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THE FUTURE OF INVESTOR-STATE ARBITRATION:
GREATER TRANSPARENCY ON THE HORIZON FOR UNCITRAL RULES

By
Kristin A. Miller

I. BACKGROUND ON INVESTOR-STATE ARBITRATION

“International investment arbitration is one of the fastest growing areas of international dispute resolution.”¹ Investor-state arbitration involves the settlement of disputes arising out of international investment agreements, which are treaties formed between States for the reciprocal encouragement, promotion, and protection of investments.² Presently, there are more than 2,500 international investment agreements in force around the world.³ These agreements take different forms, including bilateral investment treaties,⁴ double taxation treaties,⁵ and other bilateral and regional trade and investment agreements containing commitments to liberalize, protect, or promote investment.⁶

¹ U.N. Commission on International Trade Law [UNCITRAL], Working Group II: Arbitration and Conciliation, *Settlement of Commercial Disputes: Preparation of Rules of Uniform Law on Transparency in Treaty-Based Investor-State Dispute Settlement*, Note by the Secretariat, ¶ 4, U.N. Doc. A/CN.9/WG.II/WP.160 (Aug. 5, 2010), available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html [follow the A/CN.9/WG.II/WP.160 hyperlink under 53rd Session 4-8 Oct., Vienna section] (last visited May 4, 2011).

² *Id.*

³ *Id.*

⁴ A bilateral investment treaty is an “[a]greement between two countries to ensure, among other things, that (1) investors of either country are allowed to hire top management personnel of any nationality, (2) have the right to make investment related transfers, (3) assets belonging to one country’s investors in the other country can only be expropriated in accordance with the international law, and (4) investors will have access to binding international arbitration in dispute settlement.” Business Dictionary, available at <http://www.businessdictionary.com/definition/bilateral-investment-treaty.html> (last visited Apr. 28, 2011).

⁵ A double taxation treaty is a “[r]eciprocal arrangement between two countries not to retax the repatriated income that a firm or person domiciled in one country earned in (and paid taxes on) the other.” Business Dictionary, available at <http://www.businessdictionary.com/definition/bilateral-investment-treaty.html> (last visited Apr. 28, 2011).

⁶ See *supra* note 1, at ¶ 3.

Although “[i]nternational investment agreements traditionally did not contain transparency provisions,”⁷ confidentiality has long been perceived as an implied term in international arbitration that flowed from the privacy of arbitral proceedings.⁸ “With the increase of investor-State arbitrations,” issues have been raised regarding availability of case information, access to awards, and public access to hearings,⁹ thus causing many to question the proposition of confidentiality. Transparency is considered a central aspect of good governance claims directed against States and private parties view it as an important characteristic of social responsibility.¹⁰ Investor-State arbitration has been targeted by transparency proposals because it involves public interest issues typically absent in other forms of commercial arbitration.¹¹ Confidentiality, however, is generally regarded as an important feature of arbitration due to the need to protect business or governmental secrets and to protect proceedings from any outside pressures on the parties or the arbitration tribunal.¹² The push for transparency in investor-State arbitration arises from the presence of a State in the arbitration and the subject-matter of the dispute, “which often raises questions of public policy, public interest, and the amount of potential liability.”¹³ This has led to a generally accepted need for greater transparency in investor-State arbitration.¹⁴

⁷ *Id.* at ¶ 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ UNCITRAL, Working Group II: Arbitration and Conciliation, *Settlement of Commercial Disputes: Preparation of Rules of Uniform Law on Transparency in Treaty-Based Investor-State Dispute Settlement, Note by the Secretariat*, ¶ 9, U.N. Doc. A/CN.9/WG.II/WP.160/Add. 1 (Aug. 5, 2010), available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html [follow the A/CN.9/WG.II/WP.160/Add.1 hyperlink under 53rd Session 4-8 Oct., Vienna section] (last visited May 4, 2011).

¹¹ J. Martin Hunter, *Status of the Work of UNCITRAL's Working Group II*, Sept. 20, 2010, available at <http://kluwerarbitrationblog.com/blog/2010/09/20/status-of-the-work-of-uncitrals-working-group-ii/> (last visited Apr. 28, 2011).

¹² *See supra* note 10, at ¶ 9.

¹³ *Id.*

¹⁴ Hunter, *supra* note 11.

The United Nations Commission on International Trade Law (UNCITRAL) has recognized the need for greater transparency in investor-state arbitration and, at its forty-first session (New York, June 16-July 3, 2008) the Commission agreed that the topic should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitral Rules.¹⁵ The Commission agreed that the scope of the work must encompass the importance of ensuring transparency in investor-state arbitration.¹⁶ Various possible forms were envisaged by the Working Group at its forty-eighth session, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules, or optional clauses for adoption in specific treaties.¹⁷ The Commission decided, however, that it was too early to make a decision on the form of a future instrument and that broad discretion should be accorded to the Working Group in that respect.¹⁸ Members of the forty-first session outlined that the work on transparency should seek to accomplish five objectives:

- (1) creating public knowledge of the initiation of an investor-State arbitration;
- (2) allowing third parties to make submissions to the tribunal where such submissions would be helpful and relevant and would not unduly delay, interfere with, or increase the costs of, the proceeding;
- (3) allowing open hearings;
- (4) making the decisions and awards of the tribunal public;
- and (5) preserving the existing power of an

¹⁵ See *supra* note 1, at ¶ 1.

¹⁶ *Id.*

¹⁷ UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Eighth Session (New York, 4-8 Feb. 2008)*, ¶ 69, U.N. Doc. A/CN.9/646 (Feb. 29, 2008), available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html [follow the A/CN.9/646 hyperlink under 48th Session 4-8 Feb., New York section] (last visited May 4, 2011).

¹⁸ See *supra* note 1, at ¶ 1.

arbitral tribunal to allow closed proceedings and restrict access to documents, or portions thereof, when necessary to protect confidential business information and/or information that is privileged or otherwise protected from disclosure under the domestic law of the disputing State.¹⁹

To help facilitate consideration of the issues surrounding transparency in treaty-based arbitration by the Working Group, the Commission requested that the Secretariat “undertake preliminary research and compile information regarding current investor-state arbitration practices.”²⁰ To accomplish this, the Secretariat distributed a questionnaire to all member States regarding their practices with respect to transparency in investor-state arbitration.²¹ The Commission urged member States to contribute broad information to the Secretariat regarding their practices.²² At its forty-third session (New York, June 21-July 9, 2010), the Commission entrusted the Working Group with the task of preparing a legal standard for transparency in investor-state arbitration.²³

II. CURRENT STATUS OF DISPUTE SETTLEMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS AND ARBITRAL INSTITUTIONAL RULES

Dispute settlement provisions in international investment agreements addressing transparency typically contain provisions expressly on matters of public access to procedural documents, hearings, and awards.²⁴ Typically, provisions

¹⁹ See *supra* note 10, at ¶12.

²⁰ See *supra* note 1, at ¶ 1.

²¹ *Id.* (citing UNCITRAL, *Officials Records of the General Assembly, Sixty-Third Session, Supplement No. 17*, ¶ 314, U.N. Doc. A/63/17, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/63/17%28SUPP%29 (last visited May 4, 2011)) [hereinafter UNCITRAL, *Official Records*].

²² *Id.* (citing UNCITRAL, *Official Records*, *supra* note 21, at ¶ 314).

²³ *Id.* at ¶ 2.

²⁴ *Id.* at ¶ 7.

regarding public access to procedural documents provide that, absent party agreement to the contrary, documents submitted to, or issued by, the tribunal shall be publicly available, subject to the redaction of confidential information.²⁵ In an effort to further facilitate transparency, many treaty and institutional rule provisions provide that a party who submits a document alleged to contain confidential information must also submit to the tribunal a copy of that document with the confidential information removed so that it may be disseminated to the public. For example, Article 38(3)-(8) of Canada's Model Foreign Investment Promotion and Protection Agreement (FIPA),²⁶ Article 29(1) of the United States

²⁵ See *supra* note 1, at ¶ 7.

²⁶ Canada's Model Foreign Investment Promotion and Protection Agreement (FIPA), Art. 29(1), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf> (last visited Apr. 28, 2011):

3. All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.

4. Notwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information.

5. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted [*sic*] documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.

6. The Parties may share with officials of their respective federal and sub-national governments all relevant unredacted [*sic*] documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.

7. As provided under Article 10(4) and (5), the Tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.

8. To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party

of America Model Treaty concerning the Encouragement and Reciprocal Protection of Investment (US Model BIT),²⁷ and the North American Free Trade Alliance (NAFTA) Notes of Interpretation²⁸ all contain provisions to this effect.²⁹

“Provisions on public access to procedural documents typically include either a general statement on publicity of all procedural documents or a list of procedural documents that should be made publicly available.”³⁰ Where procedural documents are listed, the following are typically included: request for arbitration, notice of arbitration, pleadings, briefs submitted to the tribunal by a disputing party and any written submissions, minutes or transcripts of hearings of the tribunal, and

should endeavour [*sic*] to apply its law on access to information so as to protect information designated confidential by the Tribunal.

FIPA art.29(1).

²⁷ United States of America Model Treaty concerning the Encouragement and Reciprocal Protection of Investment (US Model BIT), *available at* www.state.gov/documents/organization/117601.pdf (last visited Apr. 28, 2011):

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:

- (a) the notice of intent;
- (b) the notice of arbitration;
- (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [*Amicus* Submissions] and Article 33 [Consolidation];
- (d) minutes or transcripts of hearings of the tribunal, where available; and
- (e) orders, awards, and decisions of the tribunal.

U.S. Model BIT.

²⁸ North American Free Trade Alliance (NAFTA), Notes of Interpretation, *available at* <http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=142> (last visited Apr. 28, 2011).

²⁹ Other examples of such provisions can be found in: Article 10.12 of the Free Trade Agreement between the U.S., Central America and the Dom. Rep. (CAFTA-DR), *available at* www.nationalaglawcenter.org/assets/crs/RL31870.pdf (last visited Apr. 28, 2011); Chapter 11, Article 26 of the Agreement Establishing the Asean-Austl.-N.Z. Free Trade Area (AANZFTA), *available at* www.aseansec.org/22260.pdf (last visited Apr. 28, 2011); Article 94(4) of the Japan-Mex. Free Trade Agreement, *available at* <http://www.mofa.go.jp/region/latin/mexico/agreement/index.html> (last visited Apr. 28, 2011); Article 7(2) of the Sing.-Austl. Free Trade Agreement, *available at* http://www.dfat.gov.au/trade/negotiations/australia_singapore_agreement.html (last visited Apr. 28, 2011).

³⁰ *See supra* note 1, at ¶ 9.

orders, awards, and decisions of the tribunal.³¹ Where provisions provide for the dissemination of documents, responsibility for making that information available to the public may lie either with the tribunal or the parties.³² Typically, provisions do not specify the manner in which information is to be conveyed to the public; provisions that do address the issue differ as to whether each party has the right to make all arbitral documents public or only their own.³³ Moreover, these provisions usually do not specify a time frame in which publication must be achieved, but rather simply state that the information shall be made available “in a timely manner.”³⁴

Open hearing provisions are found in several international investor-State agreements. These provisions provide that arbitral hearings shall be open to the public and subject to the protection of confidential information.³⁵ Issues surrounding protection of confidential information are particularly prevalent when the arbitration deals with matters threatening national security and other government secrets. The tribunal has discretion to decide which measures are to be implemented to protect confidential information.³⁶

Arbitral institution rules typically do not address the issues of public access to procedural documents, hearings, or awards, but rather leave these matters to party agreement.³⁷ The current UNCITRAL Arbitration Rules provide that

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See *supra* note 1, at ¶ 23.

³⁶ *Id.*, see e.g. Article 38(1) of Canada’s FIPA, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf> (last visited Apr. 28, 2011) and Article 29(2) of the US Model BIT, available at www.state.gov/documents/organization/117601.pdf (last visited Apr. 28, 2011).

³⁷ See *supra* note 1, at ¶ 29.

awards may be made public only with consent of all parties involved³⁸ and hearings shall be held *in camera* unless the parties agree otherwise.³⁹ Similarly, the London Court of International Arbitration (LCIA) Rules⁴⁰ and the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)⁴¹ make disclosure of documents and openness of hearings subject of party choice. The International Chamber of Commerce (ICC) Arbitration Rules take the decision outside of the parties' hands by providing, in Article 21(3), that persons not involved in the proceedings shall not be admitted into the hearings without the Tribunal's approval.⁴² An exception to the general treatment of transparency is found in the arbitral rules of the International Centre for the Settlement of Investment Disputes (ICSID), which permits immediate publication of general information about arbitral proceedings, including requests for arbitration, beginning and end dates of proceedings, and the tribunal's legal reasoning.⁴³

³⁸ UNCITRAL Arbitral Rules Art. 34(5) (2010), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html (last visited Apr. 28, 2011).

³⁹ *Id.* at 25(4).

⁴⁰ *See* London Court of Arbitration Rules Art. 30.1 (document disclosure), 30.3 (document disclosure), and 19.4 (open hearings), *available at* http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx (last visited Apr. 28, 2011).

⁴¹ Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), *available at* http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf (last visited Apr. 28, 2011).

⁴² International Chamber of Commerce (ICC), Arbitration Rules, art 21(3), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf (last visited Apr. 28, 2011).

⁴³ International Centre for the Settlement of Investment Disputes (ICSID), Arbitral Rules, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Rules_Home (last visited Apr. 28, 2011) (Regulation 22 provides: "The 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. 2. If both parties to a proceeding consent to the publication of: (a) reports of Conciliation Commissions; (b) arbitral awards; or (c) the minutes and other records of proceedings, the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments." ICSID

III. RECENT DECISIONS INVOLVING TRANSPARENCY-RELATED ISSUES

Due to the general lack of guidance within existing arbitral rules and legislation within contracting parties' agreements for dealing with transparency issues, tribunal decisions evidence an *ad hoc* approach.⁴⁴ Tribunals addressing the issue of confidentiality have held that a general principle of confidentiality does not exist in investor-State arbitration.⁴⁵ For example, in *Metalclad Corp. v. Mexico*, a NAFTA arbitration tribunal operating under the ICSID Arbitral Rules stated that "[t]hough it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is free to speak publicly of the arbitration."⁴⁶ The Tribunal held that there was neither any general duty of confidentiality nor any general rule of transparency in ICSID arbitral proceedings; therefore, it was the responsibility of each tribunal to find the appropriate balance between confidentiality and transparency.⁴⁷ When dealing specifically with the issue of document dissemination and public attendance at hearings, tribunals have held under the

Rule 48(4) further provides that "[t]he Centre shall not publish the award without the consent of the parties," but that even without the parties' consent "[t]he Centre shall...promptly include in its publications excerpts of the legal reasoning of the tribunal." Concerning open hearings, ICSID Rule 32(2) provides that the Tribunal, after consultation with the Secretary-General and absent objection by either party, may allow third persons to attend arbitral proceedings, subject to the implementation of logistical arrangements to protect confidential information).

⁴⁴ See *supra* note 10, at ¶ 5.

⁴⁵ See *e.g.*, *S.D. Myers Inc. v. Gov't of Canada*, available at http://www.naftaclaims.com/disputes_canada_sdmyers.htm (last visited Apr. 28, 2011).

⁴⁶ See *Metalclad Corp. v. Mexico*, Case No. ARB(AF)/97/, Award of Aug. 30, 2000, 16 ICSID Review 168 (2001); 40 ILM 36 (2001) ¶ 13, available at <http://ita.law.uvic.ca/documents/MetalcladAward-English.pdf> (last visited Apr. 28, 2011).

⁴⁷ *Id.* at ¶ 45-51.

current UNCITRAL rules that these matters are left to the agreement of the parties.⁴⁸

The precedential case for transparency in investor-State arbitration was *United Parcel Service of America, Inc. v. Government of Canada*.⁴⁹ In an April 2003 Procedural Order, the Tribunal permitted public disclosure by either disputing party of the pleadings and submissions of any disputing party.⁵⁰ More recently, in *Glamis Gold, Ltd. v. United States*, an ICSID tribunal operating under the UNCITRAL Rules granted five public interest groups leave to file amicus submissions.⁵¹ In addition, Canada currently has six pending cases that deal with transparency-related issues.⁵²

⁴⁸ See e.g., *Methanex Corp. v. U.S.*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, (Jan. 15, 2001) (holding that because article 25(4) of the UNCITRAL Arbitration Rules provide that hearings are to be held in camera, the petitioners could not be granted the right to attend oral hearings of the arbitration, but public attendance could be had if the parties agreed to such attendance); *S.D. Myers*, available at http://www.naftaclaims.com/disputes_canada_sdmyers.htm (last visited Apr. 28, 2011) (holding that disclosure or confidentiality was to be determined by the agreement of the disputing parties as recorded in the order regarding disclosure and confidentiality); *United Postal Serv. of America, Inc. v. Gov't of Can.*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (Oct. 17, 2001), available at <http://www.state.gov/documents/organization/6033.pdf> (holding that UNCITRAL Rule 25(4) prevented third parties or their representatives from attending hearings in the absence of both parties agreeing thereto) (last visited Apr. 28, 2011).

⁴⁹ *United Postal Serv. of Am.*, available at <http://www.state.gov/documents/organization/6033.pdf>; UNCITRAL, Working Group II: Arbitration and Conciliation, *Settlement of Commercial Disputes: Transparency in Treaty-Based Investor-State Arbitration, Compilation of Comments by Governments, Note by the Secretariat*, ¶ 1(6-7), U.N. Doc. A/CN.9/WG.II/WP.159/Add. 1 (Aug. 4, 2010), available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html [follow the A/CN.9/WG.II/WP.159/Add.1 hyperlink under 53rd Session 4-8 Oct., Vienna section] (last visited May 4, 2011).

⁵⁰ *Id.*

⁵¹ UNCITRAL, Working Group II: Arbitration and Conciliation, *Settlement of Commercial Disputes: Transparency in Treaty-Based Investor-State Arbitration, Compilation of Comments by Governments, Note by the Secretariat*, ¶ 6, U.N. Doc. A/CN.9/WG.II/WP.159/Add. 3 (Aug. 4, 2010), available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html [follow the A/CN.9/WG.II/WP.159/Add.3 hyperlink under 53rd Session 4-8 Oct., Vienna section] (last visited May 4, 2011).

⁵² *Id.* at ¶ 4.

IV. RECOMMENDATIONS OF THE UNCITRAL SECRETARIAT FOR THE WORKING GROUP

Recognizing that both “transparency and confidentiality can be considered as legitimate interests of investor-State [] arbitrations,” the UNCITRAL Secretariat recommended that the Working Group strike a balance that protects both interests.⁵³ To this end, the Secretary recommended that the Working Group consider the following issues in relation to the scope of work on procedural transparency: (1) persons or institutions concerned; (2) information subject to publicity; (3) recipients of information; (4) open hearings; and (5) submissions by third parties.⁵⁴ In addition to these specific areas of consideration, the Secretariat suggested that the Working Group determine whether it should draft a model clause on transparency for inclusion in dispute settlement provisions of international investment agreements, specific arbitration rules addressing transparency in treaty-based investor-State arbitration, or guidelines to provide guidance to States when negotiating international investment treaties.⁵⁵

In addressing the persons or institutions concerned, the Secretariat recommended that the Working Group consider “how provisions on transparency should determine the rights and obligations of each of the persons involved in the arbitration proceedings.”⁵⁶ In particular, the Secretariat recommended clarifying whether the parties to the dispute, the arbitral tribunal, or the arbitral institution should be in charge of conveying information to the public.⁵⁷ The extent to which parties may engage in general discussion about the case in public or make disclosures, and whether publication should be automatic or discretionary were additional recommended topics for consideration.⁵⁸

⁵³ See *supra* note 10, at ¶ 10.

⁵⁴ *Id.* at ¶ 12-21.

⁵⁵ *Id.* at ¶ 23-31.

⁵⁶ *Id.* at ¶ 13.

⁵⁷ *Id.* at ¶ 14.

⁵⁸ See *supra* note 10, at ¶ 14.

For information subject to publicity, the Secretariat recommended that the Working Group consider “whether there should be a general rule regarding public access to procedural documents and arbitral awards,” or this should be a matter left to party choice.⁵⁹ More specifically, the Secretariat recommended that the question of whether provisions of public access to procedural documents should be drafted in the form of a general statement or a list of procedural documents to be made publicly available.⁶⁰ Given the issues involved in many investor-State arbitrations, the Secretariat recommended that the Working Group consider “whether and to what extent documents revealing business secrets or other confidential information should be exempt from possible public disclosure” and “whether additional guidance should be provided.”⁶¹

In determining the recipients of disclosed information, the Secretariat recommended that the Working Group consider various approaches instead of simply declaring that documents will or will not be disclosed to the public.⁶² These approaches included ruling that disclosure be limited to non-disputing governments or broadened to include the public at large.⁶³ Similarly, in determining whether hearings should be open to the public, the Secretariat recommended that, if an affirmative decision was reached on this issue, the Working Group consider whether guidance should be provided to the arbitral tribunal on the organization of open hearings, accounting for the need to protect confidential information.⁶⁴

⁵⁹ *Id.* at ¶ 15.

⁶⁰ *Id.* at ¶ 16 (Documents found by the Secretariat to be most deserving of attention are: “[T]he notice of arbitration and the response thereto; the minutes or records of hearings; any of the documents produced in the arbitral proceedings by the parties, whether pursuant to a disclosure exercise or otherwise; any of the pleadings or written memorials (and any attached witness statements or expert reports); correspondence between the parties and/or the arbitral tribunal exchanged in respect (sic) of the arbitral proceedings, decisions, orders or directions of the arbitral tribunal; and awards.”).

⁶¹ *Id.* at ¶ 17.

⁶² *Id.* at ¶ 18.

⁶³ *See supra* note 10, at ¶ 18.

⁶⁴ *Id.* at ¶ 19.

Lastly, in addressing whether submissions by third parties should be permitted, the Secretariat recommended that the Working Group consider criteria for third party submissions, such as the extent of possible intervention, the form and content of submissions, whether the arbitral must provide grounds for submission refusal, and the conditions for allowing submission publication.⁶⁵

V. COMMENTS BY MEMBER STATES ON TRANSPARENCY IN INVESTOR-STATE ARBITRATION

In order to elicit member State participation in transparency-related decisions, the Secretariat distributed a questionnaire to each State, containing questions about investor-State arbitration transparency practices currently in place.⁶⁶ In his recommendation, the Secretariat suggested that the Working Group look to the practices currently in place in member States to facilitate striking the

⁶⁵ *Id.* at ¶ 21.

⁶⁶ UNCITRAL, Working Group II: Arbitration and Conciliation, *Settlement of Commercial Disputes: Transparency in Treaty-Based Investor-State Arbitration, Compilation of Comments by Governments, Note by the Secretariat*, ¶ 3, U.N. Doc. A/CN.9/WG.II/WP.159 (Aug. 4, 2010), available http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html [follow the A/CN.9/WG.II/WP.159 hyperlink under 53rd Session 4-8 Oct., Vienna section] (last visited May 4, 2011) (The questionnaire contained the following five questions: “(1) Could you provide examples of treaty-based investor-State arbitration cases in your country involving instances of publicity or transparency of the arbitral proceedings (for example, cases where information regarding the existence of the arbitral proceedings would be made publicly available, or where the possibility would exist for the public or specific interest groups to obtain access to documents used in the arbitral proceedings, or to be present at hearings)?”; “(2) Are there any examples in your country of cases where third parties have presented statements in the course of treaty-based investment arbitration (such as amicus curiae briefs) or have otherwise intervened in the proceedings?”; “(3) Is there any provision concerning transparency or publicity regarding treaty-based investment arbitration in bilateral or multilateral treaties or agreements entered into by your country? If so, could you please provide us with the texts of such treaties or agreements, or any information relating thereto?”; “(4) Is there a provision for third parties to become involved in treaty-based investment arbitration in bilateral or multilateral treaties or agreements entered into by your country? If so, could you please provide us with the texts of such treaties or agreements, or any information relating thereto?”; and “(5) Do you have any comments regarding current practices with respect to publicity or transparency in treaty-based investor-State arbitration involving your country?”).

proper balance between public interest and the need to protect confidentiality.⁶⁷ This section will discuss the responses from member States to show the variety of practices and opinions currently held regarding transparency in investor-State arbitration.

In Armenia, the public is informed about arbitral proceedings by the mass media, but it is not possible for the public or specific interest groups to obtain access to documents used in the arbitral proceedings or to be present at hearings.⁶⁸ Similarly, Canada provides public notice of the existence of all its investor-State arbitrations via the website of the Department of Foreign Affairs and International Trade.⁶⁹ Also posted on this site are all arbitral documents that Canada is permitted to publish pursuant to each Tribunal's Procedural Orders.⁷⁰ Turkey permits individuals to obtain information about investor-State arbitrations involving Turkey upon written request.⁷¹ Conversely, Bahrain⁷², China⁷³, and the Czech Republic⁷⁴ keep even the existence of investor-State arbitrations confidential.

The majority of member States reported that there had been no cases in which third parties presented statements in the course of treaty-based investor-

⁶⁷ See *supra* note 10, at ¶ 11.

⁶⁸ See *supra* note 66, at ¶ 5 (noting that Poland also informs the public of general information relating to investor-State arbitrations through the press and keeps all other information confidential). See *supra* note 51, at ¶ 1.

⁶⁹ UNCITRAL, Working Group II: Arbitration and Conciliation, *Settlement of Commercial Disputes: Transparency in Treaty-Based Investor-State Arbitration, Compilation of Comments by Governments, Note by the Secretariat*, ¶ 1(5), U.N. Doc. A/CN.9/WG.II/WP.159/Add. 1 (Aug. 4, 2010), available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html [follow the A/CN.9/WG.II/WP.159/Add.1 hyperlink under 53rd Session 4-8 Oct., Vienna section] (last visited May 4, 2011) (referencing Foreign Affairs and International Trade Canada, available at <http://www.international.gc.ca/international/index.aspx> (last visited Apr. 28, 2011) [hereinafter Foreign Affairs]).

⁷⁰ *Id.*

⁷¹ See *supra* note 51, at ¶ 5 (citing Turkey, Law No. 4982 of 09.10.2003).

⁷² See *supra* note 66, at ¶ 5.

⁷³ See *supra* note 69, at ¶ 2.

⁷⁴ See *supra* note 69, at ¶ 3.

State arbitration;⁷⁵ however, a few countries have permitted such statements to be submitted.⁷⁶ For example, the North American Free Trade Agreement (NAFTA), to which both Canada and the United States are parties, has been expanded by the NAFTA Free Trade Commission in its Statement on Non-Disputing Party participation, which provides guidelines for a Tribunal considering *amicus curiae* briefs in Chapter 11 arbitrations.⁷⁷ In its response, Canada asserted that its experience with *amicus curiae* submissions “establishes that public participation in treaty-based investor-State arbitration can be effectively managed by a Tribunal to ensure that it benefits rather than burdens the process.”⁷⁸

Similarly, the majority of member States do not provide for third-party participation in investor-State arbitrations.⁷⁹ Several states, however, do provide

⁷⁵ See e.g., UNCITRAL, Working Group II: Arbitration and Conciliation, *Settlement of Commercial Disputes: Transparency in Treaty-Based Investor-State Arbitration, Compilation of Comments by Governments, Note by the Secretariat*, ¶¶ 2-5, 7, 9, 11, U.N. Doc. A/CN.9/WG.II/WP.159/Add. 4 (Aug. 4, 2010), available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html [follow the A/CN.9/WG.II/WP.159/Add.4 hyperlink under 53rd Session 4-8 Oct., Vienna section] (last visited May 4, 2011); See *supra* note 66, at ¶¶ 1, 3; See *supra* note 51, at ¶¶ 2-5. (noting that Algeria, Armenia, Dominican Republic, El Salvador, Finland, France Germany, Iraq, Luxembourg, Norway, Russia, Spain, Tunisia and Turkey have not joined third parties).

⁷⁶ See e.g., *supra* note 66, at ¶ 2; *supra* note 69, at ¶ 1; UNCITRAL, Working Group II: Arbitration and Conciliation, *Settlement of Commercial Disputes: Transparency in Treaty-Based Investor-State Arbitration, Compilation of Comments by Governments, Note by the Secretariat*, ¶6, U.N. Doc. A/CN.9/WG.II/WP.159/Add. 4 (Aug. 4, 2010), available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html [follow the A/CN.9/WG.II/WP.159/Add.4 hyperlink under 53rd Session 4-8 Oct., Vienna section] (last visited May 4, 2011); *supra* note 51, at ¶ 1; *supra* note 51, at ¶ 6 (noting that Argentina, Canada, Greece, Poland and the United States allow such submissions).

⁷⁷ See *supra* note 69, at ¶ 1(12) (these guidelines provide that submission are to be written, no longer than 20 pages, and concern issues within the scope of the arbitration).

⁷⁸ See *supra* note 69, at ¶14.

⁷⁹ UNCITRAL, Working Group II: Arbitration and Conciliation, *Settlement of Commercial Disputes: Transparency in Treaty-Based Investor-State Arbitration, Compilation of Comments by Governments, Note by the Secretariat*, ¶¶ 1-3, 6, U.N. Doc. A/CN.9/WG.II/WP.159/Add. 4 (Aug. 4, 2010), available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html [follow the A/CN.9/WG.II/WP.159/Add.4 hyperlink under 53rd Session 4-8 Oct., Vienna section] (last visited May 4, 2011); *supra* note 75, at ¶¶ 3, 6-9; *supra* note 51, at ¶¶ 1-4 (noting that

for such participation. For example, the Chile-Australia FTA investor-State dispute settlement provisions allows the arbitral tribunal to accept written submissions and arguments of third parties that may assist the tribunal in evaluating the submissions and arguments of the disputing parties.⁸⁰ Other countries, though not specifically providing for third-party participation in their treaties, reference international arbitration bodies in their treaties that do permit third-party participation. For example, Mauritius references UNCITRAL and ICSID.⁸¹

Canada and the United States lead the way in including provisions providing for transparency in their investor-State treaties. Both countries have adopted NAFTA, which requires that non-disputing NAFTA parties receive notice of any arbitration, copies of all pleadings, evidence tendered, and copies of the written arguments of disputing parties.⁸² In addition, the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) provides in Article 10.20 for acceptance and consideration of “amicus curiae submissions from a person or entity that is not a disputing party.”⁸³

Several countries offered additional comments concerning their thoughts on greater transparency in investor-State arbitration. The majority of member

Algeria, Argentina, Armenia, Belarus, Finland, Greece, Iraq, Lebanon, Luxembourg, Poland, Russia, Spain and Tunisia do not provide for third-party participation.)

⁸⁰ Chile-Austl. Free-Trade Agreement Article 10.20.2, *available at* http://www.dfat.gov.au/geo/chile/fta/FTA_Text_10.html (last visited Apr. 28, 2011).

⁸¹ UNCITRAL, Working Group II: Arbitration and Conciliation, *Settlement of Commercial Disputes: Transparency in Treaty-Based Investor-State Arbitration, Compilation of Comments by Governments, Note by the Secretariat*, ¶¶ 4-5, 10, U.N. Doc. A/CN.9/WG.II/WP.159/Add. 4 (Aug. 4, 2010), *available at* http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html [follow the A/CN.9/WG.II/WP.159/Add.4 hyperlink under 53rd Session 4-8 Oct., Vienna section] (last visited May 4, 2011) (noting that France and Germany refer to ICSID); *supra* note 51, at ¶ 5 (noting that Turkey refers to ICSID).

⁸² *See supra* note 69, at ¶ 1(21).

⁸³ UNCITRAL, Working Group II: Arbitration and Conciliation, *Settlement of Commercial Disputes: Transparency in Treaty-Based Investor-State Arbitration, Compilation of Comments by Governments, Note by the Secretariat*, ¶¶ 2, U.N. Doc. A/CN.9/WG.II/WP.159/Add. 4 (Aug. 4, 2010), *available at* http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html [follow the A/CN.9/WG.II/WP.159/Add.4 hyperlink under 53rd Session 4-8 Oct., Vienna section] (last visited May 4, 2011) (citing CAFTA-DR, *supra* note 29).

States expressed support for the proposition. For example, Canada stated that it “believes UNCITRAL must somehow provide for transparency in investor-State arbitration, and that it must do so as soon as possible.”⁸⁴ In addition, Tunisia expressed support by stating, “[P]ublication of arbitral awards...is important for enabling States to follow the development of a case and get to know the interpretations put on the provisions of treaties...by international arbitrators.”⁸⁵ Turkey, while supportive of the idea, insists that party choice should control the extent of transparency in investor-State arbitration.⁸⁶ Other States, however, are not supportive of inserting transparency in investor-State arbitration. Bahrain asserted, “in order to prevent the gradual irrelevance and desuetude of the UNCITRAL rules, [it] would resist any attempt to incorporate transparency provisions;” however, it would support the consideration of model clauses for possible use in individual instruments.⁸⁷ Similarly, China stated it does not “consider it appropriate to impose provisions of publicity and transparency on treaty-based settlement of investor-State investment disputes.”⁸⁸

VI. CONCLUSION

International investment arbitration deals with matters of public interest; therefore, it has been argued by many that investor-State arbitration should be more transparent. Based on the comments received by the UNCITRAL Working Group, it is likely that some type of change will be made in the UNCITRAL Arbitral Rules to help increase transparency. Although several States were not supportive of the adoption of mandatory transparency rules, this is not likely to

⁸⁴ See *supra* note 69, at ¶ 3.

⁸⁵ See *supra* note 51, at ¶ 4.

⁸⁶ See *supra* note 51, at ¶ 5.

⁸⁷ See *supra* note 66, at ¶ 5.

⁸⁸ See *supra* note 69, at ¶ 2.

deter the Working Group from promulgating rules; however, it may cause the Group to make those rules applicable only by party choice.