') (Canada–Moldova BIT); Agreement between Canada and Mongolia for the Promotion and Protection of Investments (entered into force 24 February 2017) art 30; Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea (entered into force 27 March 2017) art 31; Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments (entered into force 11 October 2017) art 32(1); Canada—Côte d'Ivoire Foreign Investment Promotion and Protection Agreement (entered into force 14 December 2015) art 30(1); Canada–Mali BIT (n 144) art 30(1); Canada–Senegal Foreign Investment Promotion and Protection Agreement (entered into force 5 August 2016) art 31(1); Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments (entered into force 27 April 2015) art 31(1).

162 Art 31(1) of the Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China (entered into force 17 January 2020) reads: ('Subject to paragraph 2 and paragraph 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 in accordance with Articles 29.2, 29.3 and 34; (d) minutes or transcripts of hearings of the tribunal, if available; and (e) orders, awards and decisions of the tribunal') (Australia–Hong Kong SAR Investment Agreement). See also United States–Mexico–Canada Agreement (entered into force 1 July 2020) art 14.D.8; Belarus–India BIT (n 159) art 22.1; Comprehensive and Progressive Agreement for Trans-Pacific Partnership (entered into force 30 December 2018) art 9.24 (CPTPP); Peru–Australia Free Trade Agreement (entered into force 11 February 2020) art 8.25 (Australia–Peru FTA); Free Trade Agreement between Argentina and Chile (entered into force 1 May 2019) art 8.32(2) (Argentina–Chile FTA); Chile–Hong Kong SAR BIT (n 144) art 28(1); TPP (n 144) art 9.24; Agreement between the Government of the United Arab Emirates and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (entered into force 25 January 2018) art 20(1); Central America–Republic of Korea FTA (n 150) art 9.22(1); Honduras–Peru FTA (n 150) art 12.22;

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Republic of Korea–New Zealand FTA (n 150) art 10.27; Canada–Republic of Korea FTA (n 150) art 8.35.

163 Other parts of the Australia–Hong Kong Investment Agreement (n 162) confirm this reading. Pursuant to art 24.5, parties can modify any applicable rule set, including the Rules. By identifying some documents to be disclosed, but not others, the parties, in effect, modified Rule 3 to limit the types of documents that must be disclosed. For more information on the level of transparency within Australia's recent investment treaties, see generally Luke R Nottage and Ana Ubilava, 'Novel and Noteworthy Aspects of Australia's Recent Investment Agreements and ISDS Policy: The CPTPP, Hong Kong, Indonesia and Mauritius Transparency Treaties' in New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution (Wolters Kluwer 2021) 117.

164 See Section B.3.b.

165 See Central America–Republic of Korea FTA (n 150) art 23.4; Republic of Korea–New Zealand FTA (n 150) art 10.27(3).

166 UNCITRAL, A/CN.9/760 (n 68) paras 105–06.

167 Under art 8.32(3) of the Argentina–Chile FTA (n 162): ('*the disputing parties* may agree that the hearings be open to the public') (emphasis added).

168 Section 9.17(3) of the China–Australia Free Trade Agreement (entered into force 20 December 2015) states: ('With the agreement of the respondent, the tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements.').

169 See Augsburger, 'Article 7' (n 71) 295–97.

170 Standard forms of the text include: Canada–Moldova BIT (n 161) art 30(2) ('Hearings held under this Section shall be open to the public. The Tribunal may hold portions of hearings in camera to the extent necessary to ensure the protection of confidential information'); CPTPP (n 162) art 9.24(2) ('The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. If a disputing party intends to use information in a hearing that is designated as protected information or otherwise subject to paragraph 3 it shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect such information from disclosure which may include closing the hearing for the duration of the discussion of that information'); Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016) art 10(5) ('The tribunal shall conduct hearings open to the public provided that any protected information that is submitted to the tribunal shall be protected in accordance with the applicable law.').

171 Australia–Peru FTA (n 162) art 8.24.

172 Bergman, 'Introductory Note' (n 118) 747.

173 Buls, 'Mauritius Convention' (n 136): ('On 18 April 2017, Switzerland ratified the Mauritius Convention, following Mauritius and Canada in doing so. The Mauritius Convention required three ratifications for entry into force and therefore gained force of

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law as between these three states, now being Parties to the Convention, on 18 October 2017.').

174 See UNCITRAL, *Status—United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> accessed 28 November 2020, showing the latest status of the Mauritius Convention (hereafter UNCITRAL, 'Status—Transparency Convention'); see also Alison Ross, 'States Sign Convention on Transparency' (2015) 10(2) Global Arbitration Review 7.

175 Mauritius ratified the Mauritius Convention on Transparency (n 1) on 5 June 2015, whilst Canada ratified it on 12 December 2016. However, the Mauritius Convention on Transparency did not enter into force until 18 October 2017. See UNCITRAL, 'Status—Transparency Convention' (n 174).

176 ibid. Switzerland ratified the Mauritius Convention on Transparency on 18 April 2017.

177 ibid. Cameroon ratified the Mauritius Convention on Transparency on 18 June 2018, but it did not enter into force until 18 December 2018. Gambia ratified the Mauritius Convention on Transparency on 28 September 2018, and it entered into force on 28 March 2019.

178 ibid. Australia ratified the Mauritius Convention on Transparency on 17 September 2020, but it does not enter into force until 17 March 2021. Bolivia ratified the Mauritius Convention on Transparency on 13 October 2020, and it entered into force on 13 April 2021.

179 See UNCITRAL, 'Status—United Nations Convention on International Settlement Agreements Resulting from Mediation' (2018) <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status> accessed 30 April 2021.

180 See Jeffry Frieden, 'The backlash against globalization and the future of the international economic order' (*The Next Phase of Globalisation: Capitalism and Inequality in the Industrialized World*, February 2018) <https://scholar.harvard.edu/files/jfrieden/files/frieden_future_feb2018.pdf> accessed 30 April 2021; see also Peter S Goodman, 'A Global Outbreak is Fueling the Backlash to Globalization' (*NY Times*, 5 March 2020) <https://www.nytimes.com/2020/03/05/business/coronavirus-globalism.html> accessed 30 April 2021 ('[T]he coronavirus is merely the latest force to reveal the deficiencies of globalization as it has been managed in recent decades—an under-regulated, complacent form of interconnection that has left communities vulnerable to a potent array of treats. From the worldwide financial crisis of 2008 to climate change, ordinary people have concluded that authorities cannot be trusted to keep them secure. That has allowed politicians to attack legitimate problems with simplistic solutions, like trade protectionism and armored borders.').

181 Mike Moore, 'The Backlash against Globalization?' (*WTO News*, 26 October 2000) <https://www.wto.org/spanish/news_s/spmm_s/spmm39_s.htm> accessed 30 April 2021.

182 ibid 135.

183 Mauritius Convention on Transparency (n 1) art 2(1)–(2).

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184 Agreement between the Swiss Confederation and the Republic of Mauritius for the promotion and Protection (entered into force 21 April 2000); Agreement between Canada and the Republic of Cameroon for the Reciprocal Promotion and Protection of Investments (entered into force 16 December 2016); and Agreement between the Swiss Confederation and the Republic of the Gambia in the Promotion and Reciprocal Protection of Investments (entered into force 30 March 1994).

185 In 2018, Australia amended its international arbitration legislation that belatedly extended automatic confidentiality from 2015 to all international arbitrations seated in Australia. See Luke R Nottage, 'Confidentiality versus Transparency in International Arbitration: Asia-Pacific Tensions and Expectations' (2020) 16 Asian International Arbitration Journal 1, 1–23.

186 See UNCTAD Investment Policy Hub, *Switzerland* <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/203/switzerland> accessed 28 November 2020.

187 Query why Switzerland would ratify the Mauritius Convention on Transparency—and formally enter it into force—if it does not participate in any investment arbitrations. That question is beyond the scope of this chapter.

188 *Christian Doutremepuich and Antoine Doutremepuich v Republic of Mauritius*, Terms of Appointment, PCA Case No 2018-37, 9 August 2018 [15], [57].

189 *Dawood Rawat v Republic of Mauritius*, PCA Case No 2016-20; *Thomas Gosling and others v Republic of Mauritius*, ICSID Case No ARB/16/32.

190 *Westmoreland Mining Holdings, LLC v The Government of Canada*, ICSID Case No UNCT/20/3; *Tennant Energy, LLC v The Government of Canada*, PCA Case No 2018-54; *Resolute Forest Products Inc v The Government of Canada*, PCA Case No 2016-13.

191 See eg *Resolute Forest Products Inc v The Government of Canada*, Confidentiality Order, PCA Case No 2016-13, 14 October 2016.

192 UNCITRAL, A/CN.9/717 (n 52) paras 26 and 58.

193 *Hope Services LLC v Republic of Cameroon*, ICSID Case No ARB/20/2.

194 *West African Aquaculture Ltd, Kurt Lennart Hansson and Martje Bolt Hansson v Republic of The Gambia*, ICSID Case No ARB/18/10; *APCL Gambia BV v Republic of The Gambia*, ICSID Case No ARB/17/40.

195 See UNCITRAL, 'Status—Transparency Convention' (n 174). For completeness, one arbitration was filed against Australia after it had signed the Convention but prior to ratification or entry into force. *APR Energy LLC, Power Rental Asset Co Two LLC, Power Rental Op Co Australia LLC v Australia*, UNCITRAL. The case appeared to be a non-starter however since the Australia–United States FTA (entered into force 1 January 2005) did not have an ISDS provision. See Amokura Kawharu and Luke R Nottage, 'Renouncing Investor-State Dispute Settlement in Australia, then New Zealand: Déjà vu' (2018) The University of Sydney Law School Legal Studies Research Paper Series No 18/03, 30–31 <https://ssrn.com/abstract=3116526> accessed 11 March 2021.

196 *DP World PLC v Kingdom of Belgium*, ICSID Case No ARB/17/21.

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197 *Teyliom International and others v Republic of Benin*, ICSID Case No ARB/20/24; *Puma Energy Holdings (Luxembourg) SARL v the Republic of Benin*, SCC Case No SCC EA 2017/092.

198 *Société d'Energie et d'Eau du Gabon and Veolia Africa v Gabonese Republic and Société de Patrimoine du service public de l'eau potable, de l'énergie électrique et de l'assainissement*, ICSID Case No ARB/18/36.

199 *Strabag SE, Erste Nordsee-Offshore Holding GmbH and Zweite Nordsee-Offshore Holding GmbH v Federal Republic of Germany*, ICSID Case No ARB/19/29.

200 *AHG Industry GmbH & Co KG v Republic of Iraq*, ICSID Case No ARB/20/21; *Itisaluna Iraq LLC and others v Republic of Iraq*, ICSID Case No ARB/17/10; *Agility Public Warehousing Company KSC v Republic of Iraq*, ICSID Case No ARB/17/7.

201 *Hamburg Commercial Bank AG v Italian Republic*, ICSID Case No ARB/20/3; *Veolia Propreté SAS v Italian Republic*, ICSID Case No ARB/18/20; *Rockhopper Italia SpA, Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v Italian Republic*, ICSID Case No ARB/17/14; *VC Holding II Sarl and others v Italian Republic*, ICSID Case No ARB/16/39; *ESPF Beteiligungs GmbH, ESPF Nr 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co KG v Italian Republic*, ICSID Case No ARB/16/5.

202 *LTME Mauritius Ltd and Madamobil Holdings Mauritius Ltd v Republic of Madagascar*, ICSID Case No ARB/17/28; *(DS)2, SA, Peter de Sutter and Kristof De Sutter v Republic of Madagascar*, ICSID Case No ARB/17/18.

203 The other states—namely, the Congo, Finland, France, Luxembourg, the Netherlands, Sweden, Syria, the United Kingdom, and the US—have not had any recent investment arbitration disputes.

204 *Iberdrola, SA (España) 2. Iberdrola Energía, SAU v Plurinational State of Bolivia*, Acta de Constitución, PCA Case No 2015-15, 7 August 2015 [14].

205 *Banco Bilbao Vizcaya Argentaria SA v Plurinational State of Bolivia*, ICSID Case No ARB(AF)/18/5.

206 *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda v Plurinational State of Bolivia*, Procedural Order No 2, PCA Case No 2018-39, 8 March 2019.

207 See UNCITRAL, A/CN.9/712 (n 59) paras 95–100, which sets out the Working Group's debate on whether the investor should be able to reject the state's offer to arbitrate under the Rules; Dimitrij Euler and Maxi Scherer, 'Conclusion: The Rules as a Swing of the Pendulum' in Euler and others, *Guide to the UNCITRAL Rules on Transparency* (n 5) 353, which describes how the Rules ('level the playing field') between investors and states, in that both will be subject to increased public scrutiny and accountability.

208 The UNCTAD Database of investment treaties only lists two treaties signed in 2020: Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India (entered into force 25 January 2020), which does not provide for investor-state arbitration; Japan–Morocco BIT (n 159).

209 Kee, 'Article 3' (n 63) 105–21.

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210 UNCITRAL, A/CN.9/760 (n 68) para 15: (‘Some delegations expressed the concern that the “automatic” production of the exhibits themselves under article 3(1) would be unduly cumbersome, bearing in mind the potentially voluminous nature of exhibits and additionally that redactions may be required’); see also ICSID, ‘Compendium of State Comments on Working Paper # 2’ (28 June 2019) 154: (‘[S]ome documents are merely procedural, and their publication could negatively affect the proceedings’ good governance and may create greater confusion if taken out of context. Furthermore, they may create greater confusion and affect the reputation of individuals acting in the process if taken out of context.’) (hereafter ICSID, ‘Compendium 2019’).

211 UNCITRAL, A/CN.9/717 (n 52) para 81 (‘It was said that providing access to all documents … was an optimal solution, ensuring that the public would have sufficient access to documents.’).

212 ICSID, ‘Compendium 2019’ (n 210) 154–55 (comments from Costa Rica); ICSID, ‘Compendium of State Comments on Working Paper # 3’ (27 February 2020) 41–42 (comments from Colombia and Costa Rica) (hereafter ICSID, ‘Compendium 2020’).

213 ICSID, ‘Compendium 2020’ (n 212) 41–12 (comments from South Korea, Georgia, and Panama).

214 ibid (comments from Argentina and Paraguay).

215 ICSID, ‘Proposals for Amendment of the ICSID Rules, Working Paper #4’ (February 2020) 66 <https://icsid.worldbank.org/sites/default/files/amendments/WP_4_Vol_1_En.pdf> accessed 28 November 2020 (hereafter ICSID, ‘Proposals for Amendment’): Draft ICSID Rule 64 (‘With consent of the parties, the Centre shall publish any written submission or supporting document filed by a party in the proceeding, with any redactions agreed to by the parties and jointly notified to the Secretary-General.’).

216 UNCITRAL, A/CN.9/717 (n 52) para 114; UNCITRAL, A/CN.9/760 (n 68) para 79; Paulsson and Petrochilos, *UNCITRAL Arbitration* (n 8) 459.

217 ICSID, ‘Proposals for Amendment’ (n 215) Draft ICSID Rule 6: (‘The Tribunal shall allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal, to observe hearings, unless either party objects.’).

218 See Section C.1(a).

219 See Section B.3(a).

220 As noted above, three treaties do not fall into either Category One or Two because the obligations for the two respective states are different: Slovakia–Iran BIT (n 155); Slovakia–UAE BIT (n 155); Czech Republic–Iran BIT (n 153).

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