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UNCITRAL TRANSPARENCY: AN EXAMINATION OF THE 2014 INTERNATIONAL
ARBITRATION TRANSPARENCY RULES AND THEIR EFFECT ON INVESTOR-STATE
ENVIRONMENTAL DISPUTES AND ECONOMIC FAIRNESS

By
Kayla Kelly-Slatten¹

I. INTRODUCTION

In 2002, Pacific Rim Mining Corporation (now owned by OceanaGold) began exploring gold mining in the Central American country El Salvador.² Six years later, due to extreme public outcry regarding the polluted and depleted drinking water, Salvadoran President Elías Antonio Saca banned mineral mining, and denied all permits, including Pacific Rim's.³ Pacific Rim initiated an international arbitration proceeding in 2009 under International Center for Settlement of Investment Disputes (ICSID) rules, stating that because of Pacific Rim's investment in the State, El Salvador was bound to issue Pacific Rim a mining permit.⁴ Although this seems hardly ground-breaking, large corporations like Pacific Rim often subject developing nations to arbitrate issues arising from unsatisfied demands of the investors.⁵

The central issue in investor-state arbitration is not the submission to arbitrate,⁶ but the actual arbitral proceedings. Traditional arbitration is known for being private and secret, away from the media and public scrutiny. This lack of transparency can hurt developing States' abilities to make public policy decisions, enforce regulations, and efficiently use their limited amounts of resources.⁷ Particularly, a lack of transparency

¹ Kayla Kelly-Slatten is an Associate Editor of the Yearbook on Arbitration and Mediation and a 2017 Juris Doctor Candidate at the Pennsylvania State University, Dickinson School of Law.

² Lauren Carasik, *Undermined – The Case Against International Arbitration Tribunals*, FOREIGN AFFAIRS (Oct. 1, 2014), <https://www.foreignaffairs.com/articles/2014-10-01/undermined>.

³ *See id.*

⁴ *See id.*

⁵ Amy Westervelt, *Lawsuit Against El Salvador Mining Ban Highlights Free Trade Pitfalls*, THE GUARDIAN SUSTAINABLE BUSINESS (May 27, 2015, 13:16 EDT), <http://www.theguardian.com/sustainable-business/2015/may/27/pacific-rim-lawsuit-el-salvador-mine-gold-free-trade>.

⁶ *But see* Ciara Nugent, *El Salvador vs Pacific Rim: The Price of Saying 'No' to a Gold Mine*, THE ARGENTINA INDEPENDENT, (Sept. 28, 2015), <http://www.argentinaindependent.com/currentaffairs/analysis/el-salvador-vs-pacific-rim-the-price-of-saying-no-to-a-gold-mine/>. "The threats to water access, the negative effects of mining activity on the environment, and the will of the Salvadoran public, are therefore effectively excluded from the ICSID's deliberation. Faced with a process that is both opaque and seemingly independent of environmental concerns, the likelihood that anti-mining activists...can have an impact on the case's outcome may seem minimal."

⁷ *See* Mihaela Papa, *Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field?*, J. INT'L DISP. SETTLEMENT 83-109 (2013). *See also* Thomas

during investor-state arbitration hinders fair adjudication on public policy concerns, such as environmental and economic issues. Recognizing these complications, the United Nations Commission on International Trade Law (UNCITRAL) adopted a set of transparency rules (the Rules) in 2014 to encourage more open and public-friendly arbitration settings.⁸

This Article will examine the effects of the UNCITRAL transparency rules on global environmental issues submitted to international arbitration. Part II will briefly analyze the Rules facially, looking at their general scope and the mechanisms for ensuring transparent adjudication. Part III will then examine how the Rules can benefit the public through environmental transparency if applied appropriately. Lastly, Part IV will analyze how the Rules can promote fair economic play between industrialized nations' investors and developing communities from an environmental standpoint.

II. A FACIAL ANALYSIS OF THE UNCITRAL TRANSPARENCY RULES

UNCITRAL is not the first alternative dispute resolution forum to enact transparency rules.⁹ However, the construction of the UNCITRAL transparency rules differs from their predecessors in scope of applicability and mechanisms to ensure transparent arbitration proceedings.¹⁰

A. Scope of the Transparency Rules

First, as seen from the title, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (the Rules), the Rules only apply to investor-state treaties, more commonly known as bilateral international treaties (BITs) and multi-lateral international treaties (MITs).¹¹ Limiting the scope of the Rules to BITs and MITs eases the duty of the arbitrators when deciding the arbitrability of the Treaty. Nevertheless, other international treaties may specifically state within the language of the arbitral clause

Schultz, *Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study*, EUR. J. INT'L L. 1147 (2014).

⁸ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, G.A. Res. 68/109, U.N. Doc. A/RES/68/109 (Dec. 10, 2014) (UNCITRAL Rules on Transparency).

⁹ See Judith Resnik, Feature, *Arbitration, Transparency, and Privatization: Diffusing Disputes: the Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2896-99 (2015) (discussing California's attempt to require the publication of consumer arbitration information and other states within the United States adoption of similar laws).

¹⁰ *Id.* at 2898.

¹¹ UNCITRAL Rules on Transparency, *supra* note 8, art. I, § 1. "The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty") concluded on or after 1 April 2014 unless the Parties to the treaty have agreed otherwise."

that the UNCITRAL transparency rules will apply to any arbitration,¹² thus demonstrating UNCITRAL's intention to create universal rules of transparency.

To further promote transparent and fair arbitration, UNCITRAL requires that the Rules be applied to every BIT or MIT made on or after April 1, 2014¹³ and encourages previously made treaties to apply the Rules through agreement.¹⁴ Additionally, the Rules grant great authority to the arbitrators in employing and enforcing the Rules, as well as in balancing the Rules with the public interest and the need for an efficient and fair adjudication.¹⁵ The only limitations restricting the scope of the Rules resides with the arbitrators, the original Treaty, and the State's law.¹⁶ Otherwise, the Rules are to be used as a supplement to other arbitration rules,¹⁷ thereby working with additional rules to encourage the efficacy of arbitration. Such expansive application demonstrates UNCITRAL's attempt to treat the Rules as a necessary and significant aspect of the arbitration process.

Although UNCITRAL implicated seemingly impenetrable transparency rules, the Rules are subject to exceptions,¹⁸ some of which may eventually lead to implementation problems. Under Article Seven of the Transparency Rules, the scope of the Rules is limited if there exists protected information that cannot be made public for confidentiality reasons¹⁹ or if such protected information would damage the integrity of the arbitration.²⁰

¹² UNCITRAL Rules on Transparency, *supra* note 8, art. I, § 9. "These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings."

¹³ UNCITRAL Rules on Transparency, *supra* note 11, art. I, § 1.

¹⁴ UNCITRAL Rules on Transparency, *supra* note 8, art. I, § 2. "In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when: (a) The parties to an arbitration (the "disputing parties") agree to their application in respect of that arbitration; or (b) The Parties to the treaty or, in the case of a multi-lateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application."

¹⁵ UNCITRAL Rules on Transparency, *supra* note 8, art. I, § 4. "Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account: (a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and (b) The disputing parties' interest in a fair and efficient resolution of their dispute."

¹⁶ UNCITRAL Rules on Transparency, *supra* note 8, art. I, §§ 7-9.

¹⁷ UNCITRAL Rules on Transparency, *supra* note 8, art. I, § 7. "Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail."

¹⁸ UNCITRAL Rules on Transparency, *supra* note 8, art. VII.

¹⁹ UNCITRAL Rules on Transparency, *supra* note 8, art. VII, § 1. In order to be deemed confidentially protected, the information must include secret business dealings or strategies § 2(a), is protected contractually § 2(b) or by law § 2(c), would inhibit law enforcement if disclosed to the public § 2(d), or would put the State's securities at risk § 5.

Facially, these exceptions seem carefully thought out; however, for example, consider the exception of contractually protected confidential information.²¹ Because of the freedom to contract,²² parties can agree by treaty to avoid the Rules altogether if such information is deemed confidential by each party. Opponents to this claim may say that even such contractual language has its limitations as established by Article Seven's arbitrator review of the alleged protected information.²³ Nevertheless, even though arbitrators may consult with the parties in determining the importance of not publicizing,²⁴ the Rules in no way state how the arbitrators are to consider contractual confidentiality in light of the Rules. Article One specifically states that the Rules are not to take the place of or trump the original Treaty,²⁵ which when supplemented with Article Seven, seems to contradict the overarching goal of the Rules.

B. Mechanisms of Transparency

Aside from the questionable exceptions to the Rules, UNCITRAL included three categories of mechanisms to promote arbitration transparency: the publication of the arbitration information and documents,²⁶ third person and third party submissions,²⁷ and public hearings.²⁸ Prior to the Rules, UNCITRAL arbitration proceedings were known for closed hearings, secret awards, and restricted submissions by third parties.²⁹ Although

²⁰ UNCITRAL Rules on Transparency, *supra* note 8, art. VII, §§ 6, 7. Submitted items that may “jeopardize” the fairness and efficiency of the arbitration cannot be made available to the public. Jeopardizing the integrity of the proceedings include interfering with the collection of evidence, intimidating witnesses, lawyers, or the tribunal, and other “exceptional circumstances.”

²¹ UNCITRAL Rules on Transparency, *supra* note 19, art. VII, § 2(b).

²² See generally Thomas Carbonneau, Article, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT’L ARB. 213, 246 (2005) (discussing how the freedom of contract can diminish states’ ability to pass effective legislation and regulations).

²³ UNCITRAL Rules on Transparency, *supra* note 8, art. VII, § 3. “The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate: (a) Time limits in which a disputing party, non-disputing Party to the treaty or third person shall give notice that it seeks protection for such information in documents; (b) Procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and (c) Procedures for holding hearings in private to the extent required by article 6, paragraph 2. Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.”

²⁴ *Id.*

²⁵ UNCITRAL Rules on Transparency, *supra* note 17, art. I, § 7.

²⁶ UNCITRAL Rules on Transparency, *supra* note 8, art. II, III.

²⁷ UNCITRAL Rules on Transparency, *supra* note 8, art. IV, V.

²⁸ UNCITRAL Rules on Transparency, *supra* note 8, art. VI.

²⁹ See Samuel Levander, Note, *Resolving “Dynamic Interpretation”: an Empirical Analysis of the UNCITRAL Rules on Transparency*, 52 COLUM. J. TRANSNAT’L. L. 506, 517 (2014).

traditional, such private arbitrations have created a skeptical and untrusting international public.³⁰ Thus, each UNCITRAL Rule mechanism attempts to foster a reliable and public-friendly environment that is accessible and informative.

1. Publications

Articles Two and Three of the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* outline the types of information to be published, when the information is to be published, and who is responsible for making the documents available. Article Two specifically applies to information to be available at the onset of the arbitral proceedings, while Article Three focuses on the publication of all documents during the arbitration.³¹

Under Article Two, the repository³² must publicize the names of the parties in dispute, the economic industry affected, and the treaty or international contract upon which the claim is based. This information is to be made available at the beginning of arbitration,³³ similar to when a complaint and answer are filed in court proceedings. After arbitration has commenced, Article Three lists the various documents that must be published, unless exempted by Article Seven.³⁴ Other than those particular documents listed in Section One, the arbitral tribunal has the authority to determine what documents should be made available to the public.³⁵ Furthermore, the tribunal is also allowed to request the publications of expert and witness testimony and consult with the disputing parties to determine what exhibits are to be published.³⁶ Once the arbitral tribunal has established what documents to publish, it must report to the repository those documents

³⁰ See Robin Emmott, *EU Makes Pitch for Arbitration Court to Unblock U.S. Trade Talks*, REUTERS (Sept. 16, 2015, 9:39 AM EDT), <http://www.reuters.com/article/2015/09/16/eu-usa-trade-idUSL5N11M2BB20150916>.

³¹ UNCITRAL Rules on Transparency, *supra* note 8, art. II, III.

³² See UNCITRAL Rules on Transparency, *supra* note 8, art. VIII (stating that the repository is to be the Secretary-General of the United Nations or any other institution named by UNCITRAL).

³³ UNCITRAL Rules on Transparency, *supra* note 8, art. II.

³⁴ See UNCITRAL Rules on Transparency, *supra* note 8, art. III, § 1. “[T]he following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written sub- missions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such 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.”

³⁵ See UNCITRAL Rules on Transparency, *supra* note 8, art. III, § 3 (the arbitrators have the discretion to meet with the disputing parties in order to decide what other materials should be published, if any).

³⁶ See UNCITRAL Rules on Transparency, *supra* note 8, art. III, § 2 (the arbitrators are only limited by Article Seven exemptions).

so the repository can publish the information in a “timely manner.”³⁷

Both Article Two and Article Three attempt to limit the disputing parties’ power in deciding what information to share with the public. Investors may argue that such publications can endanger sensitive business data, strategies, and trade secrets,³⁸ but the Rules have built in safety nets to ensure protected information stays protected. First, by consultation with the arbitral tribunal, parties can make a case for why certain information should not be published or at least needs to be redacted.³⁹ Second, Article Seven exceptions prohibit arbitrators from publishing confidential business and securities information. Therefore, UNCITRAL has taken the investors’ arguments seriously and attempted to shield businesses from the possible harmful effects of public accessibility, while promoting arbitration as a serious alternative dispute resolution that is consistent, legitimate, and flexible to the public’s needs.⁴⁰

2. Submissions

Articles Four and Five govern submissions made by a third person and by a non-disputing third party to the Treaty, respectively.⁴¹ The main difference between Articles Four and Five is the party’s association to the Treaty. A third person who is not a party to the Treaty in any way is allowed to submit a matter within the scope of the dispute under Article Four;⁴² a third party who is subject to the Treaty but is not a part of the dispute is allowed to submit a matter within the scope of the dispute under Article Five.⁴³

In general, Articles Four and Five allow submissions at the discretion of the arbitral tribunal, so long as the submissions do not “disrupt” or “unfairly prejudice” the proceedings or any of the disputing parties.⁴⁴ Moreover, although the arbitral tribunal has discretion to allow the submissions, the disputing parties must be given “reasonable

³⁷ See UNCITRAL Rules on Transparency, *supra* note 8, art. III, § 4 (absent a direct definition of “timely manner,” the repository would be most likely held to some standard of reasonability).

³⁸ Levander, *supra* note 29.

³⁹ See UNCITRAL Rules on Transparency, *supra* note 8, art. III, § 4 (redactions of any published information must be made according to Article Seven).

⁴⁰ Levander, *supra* note 29, at 511.

⁴¹ See UNCITRAL Rules on Transparency, *supra* note 8, art. IV, V.

⁴² See UNCITRAL Rules on Transparency, *supra* note 8, art. IV, § 1. “After 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 regarding a matter within the scope of the dispute.”

⁴³ See UNCITRAL Rules on Transparency, *supra* note 8, art. V, § 1. “The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.”

⁴⁴ See UNCITRAL Rules on Transparency, *supra* note 8, art. IV, § 5. See also UNCITRAL Rules on Transparency, *supra* note 8, art. V, § 4.

opportunity” to comment on any of the submissions.⁴⁵

Allowing third party submissions hugely encourages transparency within arbitration. Part of the problem with traditional arbitration stems from the lack of adequate data, which then leads to an insufficient amount of information that arbitrators have as a basis for their award.⁴⁶ Submissions add to the available information arbitrators can use to come to a conclusion and grant other parties a chance to argue why they are affected by this dispute. Not only does the public and other Treaty parties receive an opportunity to bring their concerns to light, but the third party submissions can also highlight the benefits that a disputing party brings to the State, the global economy, the industry, or the public welfare. Such information is invaluable because even though the dispute may seemingly affect only a few parties, the consequences of the arbitral outcome could be on a much larger scale; thus, the submissions bring forth ideas and information that would otherwise go unnoticed.

3. Public Hearings

Article Six of UNCITRAL’s Rules provides the third mechanism for transparent arbitration. Under Article Six, all evidentiary hearings and all oral arguments are to be publicly held.⁴⁷ Additionally, the burden is upon the tribunal to arrange the necessary logistics to make the arbitration proceedings public, limited by the feasibility of such arrangements.⁴⁸ Lastly, Article Six, like Article Seven, protects information that is either confidential or a threat to the integrity of the arbitration, allowing the arbitral tribunal to hold partially private hearings.⁴⁹ Therefore, Article Six places a duty upon the arbitral tribunal to guarantee that the public has access to the majority of the arbitration while maintaining the security of traditional arbitration.⁵⁰

⁴⁵ See UNCITRAL Rules on Transparency, *supra* note 8, art. IV, § 6. See also UNCITRAL Rules on Transparency, *supra* note 8, art. V, § 5.

⁴⁶ See generally TOM TIETENBERG & LYNNE LEWIS, ENVIRONMENTAL & NATURAL RESOURCE ECONOMICS 78, 549 (Sally Yagan, et al. eds., 9th ed. 2012). Appropriately valuing the environment takes into account the damages to it as well as the benefits from it. Because these values are difficult to calculate, more data is essential to placing an actual price tag on the environment. Additionally, with a lack of transparency in traditional arbitration, the burden of proof is lower for the plaintiff and thus, information and data are often incomplete and inadequate.

⁴⁷ See UNCITRAL Rules on Transparency, *supra* note 8, art. VI, § 1. “Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument (“hearings”) shall be public.”

⁴⁸ See UNCITRAL Rules on Transparency, *supra* note 8, art. VI, § 3. The arbitral tribunal has only a duty to meet with the disputing parties to determine the logistics needed, if any, and whether such logistics would be an impediment to the arbitration.

⁴⁹ See UNCITRAL Rules on Transparency, *supra* note 8, art. VI, § 2. “Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.”

⁵⁰ See generally UNCITRAL Rules on Transparency, *supra* note 8, art. VI, VII. Questionably, this limited duty usurps the general finality of the arbitral award. If a party appeals the award based on lack of public access (an excess of arbitrator authority), what dictates whether the arbitrator failed

Giving the public the opportunity to observe the arbitral proceedings seems harmless. However, although the Rules' critics can argue that publications and submissions toe the line towards court adjudication, public hearings certainly cross the fading barrier between arbitration and the common law court. Part of the appeal of arbitration is its privacy and secretiveness.⁵¹ Once those distinguishing characteristics become evanescent, why would parties even bother to choose arbitration. It can be contended that arbitration remains beneficial to commercial transactions even with added public hearings,⁵² but that is beyond the scope of this article. Nevertheless, parties by and large will continue to arbitrate within the international world of commercial transaction so long as some aspect of privacy and secrecy remain.

III. THE TRANSPARENCY RULES AND ENVIRONMENTAL DISPUTES

Traditionally, investor-state arbitration focused on commercial disputes arising from a Treaty but not including derivative issues, such as environmental problems.⁵³ With the improvement of technology and the expansion of science, commercial contractual disputes have evolved to include environmental concerns. Unfortunately, the arbitration setting, prior to the adoption of the transparency rules, was not set up to resolve environmental claims.⁵⁴ Lacking the arbitral setting results in arbitral tribunals either ignoring environmental disputes or inadequately adjudicating environmental issues.⁵⁵ By enacting transparency rules, UNCITRAL prescribes value to the environmental disputes and to the public voice.

to allow the public access? In other words, will the Court still resolve award disputes in favor of the arbitrator or do the Rules tip the scale in favor of the public? The entirety of the Rules revolves around the promotion of public awareness and public access, but if the Court continues to favor the arbitrator, the Rules fail.

⁵¹ See generally Robert D. Argen, Note, *Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration*, 40 BROOK. J. INT'L L. 207, 213-221 (2014) (discussing the difference between privacy – restriction of public access, and confidentiality – restriction of disclosing information within the proceedings).

⁵² Samuel Levander, Note, *Resolving "Dynamic Interpretation": an Empirical Analysis of the UNCITRAL Rules on Transparency*, 52 COLUM. J. TRANSNAT'L L. 506, 511 (2014) (finding that transparency decreases uncertainty in arbitral proceedings while increasing its consistency, democracy, and legitimacy).

⁵³ Christina L. Beharry & Melinda E. Kuritzky, Symposium, *Going Green: Managing the Environment Through International Investment Arbitration*, 30 AM. U. INT'L REV. 383, 388-89 (2015) (discussing that even if environmental disputes are included in the arbitral clause, language and custom barriers still pose problems to enforcing the submitted disputes).

⁵⁴ See Julianne J. Marley, Note, *The Environmental Endangerment Finding in International Investment Disputes*, 46 N.Y.U. J. INT'L L. & POL. 1003, 1013-14 (2014) (stating that critics of traditional arbitration of environmental disputes do not think there are enough procedural safeguards to protect the public interest).

⁵⁵ *Id.* at 1011-13 (examining how the inconsistencies of arbitrators in interpreting and applying environmental regulations and public interest rights lead to a race to the bottom and have an overall chilling effect on environmental laws).

With the adoption of the Rules, environmental concerns are now arbitrable. Under Article One of UNCITRAL's transparency rules, any BIT or MIT dispute triggering UNCITRAL arbitration must apply the transparency rules.⁵⁶ Thus, any submission of any arbitrable issue falls within the scope of the Rules, including questions about the environment. Furthermore, Article One specifically grants authority to the arbitral tribunal to consider both the disputing parties' desire for "fair and efficient" adjudication and the public's interest in the matters.⁵⁷ Because arbitrators now have the power to weigh the public opinion, environmental concerns will stand a better chance of being adjudicated fully, properly, and resourcefully.⁵⁸

More important than the scope of the Rules' application is the manner in which arbitration will encourage the adjudication of environmental issues. Environmental issues span a vast range of topics, including natural resources, land use, ocean uses and pollution, energy, air and water pollution, and climate change.⁵⁹ Because of the various topics incorporated in environmental disputes, arbitrators need to have a strategy to fully collect scientific information and analyze the most current research and data available. Prior to transparency rules, arbitrators had no incentive to develop a unitary procedure to rule on environmental disputes, leading to numerous interpretations of treaties and regulations, conflicting resolutions, and negative effects on developing states.⁶⁰ With UNCITRAL's new Rules on Transparency, arbitrators now have a duty to enforce open proceedings, increasing the probability of scientific findings being applied more uniformly and decreasing the likelihood of surprising results. Through the three transparency mechanisms, environmental disputes will become more consistent, raise awareness, and reaffirm arbitration as an alternative dispute resolution option.

First, UNCITRAL's publications will encourage consistency among environmental arbitrations,⁶¹ which in turn will further predictability and efficiency. Without transparency, the arbitral tribunal has a difficult time uniformly applying precedent. Specifically, publishing arbitration documents will allow arbitrators to use

⁵⁶ See UNCITRAL Rules on Transparency, *supra* note 11, art. I, § 1.

⁵⁷ See UNCITRAL Rules on Transparency, *supra* note 15, art. I, § 4(b).

⁵⁸ Compare Beharry, et. al., *supra* note 53, at 429 (discussing the need to balance public interests of the State with the negative impacts of regulation on international investors), and Marley, *supra* note 54, at 1022, 1024, 1031 (analyzing various arbitration procedures for ensuring the proper adjudication of environmental disputes – expert witnesses, deference to State findings, and third party amici), with The Honorable Charles N. Brower & Sadie Blanchard, Article, *What's in a Meme? The Truth About Investor-State Arbitration: Why it Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 727-29 (2014) (arguing that investment tribunals do not "strike down" the environmental regulations of States). The argument is not that arbitral tribunals "strike down" environmental regulations but that environmental regulations take a backseat to the investor's needs and interests without transparency and public interest safeguards to adequately adjudicate environmental disputes.

⁵⁹ *Environmental Issues and Solutions to Current Environment Problems*, NATURAL RESOURCES DEFENSE COUNCIL, <http://www.nrdc.org/issues/> (last visited May 17, 2016).

⁶⁰ Marley, *supra* note 54, at 1017.

⁶¹ See generally Levander, *supra* note 52.

previous environmental arbitration cases to defend their award, while also allowing the arbitrators to build upon the science and knowledge of past decisions. Moreover, the publication mechanism will create a consistent system in which the disputing parties can prepare to the best of their abilities by looking at precedent arbitrations and effectively utilizing their resources. Therefore, consistency in arbitration will transitively promote predictability and efficiency. The more consistent the system becomes, the more predictable the arbitration setting becomes, leading to a better allocation of arbitral resources⁶² and less time being wasted on matters that were previously and properly adjudicated.

Aside from the advancement of consistency, publications will generate awareness for environmental issues that would otherwise tend to be ignored or adjudicated improperly.⁶³ By publishing arbitral materials, UNCITRAL acknowledges that investor-state disputes about commercial enterprises are no longer the only important matters to be arbitrated. Environmental concerns that would have remained hidden, buried, or inadequately handled can now surface, bringing forward new questions about how investor-state relations manage public interest concerns.

Second, the Rules' submission mechanism will also benefit environmental arbitration by generating a more informative setting. As mentioned above, environmental issues are numerous, diverse, and complex.⁶⁴ By permitting third persons and third parties to submit documents and information about the environmental dispute in question, the arbitrators will have more access to data, research, and information about externalities that would otherwise be difficult to obtain and understand. With additional information, the arbitrators can render more thorough and decisive awards, thus reestablishing the finality and overall autonomy of arbitration as an alternative form of adjudication.⁶⁵ Although finality of an arbitral award may not always favor the public interest side of the dispute, the submission mechanism within UNCITRAL's transparency rules will equilibrate the arbitration setting between corporate investors and developing states by providing more opportunities to acquire scientific data and present outside opinions.⁶⁶

⁶² See Mihaela Papa, *Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field?*, J. INT. DISP. SETTLEMENT 4(1): 83-109 (2013) (discussing how the allocation of resources during arbitration depends on the economic state of the country and the assistance that country receives from more developed nations).

⁶³ See generally TOM TIETENBERG & LYNNE LEWIS, ENVIRONMENTAL & NATURAL RESOURCE ECONOMICS 78, 550 (Sally Yagan, et al. eds., 9th ed. 2012) (emphasizing the importance of freedom of information in today's society).

⁶⁴ NATURAL RESOURCES DEFENSE COUNCIL, *Supra* note 59.

⁶⁵ See generally Thomas Carbonneau, Article, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT'L ARB. 213, 213-14, 219 (2005) (discussing how judicial review of the award interferes with arbitration as an alternative dispute resolution).

⁶⁶ See Beharry, et. al., *supra* note 53, at 411-18 (suggesting that third party participation creates a system to better evaluate scientific information) and Marley, *supra* note 54, at 1022, 1031 (discussing that expert witnesses and third party amici could help alleviate environmental dispute inconsistencies in arbitration).

Lastly, the public hearings mechanism provided in UNCITRAL's transparency rules is not a device by which the disputing parties can acquire information or arbitrators can substantiate their awards. Nevertheless, public hearings will benefit arbitration by demonstrating the reliability of arbitration to the public.⁶⁷ Part of the debate encircling the arbitration of environmental disputes is the lack of societal support. Because of the questionable ethics and practices that investors have exercised in past investor-state relationships,⁶⁸ the general public hesitates to embrace traditional international arbitration that favors secrecy and money over environmental protection and public rights. With public hearings, arbitration has a chance to make amends with the international community, reestablishing itself as a trustworthy, reliable, and efficient adjudication procedure that can take on environmental issues.

Nonetheless, due to the Rules' built in contract exception in which parties can agree to keep various information private,⁶⁹ environmental disputes can still remain partially or completely concealed. Arbitrators will have to take great care in fulfilling their new public interest duties when granting this exception so as to ensure that environmental disputes do not get pushed to the bottom of the barrel and remain in the stalemate of traditional arbitration. The freedom to contract, although powerful, will hopefully be limited by legitimate and good faith conflict resolution interests of all parties and the influence of the interested public sector.

With the advancement of science and technology, more environmental concerns are likely to follow. Yet, this advancement also leads to better preventative measures and solutions. If applied appropriately, UNCITRAL's transparency rules recognize and grant opportunities for both stages of environmental concerns, providing a proper and efficient forum for arguing new environmental disputes and solving such disputes with the best science and technology available.

IV. THE TRANSPARENCY RULES AND ECONOMIC FAIRNESS

There is little doubt that foreign investment in developing countries provides a foundation for economic growth.⁷⁰ Nevertheless, investing in developing countries often comes at the cost of the environment.⁷¹ Generally, investors focus on the positive

⁶⁷ See Robin Emmott, *EU Makes Pitch for Arbitration Court to Unblock U.S. Trade Talks*, REUTERS (Sept. 16, 2015, 9:39 AM EDT), <http://www.reuters.com/article/2015/09/16/eu-usa-trade-idUSL5N11M2BB20150916>.

⁶⁸ See Beharry, et. al., *supra* note 53, at 398-402 (referencing the arbitral decisions of *S.D. Myers Inc. v. Canada*, *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, and *Chemtura Corp. v. Canada*).

⁶⁹ UNCITRAL Rules on Transparency, *supra* note 19, art. VII, § 2(b).

⁷⁰ See generally The Honorable Charles N. Brower & Sadie Blanchard, Article, *What's in a Meme? The Truth About Investor-State Arbitration: Why it Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689 (2014).

⁷¹ See generally TIETENBERG, ET. AL., *supra* note 63, at 78 (discussing that the accurate value of foreign investment is difficult to calculate but must include the offset of negative externalities on the environment).

economic benefits they receive from and bring to developing nations, completely ignoring the negative externalities that arise from their investments.⁷² When disputes do surface about the negative externalities, the secrecy and nontransparency of traditional arbitration could allow investor corporations to be compensated for not following environmental regulations.⁷³ Such compensation acts as an award for the investors, thereby defeating the purpose of environmental regulations and creating a race to the bottom.⁷⁴ UNCITRAL's transparency rules will not only invite the adjudication of environmental disputes, but the Rules will also level the economic playing field between financially secure investors and developing states by creating a more predictable forum in which investors and states have equal access and can be held accountable by the public for unfair practices.

First, under the Rules' publications mechanism, arbitration becomes more predictable.⁷⁵ Previously published arbitral materials can be used by all disputing parties to strategically and economically allocate their resources. For instance, if the precedent establishes a pattern on one type of environmental regulation or concern, parties can focus their energy, time, and money on proving the precedent applies, or decide that their resources would be better spent on a different argument. By having a chance to strategize and prepare, transparent arbitration enables disputing parties to pick and choose how they want to present the best argument, no longer expending their resources on guessing how the arbitrators will rule.⁷⁶ Publications grant equal access to previous arbitration materials, present parties with choices, and give developing nations an opportunity to utilize their limited resources efficiently.

Additionally, submissions and public hearings work in tandem to create an arbitration setting that encourages fair economic practices. Both submissions and public hearings generate a system in which the symbiotic relationships between investors and

⁷² Compare The Honorable Charles N. Brower, *supra* note 70, at 702-03 (discussing how BITs promote economic growth in developing nations by increasing incoming investments), with TIETENBERG, ET. AL., *supra* note 63, at 78-9, 593 (explaining that true valuation must include the use value of the environment, the option value of the environment, and the nonuse value of the environment, not just the incoming investments, which can be offset by negative externalities).

⁷³ See TIETENBERG, ET. AL., *supra* note 63, at 549-50 and Thomas Schultz, *Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study*, EUR. J. INT'L L. 25(4): 1147 (2014) (comparing international arbitration to colonialism because arbitration tends to favor stronger, more developed countries).

⁷⁴ See TIETENBERG, ET. AL., *supra* note 63, at 549-50 and see Marley, *supra* note 54, at 1013.

⁷⁵ See Leon E. Trakman, Article, *The ICSID Under Seige*, 45 CORNELL INT'L L.J. 603, 616 (2012) (explaining that the lack of predictability in arbitration affects developing states the most because of their lack of resources to pay the fees, collect research and data, and prepare defenses).

⁷⁶ See generally Julianne J. Marley, Note, *The Environmental Endangerment Finding in International Investment Disputes*, 46 N.Y.U. J. INT'L. & POL. 1003, 1017 (2014) (discussing that a lack of transparency in arbitral proceedings leads to various interpretations of conflicts, treaties, and laws); see also Mihaela Papa, *Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field?*, J. INT'L DISP. SETTLEMENT 4(1): 83-109 (2013) (analyzing how the success of developing nations often depends upon their understanding of the underlying treaties and arbitral procedures).

states are rewarded but unfair practices and improper ethics are penalized.⁷⁷ Primarily, submissions by third persons and third parties encourage disputing parties to account for both benefits and costs of transactions⁷⁸ while the transparency of the submissions, in addition to the public hearings, utilizes freedom of information⁷⁹ to pressure the parties and the arbitrators into ensuring the fairness of the agreement and the resolution.

Freedom of information is a key mantra for living in today's fast paced and ever-changing society.⁸⁰ Traditional arbitration fails to embrace the modernity of the availability of information, and now arbitration tribunals are rapidly attempting to adapt arbitration to the current needs of the millennial generation.⁸¹ Although traditional arbitration's privacy may continue to work for private commercial transactions, with the growth of interlocking worldwide connections among businesses, consumers, and the general public, such privacy acts as a red flag to individuals who value knowledge and awareness. This value is the pressure that encourages investor-state arbitration to balance economic anomalies that arise due to the traditional notion of commercial dispute resolution. Moreover, freedom of information activates a type of checks and balances by encouraging the public to take part in the disputes, both through submissions and public hearings. Such mechanisms allow public scrutiny, which elevates the burden of proof for

⁷⁷ TIETENBERG, ET. AL., *supra* note 63, at 597-8 (Sally Yagan, et al. eds., 9th ed. 2012) (stating that adjudication proceedings need to ensure that all involved parties are held accountable for their actions to promote financial responsibility and environmental value).

⁷⁸ *Id.* at 78-79. Theoretically, third person and third party submissions will not only add to the issue but also bring forth new information and concerns that would not have been brought forth because the issue was too difficult to find, a party did not want it to be arbitrated, or costs prohibited it from being brought to the tribunal at that time. With submissions, outside parties can assert authority in making sure that specific issues are discussed and that, regardless of costs, concerns that should be adjudicated are properly imposed on the arbitrators.

⁷⁹ TIETENBERG, ET. AL., *supra* note 63, at 549-50.

⁸⁰ See Caroline H. Little, *Why Strengthening the Freedom of Information Act is So Important*, NEWSPAPER ASSOCIATION OF AMERICA (April 2015), <http://www.naa.org/News-and-Media/CEO-Update/2015-April.aspx>. "The Freedom of Information Act was enacted in 1966. It remains critical for creating and preserving an open and accountable government. However, it must be updated to keep up with changing technology and a persistent mindset within federal agencies that information belongs to the government not the general public."

⁸¹ See generally Mark Hendricks, *Marketing to Millennials: You'd Better Learn to Keep Up*, ALLBUSINESS, <https://www.allbusiness.com/marketing-to-millennials-you-d-better-learn-to-keep-up-16697426-1.html> (last visited June 9, 2016) (discussing the impacts of technology and easily accessible information on younger generations and their marketability). See also Amy Mitchell, Jeffrey Gottfried & Katerina Eva Matsa, *How Millennials, Gen Xers and Boomers Get Political News*, PEW RESEARCH CENTER (June 1, 2015), <http://www.journalism.org/2015/06/01/millennials-political-news/> (analyzing the various interests and mechanisms in which Millennials choose to acquire political information in comparison to previous generations).

the investor within the arbitral setting.⁸² With an elevated burden of proof, financially secure parties cannot easily overbear and outmaneuver financially weaker parties.

Although freedom of information certainly pushes investor-state arbitration towards a more open and public forum where an economic equilibrium becomes a possibility, what happens when a party raises the affirmative defense and arbitral cliché of freedom to contract? As explained above in Part II, the UNCITRAL transparency rules allow exceptions to publishing documents.⁸³ In order to ensure that the Rules promote economic fairness, arbitrators will have a renewed duty to question and analyze BITs and MITs and to balance the investors' interests in financial security with the States' interests in achieving economic goals through environmentally conscious practices. No longer will arbitrators be able to award solely on the basis of the Treaties' words, which often favor the investor,⁸⁴ with freedom of contract as their rationale. Freedom of information will allow the public to take a stance for the weaker party and bring forth a new wave of influential interest in economic practices and investment fairness.

V. CONCLUSION

The El Salvador and Pacific Rim conflict has been an ongoing international dilemma for the past six years.⁸⁵ Generally, arbitration is desired for handling international commercial disputes because it is less costly than court proceedings, private and formatted for industrial and commercial relationships, and much more efficient than typical court adjudication.⁸⁶ Six years is not efficient and creates more costs as the parties draw out the proceedings, so is traditional arbitration suitable for every international dispute? The answer, of course, is no. But although this seems obvious, reforming traditional arbitration that is specifically shaped to commercial transactions and not only to investor-state transactions remains difficult and controversial.

UNCITRAL's Rules on Transparency attempt to push arbitration towards a more transparent, open, and accessible adjudicatory pathway. Whether these Rules will actually balance the inequality within the arbitral system will depend on how well they are applied and how consistently they are applied. Furthermore, even though UNCITRAL

⁸² See TIETENBERG, ET. AL., *supra* note 63, at 550 (suggesting that a raised burden of proof, such as a showing of discrimination, would further increase the availability of documentation, information, and data to all parties and arbitrators).

⁸³ UNCITRAL Rules on Transparency, *supra* note 8, art. VII, § 2(b).

⁸⁴ See generally Christina L. Beharry & Melinda E. Kuritzky, Symposium, *Going Green: Managing the Environment Through International Investment Arbitration*, 30 AM. U. INT'L L. REV. 383, 388-89 (2015) (discussing how complex contractual language and different customs act as barriers towards effective investor-state arbitration).

⁸⁵ See Ciara Nugent, *El Salvador vs Pacific Rim: The Price of Saying 'No' to a Gold Mine*, THE ARGENTINA INDEPENDENT, (Sept. 28, 2015), <http://www.argentinaindependent.com/currentaffairs/analysis/el-salvador-vs-pacific-rim-the-price-of-saying-no-to-a-gold-mine/>.

⁸⁶ See generally Thomas Carbonneau, Article, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT'L ARB. 213 (2005).

enacted the Rules, other international arbitration tribunals have yet to follow suit. Thus, those parties that wish to avoid transparent proceedings only have to contractually agree to use another arbitral forum. Nevertheless, UNCITRAL's Rules underscore the international community's recognition of the need for evolving adjudication. Stagnant processes and systems never survive changing times and arbitration will not be the exception. This is particularly true with the advancement of technology and science. Currently, environmental disputes are rarely arbitrated,⁸⁷ raising concerns about arbitration's inability to adjudicate public interest issues. With new and advancing science and technology, however, environmental issues will need a stage for resolution. Arbitration could very well be that stage so long as the traditional notion of arbitration does not forcefully impose itself into environmental matters.

Unlike commercial transactions that have historically remained contractually based upon typically rigid and unchanging rules, the environment is a complex system that is constantly varying and being manipulated. An adjudicatory system that does not appreciate and cannot bend to certain needs of specific issues will not last as a prominent alternative in the international society. UNCITRAL's transparency rules are the first step towards modernizing and shaping arbitration into an adjudicatory method that welcomes environmental disputes and public interest. By creating a set of rules that encourages arbitrators and parties to take full advantage of past arbitral decisions, UNCITRAL recognizes that science builds upon itself and economic resources are not equally distributed. As more environmental disputes arise from investor-state relations, transparent proceedings will become more valuable in addressing public concerns while maintaining efficiency. The Rules help demonstrate arbitration's capacity to take on environmental issues and combat unfair economic practices, two fields that often go hand-in-hand.⁸⁸ Through three transparency mechanisms – publications, submissions, and public hearings – arbitration now promotes environmental conflict resolution, efficient allocation of resources, and freedom of information.

Although the El Salvador and Pacific Rim dispute is governed under the International Center for Settlement of Investment Disputes (ICSID),⁸⁹ the dispute beautifully portrays the limitations of traditional arbitration, both economically and environmentally. The outcome of this specific set of arbitral proceedings will determine the significance of State sovereignty, the role of the public, and the amount of concern for the environment on an international level. Arbitration has an opportunity to embrace modernizing. To remain a legitimate alternative dispute resolution system, arbitration,

⁸⁷ See Beharry, et. al., *supra* note 84, at 388-89 (2015).

⁸⁸ See Marley, *supra* note 76, at 1007 (explaining that investor-state arbitration allows investors to challenge States' tax regulations, environmental regulations, and administrative regulations); see also TIETENBERG, *supra* note 63, at 593-94 (stating that sustainable development must account for both economic growth and negative environmental externalities).

⁸⁹ See Nugent, *supra* note 85; Lauren Carasik, *Undermined – The Case Against International Arbitration Tribunals*, FOREIGN AFFAIRS (Oct. 1, 2014), <https://www.foreignaffairs.com/articles/2014-10-01/undermined>; see also Amy Westervelt, *Lawsuit Against El Salvador Mining Ban Highlights Free Trade Pitfalls*, THE GUARDIAN SUSTAINABLE BUSINESS (May 27, 2015, 13:16 EDT), <http://www.theguardian.com/sustainable-business/2015/may/27/pacific-rim-lawsuit-el-salvador-mine-gold-free-trade>.

and those who play within its realm, must welcome transparency with gumption and vigor.