

COMMENTS ON DRAFT RULES ON TRANSPARENCY IN INVESTOR–STATE ARBITRATION

One year after Working Group II began its work on the limited issue of ensuring transparency in investor–State arbitration, the Secretariat has produced draft options for the Working Group to consider adopting as new rules. This note identifies those options that in our view best further the Working Group’s mandate to ensure transparency, and proposes modifications to some of the language used in the draft options. This note also sets out the International Institute for Sustainable Development (IISD) and the Center for International Environmental Law’s (CIEL) general and specific comments regarding the Draft Articles. These comments do not address all matters or issues raised by the rules or in the Secretariat’s note. Rather, they analyze the extent to which the Draft Articles would advance or impair the Working Group’s mandate¹ and efforts to increase the openness of investor–State arbitrations which, by their very nature, are matters of public interest.²

¹ See Report of the United Nations Commission on International Trade Law (UNCITRAL) Commission, 41st Sess. (June 16–July 3, 2008), para. 314.

² CIEL and IISD have produced a number of papers addressing the public interest nature of investor–State arbitrations. These are available at <http://ciel.org/Publications/pubtae.html> and http://www.iisd.org/investment/dispute/arbitration_rules.aspx.

Contents

GENERAL COMMENTS.....	3
<i>Ensuring Transparency: Changing the non-transparent status quo.....</i>	3
<i>Ensuring Transparency: Producing rules that will make arbitrations more, not less, transparent</i>	4
<i>Ensuring Transparency: Facilitating, not frustrating, widespread application of the new rules</i>	4
ARTICLE-BY-ARTICLE COMMENTS.....	5
Draft Article 1: Scope of application and structure of the rules.....	5
Draft Article 2: Initiation of arbitral proceedings.....	7
Draft Article 3: Publication of documents	8
Draft Article 4: Publication of arbitral awards	10
Draft Article 5: Submissions by third parties (“amicus curiae”) in arbitral proceedings.....	11
Draft Article 6: Hearings and publication of transcripts of hearings.....	12
Draft Article 7: Exceptions to transparency	14
Draft Article 8: Repository of published information (“registry”).....	16
SUMMARY OF PREFERRED OPTIONS.....	16
Article 1.....	16
Article 2.....	17
Article 3.....	17
Article 4.....	17
Article 5.....	18
Article 6.....	18
Article 7.....	18
Article 8.....	20

GENERAL COMMENTS

To meet the Commission's instruction to ensure transparency in investor-State arbitration requires two things: one is the development of procedural rules that require regular, automatic and prompt disclosure of initiation of arbitrations, documents submitted to tribunals, orders, decisions and awards issued by tribunals, and open hearings and/or published transcripts. The other is ensuring that those procedural rules on transparency have the widest possible application in investor-State disputes arising under existing and future treaties.

On the matter of content, the eight Draft Articles contain a number of crucial ingredients for accomplishing the task assigned by the Commission. Each illustrates concrete ways discussed in the Working Group of increasing transparency in investor-State arbitrations from the time the dispute is initiated, through the duration of the proceedings, and up to the time when an award is issued.

But while many of the options represent important steps forward, a few contain language that would not be consistent with the task assigned by the Commission. Certain options would entrench the current non-transparent status quo the Working Group is entrusted with changing, or even threaten to render the UNCITRAL arbitration rules less transparent than they currently are. Moreover, even if the rules were drafted to ensure a significant degree of openness in the arbitrations to which they applied, some language in the Draft Articles would effectively render those achievements moot by imposing limits on use of the rules.

Ensuring Transparency: Changing the non-transparent status quo

The Working Group is undertaking the present exercise because the Commission has decided that transparency of investor-State arbitrations under the UNCITRAL arbitration rules should be *increased*. Some proposals, however, would have the Working Group develop rules on transparency that go no further than existing practice under the UNCITRAL arbitration rules. Under the 1976 and 2010 versions of the UNCITRAL arbitration rules, for example, one party can block the other party's desire to provide for open hearings. Additionally, under the 1976 and 2010 versions of the UNCITRAL arbitration rules, tribunals exercise significant discretion in determining whether and to what extent to close off proceedings from the public. As the case of *Biwater v. Tanzania* disconcertingly illustrates, tribunals have removed arbitrations from the public view precisely because there has been significant public interest in the dispute, and have even done so without any showing that public awareness of the case would have any actual negative impact on the proceedings. Allowing tribunals to retain this type of discretion to shield arbitrations from the public view would therefore also represent codification of the currently opaque and secretive status quo, rather than a step forward in transparency.

Nevertheless, some language in the Draft Articles would have this effect, granting tribunals essentially unbridled discretion to determine whether and what extent to close off proceedings from the public view (e.g., language in Draft Article 3, options 2 & 3; Draft Article 6(1), option 2; Draft Article 6(2); Draft Article 7(1)(b); and Draft Article 7(5)). Language in Draft Article 6(1), option 2, would likewise entrench the secretive status quo by allowing one party to veto open hearings.

Ensuring Transparency: Producing rules that will make arbitrations more, not less, transparent

As a basic rule, the 1976 and 2010 versions of the UNCITRAL arbitration rules do not disallow either party from unilaterally disclosing to whomever it wishes the notice of arbitration, claims and defenses submitted to the tribunal, identities of parties' witnesses, and expert reports. Companies and governments may do this voluntarily on the belief that it is good practice and policy, that there are strategic advantages to be transparent, or because they are required to do so by corporate securities laws, freedom of information regulations, or other laws.

Under the current rules, this is all permitted. New language requiring both parties' consent to disclose documents (e.g., bracketed language included in Draft Article 2, option 2, variant 2; and Draft Article 3, options 2 & 3) would make UNCITRAL arbitrations less, not more, transparent.

Ensuring Transparency: Facilitating, not frustrating, widespread application of the new rules

In addition to those issues of *content*, the Draft Articles also set forth options on the *applicability* of new rules on transparency. It may be that in certain cases domestic or international law will restrict the ability of new arbitration rules to apply to disputes arising under *existing* treaties. The Working Group, however, can potentially help remove some of those restrictions through clearly drafted rules on applicability and, where necessary, through the adoption of a multilateral instrument. As is done, for example, in the arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), clear rules on applicability could consist of language specifying that the version of the arbitration rules that is in force at the time the arbitration is initiated will apply.³ The adoption of a

³ The 2010 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce state:

Under any arbitration agreement referring to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "Arbitration Rules") the parties shall be deemed to have agreed that the following rules, or such amended rules, in force on the date of the commencement of the arbitration ... shall be applied unless otherwise agreed by the parties.

multilateral instrument is discussed in the Secretariat's note (see A/CN.9/WG.II/WP.166/Add.1, Section III). Both strategies would help ensure the new rules have the widest possible coverage consistent with applicable law.

Yet, as evidenced by some of the options in the Secretariat's note, the Working Group can instead adopt language that would impose barriers to use of the new rules in disputes arising under future as well as existing treaties. Here the text produced might look like progress on transparency, but would in reality have only limited practical significance. With respect to disputes arising under *future* treaties, for instance, the "opt-in" approach described in connection with Draft Article 1 would make the currently existing, non-transparent versions of the arbitration rules the default rules, not the new rules that provide for transparency.

Similarly, some proposed language would exclude application of the new rules on transparency to disputes arising under *existing* treaties even if applicable domestic and international law would have otherwise permitted the transparency provisions to apply. One example of such language is the bracketed text in Draft Article 1, option 1, indicating that the new rules would only apply to disputes arising under treaties concluded after the new rules had been adopted. This self-imposed limitation on the rules' coverage would have an extremely significant practical impact given that for now—and for a long time to come—the vast bulk of investor-State arbitrations will most likely arise under existing treaties.

ARTICLE-BY-ARTICLE COMMENTS

Draft Article 1: Scope of application and structure of the rules

Draft Article 1(1), option 1, can help facilitate widespread application of the new rules on transparency consistent with the Working Group's mandate, *provided that* the bracketed language "[which entered into force]" is deleted.

With an "opt-out" approach, transparency is the default rule: The rules on transparency, like other provisions of the UNCITRAL arbitration rules, will be deemed to apply unless the State parties to the treaty specified otherwise. An "opt-in" approach reverses that presumption and requires State parties to take an extra step in order for the new rules on transparency to apply; an "opt-in" approach thus would frustrate the goal of ensuring transparency in investor-State arbitration.

The revised version of the arbitration rules of the International Chamber of Commerce (ICC), which will enter into force on 1 January 2012, contains a similar provision in Article 6(1).

- Draft Article 1(1), option 1, is an “opt-out” approach that, consistent with the Working Group’s mandate, facilitates the most widespread application of the rules to future treaties.

One potential fundamental problem with the provision, however, is the bracketed language that would limit application of the new rules on transparency to only those disputes arising under treaties concluded after a specific date. This self-imposed restriction on the rules’ coverage is unnecessary and would only serve to restrict—contrary to the directive of ensuring transparency—application of the new rules to disputes arising under *existing* treaties. Whether States intended through their treaties for their references to the UNCITRAL arbitration rules to be general and dynamic (i.e., for the version of the rules in effect at the time the dispute is initiated to apply) or specific (i.e., for the 1976 or other specific version of the rules to apply) is a matter of treaty interpretation under international law. As the Secretariat’s note indicates, the Working Group can take steps such as development of a multilateral instrument to *increase* application of the new rules on transparency when treaties would seem to prevent those new rules’ application. It would be counter to the Working Group’s mandate to ensure transparency, however, for it to insert language into the new transparency rules that would actually *prevent* application of the amended rules to disputes under existing treaties when international law and principles of treaty interpretation do not foreclose their application.

- Draft Article 1(1), option 2, variants 1 and 2 might also be acceptable. Both options require that the State parties to the governing treaty have given their “consent” to application of the rules to disputes under other arbitration rules (variant 1) or UNCITRAL arbitration rules (variant 2). Such consent, as the language is currently drafted, apparently need not necessarily be given through explicit references to the “Rules on Transparency.” Rather, it may arguably flow from the fact that the States intended their general references to the UNCITRAL arbitration rules as being dynamic references. In other words, if a treaty referred to the UNCITRAL arbitration rules generally (as opposed to a specific version of the rules, such as the 1976 rules), the treaty parties may have implicitly consented to a dynamic reference to those rules and contemplated that the rules in force at the time the dispute was initiated would apply. Under either variant 1 or 2, the new rules on transparency could be deemed to apply to disputes arising under that treaty. If, however, the treaty specifically referred to the 1976 UNCITRAL arbitration rules, that implicit consent would seem lacking, and variant 1 and 2 would prevent application of the provisions on transparency. These outcomes appear reasonable assuming that it is clear that the provisions do not constitute an “opt-in” approach.

To enhance use of the new rules on transparency and avoid uncertainty, Draft Article 1 should also make clear that the “presumption” established in Article 1(2) of the 2010 rules does not limit application of the rules on transparency. To do this,

Options 1 and 2 can be amended slightly to state, “*Notwithstanding any other provision in the UNCITRAL Arbitration Rules, the Rules on Transparency shall apply to any arbitration initiated....*” The text in italics represents the proposed important addition.

We suggest that Article 1(1) thus read:

1. Notwithstanding any other provision in the UNCITRAL Arbitration Rules, the Rules on Transparency shall apply to any arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments (“treaty”) after [date of adoption of the Rules on Transparency][, unless the treaty provides that the Rules on Transparency do not apply].

Draft Article 2: Initiation of arbitral proceedings

Adoption of Draft Article 2, option 2, variant 1, would represent an important step forward in ensuring automatic, regular and prompt transparency at the crucial early stages of a claim.

The fact that an investor has filed a case against the State must be automatically and promptly disclosed. This can most easily be done through disclosure of the actual notice of arbitration (which the claimant can provide in a redacted form if necessary to protect its confidential information). Because the next step in an arbitration—formation of an arbitration tribunal—can be a lengthy process or one that may never even happen, disclosure of the initiation of the dispute should be done automatically when the notice is sent to or received by the State. It should not wait until a tribunal has been formed. Currently, a number of States post these notices on their websites or treaty-specific websites.

If this rule is adopted, the Working Group may also want to add language on how to deal with potential conflicts regarding the disputing parties’ designation of confidential information.

- Draft Article 2, option 1, while an improvement over current practices, provides for automatic disclosure of only minimal information. If the bracketed text was included, that represents an improvement, but the information is still too skeletal.
- In contrast, Draft Article 2, option 2, variant 1, which provides for the disclosure of the notice of arbitration (while recognizing the disputing

parties' rights to redact confidential information from the notice⁴), would provide for an optimal level of transparency without involving a sacrifice of current rights and protections. Under the existing UNCITRAL arbitration rules, a claimant or respondent can unilaterally disclose the notice to whomever it wants if it so chooses. Thus, by agreeing to this provision, neither disputing party is giving up any expectations or rights of privacy or confidentiality. What this provision will do, however, is ensure that disclosure is made regularly and automatically.

- Draft Article 2, option 2, variant 2, which contains bracketed text that, if added, would allow one or both parties to block mandatory publication of the notice of arbitration, does not promote transparency in investor-State arbitration as it could make arbitrations less transparent than they currently are.

We suggest that Article 2 should thus read as follows:

- 1. Once the notice of arbitration has been received by the respondent, the respondent shall promptly [communicate to the repository referred to under article 8][make available to the public] (i) information regarding the name of the disputing parties, their nationalities [and] [the economic sector involved] [and] [a brief description of the subject matter of the claim]; and (ii) the notice of arbitration, except with respect to any portion of the notice to which either the claimant (at the time it submits the notice) or the respondent objects on the ground that it contains confidential and sensitive information as defined under article 7, paragraph 2.*
- 2. If there is a dispute regarding designation of confidential information, the tribunal, once constituted, shall promptly resolve that dispute in accordance with article 7.*

Draft Article 3: Publication of documents

Draft Article 3, option 1, represents an optimal and workable degree of transparency. There is, however, a danger that disclosure may be improperly restricted if a tribunal too widely construes what is an “undue burden.”

Once a tribunal has been formed, the parties will submit their claims, defenses, and supporting legal arguments and evidence to the tribunal. The tribunal, in turn, will issue procedural orders governing the timing and

⁴ This note uses the term “confidential information” to refer generally to information that is protected from disclosure under applicable law or regulations. This may also include confidential business information such as trade secrets. It is not meant to have a precise meaning, but recognizes that further definition of the phrase is crucial.

process of the arbitration, as well as substantive decisions such as decisions on interim measures, jurisdiction and arbitrator challenges. For transparency to be meaningful, these documents submitted to the tribunal and orders and decisions issued by the tribunal should be promptly disclosed as a matter of course. The parties and tribunal can redact from the materials information that is privileged or protected under applicable law. The arbitral tribunal—as is commonly done by courts and arbitrators worldwide—can issue orders to protect against the improper disclosure of confidential information.

- In accordance with those principles and the goal of ensuring transparency in investor-State arbitration, Draft Article 3, option 1, is optimal in that it would require “all documents submitted to, or issued by, the arbitral tribunal” (which includes orders and decisions) to be made available to the public. It also recognizes the disputing parties’ rights to restrict disclosure of confidential information.

Language that would give the tribunal the right to restrict disclosure if publication would amount to an “undue burden,” however, is problematic. When, as in today’s modern era, parties transmit documents to the tribunal electronically, and the tribunal likewise sends copies of its orders and decisions to the parties electronically, it is difficult to conceive of how the act of simply posting these documents would represent an “undue burden.” It may be that documents sent between the disputing parties (e.g., documents obtained through discovery) are particularly voluminous and may be difficult to post and manage on a public website, but these types of documents would not be covered by Draft Article 3 as they would not be documents directed to or sent from the tribunal.

Further, it may be that in certain cases the disclosure obligation will cause the disputing parties to dedicate more time and attention to redacting confidential information. Specific issues regarding confidentiality, redactions, and non-disclosure of documents, however, can be dealt with under Draft Article 7, within the specifics of each case and in accordance with a tribunal’s procedural order. A potentially broad “undue burden” exception is unnecessary.

- Draft Article 3, option 2, would not represent an improvement in transparency and could constitute a step backwards:
 - If adopted without the bracketed text, it would effectively maintain the status quo non-transparent situation where tribunals can exercise their discretion to prevent the public from accessing documents and information regarding the dispute;
 - If the bracketed text allowing both disputing parties to agree to block publication were adopted, that would also simply entrench and codify the current status quo; and

- If, as the bracketed text also contemplates, one party were given veto power over publication, the rules would take a step backward in terms of transparency.
- Draft Article 3, option 3, could be a desirable option *provided that bracketed language (1) giving the tribunal wide discretion to control publication, and (2) allowing one or both parties to block publication, are deleted.*

We suggest that Article 3 read as follows:

- 1. Subject to the express exceptions set out in article 7, all documents submitted to, or issued by, the arbitral tribunal shall be made available to the public*
- 2. The documents to be published pursuant to paragraph 1 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in redacted form in accordance with article 7. The repository shall make the documents available to the public in a timely manner, in the form and in the language in which it receives them.*

Draft Article 4: Publication of arbitral awards

Draft Article 4 is a crucial and significant step forward.

Prompt and automatic publication of awards revealing the outcome of the dispute and elaborating on the meaning of treaty obligations is the most obvious ingredient of transparency in investor-State arbitrations. Awards are already commonly disclosed by one or both disputing parties on their own websites and/or sent to journalists, academics, or other non-parties for publication. Under the 1976 and 2010 UNCITRAL arbitration rules, however, this disclosure does not always happen in a timely way, or even at all, so this new article is essential.

While publication of awards by a central repository (paragraph (2), option 1) would be an ideal approach, if no such repository existed, placing the duty to publish the award on the respondent (paragraph (2), option 2) would also be an acceptable solution.

We suggest that Article 4 read as stated in the Secretariat's Draft Article 4:

- 1. Subject to the express exceptions set out in article 7, all arbitral awards shall be published.*

2. Arbitral awards shall be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, where applicable, in their redacted form in accordance with article 7. The repository shall make the arbitral awards available to the public in a timely manner, in the form and in the language in which it receives them.

Draft Article 5: Submissions by third parties (“amicus curiae”) in arbitral proceedings

Draft Article 5 (either option) is a useful clarification, though option 1 has the added benefit of simplicity.

Individuals or groups with specialized knowledge, expertise, or interests in the disputes may be able provide tribunals with important input into the disputes that, for a number of possible reasons, is not similarly provided by the parties to the cases. For the avoidance of doubt as to whether tribunals may permit such non-party participation, it is useful for the rules to specifically address the subject.⁵ The 2006 ICSID arbitration rules, as well as a number of bilateral and regional investment treaties, already explicitly permit amicus curiae participation and have guidelines regulating the practice.

It seems unnecessary to include specific rules on the admissibility of amicus curiae submissions or procedures for making those submissions in this article. Tribunals can deal with such issues on a case-by-case basis using the authority and discretion they have under the 1976 and 2010 arbitration rules to conduct the proceedings. When exercising that discretion, they will be guided by the purposes of the rules on transparency and their duties to treat the parties equally and fairly. Taking those background principles into account, option 1, though not elaborate, appears to be an adequate solution.

Option 2 may also be an acceptable approach, though some of its provisions would warrant additional consideration.

We thus suggest that Article 5 read as stated in option 1:

The arbitral tribunal may accept and consider amicus curiae submissions from a person or entity that is not a party to the dispute.

⁵ The Draft Articles use the term “third party” to refer to amicus curiae and other non-party participants. To be more precise and avoid confusion, it may be better to use the term “non-party,” making clear that such individuals and entities are not actually “parties” to the dispute.

Draft Article 6: Hearings and publication of transcripts of hearings

Draft Article 6(1), option 1, is an important improvement in transparency *provided that the last bracketed phrase is deleted thus reading: “1. Subject to article 6, paragraphs 2 and 3, hearings shall be [public] [held openly].”*

During hearings, parties present the evidence and arguments they rely on to support their claims or defenses, and tribunals may indicate through questioning whether certain lines of information and arguments are compelling. Open hearings (or, as an alternative, publication of hearing transcripts) are thus crucial to providing adequate information about the dispute and interpretation and application of the governing treaty. Traditional domestic legal systems worldwide are accustomed to providing open hearings as a matter of course (and handling issues such as preventing disclosure of confidential information during the hearings). International courts and arbitral tribunals such as WTO tribunals and arbitration panels hearing NAFTA and CAFTA disputes have likewise opened up hearings by allowing public viewing via closed-circuit television or streaming on the internet.

- Draft Article 6(1), option 1, would represent a marked improvement in transparency so long as it is adopted without the bracketed language giving either disputing party the power to close the proceedings. If the new rules contained that language allowing either disputing party to block public access to the hearings, they would not make hearings any more open than they currently are under the UNCITRAL arbitration rules.
- Draft Article 6(1), option 2, modifies the status quo in that it seems to prevent one party from having an automatic power to veto open hearings, but leaves the tribunal too much discretion to determine whether and to what extent the public will have access to investor-State arbitrations.

Draft Article 6(2) on mandatory exceptions to public hearings would be a useful addition to the rules provided that the language referring to the “integrity of the process” is deleted from the text.

Article 6(2) makes clear that provisions on transparency will not override the disputing parties’ rights to protect confidential information. This principle is unobjectionable. Nevertheless, the clause also states that a tribunal may close the proceedings in order to protect the “integrity of the arbitral process.” This is a vague and potentially broad exception that threatens to swallow the rule. Further, in light of the power that a tribunal has under Draft Article 7 to protect confidential information, and Draft

Article 6(3) to handle logistical issues, there is no value served by Article 6(2)'s broad "integrity of the arbitral process" exception.

Draft Article 6(3) can be a useful practical addition.

This provision clarifies that tribunals have authority to facilitate public access to hearings as appropriate for each specific case. Draft Articles 6(4) and (5) (see below) help ensure that when the public is not able to view the proceeding due to logistical issues, the public can access transcripts reflecting what transpired.

The principle behind Draft Articles 6(4) and 6(5)—protecting the public's rights to access information regarding the hearing when the proceedings are closed for logistical reasons—is critically important for ensuring transparency.

Some clarifications to the text are needed to indicate that if a hearing is closed in its entirety due to logistical issues or even to protect confidential information, disclosure of the transcripts need not be an all-or-nothing matter. In other words, all non-confidential aspects of the transcripts should be published.

A modified version of Articles 6(4) and (5) making that change, and synthesizing the two provisions, can read:

Where a hearing has been closed to the public for mandatory reasons under article 6, paragraph 2, or for logistical reasons under article 6, paragraph 3, transcripts of the hearings shall be prepared, and all aspects of those transcripts that are not protected from disclosure pursuant to article 7 shall be made available to the public. The repository referred to under article 8 shall publish transcripts of hearings in the form and in the language in which it receives them from the arbitral tribunal.

That change also deletes Draft Article 6(4)'s reference to a tribunal's overly broad discretion under Draft Article 6(1), option 2, discussed above.

We suggest that Article 6 should thus read in its entirety:

- 1. Subject to article 6, paragraphs 2 and 3, hearings shall be [public] [held openly].*
- 2. Where there is a need to protect confidential and sensitive information pursuant to article 7, the arbitral tribunal shall make arrangements for all or part of the hearing to be [held in private] [closed].*

3. *The arbitral tribunal may make logistical arrangements to facilitate the public's right of access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate) and may [hold the hearings in private] [close the hearings] to the extent this is or becomes necessary for logistical reasons.*

4. *Where a hearing has been closed to the public for mandatory reasons under article 6, paragraph 2, or for logistical reasons under article 6, paragraph 3, transcripts of the hearings shall be prepared, and all aspects of those transcripts that are not protected from disclosure pursuant to article 7 shall be made available to the public. The repository referred to under article 8 shall publish transcripts of hearings in the form and in the language in which it receives them from the arbitral tribunal.*

Draft Article 7: Exceptions to transparency

Draft Article 7(1) is an important protection; but Draft Article 7(1)(b) represents a potentially broad carve-out that threatens to swallow the rules on transparency and would frustrate the realization of the human right to access to information.

Article 7(1)(a) recognizes that the rules on transparency should not require disputing parties to disclose information that would otherwise be protected under applicable law. It represents an uncontroversial principle. Article 7(1)(b), however, is overly broad in that it permits the tribunal to limit transparency at all stages of the arbitral proceedings in order to protect “the integrity of the process.” The phrase “integrity of the process” is not defined. Rather, it is followed by an *illustrative* list of situations that could fall under its umbrella. The risk inherent in this provision is that it could inject in these new rules the broad discretionary authority tribunals currently possess and have used in the past to frustrate public access to disputes.

Draft Article 7(2) threatens to be overly broad due to 7(2)(a)'s protection of “confidential business information”.

In order to ensure the rules on transparency are effective and that the human right to access to information is respected, exceptions have to be bounded. It is unclear whether the phrase “confidential business information” is sufficiently specific in order to prevent the exception from being misused. Moreover, it is uncertain what legitimate interests would be served by Draft Article 7(2)(a) that are not served by Draft Article 7(2)(b), which less vaguely states that confidential and sensitive information is “information which is protected against disclosure under the treaty or the applicable law.”

Draft Article 7(5), like Draft Article 7(1)(b), could undo many of the achievements of the rules on transparency and codify existing practices by giving tribunals overly broad discretion to restrict disclosure.

This provision allows the tribunal to restrict disclosure of information for the vague and potentially broad notion of protecting the “integrity of the proceedings.” If this provision is deemed desirable by the Working Group, additional language may be necessary to clarify that Article 7(5) is not meant to be a “catch-all” exception. This language, for instance, can make clearer that the exception is limited to extreme and rare circumstances, and can also specify that the exception will not apply unless there is a showing of a real risk of serious harm. Further, the exception can make clearer that it will not apply extensively or indefinitely; restrictions on disclosure will be as narrow as possible; and disclosure will be required once the circumstances warranting the exception’s use no longer apply.

Based on those considerations, we thus suggest that Article 7 read as follows:

1. A party shall not be under any obligation to publish any confidential and sensitive information, as defined in article 7, paragraph 2, and the tribunal shall make arrangements to protect such information from publication.

2. Confidential and sensitive information is

(a) information which is protected against disclosure under the treaty or the applicable law; and

(b) information that may be designated as confidential and sensitive by the arbitral tribunal in any order on confidentiality for the aforementioned reason.

Procedure for identifying and protecting confidential and sensitive information

3. A disputing party that provides information shall clearly designate whether it contends that the information is confidential and sensitive at the time it submits the information to the arbitral tribunal and shall, at the time it submits a document containing such information, submit a redacted version of the document that does not contain the information.

4. Where the opposing party disputes that any or all of such information is confidential and sensitive, it shall so indicate within 30 days of receipt of the redacted document from the other party, identifying with precision the portions of the document that it contends ought not to be redacted. The arbitral tribunal shall then rule on any such objection to the designation or redaction of confidential and sensitive information.

Draft Article 8: Repository of published information (“registry”)

A central repository for information disclosed during investor–State arbitrations would be highly advisable and should be encouraged. UNCITRAL arbitrations can be conducted through a number of different arbitration institutions, or purely ad hoc and unaffiliated with any arbitration facility. Consequently, if there is no central repository, information can be scattered across various arbitration institutions’ websites, on countries’ websites, and/or possibly on websites specifically established for a particular dispute. A central repository can consolidate all of this information, and can also lessen any burden disclosure and publication might have on the disputing parties and/or tribunal.

We thus agree that Article 8 read as suggested in the Secretariat’s draft:

_____ shall be in charge of making available to the public information [and other services] pursuant to the Rules on Transparency.

SUMMARY OF PREFERRED OPTIONS

The provisions below consolidate the suggestions made above. They are drawn from the Secretariat’s note. Each provision contains a parenthetical indicating where the provision was pulled from in the Secretariat’s text. Modifications to the Secretariat’s Draft Articles are indicated: the underlined text is text that IISD and CIEL suggest adding; the text that has been struck is text that IISD and CIEL would remove. As explained above, the edits were made in order to produce a text that ensures transparency in investor-State dispute settlement, while providing appropriate protections for confidential information.

Article 1

1. Notwithstanding any other provision in the UNCITRAL Arbitration Rules, the Rules on Transparency shall apply to any arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments (“treaty”) ~~{which entered into force}~~ after [date of adoption of the Rules on Transparency]], unless the treaty provides that the Rules on Transparency do not apply]. **(Modified Draft Article 1(1), option 1)**

2. Articles 2 to 6 of the Rules on Transparency contain rules relating to disclosure of the initiation of arbitral proceedings (article 2), publication of documents (article 3), publication of arbitral awards (article 4), submissions by third parties in arbitral proceedings (article 5), and [public/open] hearings and publication of transcripts (article 6). These rules are subject to the express exceptions set out in article 7. Where the Rules on Transparency provide for the exercise of discretion by the

arbitral tribunal, that discretion shall be exercised by the arbitral tribunal as it considers appropriate, taking into account all circumstances it deems relevant, including where applicable the need to balance (i) the legitimate public interest in transparency in the field of treaty-based investor-State arbitration and in the arbitral proceedings and (ii) the arbitrating parties' own legitimate interest in a fast and efficient resolution of their dispute. **(Draft Article 1(2))**

Article 2

1. Once the notice of arbitration has been received by the respondent, the respondent shall promptly [communicate to the repository referred to under article 8][make available to the public] (i) information regarding the name of the disputing parties, their nationalities [and][the economic sector involved][and][a brief description of the subject matter of the claim]; and (ii) the notice of arbitration, except with respect to any portion of the notice to which either the claimant (at the time it submits the notice) or the respondent objects on the ground that it contains confidential and sensitive information as defined under article 7, paragraph 2. **(Draft Article 2, option 2, variant 1)**

2. If there is a dispute regarding designation of confidential information, the tribunal, once constituted, shall promptly resolve that dispute in accordance with article 7. (Proposed addition)

Article 3

1. Subject to the express exceptions set out in article 7, all documents submitted to, or issued by, the arbitral tribunal shall be made available to the public. ~~If the tribunal determines that certain documents are not to be published because of the undue burden such publication would impose, those documents not published should be made available to third parties upon request.~~ **(Modified Draft Article 3(1), option 1)**

2. The documents to be published pursuant to paragraph [section] 1 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in redacted form in accordance with article 7. The repository shall make the documents available to the public in a timely manner, in the form and in the language in which it receives them. **(Draft Article 3(2), option 1)**

Article 4

1. Subject to the express exceptions set out in article 7, all arbitral awards shall be published. **(Draft Article 4(1))**

2. Arbitral awards shall be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, where applicable, in their redacted form in accordance with article 7. The repository shall make the arbitral awards available to the public in a timely manner, in the form and in the language in which it receives them. **(Draft Article 4(2), option 1)**

Article 5

The arbitral tribunal may accept and consider amicus curiae submissions from a person or entity that is not a party to the dispute. **(Draft Article 5, option 1)**

Article 6

1. Subject to article 6, paragraphs 2 and 3, hearings shall be [public] [held openly] ~~unless a disputing party objects thereto~~. **(Modified Draft Article 6(1), option 1)**

2. ~~Where a hearing is to be [public] [held openly] and there is a need to protect confidential and sensitive information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements for all or part of the hearing to be [held in private] [closed].~~ **(Modified Draft Article 6(2))**

3. The arbitral tribunal may make logistical arrangements to facilitate the public's right of access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate) and may [hold the hearings in private] [close the hearings] ~~where to the extent~~ this is or becomes necessary for logistical reasons. **(Modified Draft Article 6(3))**

4. Where a hearing has been closed to the public for mandatory reasons under article 6, paragraph 2, or for logistical reasons under article 6, paragraph 3, transcripts of the hearings shall be prepared, and all aspects of those transcripts that are not protected from disclosure pursuant to article 7 shall be made available to the public. The repository referred to under article 8 shall publish transcripts of hearings in the form and in the language in which it receives them from the arbitral tribunal. **(Modified Draft Article 6(4) & (5))**

Article 7

Exceptions to transparency

1. ~~The rules set out in articles 2 to 6 are subject to the following express exceptions:~~

~~(a) A party shall not be under any obligation to publish any confidential and sensitive information, as defined in article 7, paragraph 2, and the tribunal shall make arrangements to protect such information from publication. ; and~~

~~(b) The arbitral tribunal shall be entitled to restrain the publication of information where such publication would jeopardise the integrity of the arbitral process, including where such publication could hamper the collection or production of evidence or lead to the intimidation of witnesses, lawyers acting for the parties, or members of the arbitral tribunal.~~

Definition of confidential and sensitive information

2. Confidential and sensitive information ~~is~~ consists of

~~(a) confidential business information;~~

~~(b) information which is protected against disclosure under the treaty or the applicable law; and~~

(b) information that may be designated as confidential and sensitive by the arbitral tribunal in any order on confidentiality for ~~any of~~ the aforementioned reasons.

Procedure for identifying and protecting confidential and sensitive information

3. A disputing party that provides information shall clearly designate whether it contends that the information is ~~of a~~ confidential and sensitive ~~nature~~ at the time it submits the information to the arbitral tribunal and shall, at the time it submits a document containing such information, submit a redacted version of the document that does not contain the information.

4. Where the opposing party disputes that any or all of such information is confidential and sensitive, it shall so indicate within 30 days of receipt of the redacted document from the other party, identifying with precision the portions of the document that it contends ought not to be redacted. The arbitral tribunal shall then rule on any such objection to the designation or redaction of confidential and sensitive information.

Procedure for protecting the integrity of the arbitral process

~~5. The arbitral tribunal may, at its own initiative or upon the application of a disputing party, take appropriate measures to restrain the publication of information where such publication would jeopardise the integrity of the arbitral process, including where such publication could hamper the collection or production of evidence or lead to the intimidation of witnesses, lawyers acting for the parties, or members of the tribunal. (Modified Draft Article 7)~~

Article 8

_____ shall be in charge of making available to the public information [and other services] pursuant to the Rules on Transparency. **(Draft Article 8)**