



**VALE COLUMBIA CENTER**  
ON SUSTAINABLE INTERNATIONAL INVESTMENT  
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND  
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In a September 2012 declaration, the United Nations General Assembly recognized that the rule of law, which the UN defines to include “procedural and legal transparency,”<sup>1</sup> “applies to all States equally, and to international organizations, including the United Nations and its principal organs.”<sup>2</sup> It further emphasized “that respect for and promotion of the rule of law and justice should guide” all of those organizations’ and entities’ activities and actions.<sup>3</sup>

The work of UNCITRAL is integral to the broader UN efforts to comprehensively strengthen the rule of law, and is helping to move that agenda forward, particularly through its recent initiative to increase transparency in investor-State arbitrations. In several meetings from 2008 to 2012, UNCITRAL has recognized and reaffirmed the importance of ensuring transparency in investor-State dispute settlement and has mandated its Working Group on Arbitration and Conciliation (Working Group II), to develop a legal standard reflecting that policy decision.<sup>4</sup> Working Group II, in turn, has made significant progress on that mandate, having now held five sessions on the issue.

There is a danger, however, that the Working Group will adopt an approach that may *appear* to significantly increase transparency in investor-State arbitrations but will actually have limited practical effect or impact for years to come. Under this approach, the Working Group would insert a “bright line” into the rules that would prevent the new transparency provisions from applying to disputes under the roughly 3000 treaties that currently exist. The new transparency standards would only apply to (1) UNCITRAL arbitrations arising under *future* investment treaties and (2) UNCITRAL arbitrations arising under existing treaties *if* the State parties to the underlying investment treaty were to take the extra step of “opting into” a to-be-developed instrument on transparency. The default rule for investor-State arbitrations under existing treaties, however, would be that UNCITRAL arbitrations would be no more transparent than they currently are. Thus, and in contrast to the transparency required by ICSID’s arbitration rules, investors, States and tribunals involved in disputes arising under the bulk of existing treaties could continue indefinitely to use the UNCITRAL arbitration rules to keep those disputes out of the public view from inception of the arbitrations through their conclusion.

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<sup>1</sup> “Delivering justice: programme of action to strengthen the rule of law at the national and international levels,” Report of the Secretary-General (2012), A/66/749.

<sup>2</sup> Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, Sept. 24, 2012, para. 2 (see A/67/L.1).

<sup>3</sup> *Id.*

<sup>4</sup> Report of the United Nations Commission on International Trade Law, 41st session (June 16–July 3, 2008), Gen. Ass. 63rd session, supp. No. 17, A/63/17, para. 314; Report of the United Nations Commission on International Trade Law, 45th session (June 25–July 6, 2012), Gen. Ass. 67th session, supp. No. 17, A/67/17, para. 69.

As a policy matter, such an outcome would be inconsistent with both the mandate from UNCITRAL and the UN's system-wide focus on promoting and strengthening the rule of law.<sup>5</sup> The Working Group should thus reject efforts to use this “bright line” approach to preemptively and expressly carve out existing treaties from the transparency rules’ coverage.

Nevertheless, recognizing that the “bright line” approach seems to have support within the Working Group, and that there is an apparent reluctance to adopt progressive and comprehensive rules on transparency, it may be worth considering a compromise approach that would both address the concerns of those delegations hesitant to adopt standards on transparency while helping the Working Group stay consistent with the mandate.

Below is a proposal for such an approach. It would amend the UNCITRAL arbitration rules to provide that (1) for UNCITRAL arbitrations under existing treaties, there would be a minimal transparency standard that essentially tracks existing levels of transparency under the ICSID arbitration rules – i.e., it provides for (a) disclosure of the existence of the dispute, (b) disclosure of awards, (c) provisions governing participation by amicus curiae and non-disputing state parties, and (d) provisions to guard against disclosure of protected and confidential information; and (2) for UNCITRAL arbitrations under future treaties, there would also be (a) disclosure of documents submitted to and issued by the tribunal during the course of the proceedings, and (b) open hearings.

Under this approach, State parties could also agree to immediately make the full suite of transparency rules apply to disputes arising under existing treaties. Further, the disputing parties would have the option to apply the transparency rules in UNCITRAL and other arbitrations.

The following is proposed language for this compromise approach that would be incorporated through amendments to the UNCITRAL arbitration rules:

## **UNCITRAL Rules on Transparency**

### **Section A: Scope of Application**

**Article 1(1)** [Notwithstanding any other provision in the UNCITRAL Arbitration Rules,] Section B of the Rules on Transparency shall apply to any arbitration under the UNCITRAL Arbitration Rules initiated after [date of adoption of the Rules on Transparency] pursuant to a treaty providing for the protection of investments (a “treaty-based arbitration”), unless the treaty[, as interpreted in accordance with international law,] provides that the Rules on Transparency do not apply.<sup>6</sup>

**Article 1(2).** The articles in Section C of the Rules on Transparency shall also apply to any treaty-based

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<sup>5</sup> In an attempt to sidestep that issue, some have argued that application of amended UNCITRAL rules to existing treaties is a legal impossibility. As we have pointed out elsewhere, however, application of such amendments to disputes arising under existing treaties is consistent with longstanding doctrine and practice. See, e.g., CIEL, IISD, & VCC, Submission to UNCITRAL Working Group II on International Arbitration and Conciliation, Vienna, Oct. 1-5, 2012, pp. 11-14.

<sup>6</sup> Whether the treaty provides that the amendments incorporated in the Rules on Transparency apply is an issue of treaty interpretation to be resolved in accordance with principles of international law.

arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty that is concluded or renewed<sup>7</sup> after [date of adoption of the rules on Transparency].

**Article 1(3).** These Rules on Transparency shall also apply when and to the extent that, (a) in accordance with the treaty and the applicable arbitration rules, the disputing parties agree to these Rules' application in respect of that arbitration; or, (b) the Parties to the treaty, or in the case of a multilateral treaty, the home State of the Investor and the Respondent, have [expressly] agreed to their application.

## **Section B**

[Insert in Section B rules 2 [commencement of proceedings], 4 [publication of arbitral awards],<sup>8</sup> 5 [submission by a third person], 6 [submission by a non-disputing Party to the treaty], 8 [exceptions to transparency], 9 [repository] (but renumber them accordingly)]

## **Section C**

[Insert in Section C rules 3 [publication of documents]<sup>9</sup> and 7 [hearings] (but renumber them)]

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<sup>7</sup> This aims to capture treaties that expire and are renewed after adoption of the new transparency rules.

<sup>8</sup> Under this approach, articles 3 and 4 follow the approach taken in A/CN.9/WG.II/WP.169, in which article 3 deals with production of certain documents submitted to and issued by the tribunal during the arbitral proceeding; and article 4 governs publication of awards.

<sup>9</sup> See *id.*