

**Guide for Access to Information and
Participation by NGOs in Investment Arbitration
(in particular, as *amicus curiae*)**

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Executive Summary

The purpose of this guide is to provide Non-Governmental Organizations (“NGOs”) with an overview of arbitration between foreign investors and host States (“**Investor-State Arbitration**”), also referred to as investment arbitration or Investor-State Dispute Settlement (“**ISDS**”), and practical means through which they may obtain information and participate in these proceedings. The guide focuses on the impact on Investor-State Arbitration of the United Nations Commission on International Trade Law (“**UNCITRAL**”) Rules on Transparency in Treaty-based Investor-State Arbitration (“**UNCITRAL Transparency Rules**” or the “**Rules**”).¹ It aims to assist non-practitioners in understanding Investor-State Arbitration in order to give them the opportunity to effectively advocate their public interest positions in the context of such proceedings, subject to existing procedural rules.

Different types of arbitration provide for varying levels of transparency in law and in practice. The present guide deals exclusively with Investor-State Arbitration.² Developments in the past decade point to increasing concerns about the transparency of these proceedings³ and opportunities for third person participation.⁴ As the tribunal in the *Biwater v. Tanzania* arbitration put it: “[w]ithout doubt, there is now a marked tendency towards transparency in treaty arbitration.”⁵ The entry into force of the UNCITRAL Transparency Rules on April 1, 2014 and the opening for signature of the UNCITRAL Convention on Transparency in Treaty-based Investor-State Arbitration (“**Transparency Convention**” or “**Mauritius Convention**”) on March 17, 2015 constitute significant steps toward more transparent arbitral proceedings.

Prior to discussing the ways in which third parties may participate in Investor-State Arbitration, the guide provides an overview of the ISDS regime and the levels of transparency in a number of arbitration rules that govern Investor-State Arbitration:

- **Section I(A)** distinguishes Investor-State Arbitration from commercial and State-to-State arbitration.
- **Section I(B)** sets out the types of treaties that include dispute settlement mechanisms providing for Investor-State Arbitration.
- **Section I(C)** outlines the rules developed by the International Centre for Settlement of Investment Disputes (“**ICSID**”), UNCITRAL and other institutions that govern Investor-State Arbitration.
- **Section I(D)** outlines the jurisdictional requirements and substantive protections that are specific to Investor-State Arbitration.
- **Section II(A)** outlines different levels of transparency in the dispute settlement mechanisms of several Free Trade Agreements.

¹ The present focus on the UNCITRAL Transparency Rules complements the “Guide for Potential Amici in International Investment Arbitration” published in January 2014 by the International Human Rights Program (“**IHRP**”) at the University of Toronto, Faculty of Law and the Center for International Environmental Law (“**CIEL**”). That document provides a comprehensive overview of ICSID and the means through which an *amicus curiae* brief may be submitted in the context of these proceedings. The guide is available at: http://ciel.org/Publications/Guide_PotentialAmici_Jan2014.pdf.

² Most of the publicized *amicus curiae* briefs were submitted in the context of Investor-State Arbitration. But see Eliana Tornese and Alina Leoveanu, *Amicus Curiae Interventions: Is International Commercial Arbitration Exempt?*, Corporate Disputes (July-September 2015), available at <http://www.corporatedisputesmagazine.com/amicus-curiae-interventions-is-international-commercial-arbitration-exempt/>.

³ Julie Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky*, in *TRANSPARENCY IN INTERNATIONAL LAW* 142, (Andrea Bianchi & Anne Peters eds., 2013).

⁴ Lucas Bastin, *Amici Curiae in Investor-State Arbitrations: Two Recent Decisions*, 20 *AUSTL. INT’L L.J.*, 96 (2013), available at <http://www.austlii.edu.au/au/journals/AUIntLawJI/2013/7.pdf>.

⁵ *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. Arb/05/22 [hereinafter *Biwater Gauff v. Tanzania*], Procedural Order No. 3, para. 114 (Sep.29, 2006), available at <http://www.italaw.com/sites/default/files/case-documents/ita0089.pdf>.

- **Section II(B)** outlines different levels of transparency in the procedural rules governing Investor-State Arbitration.
- **Section III** details the entry into force, applicability and content of the UNCITRAL Transparency Rules.

Investor-State Arbitration offers multiple avenues through which third persons may gain information about ongoing arbitration proceedings or participate in such proceedings. They may be subject to certain limitations, as set out below.

- **Section IV(A)** outlines what an NGO can know. More specifically, the section explains which documents and information a third person can access and how a third person could attend hearings.
- **Section IV(B)** outlines what an NGO can do. In particular, an NGO may scrutinize and report on public hearings or transcripts. Submissions of *amicus curiae* briefs constitute a direct means through which third persons may participate in arbitral proceedings.
- **Section IV(C)** sets out the limits to a third person’s ability to participate in Investor-State Arbitration, namely procedural requirements, the tribunal’s discretion and significant costs.
- **Section IV(D)** presents the landmark *Biwater v. Tanzania* case, which provides relevant insights into the requirements for third person participation in ICSID proceedings.
- **Annex 1** lists the main repositories and sources for documents filed in Investor-State proceedings.

This overview is complemented by relevant case law. Due to the recent entry into force of the UNCITRAL Transparency Rules, only a limited number of arbitrations referred to in this guide were governed by these Rules. Further, most of these cases remain at an early procedural stage. Nonetheless, cases administered by ICSID or under the UNCITRAL Arbitration Rules provide an overview of the ways in which tribunals have interpreted various provisions in these rules.

NOTE: This guide was drafted by students from the Sciences Po Law School with the assistance of lawyers from White & Case LLP. Any views or opinions contained therein are wholly the authors’, and do not necessarily reflect the views of White & Case LLP or the Sciences Po Law School.

I. Introduction to International Arbitration – Relevant Players, Notions and Rules

A. Types of Arbitration

International arbitration is “a consensual means of dispute resolution, by a non-governmental decision-maker, that produces a legally-binding and enforceable ruling.”⁶

International commercial arbitration usually takes place between private parties and is based either on an arbitration clause found in a contract or on party consent after a dispute has arisen. In their capacity as commercial actors, States may engage in this form of dispute resolution against private or public entities.⁷ Investor-State Arbitration, by contrast, concerns disputes brought by a foreign investor against the State hosting the investment. It is typically based on a treaty signed by the home State of the investor and the State hosting the investment. This treaty gives certain classes of investors the right to bring actions against the host State under certain circumstances. Investor-State Arbitration may also be based on an arbitration clause in an investment agreement concluded between a host State and an investor or on national investment law that provides for State consent to arbitration.

International commercial arbitration is characterized by “an emphasis on private law, private contracts, and private parties”, while Investor-State Arbitration “involves public international law rather than private law, treaties in addition to or instead of contracts, and States acting in their public capacity as sovereigns (which enter into treaties) and regulators (which govern populations).”⁸ Most investment treaties also contain, in addition to Investor-State dispute provisions, clauses permitting arbitration between States on matters regarding treaty interpretation or enforcement.⁹

B. International Investment Agreements

International Investment Agreements (“IIAs”) include both Bilateral Investment Treaties (“BITs”) and multilateral investment treaties.

1. BITs

BITs are “binding agreements between two States in which each assumes obligations with respect to investments made in its country by the other’s investors.”¹⁰ Investors are not parties to BITs but benefit from the protection granted by treaties under which they qualify as investors. The rationale behind BITs is the “promotion and protection of investments from one contracting party in the territory of the other contracting party.”¹¹ As noted in the preamble of numerous BITs, the regulation of international investments through treaty instruments constitutes a means of achieving mutually beneficial business activity, economic cooperation and in certain cases, sustainable development.¹² The protections granted to investors in BITs include substantive standards of protection (detailed below) and, in most cases, access to ISDS through an arbitral institution or an *ad hoc* tribunal. Since

⁶ GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 2 (2d ed. 2001).

⁷ Anthea Roberts, *Divergence Between Investment and Commercial Arbitration*, 106 AM. SOC’Y INT’L. PROC. XXX, 296-97 (2012), pp. 297-300 (noting that “when states take part in commercial arbitration, they are generally understood to be acting in their private capacity”).

⁸ *Id.*, p. 298.

⁹ Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT’L L.J. 1, 1 (2014).

¹⁰ Andrew Stephenson and Lee Carroll, *Protecting Foreign Investments by Using Bilateral Investment Treaties*, CLAYTON UTZ, (Jan. 1, 2012), p. 3, available at http://www.claytonutz.com/docs/Protecting_Foreign_Investments_Sep_2012.pdf.

¹¹ ORG. FOR ECON. CO-OPERATION AND DEV. [OECD], *INTERNATIONAL INVESTMENT PERSPECTIVES* 115 (2004).

¹² See for example: Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, CAN-BURKINA FASO, Apr. 20, 2015, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3460>.

the first agreement between Germany and Pakistan was concluded in 1959, more than 3,200 BITs have been signed.¹³

2. Multilateral Investment Treaties

Investor-State Arbitration may be initiated pursuant to multilateral investment treaties, which are treaties concluded among three States or more. The provisions of these treaties are roughly similar to those in BITs with regard to investor protection. BITs, however, are more widespread.

Free Trade Agreements (“FTA”), also referred to as International Trade Agreements, are often multilateral and include provisions setting out substantive protections for investors as well as ISDS mechanisms.

i. NAFTA

The North American Free Trade Agreement (“NAFTA”) between the United States, Canada and Mexico came into force on January 1, 1994. Chapter 11 of NAFTA provides for investor protections as well as the settlement of Investor-State disputes through arbitration under the UNCITRAL or ICSID Arbitration Rules.¹⁴

ii. CAFTA-DR

The Dominican Republic – Central America – United States Free Trade Agreement (“CAFTA-DR”) was signed in 2004 by Costa Rica, El Salvador, Honduras, Nicaragua and the United States.¹⁵ The Dominican Republic joined the Agreement later that year. CAFTA-DR provides for Investor-State dispute resolution in Article 10 – Section B.

iii. ECT

The Energy Charter Treaty (“ECT”) was signed in December 1994.¹⁶ It is designed to promote cross-border cooperation in the energy industry. It protects investments in the energy sector and provides for ISDS.

iv. CETA

The Comprehensive Economic and Trade Agreement (“CETA”) was submitted for ratification in the European Union and Canada after the negotiation phase ended in August 2014.¹⁷ CETA is the first multilateral agreement negotiated by the European Commission that includes ISDS provisions.

¹³ U.N. CONF. ON TRADE AND DEV. [UNCTAD], *IIA Issues Note: Recent Trends in IIAs and ISDS*, UNCTAD/WEB/DIAE/PCB/2015/1 (Vol. 1), 7 (Feb. 19, 2015), available at http://unctad.org/en/publicationslibrary/webdiaepcb2015d1_en.pdf.

¹⁴ North American Free Trade Agreement, U.S.-Can.-Mex., Chapter 11, Dec. 17, 1992, 32 I.L.M. 289 (1993), available at https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negotiating_Draft_Texts/asset_upload_file258_5882.pdf [hereinafter “NAFTA”].

¹⁵ Dominican Republic – Central America – United States Free Trade Agreement, U.S.-Guat.-El Sal.-Hond.-Nicar.-Costa Rica-Dom. Rep., Aug. 5, 2004, 19 U.S.C. § 4001 et seq., available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [hereinafter “CAFTA-DR”].

¹⁶ Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95, available at <http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf> [hereinafter “ECT”].

¹⁷ Comprehensive Trade and Economic Agreement, Can.-EU, Consolidated CETA Text, Sept. 26, 2014, available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [hereinafter “CETA”].

v. TPP

The Trans-Pacific Partnership (“TPP”) is a regional FTA between twelve countries along the Pacific Rim, including Japan, Canada, the United States and South-East Asian emerging markets such as Vietnam.¹⁸ It is hailed as one of the largest and far-reaching FTAs to date.¹⁹ The agreement is complemented with many related instruments setting out specific bilateral covenants. The draft text was agreed on October 4, 2015. It will have to be approved by “at least six countries [accounting] for 85 percent of the combined gross domestic production of the 12 TPP nations” and implemented into domestic law before coming into force.²⁰ It includes ISDS provisions in Chapter 9.²¹

vi. ACIA

The ASEAN Comprehensive Investment Agreement (“ACIA”)²² entered into force on March 29, 2012 between the ten members of the Association of South East Asian Nations (“ASEAN”). Consolidating and expanding two prior agreements – the Framework Agreement on the ASEAN Investment Area (“AIA”) and the ASEAN Investment Guarantee Agreement (“IGA”) – ACIA aims at creating a “free and open investment regime in ASEAN in order to achieve the end goal of economic integration under the [ASEAN Economic Community].”²³ ACIA provides for ISDS under Section B – Investment Dispute Between an Investor and a Member State.

C. Institutions and Investor-State Arbitration Rules

Investment arbitration disputes may be administered by a number of institutions within the framework of different arbitration rules. It may occur that no particular institution is designated by the parties to administer the arbitration. The arbitration will then be referred to as *ad hoc*.²⁴ To facilitate the parties’ task, several institutions have developed standardized rules that parties can use if they are referred to in the relevant dispute settlement provisions or if their applicability is specifically agreed to by the parties.

1. ICSID and the ICSID Arbitration Rules

ICSID was established by the Washington Convention (“ICSID Convention”),²⁵ which has been signed by 160 States.²⁶ The ICSID Convention is complemented by the Regulations and Rules adopted by the Centre’s Administrative Council. The Convention allows for parties to arbitrate investment disputes between an investor from a signatory State and another signatory State under the ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”).²⁷ The jurisdiction of the Centre is established pursuant to Article 25.²⁸ Four conditions must be met for

¹⁸ Trans-Pacific Partnership, 4 Feb., 2016, available at <http://www.ustr.gov/tpp> [hereinafter “TPP”].

¹⁹ United States Trade Representative (U.S.T.R.), *Summary of the Trans-Pacific Partnership Agreement* (Oct. 5, 2015), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership>.

²⁰ Reuters, *Trans-Pacific Partnership trade deal signed, but years of negotiations still to come* (Feb. 4, 2016), available at <http://www.reuters.com/article/us-trade-tpp-idUSKCN0VD08S>

²¹ TPP, *supra* note 18, ch. 9.

²² Association of South East Asian Nations Comprehensive Investment Agreement, Feb. 26, 2009, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3095> (last visited Feb. 15, 2016) [hereinafter “ACIA”].

²³ *Id.*, art. 1.

²⁴ RUDOLPH DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 238 (2d ed. 2012).

²⁵ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm> [hereinafter “ICSID Convention”].

²⁶ *List of Contracting States and Other Signatories of the Convention*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES 1 (Nov. 17, 2015), available at <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>.

²⁷ Rules of Procedure for Arbitration Proceedings, Mar. 18, 1965, 575 U.N.T.S. 159, available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF.htm> [hereinafter “ICSID Arbitration Rules”].

²⁸ ICSID CONVENTION, *supra* note 25, art. 25.

ICSID arbitration to apply²⁹: (i) the parties must have agreed to submit their dispute to ICSID; usually through a provision in a BIT signed between the host State and the investor's home State; (ii) the dispute must be between a signatory State to the ICSID Convention and a national of another signatory State; (iii) it must be a legal dispute and (iv) it must arise directly out of an investment. The purpose of the Convention, as set out in its Preamble, is to enhance investment flow and investment protection.³⁰ Among the notable features of the dispute resolution system established under the ICSID Convention, arbitral awards cannot be reviewed in domestic courts³¹ and can be directly enforced.³²

ICSID's Additional Facility Rules expand ICSID's ability to administer disputes when a State party to a dispute is not a signatory to the Convention or the investor is not a national of a signatory State.³³ The Centre may also administer disputes under non-ICSID rules such as the UNCITRAL Arbitration Rules.

ICSID is one of the most popular *fora* for the administration of Investor-State Arbitration. Out of 42 new publicized Investor-State claims identified by the United Nations Conference on Trade and Development ("UNCTAD") in 2014, 33 were filed with ICSID, including 3 cases under the ICSID Additional Facility Rules.³⁴

2. UNCITRAL and the UNCITRAL Arbitration Rules

UNCITRAL is the United Nations' body tasked with the harmonization of international business and trade laws around the world. The UNCITRAL Arbitration Rules³⁵ were drafted to promote uniform practices and procedures in the context of international arbitration disputes.³⁶

The UNCITRAL Arbitration Rules may be used in commercial, Investor-State or State-to-State Arbitration, in both institutional and *ad hoc* settings.³⁷ UNCITRAL arbitrations may be administered *inter alia* by the Permanent Court of Arbitration ("PCA"), ICSID, the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") or the International Court of Arbitration of the International Chamber of Commerce ("ICC"). UNCITRAL does not administer proceedings itself.

The UNCITRAL Arbitration Rules were published in 1976 and revised in 2010. The revision aimed at enhancing their ability to deal with complex arbitrations.³⁸ In 2013, the UNCITRAL Arbitration Rules were updated to incorporate a reference to the UNCITRAL Transparency Rules³⁹ that were specifically drafted to increase transparency in Investor-State Arbitration. These rules are discussed in further details below.

²⁹ DOLZER & SCHREUER, *supra* note 24, at 238.

³⁰ ICSID CONVENTION, *supra* note 25.

³¹ ICSID CONVENTION, *supra* note 25, art. 53.

³² ICSID CONVENTION, *supra* note 25, art. 54.

³³ ICSID Additional Facility Rules, Introduction, ICSID/11, Apr. 2006, available at https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf

³⁴ UNCTAD, *IIA Issues Note: Recent Trends in IIAs and ISDS*, UNCTAD/WEB/DIAE/PCB/2015/1 (Vol. 1), 7 (Feb. 19, 2015), available at http://unctad.org/en/publicationslibrary/webdiaepcb2015d1_en.pdf. These figures should be taken with caution as they only list publicized cases. Furthermore, there might be a bias in favor of ICSID as Article 22 of the ICSID Administrative and Financial Regulations requires the publication of all requests for arbitration filed with the Centre, whereas no such obligation exists under other arbitration rules.

³⁵ Rep. of the U.N. Comm'n on Int'l Trade Law, 43d Sess., June 21-July 9, 2010, U.N. Doc. A/65/17, annex I; GAOR, 65th Sess., Supp. No. 17 (2010), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> [hereinafter "UNCITRAL Arbitration Rules"].

³⁶ U.N. COMM'N ON INT'L TRADE L., A GUIDE TO UNCITRAL: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (Jan. 2013), available at <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>.

³⁷ Kyla Tienhaara, *Third Party Participation in Investment-Environment Disputes: Recent Developments*, 16 REV. EUR. CMTY. & INT'L ENVTL. L. 230 (2007).

³⁸ UNCITRAL Arbitration Rules, *supra* note 35.

³⁹ U. N. Comm'n on Int'l Trade Law, Dec. 16, 2013, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, art. 1, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html [hereinafter "UNCITRAL Transparency Rules"].

According to UNCTAD, six of the publicized investment disputes initiated in 2014 were filed under the UNCITRAL Arbitration Rules.⁴⁰

3. Other Institutions and Procedural Rules

Other sets of procedural rules may apply to Investor-State Arbitration. Apart from ICSID, the Arbitration Institute of the SCC headquartered in Stockholm, the ICC headquartered in Paris and the PCA headquartered in The Hague regularly administer Investor-State Arbitrations. This section focuses on the rules issued by these institutions, although several other sets of rules exist.

i. The SCC

The SCC Arbitration Institute was established independently but is attached to the Stockholm Chamber of Commerce. The institution, which handles both commercial and Investor-State disputes,⁴¹ has dealt with an increasing caseload in recent years.⁴² It is difficult to provide an exact figure since many cases are not publicized.

The SCC Arbitration Rules (the “**SCC Rules**”) were revised in 2010, alongside the publication of the SCC Rules for Expedited Arbitrations. It is one of the applicable sets of rules under the ECT, together with the ICSID and UNCITRAL Arbitration Rules.⁴³

ii. The ICC

The ICC was established in Paris in 1923 and is one of the leading *fora* for the administration of international commercial arbitrations. Despite its primary focus on commercial cases, a number of Investor-State disputes are administered by the ICC every year.⁴⁴

The current ICC Rules of Arbitration (the “**ICC Rules**”) entered into force on January 1, 2012. Contrary to most other arbitration rules, disputes under the ICC Rules can be administered only by the ICC itself.⁴⁵

iii. The PCA

The PCA’s Secretariat “registers cases, provides legal support to the tribunals, processes documents, and facilitates communication between the parties as well as provides legal research and organizes meetings and hearings.”⁴⁶ The PCA’s broad range of activities encompasses commercial and Investor-State, as well as State-to-State arbitration. In commercial cases under the UNCITRAL Rules, the PCA is involved only at the stage of appointment of the arbitrator(s).

The PCA Arbitration Rules, revised in 2012, are applicable to disputes in which at least one State or intergovernmental organization is a party, or in which the parties have consented to their application.⁴⁷

⁴⁰ *IIA Issues Note: Recent Trends in IIAs and ISDS*, UNCTAD/WEB/DIAE/PCB/2015/1 (Vol. 1), 7 (Feb. 19, 2015), available at http://unctad.org/en/publicationslibrary/webdiaepcb2015d1_en.pdf.

⁴¹ *Dispute Resolution Services*, ARB. INST. OF THE STOCKHOLM CHAMBER OF COM, <http://sccinstitute.com/dispute-resolution/>.

⁴² SCC, *About the SCC*, <http://sccinstitute.com/about-the-scc/>.

⁴³ Energy Charter Treaty art. 26(4)(c), Dec. 17, 1994, 2080 U.N.T.S. 95, 34 I.L.M. 360 (1995), available at http://www.encharter.org/fileadmin/user_upload/document/Treaty_texts/Consolidated_Treaty_and_related_documents.pdf.

⁴⁴ *Who Can Use ICC Arbitration and How to Draft an ICC Arbitration Clause*, INT’L CT. OF ARB. OF THE INT’L CHAMBER OF COM., available at <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Who-can-use-ICC-arbitration-and-how-to-draft-an-ICC-Arbitration-clause/>.

⁴⁵ International Chamber of Commerce, *ICC Rules of Arbitration*, available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> [hereinafter “ICC Rules”].

⁴⁶ DOLZER & SCHREUER, *supra* note 24, at 244.

⁴⁷ Permanent Ct. of Arb., Permanent Court of Arbitration Rules 2012, art. 1(4) (Dec. 17, 2012), available at http://www.pca-cpa.org/showfile.asp?fil_id=2309 [hereinafter “PCA Rules”].

D. Threshold Issues in Investor-State Arbitration

1. Jurisdiction

(i.) To have jurisdiction over an investment claim, a tribunal must have jurisdiction over the claimant (who?), (ii.) jurisdiction over the subject matter of the dispute (what?) and (iii.) temporal jurisdiction. This means the claim must arise and be raised within a certain period of time (when?).

i. Who?

State consent is required for a dispute to be heard by an investment tribunal. This consent is usually found in an arbitration clause included in an IIA signed by two or more States.⁴⁸ The protections granted by the treaty apply to nationals of a State investing in another State, where both States are parties to the agreement.⁴⁹ The IIA's definition of an investor and its nationality has a direct impact on the scope of the tribunal's personal jurisdiction.⁵⁰ Treaty definitions are traditionally framed in broad terms. However, some recent agreements tend to provide more precise definitions⁵¹ in order to prevent undesired practices such as treaty shopping.⁵²

ii. What?

An arbitral tribunal must have jurisdiction over the subject matter of a dispute brought before it. Consequently, the definition of what constitutes an investment under the IIA is key, and "has become increasingly important as a threshold jurisdictional question in treaty arbitration."⁵³ To have its claim heard by an arbitral tribunal, the investor must prove that its investment falls within the scope of the underlying treaty definition. Tribunals usually consider that investments involve a substantial commitment, a certain duration, an element of risk and are in principle significant for the host State's development.⁵⁴ This last criterion is particularly controversial.⁵⁵ Some tribunals have deemed it irrelevant in defining an investment.⁵⁶

iii. When?

The date on which the dispute arose and the date on which the IIA entered into force are scrutinized by tribunals before hearing a claim. This analysis is based on the non-retroactivity principle, according to which "conduct that begins and ends before a treaty entered into force cannot violate obligations created by the treaty."⁵⁷ In order to establish whether the tribunal has temporal jurisdiction, the tribunal must first assess the wording of the treaty upon which the claim is based and look at the date of its entry into force.⁵⁸ Pursuant to the non-retroactivity principle, "obligations can only guide future conduct, and States must be given notice before they are held accountable."⁵⁹

⁴⁸ DOLZER & SCHREUER, *supra* note 24, at 254. See also *supra* Section B).

⁴⁹ SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 58 (2d ed. 2012).

⁵⁰ OECD, INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS, 9 (2008).

⁵¹ UNCTAD, SCOPE AND DEFINITION (A SEQUEL), UNCTAD/DIAE/IA/2010/2, 28 (FEB. 28, 2011), available at http://unctad.org/en/Docs/diaeia20102_en.pdf.

⁵² This practice refers to conduct whereby foreign investors, deliberately seeking to acquire the benefits of a BIT, route their investment through a third country that has more favorable treaty terms with the host state than their home country. See OECD, *supra* note 50, at 22.

⁵³ CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 163 (2d ed. 2007).

⁵⁴ DOLZER & SCHREUER, *supra* note 24, at 248.

⁵⁵ CHRISTOPH H. SCHREUER et al., THE ICSID CONVENTION: A COMMENTARY 131 (2d ed. 2009).

⁵⁶ *LESI-DIPENTA v. Algeria*, Award, 10 January 2005, para. II. 13(iv) *in fine.*; *LESI & Astaldi v. Algeria*, Decision on Jurisdiction, 12 July 2006, para. 72(iv) *in fine.*

⁵⁷ Sadie Blanchard, *State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration*, 10 WASH. U. GLOBAL STUD. L. REV. 429 (2011).

⁵⁸ MCLACHLAN, *supra* note 53, at 174.

⁵⁹ Blanchard, *supra* note 57, at 429.

2. Substantive Standards

Investment treaties protect investors through a number of provisions referred to as substantive standards. The wording of these provisions can differ, but they have a significant impact on the level of protection granted to investors. The most common standards are set out below.

i. Expropriation

Expropriation is the most serious form of interference with property.⁶⁰ The obligation for States to pay compensation for any expropriation is a core protection set out in most BITs.⁶¹ It is generally recognized under international law that an expropriation is legal if three conditions are met: the measure has to serve a public purpose, it must be neither arbitrary nor discriminatory and it must be compensated.⁶² In addition, many national investment laws and constitutional protections provide for guarantees against expropriation.⁶³ Expropriation can either be (1) direct, which entails a “taking of property by the host government by direct means, including the loss of all, or almost all, useful control of property”,⁶⁴ or (2) indirect, when the taking involves a “governmental, whether administrative or legislative, measure that does not directly take property but has the same impact by depriving the owner of the substantial benefits of the property.”⁶⁵

ii. Fair and Equitable Treatment

Where the IIA provides for such protection, host States have to guarantee “Fair and Equitable Treatment” (“FET”) to investors. FET has become the prominent standard invoked in investment disputes. It addresses “such acts and occurrences which do not fall into the net of specific standards but nevertheless are deemed to be inconsistent with the object and purpose of the BIT.”⁶⁶ FET is the broadest substantive standard as it covers “a much wider range of activities than other rules.”⁶⁷ The breadth of the FET standard is controversial. Tribunals have attempted to unfold the concept by defining more precise sub-concepts.⁶⁸ Although not uniformly agreed upon, these sub-concepts include: good faith, legitimate expectations, due process, transparency, freedom from harassment and coercion, arbitrary treatment, failure to readjust equilibrium and unilateralism in the adoption of terms.⁶⁹

iii. Full Protection and Security

Another common IIA standard provides that investments by investors of a contracting party in the territory of another contracting party must enjoy full protection and security. This protection targets the exercise of police power by the host State and its failure to protect the investor against damage caused by State officials, or by third persons where the State failed to exercise due diligence.⁷⁰

iv. Most-Favored Nation

The Most-Favored Nation standard (“MFN”) provides that host countries must not treat investors protected by a BIT less favorably than those of other States. According to some tribunals,

⁶⁰ DOLZER & SCHREUER, *supra* note 24, at 98.

⁶¹ ANDREW NEWCOMBE & LUIS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 321-398 (2009).

⁶² *Id.*, at 321.

⁶³ OECD, *Protecting Investment, Legal Frameworks for Infrastructure Investment in Egypt, Jordan, Morocco and Tunisia*, DAF/INV(2014)11/REV1, 15 (Oct. 2014) available at http://www.oecd.org/globalrelations/Legal%20Study_EN.pdf.

⁶⁴ SUBEDI, *supra* note 48, at 74.

⁶⁵ *Id.*, at 75.

⁶⁶ Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 12 (2014).

⁶⁷ *Id.*, at 10.

⁶⁸ *Id.*, at 15.

⁶⁹ *Id.*, at 16-32.

⁷⁰ MCLACHLAN, *supra* note 53.

this provision allows investors to claim the same rights as those granted to investors of another country through a more favorable BIT. It is disputed whether MFN clauses are applicable to substantive standards only, or if they may be extended to procedural aspects of dispute settlement provisions.⁷¹ In respect of procedural considerations, the debate revolves around the question of whether “it is possible to avoid the conditions and limitations attached to the consent to arbitration in a treaty by relying on an MFN clause in the treaty provided the respondent State has entered into a treaty with a third State that contains a consent clause without these conditions and limitations.”⁷²

v. National Treatment

A “National Treatment” clause provides that the host country cannot treat the foreign investor less favorably than it would treat a national in like circumstances. This protection prevents discriminatory practices and guarantees a level playing field for the investor. The rationale for such a clause “is to oblige a host State to make no negative differentiation between foreign and national investors when enacting and applying its rules and regulations and thus to promote the position of the foreign investor to the level accorded to nationals.”⁷³

II. Introduction to Transparency in Investor-State Arbitration

A. Transparency in Free-Trade Agreements

1. NAFTA

NAFTA Chapter 11 includes several dispute settlement transparency provisions. In addition, the Free Trade Commission (“FTC”), which oversees NAFTA’s implementation, has interpreted Chapter 11 in a manner favorable to transparency.⁷⁴

Pursuant to Annex 1137.4, in disputes where Canada or the United States is a party, either one of these two States or an investor that is a party to the arbitration may make an award public.⁷⁵ In addition, under Article 1128, the three member States are allowed to make submissions in any NAFTA dispute.⁷⁶ NAFTA tribunals have sometimes granted non-State third persons (otherwise known as *amicus curiae* or “friends of the court”) the opportunity to submit written submissions. Well-known cases include *Methanex v. United States*⁷⁷ (considered as the first Investor-State Arbitration in which an *amicus curiae* submission was allowed) and *UPS v. Canada*.⁷⁸ There has been no similar

⁷¹ Lise Johnson, *Ripe for Refinement: The State’s Role in Interpretation of FET, MFN, and Shareholder Rights* 6-9 (Apr. 2015), available at http://ccsi.columbia.edu/files/2015/05/GEG-WP_101-Ripe-for-Refinement-The-States-Role-in-Interpretation-of-FET-MFN-and-Shareholder-Rights-Lise-Johnson_0.pdf.

⁷² DOLZER & SCHREUER, *supra* note 24, at 270-271. Conflicting decisions have been rendered on that matter; the tribunal in *Maffezini v. Spain* accepted this proposition whereas it was rejected in *Señor Tza Yap Shum v. Republic of Peru*. See *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (Jan. 25, 2000), <http://www.italaw.com/sites/default/files/case-documents/ita0479.pdf>; *Señor Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (July 7, 2011), available at <http://www.italaw.com/sites/default/files/case-documents/ita0881.pdf>.

⁷³ DOLZER & SCHREUER, *supra* note 24, at 198.

⁷⁴ NAFTA FREE TRADE COMM’N, NOTES OF INTERPRETATION OF CERTAIN CHAPTER 11 PROVISIONS (July 31, 2001), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng>.

⁷⁵ NAFTA, *supra* note 14, annex 1137(4).

⁷⁶ NAFTA, *supra* note 14, art. 1128.

⁷⁷ *Methanex Corporation v. United States of America*, Decisions of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae” (NAFTA Jan. 15, 2001), http://www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf [hereinafter *Methanex v. U.S.*].

⁷⁸ *United Parcel Serv. of Am. Inc. (UPS) v. Government of Canada*, Decision on Participation as Amici Curiae, para. 73 (NAFTA Oct. 17, 2001), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ups-23.pdf> [hereinafter *UPS v. Canada*].

development for oral submissions by non-parties. However, oral submissions are not explicitly forbidden by the agreement.⁷⁹

While the issue of public hearings is not specifically mentioned in NAFTA Chapter 11, the signatory States have expressed their willingness to open arbitration hearings to the public in a joint statement.⁸⁰ However, the consent of all parties is required for hearings to be open to the public.⁸¹

2. CAFTA-DR

Article 10 of CAFTA-DR provides for increased transparency in comparison to NAFTA Chapter 11. Hearings are held in public and respondents must disclose all decisions and submissions to the public.⁸² *Amicus curiae* participation, through written and oral submissions, may also be allowed pursuant to Articles 10.20(2) and 10.20(3).⁸³

Although Article 10.21(3) imposes limits on the disclosure of protected information, this agreement provides one of the highest levels of transparency in dispute settlement proceedings among existing FTAs.

3. ECT

The ECT does not include transparency provisions for Investor-State disputes. Article 27(3)(1) provides that a copy of the award shall be deposited with the Secretariat, which shall make it “generally available”.

The ECT Secretariat is considering publishing a consolidated text of the ECT, which would include summaries of all publicized cases decided under the ECT.⁸⁴ It would also be possible to apply the UNCITRAL Transparency Rules within the context of ECT disputes provided the parties to the dispute agree.⁸⁵

4. CETA

The consolidated CETA text is consistent with recent transparency initiatives pertaining to Investor-State Arbitration. Article X.33 incorporates the UNCITRAL Transparency Rules,⁸⁶ which are discussed in further detail below. However, the Agreement goes even further than the UNCITRAL Transparency Rules. In addition to the requirements set out in Article 3(2) of the UNCITRAL Transparency Rules, CETA provides that exhibits to witness statements and expert reports must be disclosed. The disclosure of information at the commencement of proceedings provided in Article 2 is also guaranteed by a binding obligation on Canada and the European Union.⁸⁷

⁷⁹ Alessandra Asteriti & Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW X*, 8 (Stephan W. Schill ed., 2010), available at <https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlawSSRN-id1618843.pdf>.

⁸⁰ NAFTA FREE TRADE COMM’N, *Joint Statement: Decade of Achievement* (Jul. 16, 2004), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/js-sanantonio.aspx?lang=en&view=d>.

⁸¹ Andrea Menaker, *Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES XXX*, 128 (Katia Yannaca-Small ed., 2010), p. 154.

⁸² CAFTA-DR, *supra* note 15, art. 10.21.

⁸³ *Id.*, art. 10.20 (2), art. 10.20(3).

⁸⁴ Deborah Ruff, et al., *Energy Charter Treaty: Coming up for 20 years*, NORTON ROSE FULBRIGHT (2014), p. 5, available at <http://www.nortonrosefulbright.com/files/energy-charter-treaty-115911.pdf>.

⁸⁵ *Id.*

⁸⁶ Comprehensive Econ. & Trade Agreement, Can.-E.U., art. X.33, 174, Sept. 26, 2014, available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [consolidated text].

⁸⁷ *Id.*

However, an arbitral tribunal may limit the proceeding's transparency to protect confidential or classified information (similarly to provisions in the UNCITRAL Transparency Rules).

B. Transparency in Arbitration Rules

1. ICSID Arbitration Rules

The ICSID Arbitration Rules are the sole rules exclusively designed for Investor-State disputes.⁸⁸ Acknowledging the demand for increased transparency, ICSID amended the ICSID Arbitration Rules in 2006 to incorporate provisions specifically designed to increase transparency in the arbitral process.

Among the notable features of the ICSID Arbitration Rules, the ICSID Secretary-General is required to publish information about the operation of the Centre, including the registration of all requests for arbitration.⁸⁹ Case details are listed on a publicly available website.⁹⁰ The existence of all disputes filed with ICSID are consequently known to the public even though information about their content may not be available. The publication of awards, transcripts and other records remains subject to the parties' consent.⁹¹ However, when neither party consents to the publication of an award, the institution is required to "promptly include in its publications excerpts of the legal reasoning of the Tribunal."⁹²

Pursuant to Rule 32(2), when the parties agree and after consulting the ICSID Secretary-General, a tribunal may allow third parties to observe all or part of the hearings, subject to logistical arrangements. Tribunals are also allowed to take into account *amicus* briefs. The parties need to be consulted before the tribunal makes a decision in that regard.⁹³

2. UNCITRAL Arbitration Rules 2010

Apart from the ICSID Arbitration Rules, institutional arbitration rules have largely been crafted in the context of commercial arbitration where confidentiality is the norm. It is therefore unsurprising that the UNCITRAL, SCC and ICC Arbitration Rules include relatively few references to transparency.⁹⁴ However, this does not mean that disclosure of information is prohibited but rather that the question is left for the parties to decide. It is usually addressed in a procedural order by the tribunal.

The 2010 UNCITRAL Arbitration Rules do not expressly prevent parties from publicly disclosing information about the case. There is, however, an exception with regard to the award as Article 34(5) requires that "[t]he award may be made public only with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a right or in relation to legal proceedings before a court or other competent authority."

With regard to hearings, Article 28(3) of the UNCITRAL Arbitration Rules requires hearings to be held *in camera*. This means that they are held privately before the tribunal with no public audience, unless parties agree otherwise. The UNCITRAL Arbitration Rules are silent on third person submissions, but the issue is addressed in the UNCITRAL Transparency Rules.

⁸⁸ *New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps*, COLUMBIA CTR. ON SUSTAINABLE INT'L INV. ET AL. 6 (Aug. 2013).

⁸⁹ Administrative and Financial Regulations, Regulation 22, Sept. 25th, 1967, 7 I.L.M. 351 (1968) available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [hereinafter "ICSID Admin. & Fin. Reg"].

⁹⁰ See ICSID, *ICSID Cases*, <https://icsid.worldbank.org/apps/icsidweb/cases/Pages/AdvancedSearch.aspx>.

⁹¹ ICSID Admin. & Fin. Reg. *supra* note 88, reg. 22(2).

⁹² ICSID Arbitration Rules, *supra* note 27, rule 48(4).

⁹³ ICSID Arbitration Rules, *supra* note 27, rule 37(2).

⁹⁴ COLUMBIA CTR. ON SUSTAINABLE INT'L INV. ET AL., *supra* note 88, at 4.

3. SCC Arbitration Rules

Under the SCC Arbitration Rules, the default rule for dispute information disclosure is confidentiality pursuant to Article 46. Case documents may nonetheless be disclosed, including the final award, subject to party consent. Nothing in the SCC Arbitration Rules prevents the parties from unilaterally disclosing information about their case.

Pursuant to Article 27, hearings are generally held in private unless otherwise agreed by the parties. The SCC Arbitration Rules are silent on the question of submissions by third persons. However, there is no explicit prohibition on such submissions. Further, under Article 19(1) of the SCC Arbitration Rules, the arbitral tribunal has broad discretion to “conduct the arbitration in such manner as it considers appropriate.” In principle, third person submissions may therefore be accepted.

4. ICC Arbitration Rules

The ICC Arbitration Rules are mostly silent on the issue of transparency. If confidentiality restrictions apply, the burden is on the institution and not the parties.⁹⁵ There is no default rule of confidentiality for the parties, which have extensive discretion over the degree of transparency of their dispute.⁹⁶ Nothing precludes the parties from unilaterally disclosing information about the commencement of a case or an ongoing dispute.

Third party access to hearings is subject to the agreement of both parties and the tribunal.⁹⁷ The ICC Arbitration Rules do not make any reference to *amicus curiae* submissions. The option was considered by the ICC task force drafting the 2012 revision of the rules, but was finally rejected for fear of complicating proceedings and discouraging parties from choosing the ICC.⁹⁸ However, no provision explicitly bars such submissions. Furthermore, the ICC task force considered that they could be admitted if both parties agreed under the general powers granted to the arbitral tribunal pursuant to Article 22(1).⁹⁹

5. The Draft SIAC Investment Arbitration Rules

In February 2016, the Singapore International Arbitration Centre (“SIAC”) released its draft Investment Arbitration Rules (“Draft SIAC Rules”) for public comment. Although not yet adopted in its final form, the draft contains several notable features designed to facilitate the intervention by interested third persons, referred to as ‘non-disputants.’¹⁰⁰ Pursuant to Rule 28, non-disputants can make written submissions to the tribunal, provided certain requirements are met. For instance, a party to the contract or treaty out of which the dispute has arisen that is not a party to the dispute itself may, after notifying the disputing parties, make written submissions to the tribunal, but only for questions of contract or treaty interpretation.¹⁰¹ Likewise, the tribunal may, after consultation with the disputing parties, invite written submissions from any non-disputing party regarding either factual or legal

⁹⁵ ICC Rules, *supra* note 45, art. 34(2), “Additional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else”.

⁹⁶ ICC Rules, *supra* note 45, art. 22(3) “Upon the request of any party, the arbitral tribunal *may* make orders concerning the confidentiality of the arbitration proceedings ... and *may* take measures for protecting trade secrets and confidential information.” [emphasis added].

⁹⁷ ICC Rules, *supra* note 45, art. 26(3).

⁹⁸ Jean E. Kalicki, *The Prospects for Amicus Submissions Outside the ICSID Rules*, KLUWER ARBITRATION BLOG (Sep. 14, 2012), available at <http://kluwerarbitrationblog.com/2012/09/14/the-prospects-for-amicus-submissions-outside-the-icsid-rules/>.

⁹⁹ *Id.*

¹⁰⁰ Draft Singapore International Arbitration Centre Investment Arbitration Rules, Article 28, available at [http://www.siac.org.sg/images/stories/articles/rules/IA%20Rules%20\(rev%2020160115\).pdf](http://www.siac.org.sg/images/stories/articles/rules/IA%20Rules%20(rev%2020160115).pdf) [*hereinafter* Draft SIAC Rules].

¹⁰¹ Draft SIAC Rules, *supra* note 101, Art. 28.1.

matters relevant to the proceedings,¹⁰² keeping in mind the confidentiality requirements of Rule 36 and the need to avoid undue disruption to the arbitration or unfair prejudice against either party.¹⁰³

With regard to confidentiality, the Draft SIAC Rules provide, in Rule 36, that, “matters relating to the proceedings and the award” must remain confidential absent the express written permission of the parties.¹⁰⁴ “Matters relating to the proceedings” refers to all pleadings, evidence and related documents produced in the proceedings, as well as documents produced by another party in the proceedings or that relate to the award.¹⁰⁵ Although Rule 36 sets out specific conditions under which the tribunal may disclose confidential matters to an outside entity without the consent of the parties,¹⁰⁶ it fails to provide similarly specific guidance regarding how or when it may share information and documents with non-disputants beyond the general requirement that the tribunal obtain written consent from all parties to the proceedings.¹⁰⁷ Likewise, unless the parties agree otherwise, all hearings are held *in camera*, and all “records, transcripts or documents used” remain confidential.¹⁰⁸

III. The UNCITRAL Transparency Rules

The UNCITRAL Arbitration Rules provided for limited transparency prior to 2006. Recognizing the “importance of ensuring transparency” in Investor-State disputes,¹⁰⁹ UNCITRAL decided to specifically address the issue of transparency subsequently to the revision of the UNCITRAL Arbitration Rules in 2010. In July 2013, the Commission adopted the UNCITRAL Transparency Rules. Where earlier rules generally provided for private proceedings, the new UNCITRAL Transparency Rules aimed at establishing an unprecedented level of transparency. The UNCITRAL Transparency Rules enacted a “shift in the underlying presumption towards transparency, rather than privacy, in treaty-based Investor-State Arbitrations” and “set up a process and institutional framework to ensure that transparency is clearly and consistently put into practice.”¹¹⁰ The UNCITRAL Transparency Rules constitute a template for conducting Investor-State Arbitration proceedings transparently in UNCITRAL and other arbitration settings.¹¹¹

The UNCITRAL Transparency Rules came into effect on April 1, 2014. They were incorporated into the UNCITRAL Arbitration Rules through an amendment to Article 1.¹¹² The Mauritius Convention was adopted on December 10, 2014, and will facilitate the application of the UNCITRAL Transparency Rules subject to several conditions detailed below.¹¹³

As of April 2016, few international instruments have incorporated the UNCITRAL Transparency Rules. Among these, the Swiss-Georgia BIT dated June 3, 2014¹¹⁴ as well as CETA provide for their

¹⁰² Draft SIAC Rules, *supra* note 101, Art. 28.2.

¹⁰³ Draft SIAC Rules, *supra* note 101, Art. 28.4.

¹⁰⁴ Draft SIAC Rules, *supra* note 101, Art. 36.1.

¹⁰⁵ Draft SIAC Rules, *supra* note 101, Art. 36.3.

¹⁰⁶ Draft SIAC Rules, *supra* note 101, Art. 36.2.

¹⁰⁷ *Id.*

¹⁰⁸ Draft SIAC Rules, *supra* note 99, Art. 20.4.

¹⁰⁹ Rep. of the U.N. Comm’n on Int’l Trade Law, 41st Sess., June 16–July 3, 2008, U.N. Doc. A/63/17; GAOR, 63d Sess., Supp. No. 17, para. 314 (2008); Rep. of the U.N. Comm’n on Int’l Trade Law, 44th Sess., June 27–July 8, 2011, U.N. Doc. A/67/17; GAOR, 66th Sess., Supp. No. 17, para. 200 (2011); Rep. of the U.N. Comm’n on Int’l Trade Law, 45th Sess., June 25–July 6, 2012, U.N. Doc. A/67/17; GAOR, 67th Sess., Supp. No. 17, para. 69 (2012).

¹¹⁰ COLUMBIA CTR. ON SUSTAINABLE INT’L INV. ET AL., *supra* note 88, at 7.

¹¹¹ *Id.*, at 12.

¹¹² *Id.*, at 8.

¹¹³ Rep. of the U.N. Comm’n on Int’l Trade Law, 47th Sess., July 7–July 18, 2014, U.N. Doc. A/69/17 available at <http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf> [hereinafter “UNCITRAL Convention on Transparency”].

¹¹⁴ Accord entre la confédération Suisse et la Géorgie concernant la promotion et la protection réciproque des investissements, State Secretariat to Economic Affairs SECO – Swiss Confederation, 1566, June 3, 2014, available at <https://www.admin.ch/opc/fr/federal-gazette/2015/1561.pdf>.

application.¹¹⁵ Furthermore, the EU has expressed its willingness to incorporate the UNCITRAL Transparency Rules into all of its trade agreements that are currently under negotiation.¹¹⁶

A. Applicability

1. Provisions

Following lengthy discussions over the nature of the new instrument (guidelines, stand-alone instrument or part of the UNCITRAL Arbitration Rules), UNCITRAL decided that it would be available both as part of the UNCITRAL Arbitration Rules and as a stand-alone instrument to be applied even in disputes governed by other arbitral rules.¹¹⁷ In 2013, the 2010 UNCITRAL Arbitration Rules were consequently modified in order to expressly incorporate the UNCITRAL Transparency Rules. The aim was to build a coherent legal structure.¹¹⁸ Pursuant to Article 1(9), parties to a dispute governed by rules other than the UNCITRAL Arbitration Rules may also adopt the UNCITRAL Transparency Rules. The rationale was to establish an instrument applicable to a vast number of disputes.

Under Article 1(1), the UNCITRAL Transparency Rules automatically apply when Investor-State disputes arising out of a treaty that has been concluded on or after April 1, 2014 are initiated under the UNCITRAL Arbitration Rules. However, Article 1(1) also provides that the UNCITRAL Transparency Rules apply “unless parties to the Treaty have agreed otherwise”. They thus provide an opt-out opportunity; parties can agree not to apply the UNCITRAL Transparency Rules.¹¹⁹

Article 1(2) governs situations where a dispute initiated under the UNCITRAL Arbitration Rules arises out of a treaty concluded prior to the entry into force of the UNCITRAL Transparency Rules. In such a case, parties may opt-in by agreeing on the application of the UNCITRAL Transparency Rules. The Rules also apply if the parties to the dispute agree on their application at any time throughout the proceedings or if the relevant parties to the treaty agree to their application after April 1, 2014.

2. Mauritius Convention

Given that the UNCITRAL Transparency Rules do not apply to disputes arising out of a treaty concluded before April 1, 2014, UNCITRAL established an instrument enabling States to provide for the application of the UNCITRAL Transparency Rules in any arbitral proceedings arising under one of their existing treaties.¹²⁰

The UNCITRAL Convention on Transparency (or Mauritius Convention) was adopted in July 2014 to allow State parties to treaties concluded before 1 April 2014 to decide on the automatic application of the UNCITRAL Transparency Rules to any disputes arising under those treaties. States may nonetheless make reservations and exclude the application of the Mauritius Convention to a specific treaty under Article 3(1)(a) or decide to carve out disputes under non-UNCITRAL arbitration rules from the Convention’s scope of application under Article 3(1)(b).

As of April 2016, Belgium, Canada, Congo, Finland, France, Gabon, Germany, Italy, Luxembourg, Madagascar, Mauritius, Sweden, Switzerland, the Syrian Arab Republic, the United Kingdom and the

¹¹⁵ CETA, *supra* note 17.

¹¹⁶ *EU contributes €100,000 to increase transparency in investor-to-state disputes*, EUROPEAN COMMISSION TRADE (Jan. 6, 2015), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1428>.

¹¹⁷ COLUMBIA CTR. ON SUSTAINABLE INT’L INV. ET AL., *supra* 88, at 8.

¹¹⁸ UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), UN Doc. A/RES/68/109, GAOR, 68th Sess., Supp. No. 17 (2013) art. 1(4).

¹¹⁹ The UNCITRAL Transparency Rules only apply to Investor-State arbitration. There is no automatic application in commercial disputes arising out of contracts. COLUMBIA CTR. ON SUSTAINABLE INT’L INV. ET AL., *supra* note 88.

¹²⁰ Rep. of the U.N. Comm’n on Int’l Trade Law, 46th Sess., July 8-26, 2013, U.N. Doc. A/68/17, paras. 117-127; GAOR, 68th Sess., Supp. No. 17 (2013), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V13/858/38/PDF/V1385838.pdf?OpenElement>.

United States have signed the Mauritius Convention. However, only Mauritius has acceded to the treaty, which has to date not yet entered into force.¹²¹

B. Introduction to the Content of the UNCITRAL Transparency Rules

The UNCITRAL Transparency Rules contain a number of features intended to increase transparency in Investor-State disputes. Under this new regime, basic information regarding the dispute is made public, and several documents must be disclosed during the course of proceedings.¹²² A special Transparency Repository was established to centralize and facilitate the disclosure process.¹²³ In addition, hearings for the presentation of evidence or for oral arguments are made public, in particular through the use of video recordings available online. These provisions remain subject to the protection of confidential information and of the integrity of the arbitral process, as set out in Article 7.¹²⁴ Finally, third persons are entitled to submit briefs to the tribunal, subject to certain conditions.¹²⁵ The features of the UNCITRAL Transparency Rules are detailed in the following section.

IV. Practical Guide for NGOs

A. What Can an NGO Know?

This section describes the types of information accessible under the UNCITRAL Transparency Rules, the ICSID Rules and NAFTA Chapter 11.

1. Automatic Disclosure: Public Notice of the Commencement of Proceedings

Pursuant to Article 2 of the UNCITRAL Transparency Rules, any person may access “information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made.”¹²⁶

This information is accessible through the UNCITRAL Transparency Repository.¹²⁷ In Investor-State proceedings under the UNCITRAL Arbitration Rules or other rules, parties may nonetheless select unrelated institutions to act as repository of published information.

In *Iberdrola v. Bolivia*, the parties agreed that the PCA would assume the role of repository.¹²⁸ Similarly, in *BSG v. Guinea*, “ICSID [...] confirmed its willingness [...] to act as repository.”¹²⁹

ICSID provisions set out disclosure obligations as well. Pursuant to Regulation 22(1) of the ICSID Administrative and Financial Regulations, “[t]he Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding.”¹³⁰

¹²¹ UNCITRAL Convention on Transparency, *supra* note 113, art 9(1) the text “shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.”

¹²² UNCITRAL Transparency Rules, *supra* note 39, art. 3.

¹²³ *Id.*, art. 8.

¹²⁴ *Id.*, art. 6-7.

¹²⁵ *Id.*, art. 4-5.

¹²⁶ *Id.*, art. 2.

¹²⁷ *Id.*

¹²⁸ *Iberdrola, S.A., Iberdrola Energia, S.A.U. v. el Estado Plurinacional de Bolivia*, PCA case No. 2015-05, Acta de Constitución, 14.1 (Aug. 7, 2015), available at <http://www.pcacases.com/web/sendAttach/1465> [hereinafter *Iberdrola v. Bolivia*].

¹²⁹ *BSG Resources Limited. v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 2 on Transparency, Section 10, Section 17 (Sep. 17, 2015), available at <http://www.italaw.com/cases/documents/3689> [hereinafter *BSG v. Guinea*].

¹³⁰ ICSID Admin. & Fin. Reg, *supra* note 88, Regulation 22(1).

NAFTA Article 1129 provides for the automatic disclosure of written arguments and evidence to any of the States party to NAFTA.¹³¹ Disputing parties may unilaterally disclose documents pertaining to NAFTA proceedings when Canada or the United States is a party to the arbitration, subject to confidentiality exceptions.¹³² For instance, the U.S. government discloses key documents in most claims brought against it, regardless of the applicable procedural rules.¹³³ As a general principle, most rules do not mandate confidentiality. A notable exception to this principle is the confidentiality of awards pursuant to the 1976 and 2010 UNCITRAL Arbitration Rules.¹³⁴

2. Disclosure under Specific Conditions: Documents

Pursuant to Article 3 of the UNCITRAL Transparency Rules, any person may access certain categories of documents including, *inter alia*, pleadings submitted by the parties, hearing transcripts and decisions – subject to the caveats and exceptions detailed in Section IV(C). The documents that may be automatically accessed at any time under Article 3(1) are the following.

- The notice of arbitration, response to the notice of arbitration;
- Statement of claim, statement of defense;
- Any further written statements or written submissions by any disputing party;
- The table listing all exhibits to these documents and to expert reports and witness statements, if the table has been prepared for the proceedings (but not the exhibits themselves);
- Any written submissions by the non-disputing party (or parties) to the treaty and by third persons;
- Transcripts of hearings, where available; and
- Orders, decisions and awards of the arbitral tribunal.¹³⁵

Pursuant to Article 3(2) of the UNCITRAL Transparency Rules, any person may automatically access the following documents, upon request:

- Expert reports (but not their exhibits);
- Witness statements (but not their exhibits).¹³⁶

Pursuant to Article 3(3) of the UNCITRAL Transparency Rules, the disclosure of documents not covered by Articles 3(1) and 3(2) is subject to the tribunal's discretion.¹³⁷

¹³¹ NAFTA, *supra* note 14, art. 1129.

¹³² NAFTA FREE TRADE COMM'N, NOTES OF INTERPRETATION OF CERTAIN CHAPTER 11 PROVISIONS (31 July 2001), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng>.

¹³³ U.S. Department of State, NAFTA Investor-State Arbitrations, *Cases Filed against the United States of America*, available at <http://www.state.gov/s/l/c3741.htm>.

¹³⁴ *Submission to UNCITRAL Working Group II on International Arbitration*, COLUMBIA CTR. ON SUSTAINABLE INT'L INV. ET AL. 5 (Oct. 1, 2012), available at http://ccsi.columbia.edu/files/2014/04/CIEL_IISD_VCC_UNCITRAL_Background_Note_Sept._2012.pdf.

¹³⁵ UNCITRAL Transparency Rules, *supra* note 39, art. 3.1.

¹³⁶ *Id.*, art. 3.2.

¹³⁷ *Id.*, art. 3.3.

In *BSG v. Guinea*, the parties expanded the scope of the UNCITRAL Transparency Rules by agreeing on the disclosure of the following documents: legal authorities, witness statements and expert reports including exhibits. Nonetheless, these disclosures remain subject to the exceptions set out in Article 7 (confidential or protected information). Moreover, written submissions by third persons or other parties to the treaty are not automatically made public.¹³⁸

In *Iberdrola v. Bolivia*, the parties agreed on applying the UNCITRAL Transparency Rules, without any specific derogation.¹³⁹

The ICSID Rules are silent on the disclosure of documents during arbitral proceedings.

3. Hearings and Transcripts

Open hearings enable third persons to attend all or part of the oral arguments and/or consult the transcripts. Attendance at a hearing is a less formal but logistically more complex means of collecting information than submitting written requests for document disclosures. Potential costs such as travel and accommodation may be significant.

Under Article 6(1) of the UNCITRAL Transparency Rules, hearings are held in public.¹⁴⁰ However, pursuant to Article 6(2) of the same rules, parts of a hearing may be held in private if “there is a need to protect confidential information or the integrity of the arbitral process.”¹⁴¹ Tribunals must make logistical arrangements to facilitate public hearings pursuant to Article 6(3), but either party may argue against public hearings for “logistical reasons”, the scope of which is subject to the tribunal’s discretion.¹⁴²

In *BSG v. Guinea*, the parties agreed on logistical arrangements in order to facilitate public access to the hearings under Article 6(3) of the UNCITRAL Transparency Rules. Procedural Order No. 2 specifies that “[t]he hearings will be broadcast and made publicly accessible by video link on the ICSID website. An audio-video recording will also be made of hearings [...]”¹⁴³

However, logistical concerns were also raised to restrict hearing access. First, the tribunal restricted third persons’ physical attendance by making it subject to the Tribunal’s approval.¹⁴⁴ Second, the tribunal delayed the broadcast of the hearings by 30 minutes in order to protect potential confidential or protected information.¹⁴⁵ Third, the tribunal allowed the parties to request at any time during the hearings that part of it be held in private and made confidential, that the broadcast of the hearing be temporarily suspended, and that protected information be excluded from the video transmission.¹⁴⁶

The parties went further toward transparent hearings in *Iberdrola v. Bolivia*. They agreed on applying the UNCITRAL Transparency Rules, without any specific derogation.¹⁴⁷

¹³⁸ *BSG v. Guinea*, *supra* note 129.

¹³⁹ *Iberdrola v. Bolivia*, *supra* note 128.

¹⁴⁰ UNCITRAL Transparency Rules, *supra* note 39, art. 6.1.

¹⁴¹ *Id.*, art. 6.2.

¹⁴² *Id.*, art. 6.3.

¹⁴³ *BSG v. Guinea*, *supra* note 129.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*, Section 14 (ii).

¹⁴⁶ *Id.*, Section 14 (iii).

¹⁴⁷ *Iberdrola v. Bolivia*, *supra* note 127.

The ICSID Arbitration Rules, as most arbitration rules, provide that hearings are closed unless the parties agree otherwise. Pursuant to Rule 32(2) of the ICSID Arbitration Rules, other persons may attend subject to the parties' consent.¹⁴⁸ NAFTA Chapter 11 does not expressly provide for open hearings. However, State parties have made declarations of intent in favor of open hearings; the United States¹⁴⁹ and Canada¹⁵⁰ did so in two separate statements in 2003, followed by Mexico in 2004.¹⁵¹

4. Final Award

Both the UNCITRAL Transparency Rules and the ICSID Administrative and Financial Regulations provide for the publication of the final award subject to party consent and tribunal discretion.¹⁵²

Further, Rule 48(4) of the ICSID Arbitration Rules provides *de minimis* for the publication of excerpts of the tribunal's reasoning.¹⁵³

Annex 1137.4 of NAFTA Chapter 11 provides for either party's ability to disclose an award in disputes where Canada or the United States is a party, without requiring the consent of the opposing party.¹⁵⁴

B. What Can an NGO Do?

Four main avenues of action are open to third persons.

First, disseminating documentation, attending and reporting on hearings, as outlined in Section IV(A) above.

Second, third persons may pursue lobbying strategies. For instance, a third person may seek to persuade one of the three State parties to NAFTA to submit a brief in any arbitration under NAFTA Chapter 11. States are entitled to do so for matters of NAFTA treaty interpretation pursuant to Article 1128.¹⁵⁵ The authors are not aware of any such attempts; their success rate thus remains a matter of speculation. Moreover, the entire process remains subject to extensive tribunal discretion. A third person may seek to persuade the parties to the dispute to apply the UNCITRAL Transparency Rules, even in non-UNCITRAL proceedings. The parties reached such an agreement in *BSG v. Guinea*.¹⁵⁶

Third, a third person may in principle be joined to an arbitration as a party. However, this seems unlikely under the current practice of arbitral tribunals. The *UPS v. Canada* tribunal, constituted under NAFTA Chapter 11 and applying the UNCITRAL Arbitration Rules, denied such standing to third persons. The tribunal stated that petitioners' "[r]ights and obligations were not engaged [...]"¹⁵⁷ in the

¹⁴⁸ ICSID Arbitration Rules, *supra* note 27, rule 32(2).

¹⁴⁹ U.S.T.R., *Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations*, (Oct. 7, 2003), available at https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf.

¹⁵⁰ Canadian Ministry of Foreign Affairs, Trade and Development, *Statement of Canada on open hearings in NAFTA Chapter 11 Arbitrations*, (Oct. 10, 2003), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/open-hearing.aspx?lang=en>.

¹⁵¹ NAFTA FREE TRADE COMM'N, *supra* note 79.

¹⁵² UNCITRAL Transparency Rules, *supra* note 39 art. 3(1); ICSID Admin. & Fin. Reg., *supra* note 89, reg. 22(2)(b).

¹⁵³ ICSID Arbitration Rules, *supra* note 27, rule 48(4).

¹⁵⁴ NAFTA, *supra* note 14, annex 1137(4).

¹⁵⁵ NAFTA, *supra* note 14, art. 1128.

¹⁵⁶ *BSG v. Guinea*, *supra* note 129.

¹⁵⁷ *UPS v. Canada*, *supra* note 78, para. 40.

arbitration and that they were unable “to point to a power in the Agreement read in its context which authorizes the tribunal to add parties.”¹⁵⁸

Finally, under certain conditions, organizations and individuals may submit *amicus curiae* briefs. Pursuant to Article 4(1) of the UNCITRAL Transparency Rules, “[a]fter consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty (“third person(s)”), to file a written submission with the arbitral tribunal [...]”¹⁵⁹ Similar non-disputing party participation is provided for under ICSID Arbitration Rule 37(2).¹⁶⁰ The ability for third parties to submit *amicus curiae* briefs is discussed in further detail below.

Note on terminology: the UNCITRAL Transparency Rules distinguish between a “third person” and a “non-disputing Party to the treaty”.¹⁶¹ The former is a party neither to the dispute nor to the treaty, while the latter is a signatory to the treaty governing the dispute. The ICSID Arbitration Rules do not make such a distinction and refer exclusively to a “non-disputing party”, which is “a person or entity that is not a party to the dispute.”¹⁶² Similarly, NAFTA Chapter 11 and the complementary Statement of the FTC on non-disputing party participation refer exclusively to a “non-disputing party”, which is neither an investor nor the disputing party.¹⁶³

1. Substantive Conditions for Third Person Submissions

The UNCITRAL Transparency Rules and ICSID Arbitration Rules set out three main conditions for *amicus curiae* submissions: (i) the subject matter of the submission must fall within the scope of dispute; (ii) submitting parties must have a significant interest in the proceedings; (iii) the submission must assist the tribunal in determining a factual or legal issue. Furthermore, (iv) tribunals apply additional conditions such as the proof of the third person’s independence from the parties to the dispute.

i. Matter within the Scope of Dispute

Pursuant to Article 4(4)(d) of the UNCITRAL Transparency Rules, “[t]he submission filed by the third person shall [...] address only matters within the scope of the dispute.”¹⁶⁴ Similarly, ICSID Arbitration Rule 37(2) provides that “the Tribunal may allow a person or entity that is not a party to the dispute [...] to file a written submission with the tribunal regarding a matter within the scope of the dispute.”¹⁶⁵ Third person participation is thus permitted for matters falling exclusively within the scope of the dispute.

Several tribunals have interpreted the scope of dispute broadly so as to include matters of interest to both disputing parties and third persons.

In *Methanex v. United States*, a dispute under NAFTA Chapter 11, the ICSID tribunal held that “[t]he substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties.”¹⁶⁶ The tribunal justified its acceptance of third-party submissions through a broad interpretation of the dispute’s subject matter: the ban on a gasoline additive by the State of California.

¹⁵⁸ *Id.*, para. 42.

¹⁵⁹ UNCITRAL Transparency Rules, *supra* note 39, art. 4(1).

¹⁶⁰ ICSID Arbitration Rules, *supra* note 27, rule 37(2).

¹⁶¹ UNCITRAL Transparency Rules, *supra* note 39, art. 3(1).

¹⁶² ICSID Arbitration Rules, *supra* note 27, rule 37(2).

¹⁶³ NAFTA, *supra* note 14, art. 1139; NAFTA FREE TRADE COMM’N, Statement on Non-Disputing Party Participation, (October 7, 2003), Section A(1).

¹⁶⁴ UNCITRAL Transparency Rules, *supra* note 39, art. 4(4)(d).

¹⁶⁵ ICSID Arbitration Rules, *supra* note 27, rule 37(2).

¹⁶⁶ *Methanex v. U.S.*, *supra* note 77, para. 49.

Similarly, in the *Biwater v. Tanzania* case, which concerned water privatization issues,¹⁶⁷ the ICSID tribunal allowed submissions from “interested non-disputing parties” because the dispute raised “a number of issues of concern to the wider community in Tanzania.”¹⁶⁸

However, in *Border Timbers*, the tribunal rejected a joint petition from European Center for Constitutional and Human Rights (“**ECCHR**”) and the chiefs of four indigenous communities to be admitted as *amici curiae*, despite acknowledging that the proceedings may well impact upon the rights of those communities. The tribunal argued that “(t)he Petitioners, in effect, seek to make a submission on legal and factual issues that are unrelated to the matters before the Arbitral Tribunals.”¹⁶⁹

The potential for an *amicus curiae* submission to fall within the subject matter of a dispute depends on the nature of the dispute and how broadly the dispute’s scope is construed by the tribunal. Consequently, a comprehensive approach to the subject matter and scope of dispute is crucial to a successful application. Such an approach was adopted by the World Health Organization (“**WHO**”) and the Secretariat of the WHO’s Framework Convention on Tobacco Control (“**FCTC Secretariat**”) in *Philip Morris v. Uruguay*, an ICSID case regarding Uruguay’s introduction of plain tobacco packaging.

As specialists in the effects of “large graphic health warnings, bans on misleading branding and the protection of public health”¹⁷⁰, the WHO and FCTC Secretariat alleged that they were uniquely well-qualified to provide the tribunal with factual information concerning the global regulatory regime governing tobacco and, in turn, its effect on the Claimant’s legitimate expectations. The WHO and FCTC Secretariat also submitted that their particular role in the regulatory framework would allow them to assist the tribunal in understanding the provisions of the Framework Convention on Tobacco Control and its legal relationship to the Switzerland-Uruguay BIT.¹⁷¹

Concluding that the proposed contributions by both organizations stood to enhance its decision-making capacity and would “support the transparency of the proceeding and its acceptability by users at large”¹⁷², the tribunal granted the WHO and the FCTC Secretariat leave to file a written submission pursuant to Rule 37(2) of the ICSID Rules, noting that, “[g]iven the public interest in the subject matter of this decision, the Tribunal hereby directs that this Procedural Order shall be subject to no confidentiality restrictions, and may be freely disclosed to third parties.”¹⁷³ However, the tribunal decided to keep confidential all correspondence between the parties, all documents filed in the arbitration, including all pleadings, memorials and parties’ submissions as well as all minutes, records and transcripts of hearings.¹⁷⁴

¹⁶⁷ Andrea K. Bjorklund, American Society of International Law, *ICSID Tribunal Finds Tanzania To Have Violated Bilateral Investment Treaty But Declines To Award Any Damages* (Dec. 31, 2008), available at <http://www.asil.org/insights/volume/12/issue/27/icsid-tribunal-finds-tanzania-have-violated-bilateral-investment-treaty>.

¹⁶⁸ *Biwater v. Tanzania, Gauff (Tanzania)Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, para. 358 (Jul. 24, 2008), available at <http://www.italaw.com/sites/default/files/case-documents/ita0095.pdf>.

¹⁶⁹ *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No. 2, para. 57 (26 June 2012), available at <http://www.italaw.com/sites/default/files/case-documents/ita1044.pdf> [hereinafter *Border Timbers v. Zimbabwe*].

¹⁷⁰ *Philip Morris Brand Sàrl, Philip Morris Products and Abal Hermanos v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Procedural Order No. 3, para. 7 (Feb. 17, 2015), available at <http://www.italaw.com/sites/default/files/case-documents/italaw4161.pdf> [hereinafter *Philip Morris v. Uruguay*].

¹⁷¹ *Id.*

¹⁷² *Philip Morris v. Uruguay*, Procedural Order No. 4, para. 30 (Mar. 24, 2015), available at <http://www.italaw.com/sites/default/files/case-documents/italaw4218.pdf>.

¹⁷³ *Id.*, para. 33.

¹⁷⁴ *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, available at <http://www.italaw.com/sites/default/files/case-documents/italaw1216.pdf>.

ii. Significant Interest

Article 4(3) of the UNCITRAL Transparency Rules sets out that, “[i]n determining whether to allow such a [third person] submission, the arbitral tribunal shall take into consideration, among other factors that it determines to be relevant: (a) Whether the third person has a significant interest in the arbitral proceedings [...]”¹⁷⁵ This means the third person’s interest in the proceedings must be “legitimate, significant, and able to be conclusively demonstrated.”¹⁷⁶

Pursuant to Article 37(2)(c) of the ICSID Arbitration Rules, tribunals are entitled to grant leave for third persons to file written submissions. This leave is subject to the tribunal’s assessment of whether “the non-disputing party has a significant interest in the proceeding.” In order to meet this standard, a third person must substantiate its genuine interest in a given case and demonstrate that it would be directly or indirectly affected by the tribunal’s decision. The third person must consequently demonstrate that the outcome of the arbitral proceedings may potentially impact its future rights and obligations.

In *Apotex v. United States*, the dispute concerned the purported prejudicial effect of “import alerts” imposed by the U.S. Food and Drug Administration (“FDA”) about the quality of drugs produced at two manufacturing facilities owned and operated by Apotex, a Canadian company. Specifically, Apotex contended that the import alerts, which prevented Apotex from exporting products originating in those facilities to the United States, significantly impacted its business and amounted to more favorable treatment of U.S. investors and U.S. owned investments in like circumstances.¹⁷⁷ Two non-disputing parties petitioned the tribunal to participate in the arbitration.

The first petitioner was Mr. Barry Appleton, a lawyer specializing in Investor-State Arbitration based in Canada. He sought permission to file a written submission on grounds that his extensive experience as an advocate in NAFTA proceedings and status as a national of a NAFTA-member state rendered him singularly well-equipped to comment on the effect of a government’s failure to afford foreign and domestic investors equal treatment on investment flows, as well as “the importance of ensuring that governments meet international treaty obligations.”¹⁷⁸

The second petitioner was a management consultancy firm, BNM, which similarly sought permission to file a written submission. It submitted that its status as a venture capital firm would enable it to assist the tribunal in determining whether the venture capital claimed as an ‘investment’ by Apotex would qualify as such under NAFTA. BNM added that its activities in promoting a “more ethical legal framework would allow it to assist the tribunal in appreciating the global pharmaceutical market”. This purportedly gave BNM a significant interest justifying its participation in the proceedings.¹⁷⁹ The arbitration was initiated under NAFTA Chapter 11 and governed by the ICSID Additional Facility Arbitration Rules.

The tribunal held that, in order to meet the significant interest requirement, “the applicant needs to show that he has more than a ‘general’ interest in the proceeding”.¹⁸⁰ For instance, “[t]he applicant must demonstrate that the outcome of the arbitration may have a direct or indirect impact on the rights

¹⁷⁵ UNCITRAL Transparency Rules, *supra* note 39, art. 4(3)(a).

¹⁷⁶ Katia Fach Gómez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line favorably for the Public Interest* 35 FORDHAM INT’L L.J., 510, 558.

¹⁷⁷ *Apotex Holdings Inc. and Apotex Inc. v. U.S.*, ICSID Case No. ARB(AF)/12/1, Request for Arbitration, *paras.* 2-3 (Feb 29, 2012), available at <http://www.italaw.com/sites/default/files/case-documents/italaw1228.pdf>.

¹⁷⁸ *Apotex Holdings Inc. and Apotex Inc. v. U.S.*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, Mr Barry Appleton, as a Non-Disputing Party, *paras.* 10-12 (Oct. 11, 2011), available at <http://www.italaw.com/sites/default/files/case-documents/italaw3001.pdf> [hereinafter *Apotex v. U.S.*].

¹⁷⁹ *Apotex v. U.S.*, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, *paras.* 8-10.

¹⁸⁰ *Apotex Holdings Inc. and Apotex Inc. v. U.S.*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, Mr Barry Appleton, as a Non-Disputing Party, para. 38 (Oct. 11, 2011), available at <http://www.italaw.com/sites/default/files/case-documents/italaw3001.pdf>.

or principles the applicant represents and defends.”¹⁸¹ Mr. Appleton’s request was denied for lack of significant interest in the dispute as he was not representing his own rights but “the interests of his professional clients.”¹⁸² BNM’s request was similarly rejected on the grounds that, while the firm seemed to have a “general interest”, it failed to demonstrate its significant interest in the subject matter of the arbitration.¹⁸³

In *Biwater v. Tanzania*, the petitioners submitted that they “have relied upon their general knowledge of the case and the legal issues it is likely to raise, to demonstrate why the proceeding had a significant interest to them. In this regard, the public interest involved in the case is directly related to the sphere of expertise and mandate of the Petitioners.”¹⁸⁴ The case is described in further detail in Section IV(B)’s case-study.

In *Philip Morris v. Uruguay*, the WHO and the WHO’s FCTC Secretariat filed a request to submit an *amicus* brief on the grounds that the outcome of the case had a “significant impact on the implementation of the Convention [...], both because the WHO FCTC and its Guidelines address tobacco packaging and labeling measures and because the claim challenges the sovereign authority of Uruguay to regulate in the interest of public health.” The tribunal held that both petitioners had a significant interest in proceedings, “considering that WHO is the world authority on public health matters and FCTC Secretariat is the designated global authority concerning the FCTC and its Implementation Guidelines.”¹⁸⁵

iii. Assistance in Determining a Factual or Legal Issue

Pursuant to Article 4(3)(b) of the UNCITRAL Transparency Rules, third persons must assist the tribunal in the determination of a factual or legal issue: “[i]n determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant: [...] [t]he extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.”¹⁸⁶

This requirement is set out in Rule 37(2) of the ICSID Arbitration Rules as well: “[i]n determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; [...]”¹⁸⁷

Furthermore, the FTC Statement on non-disputing party participation in NAFTA Chapter 11 proceedings sets out similar requirements in Section B(6)(a).¹⁸⁸

In *Apotex v. United States*, the tribunal declined both third person submissions, finding that the petitioners did not have the experience necessary to assist the tribunal in the determination of a factual or legal issue.

Concerning BNM’s submission, the tribunal held that, “[e]ven if the requirement of a different expertise, experience or perspective from that of the Disputing Parties is construed very broadly, the

¹⁸¹ *Id.*

¹⁸² *Id.*, para. 39.

¹⁸³ *Apotex v. U.S.*, *supra* note 180, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, para. 33.

¹⁸⁴ *Biwater Gauff v. Tanzania*, Petition for Amicus Curiae Status, at 12-13 (November 27, 2006), available at http://ita.law.uvic.ca/documents/investment_petition_arb0522.pdf.

¹⁸⁵ *Philip Morris v. Uruguay*, Procedural Order No.3, para. 25(c) (Feb. 17, 2015), available at <http://www.italaw.com/sites/default/files/case-documents/italaw4161.pdf>.

¹⁸⁶ UNCITRAL Transparency Rules, *supra* note 39, art. 4(3)(b).

¹⁸⁷ ICSID Arbitration Rules, *supra* note 27, rule 37(2).

¹⁸⁸ NAFTA FREE TRADE COMM’N, *supra* note 79, Section B(6)(a).

tribunal agrees with the Claimants' assessment that BNM does not have any special knowledge or relevant expertise or experience with the food and drug laws of the United States, or any other aspect of the United States legal and judicial system, or with NAFTA itself, which would provide to the tribunal [...] a material perspective or insight that is different from that of the Disputing Parties."¹⁸⁹

Regarding Mr. Appleton's submission, the tribunal considered that:

[...] While the tribunal has no doubt that Mr. Appleton has acquired the experience and expertise he states in the understanding of the meaning of investment treaty obligations and in the analysis of governments' regulatory conduct, the tribunal does not consider that this knowledge and insight by one individual practitioner, however extensive, equals (still less surpasses) the very considerable experience and insights possessed by the Disputing Parties' several Counsel in this particular arbitration. It is thus most unlikely that Mr. Appleton would provide the Tribunal with any particular perspective or insight different from the Disputing Parties.¹⁹⁰

iv. Independence

Pursuant to Article 4(2) of the UNCITRAL Transparency Rules, a third person must provide information that will enable the tribunal to assess whether it [the third person] is fully independent from either of the disputing parties. In particular, third persons wishing to make a submission must "disclose any connection, direct or indirect, which the third person has with any disputing party."¹⁹¹

ICSID tribunals strictly enforce a similar independence requirement: the *Suez/Vivendi v. Argentina* tribunal held that the "Tribunal will therefore only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case."¹⁹²

If full independence is not demonstrated, tribunals do not allow third person submissions. Two cases dealing with land seizure in Zimbabwe in the context of President Robert Mugabe's land reclamation program illustrate this point. In *Bernhard Von Pezold and Others v. Republic of Zimbabwe* and *Border Timbers Limited, Border Timbers International (Private) Limited and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (heard jointly), a tribunal denied submission of an *amicus curiae* brief by an NGO, the ECCHR. The tribunal held that the ECCHR was connected to an individual within Zimbabwe's government who had publicly expressed his support for Zimbabwe's land reform program.¹⁹³ This was found to "give rise to legitimate doubts as to the independence or neutrality of the Petitioners"¹⁹⁴ and was sufficient to defeat the petition.

The ECCHR considers that "this narrow application of the non-disputing party criteria could lead to grave consequences for non-disputing party participation in ICSID proceedings generally: in effect, all affected communities and organizations that have sought or seek to assert their rights within the framework of governmental policies could be excluded as *amicus curiae* for lack of independence,

¹⁸⁹ *Apotex v. U.S.*, *supra* note 183, para. 24.

¹⁹⁰ *Id.*, paras. 32-33.

¹⁹¹ UNCITRAL Transparency Rules, *supra* note 39, art. 4(2).

¹⁹² *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, para. 24 (May 19, 2005), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC516_En&caseId=C19 [hereinafter *Suez v. Argentina*].

¹⁹³ *Border Timbers v. Zimbabwe*, *supra* note 169, para. 56.

¹⁹⁴ *Id.*, para. 56.

even where there is no relationship of direct or indirect control between the government and the community or organization.”¹⁹⁵

2. Procedural Conditions for Third Person Submissions

Third person submissions are subject to two sets of procedural requirements: (i.) procedural requirements for leave to file a submission; and (ii.) procedural requirements for the submission itself, once leave has been granted.

i. Procedural Conditions for Leave to File a Submission

Pursuant to Article 4(2) of the UNCITRAL Transparency Rules, “[a] third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:

- a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);
- b) Disclose any connection, direct or indirect, which the third person has with any disputing party;
- c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g., funding around 20 percent of its overall operation annually);
- d) Describe the nature of the interest that the third person has in the arbitration; and
- e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.”¹⁹⁶

Section B(2) of the FTC Statement on non-disputing party participation in NAFTA Chapter 11 proceedings sets out similar submission requirements.¹⁹⁷

ii. Procedural Conditions for Filing a Submission

Once the leave for application is granted, the subsequent procedural requirements are set out in Article 4(4) of the UNCITRAL Transparency Rules: “[t]he submission filed by the third person shall:

- a) Be dated and signed by the person filing the submission on behalf of the third person;
- b) Be concise, and in no case longer than as authorized by the arbitral tribunal;
- c) Set out a precise statement of the third person’s position on issues; and

¹⁹⁵ European Center for Constitutional and Human Rights, *Human Rights Inapplicable in International Investment Arbitration? A commentary on the non-admission of ECCHR and Indigenous Communities as Amici Curiae before the ICSID tribunal*, 7 (Jul., 2012), available at http://www.ecchr.eu/en/our_work/business-and-humanrights/worldbank.html?file=tl_files/Dokumente/Wirtschaft%20und%20Menschenrechte/ICSID%20tribunal%20%20Human%20Rights%20Inapplicable_A%20Commentary.pdf.

¹⁹⁶ UNCITRAL Transparency Rules, *supra* note 39, art. 4(2).

¹⁹⁷ NAFTA FREE TRADE COMM’N, *supra* note 79.

- d) Address only matters within the scope of the dispute.”¹⁹⁸

Similar criteria are set out in Section B(3) of the FTC Statement on non-disputing party participation in NAFTA Chapter 11 proceedings.¹⁹⁹ For practical purposes, the submission is generally sent with the petition, which means that all procedural requirements set out above must be complied with in one instance.

C. Caveats: Costs and Tribunal Discretion

The UNCITRAL Transparency Rules provide exceptions to transparency based on (1) tribunals’ discretion and (2) significant costs for third parties requesting document disclosures or participation in the proceedings.

1. Impact of the Tribunal’s Discretion

The arbitral tribunal exercises discretion over (i) document disclosures and public hearings, as well as (ii) third person written submissions.

i. Impact of the Tribunal’s Discretion on Information Disclosure

(a) Confidential or protected information may be redacted and (b) hearings may be restricted. Furthermore, (c) general exceptions to transparency remain available to disputing parties and tribunals.

a. Redaction of Confidential or Protected Information

The right to access information set out in Article 3(3) of the UNCITRAL Transparency Rules does not entail full or systematic disclosures.²⁰⁰ Moreover, the general public and admitted *amicus curiae* petitioners do not have the same standing with regard to document requests. While Article 3 of the UNCITRAL Transparency Rules sets out documents available to the general public, third persons admitted as *amicus curiae* often request access to additional documents. Neither ICSID Rule 37(2) nor Article 4 of the UNCITRAL Transparency Rules address the standing of the *amicus curiae* in requesting information that is not publicly available. However, the *Philip Morris v. Uruguay* tribunal held that “[a]cceptance of a submission shall confer to the petitioner neither the status of a party to the arbitration proceeding nor the right to access the file of the case or to attend hearings.”²⁰¹

Article 3(3) of the UNCITRAL Transparency Rules is subject to Article 7. Article 7(1) of the UNCITRAL Transparency Rules sets out that “[c]onfidential or protected information [...] shall not be made available to the public pursuant to articles 2 to 6.”²⁰²

Similar restrictions have been established by ICSID tribunals. In *Suez v. Argentina*, the petitioners requested access to all documents. The request was denied on the grounds that “the Petitioners propose to offer their views to the Tribunal on general issues which *per se* do not require comprehensive information of the factual basis of this case.” The tribunal further stated:

¹⁹⁸ UNCITRAL Transparency Rules, *supra* note 39, art. 4(4).

¹⁹⁹ NAFTA FREE TRADE COMM’N, *supra* note 79, Section B(3).

²⁰⁰ UNCITRAL Transparency Rules, *supra* note 39, arts. 3(2), 3(3).

²⁰¹ *Philip Morris v. Uruguay*, *supra* note 173, para. 24.

²⁰² UNCITRAL Transparency Rules, *supra* note 39, art. 7(1).

Furthermore, it must be emphasized that the role of an *amicus curiae* is not to challenge arguments or evidence put forward by the Parties; this is the Parties' role. The role of the Petitioners in their capacity as *amicus curiae* is to provide their perspective, expertise, and arguments to help the court. The Tribunal believes that, under the circumstances of the present case, the Petitioners can fully carry out that function without access to the record.²⁰³

However, the tribunal's determination on confidentiality does not preclude mandatory disclosures under domestic law. A document deemed confidential by a tribunal may potentially be obtained through an injunction in domestic courts. CAFTA-DR explicitly provides that "[n]othing in this Section [the Investment Chapter] requires a respondent to withhold from the public information required to be disclosed by its laws."²⁰⁴

b. In Camera Hearings

The right to attend hearings provided for in Article 6(1) of the UNCITRAL Transparency Rules does not apply systematically.²⁰⁵ Hearings may be held *in camera*.²⁰⁶ *In camera* hearings are less expensive as they entail fewer logistical costs such as sound and video recording, metal detectors and other security measures. Parties with limited means may therefore favor *in camera* hearings. As a general rule, however, hearings are to be held in public and any exceptions to this principle are to be construed narrowly.

Article 6(2) of the UNCITRAL Transparency Rules is subject to the exceptions set out in Article 7 (confidential or protected information) and, consequently, to the arbitrators' discretion. Parts of the hearing may be held in private if the tribunal finds that they require such protection. Furthermore, parties to the dispute may argue against public hearings for "logistical reasons" under Article 6(3) of the UNCITRAL Transparency Rules.²⁰⁷

Similarly, Article 32(2) of the ICSID Arbitration Rules sets out that open hearings are subject to party consent and logistical arrangements. Moreover, the Article provides that "[t]he Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information."²⁰⁸

c. Other Exceptions to Transparency

Articles 7(5), 7(6) and 7(7) of the UNCITRAL Transparency Rules set out further potential exceptions to transparency, such as security interests and the integrity of the arbitral process.²⁰⁹ However, these exceptions are also commonly found in other arbitration rules, even those that do not specifically address *amicus* submissions such as the UNCITRAL Arbitration Rules.

ii. Impact of the Tribunal's Discretion on Third Person Submissions

Prior to allowing third person submissions, the tribunal exercises discretion by (a) determining if the procedural requirements are met and (b) assessing the applicability of any other exceptions.

²⁰³ *Suez v. Argentina*, Order in Response to a Petition by five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission, para. 25 (Feb. 12, 2007), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC519_En&caseId=C19.

²⁰⁴ CAFTA-DR, *supra* note 15, art. 10.21(5).

²⁰⁵ *Id.*, art. 6(1).

²⁰⁶ United States Courts, Glossary of Legal Terms, *in camera*, available at <http://www.uscourts.gov/glossary>.

²⁰⁷ UNCITRAL Transparency Rules, *supra* note 39, art. 6(3).

²⁰⁸ ICSID Arbitration Rules, *supra* note 27, rule 32(2).

²⁰⁹ UNCITRAL Transparency Rules, *supra* note 39, art. 7(5); 7(6); 7(7).

a. Discretionary Control over the Admissibility of Submissions

Article 4(3) of the UNCITRAL Transparency Rules allows tribunals to exercise discretion in assessing the applicant's standing and the potential value of the brief that it seeks to submit.²¹⁰ Article 37(2) of the ICSID Arbitration Rules grants similar powers to tribunals by setting out that they "may allow" such submissions.²¹¹ This approach was confirmed by the tribunal in *Philip Morris v. Uruguay*, which held that, "[u]nder the terms of Rule 37(2), the Tribunal has discretion in determining whether to accept a written submission by a non-disputing party."²¹²

b. Other Exceptions to Third Person Submissions

Article 4(5) of the UNCITRAL Transparency Rules mandates tribunals to verify whether written submissions do not "disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party."²¹³

Similarly, ICSID Arbitration Rule 37(2) provides that a third party submission "does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party."²¹⁴ ICSID arbitration practice reflects this principle. In *Apotex v. United States*, the arbitrators asserted that, "[i]n view of the tribunal's decisions above, it would be materially disruptive and would unduly burden the Disputing Parties to grant permission to BNM to file a non-disputing party submission in this arbitration, given especially the fact that BNM's application does not address the relevant facts and arguments advanced in this arbitration."²¹⁵

2. Costs

Substantial costs may be incurred through (i) information disclosure; and (ii) third person interventions.

i. Costs of Information Disclosure

The documentation request procedure entails costs. Article 3(3) and 3(5) of the UNCITRAL Transparency Rules set out the administrative costs borne by requesting parties, such as photocopying and shipping costs.²¹⁶ However, the costs of making those documents available through the repository are not borne by the requesting party.²¹⁷ The repository is therefore the starting point for any documentary research. The costs for disclosures pursuant to Articles 3(1) and 3(2) are not borne by the requesting party either.

In the unlikely event that hearings are not live streamed, attending public hearings pursuant to Article 6(3) of the UNCITRAL Transparency Rules²¹⁸ may generate travel or representation costs. The transcript of proceedings may however be available, making physical attendance unnecessary.

ii. Costs of Third Person Submissions

Third person submissions entail substantial costs, including potential translation, legal advice and drafting fees. Moreover, the submitting party may have to bear all costs incurred by the disputing parties due to the submission (for example, the costs incurred in commenting on the third party submission). In *Philip Morris v. Uruguay*, the tribunal stated that it "reserves the right to make at the

²¹⁰ UNCITRAL Transparency Rules, *supra* note 39, art. 4(3).

²¹¹ ICSID Arbitration Rules, *supra* note 27, rule 37(2).

²¹² *Philip Morris v. Uruguay*, *supra* note 173, para. 24.

²¹³ UNCITRAL Transparency Rules, *supra* note 39, art. 4(5).

²¹⁴ ICSID Arbitration Rules, *supra* note 27, rule 37(2).

²¹⁵ *Apotex v. U.S.*, *supra* note 183, para. 37.

²¹⁶ UNCITRAL Transparency Rules, *supra* note 39, art. 3(5).

²¹⁷ *Id.*

²¹⁸ *Id.*, art. 6(3).

appropriate time an order for costs to be paid or reimbursed by the Petitioner should either Party request the reimbursement of properly documented costs it has incurred by reason of the Submission.”²¹⁹ The UNCITRAL Transparency Rules remain silent on this point, leaving it open to the tribunals’ discretion.

D. Third Person Participation in ICSID Arbitration Proceedings: Case Study

1. Chronology of the *Biwater Gauff Ltd. v. United Republic of Tanzania* Case

On August 2, 2005, Biwater Gauff Ltd. (“BGT”), a private water management company, filed a request for arbitration with ICSID concerning a contractual dispute with the United Republic of Tanzania (“Tanzania”). The dispute arose out of agreements entered into by BGT and Tanzania for the operation and management of the Dar es Salaam water system through a local operating company established by BGT and called City Water Services Limited. After BGT experienced issues operating and managing the water system, Tanzania repudiated the lease contract and occupied City Water Services’ facilities, taking over the operation and deporting its senior managers. BGT initiated an ICSID arbitration under the UK-Tanzania BIT, claiming that the conduct of Tanzania was in breach of the BIT.²²⁰

On November 27, 2006, five NGOs filed a joint “Petition for *Amicus Curiae* Status” pursuant to Rule 37(2) of the ICSID Rules. Three of the NGOs were Tanzanian: the Lawyers’ Environmental Action Team (“LEAT”), the Legal and Human Rights Centre (“LHRC”), and the Tanzania Gender Networking Program (“TGNP”). The remaining two were international organizations: the Center for International Environmental Law (“CIEL”) and the International Institute for Sustainable Development (“IISD”).²²¹

On February 2, 2007, the tribunal granted the NGOs leave to file a joint written *amicus curiae* submission pursuant to recently revised [in 2006] Rule 37(2) in Procedural Order No. 5.²²² The tribunal denied the NGOs’ application for access to specific arbitration documents, as well as their request to attend hearings.²²³

On July 24, 2008, the tribunal issued its final decision. It held that the Tanzanian government had violated the terms of the UK-Tanzania BIT.

2. The Initial Petition

The NGOs sought the following outcomes: status as *amicus curiae* in the arbitration, access to key arbitration documents and permission to attend any hearings and to reply to any specific questions of the tribunal on the written submissions.²²⁴ The NGOs based the admissibility of their petition on the legal grounds set out in ICSID Rule 37(2).²²⁵

The petitioners held that the arbitration raised “a number of issues of vital concern to the local community in Tanzania, and a wide range of potential issues of concern to developing countries [...] that have privatized, or are contemplating a possible privatization of, water or other infrastructure

²¹⁹ *Philip Morris v. Uruguay*, *supra* note 173, para. 32.

²²⁰ *Biwater Gauff v. Tanzania*, *supra* note 168, paras. 16-17.

²²¹ *Biwater Gauff v. Tanzania*, *supra* note 184, at 3, 7.

²²² *Biwater Gauff v. Tanzania*, *supra* note 184, Procedural Order No. 5, para. 60 (Feb. 2, 2007), available at http://www.italaw.com/sites/default/files/case-documents/ita0091_0.pdf.

²²³ *Id.*, paras. 68, 71.

²²⁴ *Biwater Gauff v. Tanzania*, *supra* note 184, at 2.

²²⁵ *Id.*

services.”²²⁶ The petitioners submitted that the arbitration “[h]as a substantial influence on the population’s ability to enjoy basic human rights.”²²⁷

With regard to the condition set out in Rule 37(2)(a), the petitioners held that “the starting perspective of the Petitioners, as NGOs with specialized interests and expertise in human rights, environmental and good governance issues locally in Tanzania, and in the multiple critical inter-relationships between international investment law and sustainable development at the international level, will be different than the initial interests, expertise and perspectives of the two contending parties.”²²⁸

With regard to the condition set out in Rule 37(2)(c), the petitioners held that the arbitration involved “issues of obvious public importance”, and had “direct and indirect relevance to the Petitioners’ mandates and activities at the local, national and international levels.”²²⁹ The organizations submitted that their “interest [...] in all of these public concerns is, without question, longstanding, genuine, and supported by their well-recognized expertise on these issues.”²³⁰

Finally, the petitioners noted that “there is a history of practice by *amici* that is growing in Investor-State Arbitrations” and “there is no recorded instance of the abuse of this process by any petitioner or accepted *amicus curiae*.”²³¹ They emphasized “the importance of public access to such arbitrations from a different perspective; the credibility of the arbitration process in the eyes of the public” and that “the public perception [of Investor-State Arbitration] can be one of a system unfolding in a secret environment that is anathema in a democratic context.”²³²

3. The Tribunal’s Order

i. Leave to File a Written Submission

The tribunal held that “on the basis of the information provided in the Petition, the nature and expertise of each Petitioner”, it may benefit from a written submission by the petitioners, and that “allowing for the making of such submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal’s mandate, and in securing wider confidence in the arbitral process itself.”²³³ In particular, the tribunal considered that “a written submission by the Petitioner appears to have the reasonable potential to assist the Arbitral Tribunal by bringing a perspective, particular knowledge or insight.”²³⁴ Finally, the tribunal stated that the petitioners’ submissions addressed matters within the scope of the dispute and that each of the petitioners had a “significant interest” in the proceedings.²³⁵

The tribunal therefore granted leave to file a written submission discussing the intersection of sustainable development, human rights and international investment and the impact of international investment on civil society within Tanzania and beyond pursuant to Rule 37(2).

ii. Request for Access to Key Arbitration Documents

The tribunal held that petitioners did not have the same standing as the parties to the dispute and would not assist the tribunal in determining a factual or legal issue. Given that “[t]his [had] been a very public and widely reported dispute”²³⁶ and that relevant issues were in the public domain,²³⁷ the

²²⁶ *Id.*, at 7.

²²⁷ *Id.*, at 8.

²²⁸ *Id.*, at 12.

²²⁹ *Id.*, at 9.

²³⁰ *Id.*, at 9.

²³¹ *Id.*, at 13.

²³² *Id.*, at 14.

²³³ *Biwater Gauff v. Tanzania*, *supra* note 222, para. 50.

²³⁴ *Id.*, at 15.

²³⁵ *Id.*

²³⁶ *Id.*, para. 65.

tribunal held that “[n]one of these types of issue ought to require [...] disclosure of documents from the arbitration.”²³⁸ Accordingly, the NGOs’ request for access to key arbitration documents was denied.²³⁹

iii. Request to Attend the Hearings

In light of the claimant’s objection to the presence of petitioners at the hearing, the tribunal held that it had “no power to permit the Petitioners’ presence or participation at the hearing, and must accordingly reject its application in this regard.”²⁴⁰

4. The Final Award

In its final award, the tribunal held that “[t]he Petitioners provided information and views relevant to the Arbitral tribunal’s mandate.”²⁴¹ The tribunal summarized several key arguments submitted by the *amici* on investor responsibility, including topics such as “the duty to apply proper business standards to the investment process”; “the principle of *pacta sunt servanda*”; and “the duty to act in good faith both prior to and during the investment period.”²⁴² The observations submitted by the *amici* were thus deemed “useful” by the tribunal²⁴³: “[t]heir submissions have informed the analysis of claims [...], and where relevant, specific points arising from the *Amici*’s submissions are returned to in that context.”²⁴⁴

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*, para. 68.

²⁴⁰ *Id.*, para. 71.

²⁴¹ *Biwater Gauff v. Tanzania supra* note 184, para 370.

²⁴² *Id.*, para. 374.

²⁴³ *Id.*, para. 392.

²⁴⁴ *Id.*

Annex 1 - Document Sources

Several institutions and international organizations serve as repositories for arbitral awards and other documents pertaining to arbitral proceedings. Documents may also be accessed through non-governmental or private sources. Below are the main freely accessible repositories and sources for Investor-State proceedings.

i. International Organizations

The **UN Transparency Registry** is the latest and most ambitious tool to collect documents disclosed under the UNCITRAL Transparency Rules. However, documents pertaining to only 7 cases have been filed as of April 2, 2016.

The specifics of the Registry are set out in Articles 2, 3 and 8 of the UNCITRAL Transparency Rules.

<http://www.uncitral.org/transparency-registry/registry/index.aspx>

The **United Nations Conference on Trade and Development** (“UNCTAD”) provides a database for international investment agreements as well as a listing of publicly disclosed cases. UNCTAD’s Investment and Enterprise division regularly publishes briefs on recent developments in Investor-State Arbitration.

<http://investmentpolicyhub.unctad.org/IIA>

ii. Arbitral Institutions

ICSID is the largest institutional source for documents disclosed in Investor-State disputes.

<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>

The PCA acts as a repository for disclosed information in pending and past cases it administered. It may also act as repository for a case it did not administer if both parties agree to it.

<http://www.pccases.com/web/allcases/>

iii. Private/Non-Governmental Organizations

Italaw is a private case index for Investor-State Arbitration and includes publicly available documents of proceedings such as arbitral awards. It provides a number of user friendly filters to identify relevant cases.

<http://www.italaw.com/browse>

Naftaclaims is a privately run website which compiles documents disclosed in arbitrations under the NAFTA Treaty.

<http://www.naftaclaims.com/index.html>

International Arbitration Case Law is a non-profit venture organized by several academic institutions which aims at disseminating arbitral decisions, mainly in the Investor-State field. The website provides documents in 5 different languages: English, Spanish, French, Portuguese and Chinese.

<http://www.internationalarbitrationcaselaw.com/home>

iv. News Sources

The **Global Arbitration Review** is an online magazine covering international arbitration. It does not publish procedural documents but provides briefings and updates.

<http://globalarbitrationreview.com/about/>

Investment Arbitration Reporter is a news source covering all types of Investor-State disputes.

<http://www.iareporter.com/>

Kluwer Arbitration Blog is a well-reputed blog covering commercial and Investor-State disputes.

<http://kluwerarbitrationblog.com/>