

## NOTE

# *The 2022 ICSID Rules: A Leap Toward Greater Transparency in ICSID Arbitration*

Gary J Shaw<sup>1</sup>

The International Centre for Settlement of Investment Disputes (ICSID) recently issued an amended set of rules to govern its arbitration proceedings.<sup>2</sup> One of the core topics addressed by the new Rules is transparency and the mechanisms by which ICSID arbitrations—traditionally confidential—may be ‘opened’ to the public. On this issue, the 2013 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration played an influential role in shaping the new ICSID Rules.<sup>3</sup> But ICSID took a slightly different approach by giving States more authority to decide which parts of the proceedings will be kept confidential. This note addresses ICSID’s new transparency regime and how it differs from UNCITRAL’s regime.

## I. BACKGROUND

The transparency movement began with the North American Free Trade Agreement (NAFTA) in 2001. The three NAFTA States—Canada, Mexico and the United States—agreed that ‘nothing in the NAFTA precludes [them] from providing public access to documents submitted to, or issued by, a [NAFTA] tribunal’.<sup>4</sup> Two years later, they allowed non-disputing parties to comment on the proceedings.<sup>5</sup> One year later, they opened NAFTA hearings to the public.<sup>6</sup>

Prior to NAFTA, the international arbitration system was almost universally confidential. However, the field of *investment* arbitration came to be perceived as something different.<sup>7</sup> ‘[I]mportant domestic issues such as environmental and health protection, exploitation of minerals, forests, water and other natural resources’ come center stage in these types of disputes. Thus, the public should be able to

<sup>1</sup> Gary J Shaw is an associate in the international arbitration group at Pillsbury Winthrop Shaw Pittman in Washington, DC, USA. Email: [gary.shaw@pillsburylaw.com](mailto:gary.shaw@pillsburylaw.com).

<sup>2</sup> ICSID, ‘ICSID Rules and Regulations Amendment—Working Papers’, <<https://icsid.worldbank.org/resources/rules-amendments>> accessed January 24, 2022.

<sup>3</sup> ICSID, ‘Proposals for Amendment of the ICSID Rules—Working Paper 1’ (August 2, 2018) (‘Working Paper 1’) paras 10–13.

<sup>4</sup> NAFTA Free Trade Commission, ‘Notes of Interpretation of Certain Chapter 11 Provisions’ (July 31, 2001) para A(1) <[www.sice.oas.org/tpd/nafta/commission/ch11understanding\\_e.asp](http://www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp)> accessed January 24, 2022.

<sup>5</sup> NAFTA Free Trade Commission, ‘Statement of the Free Trade Commission on Non-Disputing Party Participation’ (October 7, 2003) <[www.sice.oas.org/TPD/NAFTA/Commission/Nondispute\\_e.pdf](http://www.sice.oas.org/TPD/NAFTA/Commission/Nondispute_e.pdf)> accessed January 24, 2022.

<sup>6</sup> NAFTA Free Trade Commission, ‘Joint Statement: Decade of Achievement’ (July 16, 2004) <[www.sice.oas.org/TPD/NAFTA/Commission/Statement2004\\_e.asp](http://www.sice.oas.org/TPD/NAFTA/Commission/Statement2004_e.asp)> accessed January 24, 2022.

<sup>7</sup> Dimitrij Euler, Markus Gehring and Maxi Scherer (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (CUP 2015) 2.

hold their governments accountable, as it is the public who ultimately pays for any award rendered against the State.<sup>8</sup> In addition to accountability, transparency ensures a level of credibility in the investment arbitration system. In particular, transparency ‘serves to enhance the legitimacy of the mechanism of investment arbitration’; ‘addresses issues of fairness and efficiency in the resolution of investor-state disputes through arbitration’; and helps to develop a more consistent and stable body of jurisprudence.<sup>9</sup>

ICSID followed NAFTA in 2006, issuing a revised set of arbitration rules that, among other things, increased transparency in its proceedings.<sup>10</sup> Under the new rules, ICSID was *required* to publish portions of the award if the parties did not agree to full publication.<sup>11</sup> The hearings could be public if neither party objected,<sup>12</sup> and tribunals could accept third-party submissions at their discretion.<sup>13</sup>

These amendments were indeed a step toward greater transparency. Up to that point, hearings were typically closed at ICSID, and awards were typically confidential. Compared with NAFTA, however, the amendments were modest. The parties to an ICSID dispute still had the power to close the hearing if either one wished, and case documents other than the award—party submissions, evidence, etc—were not subject to disclosure.<sup>14</sup>

UNCITRAL adopted its own transparency rules in 2013, called the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (‘UNCITRAL Rules’ or ‘Transparency Rules’). The goal was to create the ‘highest standards on transparency’ based on ‘clear rules rather than looser and more discursive guidelines’.<sup>15</sup> The Transparency Rules—separate from the UNCITRAL Arbitration Rules—came into effect on April 1, 2014. Until recently, they were the most detailed and most transparent of the three sets.

<sup>8</sup> Center for International Environmental Law, and International Institute for Sustainable Development, ‘Revision of UNCITRAL Rules and investment arbitration: An Update on the Ongoing Process to Increase Transparency in Investment Arbitration’ (February 2009) <[https://www.ciel.org/wp-content/uploads/2015/06/UNCTAD\\_meeting\\_Jan09.pdf](https://www.ciel.org/wp-content/uploads/2015/06/UNCTAD_meeting_Jan09.pdf)> accessed April 22, 2022; Shahla F Ali and Odysseas G Repousis, ‘Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat?’ [2017] 45 Denv J Intl L & Poly 225, 227 (discussing that many ‘investment arbitration cases involve investment in public service sectors and public utilities; investment claims arising out of emergency economic measures or civil unrest; and cases that revolve around issues of public health, environmental regulation, and human rights’).

<sup>9</sup> N Jansen Calamita, ‘Dispute Settlement Transparency in Europe’s Evolving Investment Treaty Policy: Adopting the UNCITRAL Transparency Rules Approach’ (2014) 15 Journal of World Investment and Comparative Law 645, 650–53 (discussing the various benefits of increased transparency within investment arbitration proceedings); Christina Knahr and August Reinisch, ‘Transparency versus Confidentiality in International Investment Arbitration—The Biwater Gauff Compromise’ (2007) 6 Law and Practice of International Courts and Tribunals 97, 111.

<sup>10</sup> ICSID was in fact the first institution to promote some form of transparency in investment arbitration. Since 1984, ICSID’s Administrative and Financial Regulations have authorized the Secretary-General, with the consent of the parties, to publish awards and other records of proceedings ‘with a view to furthering the development of international law in relation to investments’. ICSID (1984) Administrative and Financial Regulation 22(2).

<sup>11</sup> ICSID (2006) Arbitration Rule 48(4) (‘The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal’).

<sup>12</sup> *ibid* (2006) Arbitration Rule 32(2) (‘Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements’).

<sup>13</sup> *ibid* (2006) Arbitration Rule 37(2) (‘After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the ‘non-disputing party’) to file a written submission with the Tribunal regarding a matter within the scope of the dispute’).

<sup>14</sup> Jarrod Wong and Jason Yackee, ‘The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns’ in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy* (OUP 2010) 234 (describing ICSID’s amendments as ‘modest, incremental and conservative’).

<sup>15</sup> UNCITRAL, ‘Report of the Working Group II on the Work of Its Fifty-Fourth Session’ A/CN.9/717 (2011) paras 26, 58.

The main features of the Transparency Rules are:

- Application (article 1): the rules apply in any investment arbitration initiated under the UNCITRAL Arbitration Rules (2010) pursuant to an investment treaty concluded after April 1, 2014.<sup>16</sup> The rules may also apply by agreement: (i) States can refer to them specifically in their newer investment treaties, with or without modification;<sup>17</sup> (ii) they can ratify the Mauritius Convention, which incorporates the Rules into preexisting treaties retroactively;<sup>18</sup> or (iii) the parties can agree to adopt the rules on an ad hoc basis.<sup>19</sup>
- Public Documents (article 3): almost all case documents, including the written submissions, orders and awards, are published automatically.<sup>20</sup> Witness statements, expert reports and exhibits may be disclosed upon request.<sup>21</sup>
- Non-disputing Party Submissions (article 4): non-disputing parties may file submissions with the tribunal's permission, after consultations with the parties.<sup>22</sup>
- Non-disputing Treaty Party Submissions (article 5): non-disputing treaty parties can comment on how the treaty is to be interpreted without the tribunal's permission. For other matters, however, permission is required.<sup>23</sup>
- Hearings (article 6): hearings are public as the default rule. They can be closed in a limited number of circumstances.<sup>24</sup>
- Exceptions to transparency (article 7): certain types of information may be withheld or redacted, including inter alia, confidential business information, information protected under the treaty or applicable law and State secrets.<sup>25</sup>

<sup>16</sup> UNCITRAL Transparency Rules, art 1(1) ('The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors concluded on or after 1 April 2014 unless the Parties to the treaty have agreed otherwise').

<sup>17</sup> See eg, Agreement between the Government of Hungary and the Government of the Kyrgyz Republic for the Promotion and Reciprocal Protection of Investments (signed September 29, 2020) art 11; Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments (signed April 5, 2019) art 14.

<sup>18</sup> United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (entered into force October 18, 2017) ('Mauritius Convention') art 2(1) ('The UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a relevant reservation under article 3(1)(a) or (b), and the claimant is of a State that is a Party that has not made a relevant reservation under article 3(1)(a)').

<sup>19</sup> See eg, *Christian Doutremepuich and Antoine Doutremepuich v Republic of Mauritius*, UNCITRAL, Terms of Appointment (August 9, 2018) paras 15, 57.

<sup>20</sup> UNCITRAL Transparency Rule 3(1) ('Subject to article 7, the 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 submissions by any disputing party ... 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').

<sup>21</sup> *ibid* Transparency Rule 3(2) ('Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal'); Transparency Rule 3(3) ('[T]he arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above').

<sup>22</sup> *ibid* Transparency Rule 4(1), 4(3).

<sup>23</sup> *ibid* Transparency Rule 5(1).

<sup>24</sup> *ibid* Transparency Rule 6.

<sup>25</sup> *ibid* Transparency Rule 7(1) ('Confidential or protected information, as defined in paragraph 2 ... shall not be made available to the public ... (2) Confidential or protected information consists of: (a) Confidential business information; (b) Information that is protected against being made available to the public under the treaty').

Since the UNCITRAL Rules were adopted, many States have incorporated them into their newer investment treaties.<sup>26</sup> But these newer treaties have yet to produce any disputes where the rules would apply. As for the Mauritius Convention, which incorporates the rules retroactively, only a few States have ratified it. And only a handful of disputing *parties* have formally adopted the rules ad hoc. Thus, it is fair to say that the UNCITRAL Rules have yet to be really tested.<sup>27</sup>

This year, ICSID revised its arbitration rules once again. The goal was to ‘modernize, simplify, and streamline the rules’, to, among other things, introduce greater transparency in the conduct and outcome of the proceedings.<sup>28</sup> The revisions were based, in part, on the UNCITRAL Rules (at least, for purposes of transparency). ICSID made slight adjustments however to make its rules more palatable for some States. The revision process began in October 2016, when ICSID informed Member States that it would begin consultations on rule amendments.<sup>29</sup> ICSID issued six ‘Working Papers’ over the course of three years, each with a revised draft of rules. Each draft was open for public comment and comments from Member States.

The remainder of this note will discuss each ICSID rule in greater detail. Rules 62–68 of the 2022 Convention Rules govern transparency in Convention-based proceedings. Rules 73–78 of the 2022 Additional Facility Rules (‘AF Rules’) govern transparency in non-Convention-based proceedings. While many of these rules were once scattered throughout the 2006 version in some form, now they are grouped together in a single chapter (Chapter X) specific to transparency. This alone is a testament to the attention ICSID now gives to the issue.

## II. 2022 ICSID RULES CHAPTER X: PUBLICATION, ACCESS TO PROCEEDINGS AND NON-DISPUTING PARTY SUBMISSIONS

### A. Awards and Annulment Decisions

Under Rule 62 of the Convention Rules, Convention-based awards, annulment decisions and other post-award decisions (supplementary decisions on the award, interpretations, rectifications and revisions)<sup>30</sup> are public by default. The AF Rules treat these documents differently, as discussed in the next section. The Convention requires that each party consent before an award can be published,<sup>31</sup> which means publication under Rule 62 is not automatic. But, according to Rule 62(3),

<sup>26</sup> See Gary J Shaw and Lorena Guzman-Diaz, ‘Looking in on Transparency: A 2020 Review of States’ Reactions to the UNCITRAL Transparency Rules and the Mauritius Convention’ in Lisa Sachs and others, *Yearbook on International Investment Law and Policy* (OUP 2020) section C.

<sup>27</sup> *ibid* para 19.77.

<sup>28</sup> ICSID, ‘ICSID Rules and Regulations Amendment—Working Papers’ <<https://icsid.worldbank.org/resources/rules-amendments>> accessed April 2, 2022; ICSID, ‘ICSID Releases Sixth Working Paper on Proposed Amendments to its Procedural Rules’, <<https://icsid.worldbank.org/news-and-events/news-releases/icsid-releases-sixth-working-paper>> accessed April 2, 2022.

<sup>29</sup> ICSID News Release, ‘50th Annual Meeting of ICSID’s Administrative Council’ (October 7, 2016) <<https://icsid.worldbank.org/news-and-events/news-releases/50th-annual-meeting-icsids-administrative-council?CID=196>> accessed January 24, 2022.

<sup>30</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force October 14, 1966) (‘ICSID Convention’) arts 50–52 (setting out ICSID’s post-award remedies).

<sup>31</sup> *ibid* art 48(5).

---

Rule 62: Publication of Awards and Decisions on Annulment

---

- (1) With consent of the parties, the Centre shall publish every Award, supplementary decision on an Award, rectification, interpretation, and revision of an Award, and decision on annulment.
  - (2) The parties may consent to publication of the full text or to a jointly redacted text of the documents referred to in paragraph (1).
  - (3) Consent to publish the documents referred to in paragraph (1) shall be deemed to have been given if no party objects in writing to such publication within 60 days after the dispatch of the document.
  - (4) Absent consent of the parties pursuant to paragraphs (1)–(3), the Centre shall publish excerpts of the documents referred to in paragraph (1). The following procedure shall apply to publication of excerpts:
    - (a) the Secretary-General shall propose excerpts to the parties within 60 days after the date upon which either party objects to publication or notifies the Secretary-General that the parties disagree on redaction of the document;
    - (b) the parties may send comments on the proposed excerpts to the Secretary-General within 60 days after their receipt, including whether any information in the proposed excerpts is confidential or protected as defined in Rule 66; and
    - (c) the Secretary-General shall consider any comments received on the proposed excerpts and publish such excerpts within 30 days after the expiry of the time limit referred to in paragraph (4)(b).
- 

consent is ‘deemed to have been given’ if neither party objects within 60 days, making publication the default position.

If either party objects, the award will not be published (at least not by ICSID). ICSID will publish excerpts of the award pursuant to Rule 62(4), just like it did under the 2006 rules. But the parties can only comment on which excerpts to publish. ICSID makes the final decision.

Throughout its drafting, Rule 62 was amended several times, but the substance remained the same. The ‘deeming’ provision was removed halfway through because some States (and public observers) objected to it.<sup>32</sup> But it was reinserted after a majority of States thought it would be ‘useful’.<sup>33</sup>

Compared with the 2006 version (Rule 48), Rule 62 is certainly more transparent. According to one observer, Rule 62 provides ‘the maximum transparency that is permissible under [the] ICSID Convention’.<sup>34</sup> Even still, the rule is more conservative than its UNCITRAL counterpart, where consent is not a factor. UNCITRAL awards are published automatically because there is no Convention-based need for consent. What this means is that in practice ICSID parties have more

<sup>32</sup> ICSID, ‘Proposals for Amendment of the ICSID Rules—Working Paper 2’ (March 15, 2019) (‘Working Paper 2’) para 410; International Institute for Sustainable Development, ‘Summary Comments to the Proposals for Amendment of the ICSID Arbitration Rules’ (March 15, 2019) 14 <<https://icsid.worldbank.org/sites/default/files/amendments/public-input/IISD.pdf>> accessed January 24, 2022.

<sup>33</sup> ICSID, ‘Proposals for Amendment of the ICSID Rules—Working Paper 3’ (August 16, 2019) (‘Working Paper 3’) para 155.

<sup>34</sup> ‘Letter from Corporate Counsels’ International Arbitration Group’ (February 20, 2020) 2; ‘Letter from Steptoe & Johnson LLP’ (December 28, 2018) 6, <[https://icsid.worldbank.org/sites/default/files/amendments/public-input/Steptoe%20Comments\\_12.28.18.pdf](https://icsid.worldbank.org/sites/default/files/amendments/public-input/Steptoe%20Comments_12.28.18.pdf)> accessed January 24, 2022.

authority (almost absolute authority) to keep Convention-based awards confidential. UNCITRAL parties do not share this authority.

## B. Other Orders and Decisions

Rule 63: Publication of Orders and Decisions	AF Rule 73: Publication of Orders, Decisions and Awards
(1) The Centre shall publish orders and decisions, with any redactions agreed to by the parties and jointly notified to the Secretary-General within 60 days after the order or decision is issued.	(1) The Centre shall publish orders, decisions and Awards with any redactions agreed to by the parties and jointly notified to the Secretary-General within 60 days after the order, decision or Award is rendered.
(2) If either party notifies the Secretary-General within the 60-day period referred to in paragraph (1) that the parties disagree on any proposed redactions, the Secretary-General shall refer the order or decision to the Tribunal to decide any disputed redactions. The Centre shall publish the order or decision in accordance with the decision of the Tribunal.	(2) If either party notifies the Secretary-General within the 60-day period referred to in paragraph (1) that the parties disagree on any proposed redactions, the Secretary-General shall refer the order, decision or Award to the Tribunal to decide any disputed redactions. The Centre shall publish the order, decision or Award in accordance with the decision of the Tribunal.
(3) In deciding a dispute pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information as defined in Rule 66.	(3) In deciding a dispute pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information as defined in Rule 76.

Under Convention Rule 63, orders or decisions besides the award/annulment decision are published *automatically*. No consent is required here, like it is for awards.<sup>35</sup> The parties may propose redactions *jointly*, meaning each redaction must be agreed upon.<sup>36</sup> If the parties disagree over a redaction, the tribunal makes the final decision pursuant to Rule 63(2) ensuring that no ‘confidential or protected information’ is disclosed. Redacted or not, these documents will be published.

Rule 73 of the Additional Facility Rules does the same thing. All decisions and orders issued under the AF Rules are published automatically. But since the Convention does not apply, consent is not needed, which means that the Additional Facility-based awards and annulment decisions are published automatically as well. It is only under the Convention Rules where the parties may object to a public award.

UNCITRAL takes the same approach as AF Rule 73. Under UNCITRAL Rule 3, all awards, decisions and other orders are published automatically.<sup>37</sup> As

<sup>35</sup> ICSID Convention, art 48 is limited to awards.

<sup>36</sup> This was designed to ‘ensure that redactions are limited’. Working Paper 1, para 448.

<sup>37</sup> UNCITRAL Transparency Rule 3(1).



mentioned above, consent is not required. Given the overall similarities between the UNCITRAL and ICSID in this regard, there appears to be a consensus among States that awards and decisions should be available to the public with few exceptions.

C. Party Submissions, Expert Reports and Exhibits

Rule 64: Publication of Documents Filed in the Proceedings	AF Rule 74: Publication of Documents Filed in the Proceedings
(1) With consent of the parties, the Centre shall publish any written submission or supporting document filed by a party in the proceeding, with any redactions agreed to by the parties and jointly notified to the Secretary-General.	(1) With consent of the parties, the Centre shall publish any written submission or supporting document filed by a party in the proceeding, with any redactions agreed to by the parties and jointly notified to the Secretary-General.
(2) Absent consent of the parties pursuant to paragraph (1), a party may refer to the Tribunal a dispute regarding the redaction of a written submission, excluding supporting documents, that it filed in the proceeding. The Tribunal shall decide any disputed redactions and the Centre shall publish the written submission in accordance with the decision of the Tribunal.	(2) Absent consent of the parties pursuant to paragraph (1), a party may refer to the Tribunal a dispute regarding the redaction of a written submission, excluding supporting documents, that it filed in the proceeding. The Tribunal shall decide any disputed redactions and the Centre shall publish the document in accordance with the decision of the Tribunal.
(3) In deciding a dispute pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information as defined in Rule 66.	(3) In deciding a dispute pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information as defined in Rule 76.

Under Convention Rule 64(1) and AF Rule 74(1), ICSID will publish any written filing with the agreement of the parties. For witness statements, expert reports and exhibits, the parties *must* consent before they will be published.<sup>38</sup> Disputes over whether to publish must be resolved by the parties.<sup>39</sup> If consent is lacking, these documents will *not* be published by ICSID.

Party submissions (or briefs) are treated a little different. Under Convention Rule 64(2) and AF Rule 74(2), ICSID will publish a party’s own sub-

<sup>38</sup> ICSID, ‘Proposals for Amendment of the ICSID Rules—Working Paper 5’ (June 15, 2021) (‘Working Paper 5’) para. 116.  
<sup>39</sup> ICSID, ‘Proposals for Amendment of the ICSID Rules—Working Paper 4’ (February 28, 2020) (‘Working Paper 4’) para 138.

mission if that party requests, even if the other party does not consent. Both parties may propose redactions, and any redaction disputes are referred to the tribunal. The rule was designed to ‘balance’ the ‘firmly held view of many parties that they should be allowed to publish their own submissions’ with the ‘concern that in so doing, protected or confidential information is not disclosed’.<sup>40</sup>

Rule 64 and AF Rule 74 went through some dramatic changes during the consultation process. The original text was much less complex, reading: ‘Upon request of a party, the Centre shall publish any written submissions, observations or other documents which that party filed in the proceeding, with redactions agreed to by the parties’.<sup>41</sup> Consent was not an issue.

As the negotiations progressed however, States developed ‘divergent positions’ on whether to publish these documents, particularly whether to publish exhibits.<sup>42</sup> Many States questioned the extent to which publication would advance the objectives of transparency.<sup>43</sup> There was also concern about the time and cost involved in redacting such documents and the disputes that would arise.<sup>44</sup> Other States took the position that all publication advanced transparency, and that the time and cost involved in redaction was manageable.<sup>45</sup> The final texts appear to be a compromise between these divergent positions.

A similar debate took place at UNCITRAL. Some States thought that these types of supporting documents were critical to understanding the background of the case.<sup>46</sup> Others felt they would do more harm than good and cause undue burden on the publishing party.<sup>47</sup> Like the ICSID rules, the text of UNCITRAL Rule 1 is a compromise between divergent views.

There are however some key differences between the text of UNCITRAL Rule 1 and ICSID Rule 64/AF Rule 74. For one, party submissions are published automatically under UNCITRAL Rule 3(1), while under ICSID Rule 64/AF Rule 74, they are published only upon mutual consent, or when the submitting party requests. Exhibits are treated differently as well. Under UNCITRAL Rule 3(3), the tribunal decides whether to publish exhibits. Under the two ICSID rules, the decision is left to the parties (consent). Here again, ICSID parties have more control over the level of transparency.

<sup>40</sup> Working Paper 5, para 117. One observer objected to this proposal because ‘the pleadings of one party will inevitably disclose the positions and evidence adduced by the other party’. ‘Letter from Three Crowns’ (January 16, 2019) 14 <[https://icsid.worldbank.org/sites/default/files/amendments/public-input/Three%20Crowns-Comments\\_1.16.19.pdf](https://icsid.worldbank.org/sites/default/files/amendments/public-input/Three%20Crowns-Comments_1.16.19.pdf)> accessed January 24, 2022.

<sup>41</sup> Working Paper 1, page 210 (Rule 46).

<sup>42</sup> Working Paper 4, para 137.

<sup>43</sup> *ibid* para 135.

<sup>44</sup> *ibid*.

<sup>45</sup> *ibid*.

<sup>46</sup> UNCITRAL, ‘Report of the Working Group II on the Work of Its Fifty-Fourth Session’ (n 15) para 81 (‘It was said that providing access to all documents ... was an optimal solution, ensuring that the public would have sufficient access to documents’).

<sup>47</sup> UNCITRAL ‘Report of Working Group II on the Work of Its Fifty-Seventh Session’ A/CN.9/760 (2012) para 15 (‘Some delegations expressed the concern that the “automatic” production of the exhibits themselves under article 3(1) would be unduly cumbersome, bearing in mind the potentially voluminous nature of exhibits and additionally that redactions may be required’); *ibid* paras 17–18; Lise Johnson and Nathalie Bernasconi-Osterwalder, ‘New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps’ Center for International Environmental Law and International Institute for Sustainable Development (2013) 15.



## D. Public Hearings

Rule 65: Observation of Hearings	AF Rule 75: Observation of Hearings
(1) The Tribunal shall allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal, to observe hearings, unless either party objects.	(1) The Tribunal shall allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal, to observe hearings, unless either party objects.
(2) The Tribunal shall establish procedures to prevent the disclosure of confidential or protected information as defined in Rule 66 to persons observing the hearings.	(2) The Tribunal shall establish procedures to prevent the disclosure of confidential or protected information as defined in Rule 76 to persons observing the hearings.
(3) Upon request of a party, the Centre shall publish recordings or transcripts of hearings, unless the other party objects.	(3) Upon request of a party, the Centre shall publish recordings or transcripts of hearings, unless the other party objects.

ICSID hearings are open to the public unless a party objects. Convention Rule 65 and AF Rule 75 make hearings public by default, but they retain the parties' option (or veto) to close the hearing if they choose. If the hearing is public, then pursuant to Rule 65(2), the tribunal must establish procedures to protect 'confidential or protected information', as defined in Rule 66/AF Rule 76. Upon request from either party, ICSID must publish recordings or transcripts of the hearing unless the other party objects, pursuant to Rule 65(3).

The veto power was a major point of discussion during the negotiations. Canada, the European Union, the Netherlands and the law firm Three Crowns, among others, all argued that the parties' veto power should be removed, opening the hearing automatically.<sup>48</sup> Others, like the Republic of Korea and Haiti, advocated in favor of the veto power.<sup>49</sup> Midway through the negotiations, ICSID removed the veto power and gave the final decision to the tribunal.<sup>50</sup> But that was quickly abandoned, and ICSID reinstated the veto power,<sup>51</sup> with the majority of States in support of it.<sup>52</sup>

The veto power is a key distinction between Rule 65/AF Rule 75 and their UNCITRAL counterpart.<sup>53</sup> UNCITRAL Rule 6 opens hearings to the public automatically, with a *limited opportunity* to close the hearing for 'logistical reasons'.<sup>54</sup>

<sup>48</sup> ICSID 'Compendium of Member State and Public Comments on Working Paper 1' (March 15, 2019) 308–10; 'Letter from Gibson Dunn' (January 15, 2019) 2 <[https://icsid.worldbank.org/sites/default/files/amendments/public-input/GibsonDunn-Comments\\_1.15.19.pdf](https://icsid.worldbank.org/sites/default/files/amendments/public-input/GibsonDunn-Comments_1.15.19.pdf)> accessed January 24, 2022.

<sup>49</sup> ICSID 'Compendium of Member State and Public Comments on Working Paper 2' (June 28, 2019) 155; ICSID 'Compendium of Member State and Public Comments on Working Paper 3' (undated) 42.

<sup>50</sup> Working Paper 3, 350.

<sup>51</sup> Working Paper 4, 334.

<sup>52</sup> Working Paper 5, 118.

<sup>53</sup> The corresponding NAFTA norm on hearings gave parties the veto power as well.

The final decision lies with the tribunal, not the parties. The issue was a major point of contention during the UNCITRAL negotiations, with States taking opposing positions, just like at ICSID.<sup>55</sup> The final text of UNCITRAL Rule 6 was part of a larger compromise covering several different topics.<sup>56</sup>

The two similar debates resulted in very different rules, which suggests a lack of consensus among States about public hearings. While most States agree that hearings should be public in general, they disagree over the parties’ ability to close them. Many States would prefer to open the hearings automatically to achieve greatest levels of transparency. Others advocate for more party input in the decision. Here again, ICSID parties have more power.

E. *Protection of Confidential Information*

Rule 66: Confidential or Protected Information	AF Rule 76: Confidential or Protected Information
For the purposes of Rules 62–65, confidential or protected information is information which is protected from public disclosure:	For the purposes of Rules 73–75, confidential or protected information is information which is protected from public disclosure:
(a) by the instrument of consent to arbitration;	(a) by the instrument of consent to arbitration;
(b) by the applicable law or applicable rules;	(b) by the applicable law or applicable rules;
(c) in the case of information of a State party to the dispute, by the law of that State;	(c) in the case of information of a State or an REIO party to the dispute, by the law of that State or that REIO;
(d) in accordance with the orders and decisions of the Tribunal;	(d) in accordance with the orders and decisions of the Tribunal;
(e) by agreement of the parties;	(e) by agreement of the parties;
(f) because it constitutes confidential business information or protected personal information;	(f) because it constitutes confidential business information or protected personal information;
(g) because public disclosure would impede law enforcement;	(g) because public disclosure would impede law enforcement;

(continued)

<sup>54</sup> UNCITRAL Transparency Rules 6(1) and 6(3).  
<sup>55</sup> UNCITRAL ‘Report of Working Group II on the Work of Its Fifty-Seventh Session’ (n 47) para 79; Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration* (Kluwer Law International 2018) 459; UNCITRAL, ‘Report of the Fifty-Fifth Session’ A/CN.9/736 (2012) para 100.  
<sup>56</sup> UNCITRAL, ‘Report of the Fifth-Eighth Session’ A/CN.9/765 (2013) paras 59–62, 67–78. The compromise was noted in the draft rules as they were sent to the Commission for approval. UNCITRAL, *Report of the United Nations Commission on International Trade Law*, 46th Sess, A/68/17 (2013) para 69.

(Continued)

Rule 66: Confidential or Protected Information	AF Rule 76: Confidential or Protected Information
(h) because a State party to the dispute considers that public disclosure would be contrary to its essential security interests;	(h) because a State or an REIO party to the dispute considers that public disclosure would be contrary to its essential security interests;
(i) because public disclosure would aggravate the dispute between the parties; or	(i) because public disclosure would aggravate the dispute between the parties; or
(j) because public disclosure would undermine the integrity of the arbitral process.	(j) because public disclosure would undermine the integrity of the arbitral process.

Rule 66 defines the phrase ‘confidential or protected information’ for purposes of Rules 62–65.<sup>57</sup> AF Rule 76 does the same for purposes of AF Rules 73–75. They are meant to provide ‘guidance for parties and the Tribunal as to when information would be considered confidential or protected’.<sup>58</sup> The two rules were added midway through the consultation process and went through few changes once they were added.<sup>59</sup>

One notable change was the addition of paragraph (c), which protects the *State* party’s information from any disclosure that would violate that State’s laws. In other words, the State can protect its own information pursuant to its own law.<sup>60</sup> The investor may only rely on the law of the arbitration. Paragraph (h) was also revised to make the ‘essential security’ exception self-judging by the State.<sup>61</sup> In the previous drafts of paragraph (h), the question of whether disclosure threatened the essential security interests of the State would have presumably been decided by the tribunal.

Rule 66/Rule 76 are very similar to UNCITRAL Rule 7 in that they both define categories of information considered to be confidential or protected.<sup>62</sup> They both protect (i) confidential business information, (ii) information protected by the applicable treaty,<sup>63</sup> (iii) information that would impede law enforcement, (iv) information that would jeopardize the integrity of the arbitral process and (v) information that the State party considers contrary to its essential security interests. Both rules also protect information that may be withheld pursuant to the applicable law or, in the case of State party’s information, pursuant to the law of that State.

The ICSID rules protect a few additional categories as well. The additional categories include information protected by agreement of the parties, information protected by the tribunal and information that would aggravate the dispute between

<sup>57</sup> Working Paper 4, para 144.

<sup>58</sup> Working Paper 3, para 165.

<sup>59</sup> Working Paper 3, para 165. Member States suggested several different categories to include, including professional confidence, commercial and business confidences, industrial and trade secrets, personal information, information affecting essential security interests, and confidences established by domestic legislation. Working Paper 1, 871.

<sup>60</sup> Working Paper 4, page 335.

<sup>61</sup> *ibid.*

<sup>62</sup> UNCITRAL Transparency Rule 7(2).

<sup>63</sup> ICSID (2022) Rule 66 uses the phrase ‘instrument of consent to arbitration’, while UNCITRAL Transparency Rule 7 refers to ‘the treaty’.

the parties. The first of these categories—protected by agreement—is notable for the power it gives to the parties. At ICSID, the parties have the right to withhold categories of information by agreement. At UNCITRAL, they do not.

F. *Non-Disputing Party Submissions*

Convention Rule 67: Submission of Non-Disputing Parties	AF Rule 77: Submission of Non-Disputing Parties
<p>(1) Any person or entity that is not a party to the dispute (‘non-disputing party’) may apply for permission to file a written submission in the proceeding. The application shall be made in the procedural language(s) used in the proceeding.</p> <p>(2) In determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including:</p> <ul style="list-style-type: none"><li>(a) whether the submission would address a matter within the scope of the dispute;</li><li>(b) how the submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the parties;</li><li>(c) whether the non-disputing party has a significant interest in the proceeding;</li><li>(d) the identity, activities, organization and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party; and</li><li>(e) whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission.</li></ul>	<p>(1) Any person or entity that is not a party to the dispute (‘non-disputing party’) may apply for permission to file a written submission in the proceeding. The application shall be made in the procedural language(s) used in the proceeding.</p> <p>(2) In determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including:</p> <ul style="list-style-type: none"><li>(a) whether the submission would address a matter within the scope of the dispute;</li><li>(b) how the submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the parties;</li><li>(c) whether the non-disputing party has a significant interest in the proceeding;</li><li>(d) the identity, activities, organization and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party; and</li><li>(e) whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission.</li></ul>

(continued)

(Continued)

Convention Rule 67: Submission of Non-Disputing Parties	AF Rule 77: Submission of Non-Disputing Parties
(3) The parties shall have the right to make observations on whether a non-disputing party should be permitted to file a written submission in the proceeding and on any conditions for filing such a submission.	(3) The parties shall have the right to make observations on whether a non-disputing party should be permitted to file a written submission in the proceeding and on any conditions for filing such a submission.
(4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to the format, length, scope or publication of the written submission and the time limit to file the submission.	(4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to the format, length, scope or publication of the written submission and the time limit to file the submission.
(5) The Tribunal shall issue a reasoned decision on whether to permit a non-disputing party submission within 30 days after the last written submission on the application.	(5) The Tribunal shall issue a reasoned decision on whether to permit a non-disputing party submission within 30 days after the last submission on the application.
(6) The Tribunal shall provide the non-disputing party with relevant documents filed in the proceeding, unless either party objects.	(6) The Tribunal shall provide the non-disputing party with relevant documents filed in the proceeding, unless either party objects.
(7) If the Tribunal permits a non-disputing party to file a written submission, the parties shall have the right to make observations on the submission.	(7) If the Tribunal permits a non-disputing party to file a written submission, the parties shall have the right to make observations on the submission.

Convention Rule 67/AF Rule 77 govern the procedure for submissions from non-disputing parties. ‘Any person or entity that is not a disputing party may apply for permission to file a written submission in the proceedings’. These types of submissions were permissible under the 2006 rules.<sup>64</sup> The new rules simply build off the old ones, making changes based on ‘practice and experience to date’.<sup>65</sup>

Subsection (2) lays out a list of criteria that a tribunal must consider before accepting an outside submission. The first three factors—related to the scope of the submission and the non-disputing parties’ interest in the dispute—were carried over from the 2006 rules. The last two are new. Tribunals must now consider the identity

<sup>64</sup> See ICSID (2006) Arbitration Rule 37(2).

<sup>65</sup> Working Paper 1, para 460.

of the non-disputing party and its affiliations with the parties. Tribunals must also consider whether the non-disputing party is being paid for its submission.

Subsection (3) gives each party the opportunity to comment on whether the proposed submission should be permitted and on what conditions, if any. Subsection (4) identifies the conditions that may be set, including the format, length and scope of the submission and a deadline to file. Earlier versions of Rule 67/AF Rule 77 included a third condition, which would have potentially allocated some of the costs to the third party. ICSID removed this third condition however for fear that it could deter third parties from making submissions.<sup>66</sup>

Under subsection (5), the tribunal has 30 days to issue a reasoned decision on the third-party’s application. If accepted, Subsection (7) confirms the parties’ right to comment on the submission.

Subsection (6) deals with the third-party’s access to case documents. There was some debate as to whether non-disputing parties should have access to case documents or not. Ultimately, Rule 67/AF Rule 77 give non-disputing parties access to *relevant* documents, unless a party objects. The parties thus have the power to limit third-party access, as they do with hearings. However, they do not have final authority over whether a non-disputing party may make a submission.

These rules are identical in substance to UNCITRAL Rule 4. ICSID’s rules are perhaps a bit stricter as far as the tribunal’s deadline to decide. But overall, they are the same. Thus, the international community appears to agree that non-disputing party submissions are permissible, subject to a widely accepted set of criteria.

G. Non-Disputing Treaty Party Submissions

Convention Rule 68: Participation of Non-Disputing Treaty Parties	AF Rule 78: Participation of Non-Disputing Treaty Party
(1) The Tribunal shall permit a Party to a treaty that is not a party to the dispute (‘non-disputing Treaty Party’) to make a submission on the interpretation of the treaty at issue in the dispute and upon which consent to arbitration is based. The Tribunal may, after consulting with the parties, invite a non-disputing Treaty Party to make such a submission.	(1) The Tribunal shall permit a Party to a treaty that is not a party to the dispute (‘non-disputing Treaty Party’) to make a submission on the interpretation of the treaty at issue in the dispute and upon which consent to arbitration is based. The Tribunal may, after consulting with the parties, invite a non-disputing Treaty Party to make such a submission.
(2) The Tribunal shall ensure that non-disputing Treaty Party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the making of the submission by the non-disputing Treaty	(2) A submission of a non-disputing Treaty Party pursuant to paragraph (1) shall not support a party in a manner tantamount to diplomatic protection.

(continued)

<sup>66</sup> Working Paper 2, para 428.



(Continued)

Convention Rule 68: Participation of Non-Disputing Treaty Parties	AF Rule 78: Participation of Non-Disputing Treaty Party
<p>Party, including with respect to the format, length, scope or publication of the submission, and the time limit to file the submission.</p>	
<p>(3) The Tribunal shall provide the non-disputing Treaty Party with relevant documents filed in the proceeding, unless either party objects.</p>	<p>(3) The Tribunal shall ensure that non-disputing Treaty Party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the making of the submission by the non-disputing Treaty Party, including with respect to the format, length, scope or publication of the submission, and the time limit to file the submission.</p>
<p>(4) The parties shall have the right to make observations on the submission of the non-disputing Treaty Party.</p>	<p>(4) The Tribunal shall provide the non-disputing Treaty Party with relevant documents filed in the proceeding, unless either party objects.</p>
	<p>(5) The parties shall have the right to make observations on the submission of the non-disputing Treaty Party.</p>

Submissions from non-disputing *treaty* parties are treated a little different. Pursuant to Rule 68 and AF Rule 78, non-disputing treaty parties, including both States and regional organizations like the European Union,<sup>67</sup> have the right to comment on how the text of the treaty should be interpreted. The tribunal cannot refuse these submissions. The rules were ‘inspired by various modern investment treaties’ that specifically confer this right on States and regional organizations.<sup>68</sup> The UNCITRAL Transparency Rules also confer this right.

The scope of a Rule 68/AF Rule 78 submission is strictly limited to matters related to treaty interpretation. If the non-disputing treaty party wants to make a submission on another topic, it must request permission to do so in accordance with Rule 67/AF Rule 77.<sup>69</sup> Submissions may also be made orally, subject to the tribunal’s approval. ICSID went back and forth on whether to only allow written submissions, but ultimately gave the decision to the tribunals.<sup>70</sup>

<sup>67</sup> ICSID, ‘Proposals for Amendment of the ICSID Rules—Working Paper 6’ (November 12, 2021) (‘Working Paper 6’) para 28.

<sup>68</sup> Working Paper 1, para 472.

<sup>69</sup> Working Paper 4, para 154.

<sup>70</sup> Working Paper 6, para 29.

States had ‘mixed views’ on whether Rule 68/AF Rule 78 were advisable or even necessary.<sup>71</sup> Some expressed concern over the potential for the dispute to become politicized, while others had concerns about the costs.<sup>72</sup> Some States, on the other hand, advocated for a broader rule that would have allowed treaty parties to comment on any matter. ICSID rejected this latter proposal since Rule 67/AF Rule 77 already covered the broader set of submission topics.<sup>73</sup>

Here again, there is little difference between Rule 68/AF Rule 78 and their UNCITRAL counterpart. UNCITRAL Rule 5 confers the same right on treaty parties to comment on the treaty’s interpretation. As with other topics, this suggests a consensus among the international community over the treaty parties’ rights in this regard. One notable difference however is how these submissions are treated once submitted. Under the UNCITRAL rules, non-party submissions (treaty party or not) are published automatically.<sup>74</sup> At ICSID, the tribunal decides whether to publish.<sup>75</sup>

### H. *Flexibility*

The last thing to mention is that the ICSID rules above, like all the other ICSID rules, are not set in stone. Under ICSID Rule 1, the parties are free to amend the rules by agreement so long as the change does not conflict with the ICSID Convention or the Administrative Regulations. This is notably different from the UNCITRAL rules, which cannot be amended on a case-by-case basis. States are free to supersede the Transparency Rules via their investment treaties, but once the rules apply to a particular dispute, they cannot be changed.<sup>76</sup> If the Mauritius Convention is applicable moreover, then the Transparency Rules govern as written.<sup>77</sup> In sum, ICSID’s approach is much more flexible.

## III. CONCLUSIONS

The new ICSID rules certainly take great strides to increase transparency within its proceedings. Hearings are public by default, third parties can submit comments to the tribunal, and most, if not all, case documents will be disclosed to the public. As a result, students and practitioners of investment arbitration, as well as States, will have a large tool-belt of orders, decisions and submissions at their disposal to apply or distinguish for a particular case. States can also use the new rules as a way to implement their own domestic policies on transparency and the freedom of information. At the same time, members of the public—possibly citizens of the respondent State—will be able to observe as State governments are held accountable. They may even have access to the hearing and can watch the witnesses themselves. Some of this was possible under the 2006 rules, but the 2022 rules have formalized those possibilities and, in some cases, made them automatic. Confidentiality is a thing of the past.

<sup>71</sup> Working Paper 2, para 430.

<sup>72</sup> *ibid* para 430; Working Paper 3, para 168.

<sup>73</sup> Working Paper 4, para 154.

<sup>74</sup> UNCITRAL Transparency Rule 3(1).

<sup>75</sup> 2022 ICSID Rule 68(2); 2022 ICSID Rule 67(4).

<sup>76</sup> UNCITRAL Transparency Rule 1(3)(a) (‘In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty: (a) The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do by the treaty’).

<sup>77</sup> Mauritius Convention, art 2(4).

That said, the 2022 ICSID rules still afford parties the ability to ‘close’ the dispute and withhold information from the public if they choose. By contrast, the UNCITRAL rules are more mandatory. ICSID awards issued under the ICSID Convention will not be published if either party objects. Nor will the written briefs, witness statements or exhibits be published if either party objects.<sup>78</sup> Hearings can be closed upon objection as well. These are key distinctions between the 2022 ICSID rules and the UNCITRAL rules. There is no question that parties to an ICSID dispute have much more authority to keep parts of the case confidential.

ICSID’s approach is no better or worse than UNCITRAL’s however. Rather, it is an alternative to the UNCITRAL model. Some States prefer having more control over transparency than what is provided by the UNCITRAL rules. For those States, the ICSID rules provide a more party-driven alternative to the more mandatory UNCITRAL rules. On the other hand, some States have public policies that promote the highest levels of transparency with respect to all State action. The UNCITRAL rules are an appropriate means to that end.

In addition, the claimant-investors may prefer more or less control over transparency for various reasons. In this regard, UNCITRAL and ICSID provide the same alternatives to investors as they do for States. Investors, like some States, may prefer to keep the proceedings confidential as much as possible due to the sensitive or controversial nature of the case. The ICSID rules may be a better option in that case. Other investors however may wish to use the threat of a *public* arbitration against an opponent State as an incentive to settlement. The UNCITRAL rules are better suited to ensure a high level of transparency.

From here, a few questions remain. First, which alternative will be chosen most often? Will parties opt for more transparency (UNCITRAL) or more control (ICSID)? Most likely the latter, in the author’s opinion. As explained above, the UNCITRAL rules have been used sparingly over the past eight years, and research shows that States are hesitant toward them because there is no room for adjustment.<sup>79</sup> ICSID’s rules may be considered more palatable in this regard.

In addition, the ICSID rules, including those on transparency, will apply in every ICSID arbitration by default, subject to any amendments from the parties. The UNCITRAL rules on the other hand are separate from the UNCITRAL Arbitration Rules, and they only apply if the disputing parties or the treaty parties (States) have agreed to apply them. Since the ICSID rules apply more broadly (and automatically), they may be used more often by default.

A second question is whether the parties will exercise their authority to keep parts of the case confidential, assuming the ICSID rules are chosen? In other words, will parties insist on closed hearings or a confidential award? Only time will tell because there are many reasons why parties would change their transparency preferences on a case-by-case basis. But if the transparency trend continues as it has for the past 20-plus years, and as more investors and States become more comfortable with transparency, then likely the parties will assert their powers less frequently as time goes on.

Finally, what will members of the public (State citizens, practitioners, arbitrators, academics, etc) do with the resources now available? Will counsel for an investor use

<sup>78</sup> The one exception is that each party may request ICSID publish its own submission. 2022 ICSID Rule 64(2).

<sup>79</sup> See Shaw and Guzman-Diaz (n 26) section D.2.

a State's own statements from a prior case against the State, or vice versa? Also, will counsel use the procedural rulings now available to it when selecting potential arbitrators or agreeing to other appointments? The savviest of counsel will understand the tools that ICSID's rules now provide and use those tools to better represent their clients.