9

Article 7. Exceptions to transparency

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Confidential or protected information

1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6.
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;
   (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or
   (d) Information the disclosure of which would impede law enforcement.
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.

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Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.

4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.
5. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.

Integrity of the arbitral process

6. Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardize the integrity of the arbitral process as determined pursuant to paragraph 7.
7. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties or members of the arbitral tribunal, or in comparably exceptional circumstances.

9.1 Introduction

9.1.1 Scope and purpose

1. Article 7 of the Rules is the provision limiting the principle of transparency as promulgated in Articles 2 to 6 of the Rules.

2. In view of the mandatory nature of the Rules,[1] the inclusion of certain limitations seems not only appropriate, but a mere necessity to strike a balance between the public interest in transparency and the interest of the parties in a fair and efficient resolution of their dispute.[2]

[1] For a discussion on the level of consent see Krista Nadakavukaren Schefer, 'Article 1', [60]–[68].

[2] See Article 1(4) of the UNCITRAL Transparency Rules; also, Julia Salasky and Corinne Montineri, 'UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration' (2013) 4 *ASA Bulletin* 774, 793.

Publishing all information without taking into consideration their nature or possible impact when made public would mean ignoring justified party or public interests to keep certain information confidential. Transparency can neither be an end in itself, nor absolute. Where concrete and substantial interests outbalance the general public interest in transparency, the latter has to step back.[3]

3. Article 7 defines such substantial interests colliding with the principle of transparency and gives procedural guidance on how to deal with them.

4. As a principle, Article 7 deals only with exceptions to the flow of information from within a specific arbitration procedure into the public sphere.[4]

5. The Rules do not deal with information (only) in the sphere of a party to the proceedings and the mechanisms under which such information comes into the arbitration proceeding. This is an issue of evidence. Article 7 of the Rules is no guide when it comes to issues of discovery, document production and evidentiary privilege claims, i.e., which information has to be disclosed by a party in such a procedure or under an order pursuant to Article 27(3) of the Arbitration Rules (2010).[5]

6. The case of *Apotex Holdings Inc. and Apotex Inc.* v. *United States of America* is illustrative: its Confidentiality Agreement and Order dated 24 July 2012 deals only with public access issues.[6] Even after it was amended on 24 October 2013 by an addendum providing for a category of documents not to be disclosed to the other party, but only its counsel, the difference between the issue of public access to documents and the matters of evidence remained.[7] This difference is also to be respected when applying Article 7 of the Rules.

[3] For a discussion on the balance of interest, see Article 1(4) UNCITRAL Transparency Rules, discussed above, Krista Nadakavukaren Schefer, 'Article 1', [69]–[73].

[4] And vice versa, when it comes to public participation in the proceeding.

[5] Waincymer speaks of 'inter-party confidentiality' vs. 'confidentiality vis-à-vis the rest of the world', cf. Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) 799.

[6] *Apotex Holdings Inc. and Apotex Inc.* v. *United States of America*, ICSID Case No. ARB (AF)/12/1, First Procedural Order (29 November 2012) [11] www.state.gov/documents/organization/203094.pdf; and Confidentiality Agreement and Order (24 July 2012), accessible via the case search function on the ICSID homepage https://icsid.worldbank.org/ICSID/Index.jsp.

[7] *Apotex Holdings Inc.* (n. 6), Amended Confidentiality Agreement and Order (24 October 2013) http://italaw.com/sites/default/files/case-documents/italaw3064.pdf.

9.1.2 Background

7. Article 7 of the Rules did not come out of the void. Where multilateral treaties and model BITs foresee procedural transparency for investor-State arbitration, they regularly also provide for exceptions. This is the case, for example, in NAFTA, CAFTA-DR, the US Model BIT 2012, the Canadian Model BIT 2004 and the (withdrawn) Norwegian Model BIT 2007.[8] These forbearers of Article 7 will be briefly discussed hereinafter.

8. The NAFTA FTC Note of Interpretation dated 31 July 2001,[9] which is binding for NAFTA Chapter 11 tribunals according to Article 1131(2) NAFTA, contains the following exceptions to public access to documents:

> 2. . . .
>
> b. Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
>
> i. confidential business information;
>
> ii. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
>
> iii. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.
>
> . . .
>
> 3. The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it may withhold in accordance with Articles 2102 or 2105.

9. In the aftermath of the opening of NAFTA Chapter 11 arbitration to the public, another bilateral treaty was concluded that influenced the wording of Article 7: CAFTA-DR.[10] Article 10.21 CAFTA-DR, entitled 'Transparency of Arbitral Proceedings',[11] provides not only for a high

[8] Other examples are ASEAN Comprehensive Investment Agreement (2009), COMESA Common Investment Areas (2007) and a small number of BITs, see Joachim Pohl, Kekeletso Mashingo and Alexis Nohen, 'Dispute Settlement Provisions in International Investment Agreements – A Large Sample Survey', *OECD Working Papers on International Investment* (OECD Publishing, 2012) 37.

[9] Cf. NAFTA Free Trade Commission, 'North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001) www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

[10] Today seven countries are members of CAFTA-DR: the United States of America, El Salvador, Honduras, Nicaragua, Guatemala, the Dominican Republic and Costa Rica, cf. www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp.

[11] Cf. www.sice.oas.org/Trade/CAFTA/CAFTADR_e/chapter6_12.asp#Article10.21.

degree of transparency, but also both for certain exceptions to this principle and the procedure to be applied:

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.
3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 21.2 (Essential Security) or Article 21.5 (Disclosure of Information).
4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:
   (a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to any non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);
   (b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;
   (c) A disputing party shall, at the same time that it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Parties and made public in accordance with paragraph 1; and
   (d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.
5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

10. The US Model BIT 2012's provision regulating transparency of the proceedings and the limits thereto, Article 29,[12] is an exact copy of Article 10.21 CAFTA-DR reproduced above.

11. Canada's Model BIT 2004 also regulates public access to hearings and documents of investor-State arbitrations under the BIT.[13] First, Article 1 provides that 'confidential information means confidential business information and information that is privileged or otherwise protected from disclosure'.[14] Second, Article 38 states:

> 1. Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera.
> 2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.
> 3. All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.
> 4. Notwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information.
>
> . . .
>
> 7. As provided under Article 10(4) and (5), the Tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.

[12] United States Government, '2012 US Model Bilateral Investment Treaty' (2012) www.state.gov/documents/organization/188371.pdf.

[13] The Model BIT has seen some amendments since 2004, see Catharine Titi, 'The Evolving BIT: A Commentary on Canada's Model Agreement', *IISD Investment Treaty News* (26 June 2013) www.iisd.org/itn/2013/06/26/the-evolving-bit-a-commentary-on-canadas-model-agreement/. Its provisions regulating transparency and limitations thereto have not, however, fundamentally changed, cf. e.g. Article 30 of the Canada–Tanzania BIT, in force since 9 December 2013 www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/tanzania-text-tanzanie.aspx?lang=eng.

[14] Foreign Affairs, Trade and Development Canada, 'Canada Model Foreign Investment Promotion and Protection Agreement' (2004) http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf.

12. In contrast to the above-cited examples, the Norwegian Draft Model BIT, published in December 2007, provides for a very lean framework regulating the transparency and confidentiality of the proceeding in its Article 19.[15] Article 19(2) of the Norwegian Model BIT limits the otherwise full transparency of all documents and hearings:

> When submitting information to the Tribunal, a Party to the dispute may designate specific information as confidential if the information
>
> i. is not generally known or accessible to the public, and
> ii. if disclosed would cause or threaten to cause prejudice to an essential interest of any individual or entity, or to the interest of a Party.
>
> Such information shall be treated as confidential and shall only be made available to the parties to the dispute and to the other Party.

13. According to Article 19(3) of the Norwegian Model BIT, the arbitral tribunal will have to decide on the designation of the information as confidential if the other party objects thereto. Should the arbitral tribunal find that the information does not meet the criteria of Article 19(2), the party that submitted the information can withdraw it.

14. In view of the above examples, it is hard to ignore the similarity of the framework provided in Article 7 of the Rules and in particular the respective provisions in NAFTA, CAFTA-DR and the US and Canadian Model BITs, which all provide for a high degree of transparency, paired with a couple of exceptions in relation to certain information.[16] It seems,

[15] www.italaw.com/sites/default/files/archive/ita1031.pdf. See also the comments on Norway's draft BIT 2007, published at the same time: Norwegian Draft Model BIT 2007: Comments on the model for future investment agreements (19 December 2007) www.italaw.com/sites/default/files/archive/ita1029.pdf. In 2009 the Norwegian government decided to withdraw the draft Model BIT, cf. Damon Vis-Dunbar, 'Norway Shelves its Draft Model Bilateral Investment Treaty', *IISD Investment Treaty News* (8 June 2009) www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/.

[16] It must be said, however, that the BITs concluded do not always retain the high degree of transparency provided for in the Model. For example, the recent Canada–China BIT deviates from the Canada Model BIT's policy of transparency insofar as it restricts publication of documents to the award only and does not provide for open hearings if the respondent State does not explicitly wish so; cf. Articles 28(1) and (2) of the Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (signed on 9 September 2012) www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng.

therefore, that Article 7 of the Rules has been largely influenced by a Canadian approach to both treaty drafting and transparency in treaty-based investor-State arbitration. The simple Norwegian Model was not retained.

9.1.3 Use of case law

15. Case law based on the above (and other) treaties can be a valuable source for the interpretation of Article 7 of the Rules. This is particularly true for issues where Article 7 lacks a comprehensive definition (for example, as to the meaning and scope of 'confidential business information'[17]) or leaves to the arbitral tribunal a large degree of discretion (such as in the arrangements of the procedure to detect, redact and protect confidential or protected information[18]).

16. However, reliance on such case law in the application of Article 7 of the Rules should be made with care for several reasons:

– First, the Rules enclose a general principle of transparency unknown to most treaties and all arbitration rules commonly used to resolve investor-State disputes.[19]
– Second, past arbitral tribunals did often only have a say on matters relating to exceptions to transparency if the parties disagreed on a particular issue. In the case of a mutual agreement of the parties on confidentiality, the arbitral tribunal was bound by it.[20] Under the Rules this is different: the arbitral tribunal is *de officio* the sole decision maker on all matters of exceptions to transparency, notwithstanding the parties' position.[21]
– Third, the Rules sometimes limit or guide the discretion of the arbitral tribunal in a very unique way.[22]

[17] Article 7(2)(a) UNCITRAL Transparency Rules; see below, section 9.3.1.
[18] Article 7(4) of the Rules, see below, section 9.4.
[19] For the general principle of transparency in the Rules, see Article 1(3)(b), (4)(a), (5), (6) of the Rules and their discussion in Krista Nadakavukaren Schefer, 'Article 1', [60ff]; in contrast, for the (few) treaties containing transparency provisions, see Joachim Pohl, Kekeletso Mashingo and Alexis Nohen (n. 8), and for provisions on confidentiality in arbitration rules Articles 28(3), 34(5) UNCITRAL Arbitration Rules; and Rules 32(2), 48 (4) ICSID Arbitration Rules; Articles 27(3), 46 SCC Rules.
[20] See the arbitration rules provisions cited *ibid.*
[21] Article 7(3) of the Rules, see below, section 9.4 (in particular section 9.4.7).
[22] See e.g. Article 7(2)(c), below section 9.3.3.1, Article 7(4), below section 9.6, or Article 7(7), below section 9.9.4.

17. For the above reasons, case law which would be pertinent for the Rules is scarce: arbitral tribunals did not have to decide on this matter. In addition, the assumption of transparency underlying the Rules makes it difficult to draw on the decisions of past tribunals in arbitrations where transparency was not the underlying principle. It is this author's view that this paradigm shift is a compelling ground for future arbitral tribunals to adopt solutions different from the ones established in past investment arbitrations.[23] Pertinent case law is slightly more frequent for exceptions to safeguard the integrity of the arbitral process (Articles 7 (6) and 7(7)), as arbitral tribunals have used their powers to conduct the proceedings to regulate party behaviour in the context of information dissemination due to procedural integrity considerations.[24]

9.1.4 WG's deliberations

18. In order to understand Article 7 of the Rules, it is necessary to have a certain understanding of how the provision came to be. A grasp of the thoughts and discussions during the making of the provision is particularly important at this early stage of the Rules, where no case law on their interpretation exists.

19. The discussion about exceptions to transparency is as old as the discussion about transparency itself.

20. During the revision of the Arbitration Rules (1976), the WG considered the inclusion of a transparency provision for investment arbitration in the Arbitration Rules themselves, but dismissed the idea in favour of a generic approach to fit all kinds of arbitration under the Rules.[25] Already at that time the WG was aware that even if the principle ought to be one of transparency, public access and openness, such

[23] *Saipem SpA* v. *The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) [67], www.italaw.com/sites/default/files/case-documents/ita0733.pdf.

[24] For such case law see below, section 9.7 Article 7(6) and 7(7): Integrity of the arbitral process.

[25] UNCITRAL, 'Report of the Working Group on Arbitration and Conciliation on the work of its forty-sixth session (New York, 5–9 February 2007)' (2007) UN Doc. A/CN.9/619 [61]–[62]; UNCITRAL, 'Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session (New York, 4–8 February 2008) (2008) UN Doc. A/CN.9/646 [54]–[69]; Annexes I–III. On the other hand, the UNCITRAL Working Group II also rejected the inclusion of a generic duty of confidentiality into the UNCITRAL Arbitration Rules: cf. UNCITRAL UN Doc. A/CN.9/619 [127]–[133].

principle ought to have to be limited, at the arbitral tribunal's discretion, by exceptions to protect 'truly confidential information'.[26]

21. The Government of Canada, a strong supporter of the inclusion of a transparency provision in the Arbitration Rules, wrote to the UNCITRAL Commission, setting out several objectives of such inclusion, including:

> preserving the existing power of an arbitral tribunal to allow closed proceedings and restrict access to documents, or portions thereof, when necessary to protect confidential business information and/or information that is privileged or otherwise protected from disclosure under the domestic law of the disputing State.[27]

22. At the outset of the deliberations of the WG of a possible standard of transparency in treaty-based investor-State arbitration, the UNCITRAL Secretariat addressed a Note to the WG, observing that any such standard will have to balance 'the public interest and the need to protect confidentiality'.[28] The following points were judged as important for the WG to consider in this respect:

- who would 'be in charge of conveying information to the public';[29]
- clarification of 'the extent to which the parties may engage in general discussions about the case in public, or make disclosures';[30]
- 'whether publication should be automatic, left to the parties' discretion or subject to prior permission by the arbitral tribunal';[31]
- guidance as to 'whether and to what extent documents, revealing business secrets or other confidential information should be exempt from the possible public disclosure';[32] and
- the organisation of open hearings, 'taking account of the possible need to protect, to the extent required, confidential information'.[33]

23. The WG started discussing the exceptions to transparency in its fifty-third session, after having agreed on the principle of transparency

[26] UNCITRAL (n. 25) UN Doc. A/CN.9/646 [64].
[27] UNCITRAL 'Note by the Secretariat – Observation by the Government of Canada – Revision of the UNCITRAL Arbitration Rules – Settlement of commercial disputes' (12 June 2008) UN Doc. A/CN.9/662, Annex [17].
[28] UNCITRAL, 'Settlement of commercial disputes: Preparation of rules of uniform law on transparency in treaty-based investor-State dispute settlement' (2010) UN Doc. A/CN.9/WG.II/WP.160/Add.1 [11] *in fine*.
[29] *Ibid.* [14]. [30] *Ibid.* [31] *Ibid.* [32] *Ibid.* [17]. [33] *Ibid.* [19].

in the different stages of the arbitral procedure.[34] The idea was that these carve-outs would be 'drafted in a generic manner, thus circumventing the need to envisage all possible circumstances, but rather leaving a large degree of discretion to the arbitral tribunal'.[35] It was considered that it might be difficult to find a comprehensive definition of confidential information and that it would thus be useful to provide examples.[36] The WG considered that the arbitral tribunal should handle the determination of information to be protected: the parties would identify the information they considered to be sensitive, and such identification would then trigger the consideration and decision by the arbitral tribunal.[37] Overall, the provision on the 'exceptions to transparency to protect confidential or sensitive information should provide clarity and guidance, in order to avoid disputes between the parties on that matter'.[38]

24. Despite these simple initial ideas, the issue of exceptions to transparency turned out to be one of the most debated and discussed aspects of the Rules.[39]

25. At the wake of the second last session of the WG on the Rules, the draft of Article 7 had developed into a provision with eleven paragraphs[40] – more than double the number of the previous draft.[41] Part of the WG found that the draft had become 'too detailed and risked over-regulating the powers of an arbitral tribunal, while at the same time failing to enumerate every circumstance that may arise'.[42] The same part of the WG presented a new, concurring proposal, embracing 'a more flexible and simplified drafting approach … in order to permit an arbitral tribunal to adjust its procedures to individual situations'.[43] The WG decided to continue its deliberation based on this concurring draft,[44]

[34] UNCITRAL, 'Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (Vienna, 4–8 October 2010)' (2010) UN Doc. A/CN.9/712 [67]–[72].
[35] *Ibid.* [67]. [36] *Ibid.* [37] *Ibid.* [69]. [38] *Ibid.* [70].
[39] Julia Salasky and Corinne Montineri, 'UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration' (2013) 4 *ASA Bulletin* 774, 793.
[40] UNCITRAL, 'Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration' (2011) UN Doc. A/CN.9/WG.II/WP.169 [45].
[41] UNCITRAL, 'Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration' (2011) UN Doc. A/CN.9/WG.II/WP.166/Add.1 [1].
[42] *Ibid.* [91].
[43] UNCITRAL, 'Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-seventh session' (2012) UN Doc. A/CN.9/760 [92].
[44] Except for paragraphs 8(2)(c), 8(10) and 8(11), which were retained from the Secretariat's draft, cf. UNCITRAL (n. 43) UN Doc. A/CN.9/760 [93], [118]–[119].

thus departing from the draft that had been discussed before. During that same session, the WG discussed three further propositions:

- first, various wordings of Article 8(2)(c), addressing the extent to which an exception shall be made for information protected against being made available to the public according to a choice of law determination by the arbitral tribunal and the extent of such a determination;[45]
- second, the possibility of a new Article 8(2)(d), which would provide for an exception for information the parties had agreed should not be made public;[46] and
- third, a newly presented Article 8(2)(bis), providing for self-judging exceptions for the publication of information a respondent State unilaterally could consider 'would impede law enforcement or would be contrary to the public interest or its essential security interests' if made public.[47]

26. All these issues arose at a very late stage of the deliberations: there was only one session left during which the WG was supposed to revise and adopt the final version of the Rules, in spite of the number and importance of these newly brought up questions and issues.

27. During that last session, the WG's 58th, two of the issues introduced in the previous session could not be resolved:

- first, there was no agreement as to which one of the propositions of Article 8(2)(c) should govern the arbitral tribunal's determination of exceptions based on conflict of laws considerations;[48] and
- second, there was disagreement over whether the self-judging exceptions brought before the WG during the last session should be retained.[49]

28. A solution was included in the compromise proposal, with which all issues of disagreement throughout the Rules were to be resolved.[50] Although some of the other unresolved issues were of a far more fundamental nature,[51] it was the disagreement on exception provisions which

[45] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [104].
[46] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [117].
[47] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [105].
[48] *Ibid.* [59]–[62].
[49] *Ibid.* [65]–[66].
[50] *Ibid.* [69].
[51] Such as the field of application of the Rules as such or the degree of openness of the hearings, cf. *ibid.* [67]–[68].

averted an agreement on the compromise proposal, incited the presentation of a counter-proposal (considerably reducing the arbitral tribunal's discretion by, first, a self-judging exception for essential security information and, second, the mandatory application of the respondent State's law for information of the respondent State (Articles 7(5) and 7 (2)(c) of the Rules, respectively),[52] and endangered the adoption of the complete Rules.[53] In the end, the adopted version of Article 7 was the one suggested in the counter-proposal.[54]

29. The restrictive versions of Articles 7(5) and 7(2)(c) of the Rules are, therefore, not the solutions a majority of the WG had preferred. Their adoption is the result of a tenacious minority able to impose on the rest of the WG its more restrictive preferences in view of a lingering risk that as an alternative no Rules at all would be adopted.

30. In any event, these amendments have changed the spirit of Article 7 of the Rules: while the initial premise was that the arbitral tribunal would have full and sole control over the exceptions to transparency, the respondent State now has considerable influence on their scope and content. A majority of the WG feared that this shift in control had the potential of being abused by respondent States.[55]

31. Finally, the substitution of the Secretariat's draft by a concurring draft of Article 7, the late introduction of new proposals for additional provisions in the WG's second last session and the tug-of-war on the different proposals in the WG's last session left the WG little time to deliberate on several aspects of the adopted version of Article 7. The result is twofold. First, Article 7 might at some places lack the clarity and guidance which the WG had contemplated at the start of the deliberations. Second, the *travaux préparatoires* do not always contain the desirable degree of explanation an arbitral tribunal would wish to find in them when having to interpret Article 7 of the Rules.

[52] *Ibid.* [70]–[71].

[53] *Ibid.* [73]: 'It was said that in relation to both proposals, delegations had made important concessions and in so doing had moved from their original positions. In particular, it was said that in considering the counter-proposal, the concessions agreed by some delegations in the initial compromise proposal were open to re-negotiation only on a non-comprehensive, article-by-article basis.'

[54] *Ibid.* [75], [78].

[55] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [103], [106]–[109]; UNCITRAL, 'Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session' (2013) UN Doc. A/CN.9/765 [61].

9.1.5 Structure

32. Article 7 is divided into two parts:

- The first part, entitled 'Confidential or protected information', paragraphs 1 to 5, consists of provisions dealing with exceptions to transparency due to the confidential or protected nature of information. Hence, this part considers information that shall not be made public due to the very nature of the information itself.
- The second part, entitled 'Integrity of the arbitral process', paragraphs 6 and 7, consists of provisions dealing with exceptions to transparency in order to safeguard the integrity of the arbitral process, i.e., information not to be disclosed to the public because this could have a disruptive effect on the arbitration.

33. Both of these parts contain (i) material provisions that identify the information giving rise to an exception; and (ii) procedural provisions that define by whom and how decisions about the materiality of an exception shall be made and what the consequences of such a decision are.

34. This division is slightly misleading, as there exists in reality a third category of information, for which the procedures set forth in the rest of Article 7 (and the whole Rules) do not apply: information the publication of which a respondent State unilaterally considers to be contrary to its essential security interests (paragraph 5).

35. Therefore, the following commentary on the different provisions of Article 7 will first discuss the exceptions due to confidential or otherwise protected information (Articles 7(1) to 7(4)), then turn to the essential security exception (Article 7(5)), and end with comments on the exceptions to safeguard the integrity of the arbitral process (Articles 7(6) and 7(7)).

9.2 Article 7(1)

9.2.1 'Confidential or protected information'

36. The WG chose the term 'confidential or protected' over the term 'privileged', as the latter 'might not be understood in the same manner in all jurisdictions'.[56]

[56] UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session' (2011) UN Doc. A/CN.9/717 [132].

37. The reference to 'information' makes clear that what gives rise to an exception is a particular protected information, and not a particular document, type of document or certain author. For every piece of information, it will have to be established if it falls under an exception or not. Why the WG made this choice is not exposed in the *travaux préparatoires*. In *Biwater Gauff (Tanzania) Limited* v. *Tanzania*, for example, the arbitral tribunal preferred to link confidentiality to the type of document.[57] The latter solution implies, however, that information will be kept from the public based on the fact that it is contained in a certain type of document and not that there was a preponderant interest in keeping the very information confidential. The *Biwater* approach, therefore, protects more than what is necessary. This is inconsistent with the Rules' underlying principle of transparency, i.e. that the arbitration should be as accessible as possible. This being said, the solution retained by the *Biwater* tribunal was simple, clear and efficient. Costs and effort for the tribunal and the parties in connection to sensitive information were minimal. The solution in the Rules – while being more precise and providing for a higher level of transparency – has the potential to generate important costs and delays when undertaking the necessary work to identify, redact and protect information. It will be the arbitral tribunal's duty to limit this burden as far as possible and in scope with the transparency principle underlying the Rules.[58]

9.2.2 'as defined in paragraph 2'

38. The reference to paragraph 2 clarifies that only the circumstances listed in Article 7(2) of the Rules call for an exception. The arbitral tribunal is not free to define additional circumstances under which an exception shall be granted.

9.2.3 'and identified pursuant to the arrangements referred to in paragraphs 3 and 4'

39. This part of the provision refers to the procedure according to which the information is identified as potentially protected information and

[57] *Biwater Gauff (Tanzania) Limited* v. *Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 (29 September 2006) [163(a)] www.italaw.com/sites/default/files/case-documents/ita0089.pdf.

[58] See Articles 1(3)(b) and 1(4) of the Rules, Krista Nadakavukaren Schefer, 'Article 1', [60]–[70].

decided upon by the arbitral tribunal. This implies that the arbitral tribunal has to put in place such arrangements.

9.2.4 'shall not be made available to the public'

40. This part of the provision states the core principle of Article 7: where the arbitral tribunal decides to protect certain information, all parties involved have to keep that information confidential. The wording of Article 7 does not limit this duty to the arbitral tribunal and/or the body administering an arbitration, but includes all parties involved.

41. The duty to keep information confidential does not only kick in when the arbitral tribunal has made its decision to protect certain information. If the exceptions in Article 7 of the Rules are to have any practical meaning, the prohibition to disseminate any information has to include the time up to such a decision. Otherwise Article 7 of the Rules would remain idle, as a party could undermine it by publishing any information as long as no decision to keep it confidential has been issued. This is obviously not the objective of Article 7, and a party acting in such way violates the Rules and its duty to act in good faith.

9.2.5 'pursuant to Articles 2 to 6'

42. Article 7(1) explicitly refers to Articles 2 to 6, but not to Article 1. This clarifies that Article 7 does not overrule the general principles laid down in Article 1 of the Rules. On the contrary, Article 1 has to be respected when applying Article 7.

43. When defining what kind of information shall be protected and in way such protection shall be executed, Article 7 confers on the arbitral tribunal a large degree of discretion. When exercising this discretion, Article 1(4) of the Rules directs the arbitral tribunal to take into account:

- the public interest in transparency in treaty-based investor-State arbitration in general, and in the arbitration at hand in particular; and
- the disputing parties' interest in a fair and efficient resolution of their dispute.

44. The use of the word 'shall' in Article 1(4) of the Rules means that the arbitral tribunal must take into account these two issues when exercising the discretion vested in it by Article 7 of the Rules.

9.3 Article 7(2): 'Confidential or protected information consists of'

45. Article 7(2) contains the list of information that shall give rise to an exception to transparency. This list is exhaustive.[59]

9.3.1 Article 7(2)(a): 'Confidential business information'

46. Article 7(2)(a) of the Rules forms the basis for exceptions based on confidential business information.

47. This subparagraph remained almost unchanged throughout the deliberations by the WG. Its wording did, however, raise some concerns. Parts of the WG found that it was not sufficiently broad and suggested including a definition or list of what kind of information shall fall under the term of confidential business information.[60] It was suggested that such a list could include 'business, political, institutional sensitive information, personal data and legal impediments under a law',[61] or enclose 'industrial or financial information, or personal data'.[62]

48. In the end, however, the WG did not retain any definition of the term 'confidential business information', nor provide for any guidance as to which type of information would fall under this term. It will remain the arbitral tribunal's duty to define the meaning of 'confidential business information' within an arbitral proceeding.

49. Several past arbitral tribunals have defined the term of confidential business information in their respective confidentiality orders. In various NAFTA Chapter 11 arbitrations, confidential business information has been defined in the form of a list enclosing:[63]

- trade secrets;
- financial, commercial, scientific or technical information that is treated consistently in a confidential manner by the disputing party or third

[59] Article 7(1) of the Rules, see above section 9.2 Article 7(1).

[60] UNCITRAL, 'Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fifth session' (2011) UN Doc. A/CN.9/736 [118], [125]; UNCITRAL (n. 43) UN Doc. A/CN.9/760 [96], [99].

[61] UNCITRAL (n. 60) UN Doc. A/CN.9/736 [118]; UNCITRAL (n. 43) UN Doc. A/CN.9/760 [99].

[62] UNCITRAL (n. 60) UN Doc. A/CN.9/736 [118].

[63] Inspired by *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.* v. *Canada*, PCA Case No. 2009–04, Procedural Order No. 2 (Confidentiality Order) (4 May 2009) [1]; *Mercer International Inc.* v. *Government of Canada*, ICSID Case No. ARB(AF)/12/3, Confidentiality Order (24 January 2013) [1].

party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or detailed accounting or financial records not otherwise disclosed in the public domain;
– information the disclosure of which could result in financial loss or gain to the disputing party or third party to which it relates;
– information the disclosure of which could interfere with contractual or other negotiations of the disputing party or third party to which it relates; and
– other communications treated as confidential in furtherance of settlement between the disputing parties.

50. A further example can be found in *Philip Morris Asia Limited* v. *Australia*:[64]

> information relating to past, present or contemplated future business activities of the Claimant; the financial affairs of the Claimant or any of its affiliates; the past, present, or contemplated future management or operational policies, procedures, or practices of the Claimant or any of its affiliates; the manufacturing, supply, or distribution process and techniques of the Claimant or any of its affiliates; the value of the Claimant or any of its affiliates or any of their respective assets; the granting of licenses or the provision of goods or services to or by the Claimant or any of its affiliates; and any other information that is proprietary or competitively sensitive and the public disclosure of which may cause competitive injury[65]

51. Although these examples provide guidance and inspiration to future arbitral tribunals, every definition will have to take into account the particular circumstances of a case. The arbitral tribunal has, therefore, full discretion to define the scope of 'confidential business information' pursuant to Article 7(2)(a) of the Rules.

9.3.2 Article 7(2)(b): 'Information which is protected against being made available to the public under the treaty'

52. The provision clarifies that any information, for which the treaty provides protection from publication, is also protected in the scope of the

[64] *Philip Morris Asia Limited* v. *Australia*, PCA Case No. 2012–12, Procedural Order No. 5 (Regarding Confidentiality) (30 November 2012) [53].
[65] *Ibid*.

Rules. Article 7(2)(b) is thus an application of Article 1(7) (providing that where the Rules conflict with a treaty provision, the latter prevails[66]). Information protected directly by the treaty often relate to information in connection with:

– national security;[67]
– law enforcement;[68]
– public interest;[69]
– essential security interests;[70]
– cabinet and government confidence;[71]
– personal privacy;[72]
– legitimate commercial interests of particular public or private enterprises;[73] or
– the financial affairs and accounts of individual customers of financial institutions.[74]

53. Some of these treaty-based exceptions are also restated in the Rules: Article 7(2)(d), for example, contains an exception for information the disclosure of which could impede law enforcement, and Article 7(5) provides for an exception for information relating to essential security interests.

9.3.3 Article 7(2)(c) – Information protected under the applicable law

54. Article 7(2)(c) of the Rules contains an exception arising from various laws applicable to the information to be protected.

55. This exception was the most discussed issue throughout the deliberation of Article 7. It only found its final form in the scope of the compromise proposal, counter-proposal and revised compromise proposal at the very end of the deliberations of the Rules.[75]

56. The discussion started with the WG's statement that the provision dealing with exceptions should also consider 'information otherwise

[66] See Krista Nadakavukaren Schefer, 'Article 1', [74]–[80].
[67] E.g. Article 2102 NAFTA.
[68] E.g. Article 2105 NAFTA; Articles 10.21(3) and 21(5) CAFTA-DR; Article 38(7) Canada Model BIT 2004.
[69] E.g. Articles 10.21(3) and 21(5) CAFTA-DR.
[70] E.g. Articles 10.21(3) and 21(2) CAFTA-DR; Article 38(7) Canada Model BIT 2004.
[71] E.g. Canada Model BIT 2004. [72] E.g. Article 38(7) Canada Model BIT 2004.
[73] E.g. Articles 10.21(3) and 21(5) CAFTA-DR.
[74] E.g. Article 38(7) Canada Model BIT 2004. [75] See above, section 9.1.4.

protected from disclosure by the law of a party'.[76] The WG directed the Secretariat to take into account the question of applicable law as 'there often was national legislation to protect certain information',[77] and mentioned the NAFTA FTC 'Notes of Interpretation of Certain Chapter 11 Provisions' and its reference to 'information which is privileged or otherwise protected' from disclosure under the party's domestic law to the public.[78] The first draft of this provision, therefore, simply stated: 'Confidential and sensitive information consists of . . . information which is protected against disclosure under the treaty or the applicable law'.[79] This was found to be too vague.[80] At this point emerged what would become the central question not only for this provision, but for all of Article 7: how much discretion should be given to the arbitral tribunal in deciding on an exception? Until the very end, the delegations struggled to find a consensus: one part of the WG wanted to grant the arbitral tribunal 'discretion to determine whether the law of a disputing party or any other law or rules were applicable to the disclosure of confidential information'.[81] On the other hand, some delegates found that at least for the information provided by the respondent State, 'the arbitral tribunal should be under an obligation to apply the laws of a disputing party in that regard'.[82] The second view prevailed, making it mandatory for the arbitral tribunal to apply 'in the case of the information of the respondent . . . the law of the respondent'.[83]

57. Article 7(2)(c) thus directs the arbitral tribunal to apply two different standards when evaluating the law applicable to exceptions to transparency. If the information was provided by the respondent State, the arbitral tribunal must apply the law of that State. If, on the other hand, the information was provided by any other party, e.g., the claimant, a non-disputing party to the treaty or a third party, the arbitral tribunal has the discretion to determine which law is applicable to the exception.

58. The *travaux préparatoires* reveal that the term 'information of the respondent State' refers to information that has been provided in the arbitration by the responding State, i.e., the responding State introduced

[76] UNCITRAL (n. 34) UN Doc. A/CN.9/712 [67].
[77] UNCITRAL (n. 56) UN Doc. A/CN.9/717 [131].
[78] *Ibid.* [132].
[79] UNCITRAL (n. 41) UN Doc. A/CN.9/WG.II/WP.166/Add.1 [1].
[80] UNCITRAL (n. 60) UN Doc. A/CN.9/736 [119].
[81] *Ibid.* [127]; UNCITRAL (n. 43) UN Doc. A/CN.9/760 [102].
[82] UNCITRAL (n. 60) UN Doc. A/CN.9/736 [121], [127]; UNCITRAL (n. 55) UN Doc. A/CN.9/765 [61].
[83] UNCITRAL (n. 55) UN Doc. A/CN.9/765 [75].

the information into the arbitration.[84] So, the term does not refer to any information that has a connection with or concerns the responding State (which in an investor-State arbitration would direct to the respondent State's law for almost all information).

9.3.3.1 'in the case of the information of the respondent State, under the law of the respondent State'

59. The arbitral tribunal has to apply the law of the respondent State to information provided by the respondent State. This means that the arbitral tribunal has no discretion as to the choice of the applicable law. In the past, arbitral tribunals had at times rejected the application by the responding State of its own national laws in order to resist the production of documents because the arbitral tribunal found it not appropriate to allow such recourse to national law.[85] Such an approach is not possible within the scope of Article 7(2)(c) of the Rules.[86] The Arbitral Tribunal, however, retains discretion as to the interpretation – the content – of the respondent State's law. This is consistent with the goal of the mandatory application of the respondent State's law discussed within the WG, i.e., preventing a respondent State from being put in a situation in which it breaches its own laws because it has to make available to the public information that, according to its national law, it has to keep confidential.[87] Beyond that goal, the arbitral tribunal still has discretion in the application of the law of the respondent State and can use this discretion 'in order to equalize the protection of confidential information that might differ between the home State of the investor and the State party to the dispute'.[88]

[84] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [102]–[103]; UNCITRAL (n. 55) UN Doc. A/CN.9/765 [61].

[85] See e.g. *Pope & Talbot Inc.* v. *Canada*, Decision by the Arbitral Tribunal (6 September 2000) [1.2]–[1.4] http://italaw.com/sites/default/files/case-documents/ita0676.pdf; or *Biwater Gauff (Tanzania) Limited* v. *Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2 (24 May 2006) 8 www.italaw.com/sites/default/files/case-documents/ita0088.pdf.

[86] The Rules do not, however, preclude the arbitral tribunal from persisting with such a view in the scope of document production: Article 7(2)(c) of the Rules is only applicable for the issue of an exception to public access and does not interfere with the determination by the arbitral tribunal of the applicable law for evidentiary privileges, i.e., the protection of documents from having to produce them to the other disputing party.

[87] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [102].

[88] UNCITRAL (n. 60) UN Doc. A/CN.9/736 [121].

60. But even considering the above-mentioned use by the arbitral tribunal of its remaining discretion as a corrective tool, the mandatory application of the law of the respondent State remains a double-edged sword: keeping in mind all the possibilities that might arise during an arbitration, the law of the respondent State is not necessarily the best solution for every single such case.[89] This configuration does not, for example, take into consideration systems in which the respondent State's legal system attaches the protection of client–counsel correspondence to the country of residence or practice of the counsel and not of the client. If, under such a system, the respondent State retains foreign legal counsel, the information would not be protected from being made public under the laws of the respondent State and, therefore, neither under Article 7(2)(c) of the Rules.

61. Finally, the mandatory application of the respondent State's law might, as discussed during the WG's deliberations, open the door 'to abuse and . . . dilute the objective of the rules' as it would 'permit a State to circumvent the object of the Rules by introducing legislation precluding the disclosure of all information in investor-State disputes'.[90] It is, however, evident – and the WG unanimously affirmed this twice – that it is not permissible for a State to adopt the Rules in its investment treaties, and 'then use its domestic law to undermine the spirit (or the letter) of such rules'.[91]

62. Such behaviour would trigger Article 1(6) of the Rules, directing the arbitral tribunal to ensure the supremacy of the transparency objectives of the Rules 'in the presence of any conduct, measure or other action having the effect of wholly undermining' these objectives.[92]

63. The question remains, however, how an arbitral tribunal shall react if a respondent State not 'wholly' but only partially undermines the transparency objective of the Rules in its endeavour to maintain

[89] UNCITRAL (n. 55) UN Doc. A/CN.9/765 [60].

[90] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [103]; UNCITRAL (n. 55) UN Doc. A/CN.9/765 [61].

[91] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [103]; UNCITRAL (n. 55) UN Doc. A/CN.9/765 [65].

[92] And might well – should the UNCITRAL Transparency Rules indeed be incorporated into an investment treaty – put the respondent State in breach of its duties under Articles 26 and 27 of the Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force on 27 January 1980), which states that every treaty must be performed in good faith and that a State may not invoke its domestic law to justify a failure to execute its treaty obligations. In addition this could also constitute a breach of the respondent State's fair and equitable treatment obligation under the treaty.

secrecy. For instance, what if a State tried to exclude information pertaining to a certain sector or issued by a certain entity from publication?

64. How arbitral tribunals react to such behaviour by a respondent could be an important test of the effectiveness of the Rules.[93]

65. It is submitted that the test should be the same as for the essential security exception, discussed below:[94] the arbitral tribunal is to conduct a good faith test. In other words: the arbitral tribunal will have to determine if the main purpose of the respondent State's domestic law protecting certain information is to circumvent the publication of information otherwise not protected from being made public by the Rules or if the respondent State can bring forward reasonable justifications for the protection of such information other than preventing their openness to the public in an investment arbitration.

66. In summary, the arbitral tribunal is obliged to apply the respondent State's law when establishing if information provided by the respondent State is protected from being made available to the public or not, but:

- retains discretion in interpreting the content of such applicable laws; and
- retains the right to conduct a good faith test as to the purpose of the respondent State's applicable law.

67. Finally, the direction to the respondent State's laws in Article 7(2)(c) does not lower the protection otherwise provided by the Rules. In other words, while Article 7(2)(c) of the Rules has the goal of preventing the respondent State from having to act against its own law because the arbitral tribunal orders the disclosure of information that the respondent State has to keep confidential under its domestic law, it does not at the same time allow a State to disclose information protected under the Rules because under its national law it can be compelled to do so. For example, if any particular information has been accorded protection because it is confidential business information pursuant to Article 7(2)(a), the responding State would violate the Rules if it makes it accessible to the public because the protection in its national freedom of information law does not deem the same information protection-worthy. The reference to the responding State's national laws in Article 7(2)(c) does not allow the responding State to put its own national laws before the Rules.

[93] Ian A. Laird, 'Transparency in Investor-State Arbitration', OUPblog (3 March 2014) http://blog.oup.com/2014/03/transparency-in-investor-state-arbitration/.

[94] See below, section 9.6.3.

9.3.3.2 'and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information'

68. For all information not coming from the respondent State, the arbitral tribunal has to determine the law applicable to the disclosure of the information in question.

69. The arbitral tribunal is free, in the limits set by the treaty, to determine which laws or rules it deems the most appropriate to apply.

70. The reference to 'rules' does not only enclose the applicable arbitration rules, but also other types of complementary rules, such as the IBA Rules for the Taking of Evidence in International Arbitration. Inspiration by the IBA Rules seems appropriate insofar as the exercise to be undertaken by the arbitral tribunal when applying Article 7(2)(c), second possibility, bears a strong resemblance to the analysis it has to make when determining the applicable law for evidentiary privileges.

71. Many arbitral tribunals have conducted such an analysis, which necessarily has to be made on a case-by-case basis.[95] Often arbitral tribunals have tried to find a standard that evens out the sometimes important differences between different national laws. For any information coming from the investor, a third party or a non-disputing party to the treaty, the arbitral tribunal is free to do so.

72. In order to avoid any discussion at a later time about the laws and rules on which the arbitral tribunal may rely in this respect, it might be appropriate for the arbitral tribunal to include the laws and rules it will take into consideration in an eventual transparency order.

[95] See e.g. *Vito G. Gallo* v. *Canada*, Procedural Order No. 3 (8 April 2009) www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/gallo-po-12.pdf; *Abaclat and Others* (case formerly known as *Giovanna A Beccara and Others*) v. *Argentina*, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order) (27 January 2010); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.* v. *Canada*, Procedural Order No. 12 (2 May 2012) www.pca-cpa.org/showfile.asp?fil_id=2034 and Procedural Order No. 13 (11 July 2012) www.pca-cpa.org/showfile.asp?fil_id=2035; *Glamis Gold Ltd.* v. *United States of America* (NAFTA, UNCITRAL Arbitration Rules 1976), Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege (17 November 2005) www.state.gov/documents/organization/57342.pdf and Decision on Requests for Production of Documents and Challenges to Assertions of Privilege (21 April 2006) www.state.gov/documents/organization/75784.pdf.

73. In any event, the arbitral tribunal will of course always have to weigh the protection conferred by the applicable law against the public interest for transparency.

9.3.4 Article 7(2)(d): Protection of law enforcement

74. The exception in Article 7(2)(d) of the Rules, relating to information 'the disclosure of which would impede law enforcement' had not been included in any of the earlier drafts discussed by the WG, but emerged from within the WG towards the end of the deliberation of the Rules as part of a new 'self-judging' exception:[96]

> Nothing in these rules shall require a party to make available information [to the public] the disclosure of which it considers would impede law enforcement or would be contrary to the public interest or its essential security interests.

75. The provision was heavily criticised.[97] The WG did not discuss the meaning of 'information the disclosure of which would impede law enforcement' or how information relating to 'law enforcement' would have to be delimited from information relating to 'security interests' and/or 'public interest'. The reason for this may well have been that Article 7(2)(d) was completely dropped in the compromise proposal put before the WG to resolve the outstanding differences, and only reintroduced at the very last moment in the revised compromise proposal, although not as a self-judging exception, but as a regular exception under Article 7(2) of the Rules.[98] The *travaux préparatoires* do not provide for any further discussion as to why this was done, nor give the arbitral tribunal any guidance as to the interpretation of 'information the disclosure of which would impede law enforcement'.

76. In treaties, information regarding law enforcement is mostly referred to in the same breath as essential security interests and/or public interest. Neither treaty language nor case law give any autonomous definition or meaning to it.

[96] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [105].

[97] In fact parts of the WG criticised the overly broad wording of 'would impede law enforcement', found that the same protection was already carried for in national laws and treaties and, therefore, found it unworthy to form a separate exception, see UNCITRAL (n. 43) UN Doc. A/CN.9/760 [106]–[109].

[98] For the compromise proposal and the revised compromise proposal, see UNCITRAL (n. 55) UN Doc. A/CN.9/765 [67]–[78].

77. It is therefore suggested that law enforcement relates to institutions, principles, operations and arrangements with the duty to enforce the application of the laws of a State and engage with the pursuit and prosecution of crime.

78. A more detailed definition is included in the US Freedom of Information Act, which contains a publication exception for information compiled for law enforcement purposes, when such information:

(a) could reasonably be expected to interfere with enforcement proceedings;
(b) would deprive a person of a right to a fair trial or an impartial adjudication;
(c) could reasonably be expected to constitute an unwarranted invasion of personal privacy;
(d) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;
(e) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or
(f) could reasonably be expected to endanger the life or physical safety of any individual.[99]

79. The scope of the exception is closely linked to the functioning of the State and the ways it upholds the rule of law. Considering its scope, the law seems tailored to be invoked by the respondent State.

80. The exception is regularly included in treaties (and thus covered by Article 7(2)(b) of the Rules[100]). In addition, national law will regularly preclude the publication of information which, if made public, could impede law enforcement (thus meaning that such information is protected under Article 7(2)(c) of the Rules). It is therefore difficult to imagine a situation in which Article 7(2)(d) of the Rules carries weight

[99] The Freedom of Information Act, 5 USC § 552(b)(7) www.law.cornell.edu/uscode/text/5/552.
[100] See above, section 9.3.2.

of its own. One of the possible situations might be that a non-disputing party to the treaty invokes it.

9.4 Article 7(3)

81. Article 7(3) of the Rules clarifies both the 'gateway function' of the arbitral tribunal and the process to detect, decide on and enforce an exception under Article 7(2) of the Rules within the arbitral procedure. The paragraph also stipulates that the sole decision maker on an exception to transparency for information based on an exception under Article 7(2) of the Rules is the arbitral tribunal, and not the parties.

9.4.1 'The arbitral tribunal, after consultation with the disputing parties'

82. Before making any arrangements to prevent the publication of confidential or protected information, the arbitral tribunal is held to consult with the disputing parties. Other possible parties to the arbitration, such as non-disputing parties to the treaty or third parties, are not part of the consultation process. This includes, for example, that they have neither any veto right, nor any right to be heard when it comes to the arrangements made.

83. The leadership role of the arbitral tribunal intended by the Rules does not mean that the parties shall not be involved in the setting-up of the arrangements. On the contrary, including and considering the parties' comments or input will enhance the acceptance of such a framework. Possible ways for the arbitral tribunal to do so are, for example: (i) to circulate a procedural draft order regulating transparency; or (ii) to ask the parties to confer, and if possible agree on a possible framework. The arbitral tribunal might, however, have to remind the parties that they are not allowed, not even by joint agreement, to deviate from the Rules, and that even the arbitral tribunal is bound to the transparency objective of the same,[101] in particular if the propositions of the parties are undermining the purpose or functioning of Article 7 of the Rules.

84. In addition, the arbitral tribunal will have to consider how to balance and distribute the additional work made necessary by the transparency arrangements required under the Rules. In any event the Rules

[101] Articles 3(a) and 3(b) UNCITRAL Transparency Rules.

are likely to (further) increase the administrative and logistical burden going along with the arbitration procedure for both disputing parties, the arbitral tribunal and its secretary/clerk – and thus create higher costs for an investment arbitration procedure.[102]

9.4.2 'shall make arrangements to prevent any confidential or protected information from being made available to the public'

85. This part of the provision includes a positive and a negative duty: first, the arbitral tribunal has the (positive) duty to put in place a system to detect, process and protect confidential or protected information. Second, the parties have a (negative) duty to refrain from disseminating any information obtained in the arbitration before such arrangements are in place. This relates in particular to possible exchanges and/or submissions regarding interim measures, which, due to their urgent nature, might often be discussed before the arrangements to prevent the publication of protected information are in place.

86. Under the Rules, the information is channelled through the arbitral tribunal, not the parties.[103] This creates a duty of the parties to adhere to the prohibition to disseminate information unilaterally–even if no explicit prohibition to do so is contained in Article 7.[104]

87. In any event, the arbitral tribunal should endeavour to put in place the necessary arrangements rapidly and, if necessary, in several steps if the consultation process for a comprehensive solution takes too long.

9.4.3 'including putting in place, as appropriate'

88. The wording 'as appropriate' clarifies three things. First, it emphasises the vast discretion of the arbitral tribunal when it comes to putting

[102] E.g. Australia based its refusal to make accessible its Statement of Defence in *Philip Morris Asia Limited* v. *Australia*, PCA Case No. 2012–12, upon a request made under the Australian Freedom of Information Law, *inter alia*, on the 'significant cost' it would have to bear related to the designation and redaction of confidential information, cf. Jarrod Hepburn, 'Australia denies access to its "plain packaging" arbitration defence under freedom of information law' (12 May 2014) *Investment Arbitration Reporter* www.iareporter.com/articles/20140512_1.

[103] UNCITRAL (n. 60) UN Doc. A/CN.9/736 [112].

[104] *The Loewen Group, Inc. and Raymond L. Loewen* v. *United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on hearing of Respondent's objection to competence and jurisdiction (5 January 2001) [25] www.state.gov/documents/organization/3921.pdf.

in place the arrangements in connection with confidential and protected information. The examples listed in Article 7(3)(a) to (c) of the Rules are neither exhaustive nor mandatory. The arbitral tribunal is free to adapt them or to replace them by measures it considers more appropriate. The WG wanted a flexible wording, 'in order to permit an arbitral tribunal to adjust its procedures to individual situations'.[105] Second, the words 'as appropriate' are also a reminder of Article 1(4)(b) of the Rules, which makes reference to the parties' interest in an efficient resolution to their dispute, and to Article 17(1) of the Arbitration Rules (2010), directing the arbitral tribunal to 'conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute'. Thus, the arbitral tribunal should put in place arrangements which keep the framework as lean and efficient as possible.

89. Finally, the appropriateness of a measure can, over time, diminish, for example, when 'the threat that led to prohibit such publication dissipated'.[106] It might be appropriate for the tribunal to revisit certain of the arrangements it has made, balancing such a review process with the previously mentioned necessity to prevent an overburdened process.[107]

9.4.4 Article 7(3)(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'

90. The WG found it important to provide for 'some flexibility in terms of timing, as it was not practicable to require from a party that, at the time it submitted the information to the arbitral tribunal, it also submitted a redacted version'.[108] In some cases such additional time limits might indeed be the most practicable solution. Past tribunals have, however, on various occasions directed the parties to raise issues of protection at the time of their submissions already, for example by: (i) designating all of their documents (including exhibits and witness statements) containing confidential information;[109] and/or (ii) identifying the confidential information in the documents by, for example, placing it in

[105] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [92].
[106] UNCITRAL (n. 60) UN Doc. A/CN.9/736 [130]. [107] *Ibid.* [108] *Ibid.* [129].
[109] *Fireman's Fund Insurance Company* v. *Mexico,* ICSID Case No. ARB(AF)/02/01Award (17 July 2006) (redacted version) [222]–[223] www.italaw.com/sites/default/files/case-documents/ita0331.pdf.

square brackets.[110] In view of the duty to provide for efficient arrangements, it might therefore be a time-saving solution to require from the parties making a submission to the arbitration to already designate any information they seek protection for at the time of submission.

91. The wording 'disputing party, non-disputing party to the treaty or third person' clarifies that not only the disputing parties, but all parties in the arbitration have the right to seek protection of confidential or protected information. In *Glamis Gold Ltd.* v. *United States of America,* for example, the protection of certain information as to their tribal lands seems to have been requested by the Quechan Indian Nation (QIN) acting as third party to the arbitration,[111] and not by any of the disputing parties.

92. Finally, the provision also provides that any party can seek protection of information notwithstanding in which party's submission this information is enclosed. The party having an interest in the non-publication of any information does not necessarily have to be the same as the one that introduced it into the arbitration. This might happen, for example, in situations in which the information had been provided to the other party before or during the arbitration on a confidential basis or at least on a basis excluding dissemination to the public. This situation, created by the wording of this provision, causes problems in the application of Article 7(4) of the Rules.[112]

93. To summarise, Article 7(3)(a) of the Rules calls for two different steps: first, the designation by each party of protected information in its own submission, and, second, the notification of possible protected information in the submissions of another party. While the parties might be best asked to do the first directly in their submission, the arbitral tribunal will in any event need to set an appropriate time limit to do the latter.

9.4.5 Article 7(3)(b): 'Procedures for the prompt designation and redaction of the particular confidential or protected information in such documents'

94. Once the information for which protection is requested has been designated, the arbitral tribunal needs to make a decision on such a

[110] *Philip Morris Asia Limited* (n. 64) [53.B.2].

[111] See, e.g., *Glamis Gold Ltd.* v. *United States of America* (NAFTA, UNCITRAL Arbitration Rules 1976), Award (8 June 2009) fn 10 www.italaw.com/sites/default/files/case-documents/ita0378.pdf.

[112] See below, section 9.5.

request and, if it decides that the information is indeed worthy of protection under Article 7(2), to ensure that such information is redacted from all documents.

95. The structure of Article 7(3) of the Rules does not strictly follow the logical sequencing of such a procedure: while Article 7(3)(a) of the Rules refers to 'giving notice', Article 7(3)(b) of the Rules jumps directly to the 'designation and redaction', skipping the part of the process in which the arbitral tribunal reaches its decision on the notifications/designations of potentially confidential or otherwise protected information. This step is only referred to later, at the very end of Article 7(3) of the Rules. Of course the procedure also has to include a step in which the disputing parties are consulted on the notifications made and in which the arbitral tribunal takes its decision.

96. Article 7(3)(b) of the Rules clarifies that any procedure to designate and redact information in the documents has to be of such a nature as to make the redacted documents available within a short period of time. The WG felt that 'the linkage between Article 3 and Article (then) 8 should be . . . clearly set out . . . and that the question of the promptness of making documents available be addressed'.[113] Hence, the element 'prompt' in this provision is to be read together with Article 3(4) of the Rules, which provides that the arbitral tribunal has to communicate the redacted documents to the repository 'as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information'.

97. The arbitral tribunal shall oversee the process of redaction, 'regardless of whether there is an objection by a party to such designation'.[114] The WG, therefore, intended the arbitral tribunal to take an active role in such process. This means that the arbitral tribunal has to at least control the redactions made. Such a redaction process applies 'to all documents, including reports by tribunal appointed experts, submissions by third parties, and not only documents submitted by the disputing parties'.[115]

98. There are examples for both time limits and the procedure to designate, comment and decide on (disputed) designations: in *Apotex Holdings Inc.*, for example, the time limit to designate information for which protection was requested in a document submitted by another party was thirty days.[116] For disputes about the designation as 'eyes of

[113] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [110].
[114] UNCITRAL (n. 60) UN Doc. A/CN.9/736 [129].
[115] *Ibid.*
[116] *Apotex Holdings Inc.* (n. 7) [3].

tribunal and counsel only', the challenge had to occur within five days, the response within four days and the reply within three days, while the arbitral tribunal undertook to decide within a week.[117] In *Philip Morris Asia Limited*, a party had twenty-one days to produce a redacted version of its document, for which it had in its submission indicated the confidential information.[118] The other party had sixty days from the submission of the information to object to the designation, following which the dispute could be brought by either party before the arbitral tribunal in writing within twenty-one days after the objection, triggering a time limit of fourteen days for the other party to respond in writing to the application to the arbitral tribunal.[119] In *William Ralph Clayton et al.*, the party was to provide a redacted copy of its submission within twenty days after the submission of the unredacted version.[120] For any dispute on the designation, five-day time limits were set for submissions to the arbitral tribunal.[121]

9.4.6 Article 7(3)(c): 'Procedures for holding hearings in private to the extent required by article 6, paragraph 2.'

99. The arrangements to protect confidential or protected information during the hearing will largely depend on the arrangements that have been made for the public hearing as such and the possibilities of the hearing location and the service provider in this respect.[122]

100. An early assessment of available hearing venues and the different technical solutions provided might therefore be necessary. It might be appropriate to not set in place the respective procedures contemplated by Article 7(3)(c) of the Rules together with the arrangements for the designation, decision on and redaction of protected information in documents at the start of the arbitration. Rather, this should be contemplated once the arbitral tribunal has an indicative idea on the extent,

[117] *Ibid.* [Addendum 6bis].
[118] *Philip Morris Asia Limited* (n. 64) [53.B.3].
[119] *Ibid.* [53.B.5].
[120] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.* v. *Canada*, Procedural Order No. 2 (Confidentiality Order) (4 May 2009), [4]–[5] www.pca-cpa.org/showfile.asp?fil_id=1374.
[121] *Ibid.* [6]; and Procedural Order No. 1 (9 April 2009) [30]–[31] www.pca-cpa.org/showfile.asp?fil_id=1373.
[122] Service providers experienced in administering investment arbitration hearings, such as the PCA and ICSID, are probably best placed to not only accommodate or provide for various means of public hearings, including broadcasting and web-streaming services, but also to provide or suggest solutions for the protection of sensitive information based on their experience with this kind of arbitration.

nature and distribution of the information that needs to be protected during the hearing. Only at that time will it be possible to assess the need for arrangements to make sure this information is not made public. These arrangements are issues that need to be discussed with the parties during the hearing preparation.

101. The procedures to protect information during hearings depend on how the arbitral tribunal plans to provide for public access to the hearing. If there is to be live attendance and it is conceivable that the discussion will touch on protected information, the booking of a separate room with closed-circuit broadcast is an appropriate option. This has several advantages: first, it minimises possible disruptions of the hearing. Second, it also gives the arbitral tribunal the possibility of interrupting the broadcast when protected information is discussed. This will be less disruptive than having to ask the audience to leave the room every time the discussion comes to protected information. Depending on the circumstances, the predictability of the witnesses' behaviour and the degree of delimitation between protected and non-protected information, it could be advisable to provide for a slight deferral in the broadcast and a 'red flag' system with the parties. This would ensure that if protected information is addressed in an impromptu manner, the broadcast could immediately be interrupted, so to prevent the 'slip of tongue' from being broadcast to the public.

102. Depending on the division of work contemplated by the arbitral tribunal between its members and the secretary to the tribunal during the actual hearing, it might be necessary to appoint an additional person under the arbitral tribunal's supervision to be responsible for the broadcast and its possible interruption. It is in any event highly recommended to test the whole system before the hearing.

103. Finally, it might be necessary to provide for different levels of 'publicity' of the hearing. In *Glamis Gold Ltd.* v. *United States of America*, part of the confidential information discussed in the hearing concerned the sacred grounds of the QIN for which the same had requested (and obtained) that they not be made available to the public. The hearing was reported via closed-circuit television to a separate room, where the public could view it. In addition, a second broadcast line was installed for members of the QIN, which was not interrupted when the discussion turned to confidential cultural resource information.[123] So, various types of third parties with different 'clearance levels' when it comes to

[123] *Glamis Gold Ltd.* (n. 111), [290] and fn 614; also Procedural Order No. 11 (9 July 2004) [15], [22], [25] www.state.gov/documents/organization/88173.pdf.

protected information can exist, i.e., one group is allowed to witness certain confidential information while the wider public is not.[124] In such cases, arrangements for different broadcast lines[125] or different versions of the transcript have to be made.

104. If a third party has requested the protection of certain information and the arbitral tribunal has granted such protection, it might also be necessary to involve this third party in the control of the broadcast or the redaction of the transcript as to the information protected on its request.[126]

105. If, as contemplated by Article 6(3) of the Rules, a hearing is neither held in private nor broadcasted due to logistical restrictions, the publicity of the hearing may be ensured by publication of the hearing transcripts or posting of audio or video recordings on the internet. In such instances, the procedure to ensure the protection of confidential information will broadly follow the same principles as the one for the designation and redaction of confidential information in documents.

106. Article 6 of the Rules does not make any difference between third parties and non-disputing parties to the treaty. Therefore, where the arbitral tribunal decides that information is confidential or protected, the non-disputing party to the treaty is similarly prohibited from receiving it and/or from being present when the information is discussed at the hearing.[127]

9.4.7 Article 7(3): 'Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties'

107. In the past, arbitral tribunals have regularly restricted themselves to the function of deciding issues on which the parties disagreed when it came to the publication or non-publication of information.[128]

[124] See Klint Alexander, 'Article 6', [27]–[28].
[125] *Glamis Gold Ltd.* (n. 123) Procedural Order No. 11 [15].
[126] *Glamis Gold Ltd*. (n. 111) fn 10 and [290].
[127] See in this respect *Detroit International Bridge Company* v. *Canada*, PCA Case No. 2012–25, Procedural Order No. 7 (25 March 2014) www.italaw.com/sites/default/files/case-documents/italaw3162.pdf; and Procedural Order No. 8 (12 May 2014) www.italaw.com/sites/default/files/case-documents/italaw3169.pdf. In this case, the USA was denied access to the hearings of a NAFTA Chapter 11 arbitration.
[128] *Standard Chartered Bank* v. *Tanzania,* ICSID Case No. ARB/10/12, Procedural Order No. 3 (4 May 2011), [3] www.italaw.com/sites/default/files/case-documents/italaw1378.pdf.

108. In practice, arbitral tribunals would at times let the parties decide on the wording of a confidential order without participating in such discussion,[129] and, consecutively, adopt the text provided jointly by the parties without questioning the solution presented to them.[130]

109. The WG did consider this solution, i.e., that the arbitral tribunal would content itself to rule on exceptions on which the parties disagreed,[131] but decided against it. In fact, the *travaux préparatoires* show a salient distrust of the WG towards the arbitrating parties when it comes to the issue of ensuring transparency:[132] This distrust also seems to have been the reason why the WG did not retain an additional subparagraph under Article 7(2), providing for an exception to transparency for 'information that both disputing parties agree not be made available to the public unless it constitutes a breach of the public interest', but struck out this proposal without further ado.[133]

110. Article 7(3) explicitly elevates the arbitral tribunal to the sole decision maker when it comes to the exceptions mentioned in Article 7 (2) of the Rules. Even if the parties agree that certain information shall not be made available to the public, the arbitral tribunal is supposed to overrule the disputing parties' consent and order the publication of any information if it concludes that the information is not protected by any of the exceptions under Article 7(2) of the Rules. Thus, the arbitral tribunal is supposed to dispel a party agreement in favour of an interest stemming from outside of the dispute before it. Such a situation is highly unusual for an arbitration, where the arbitrators derive their powers from the parties' agreement to arbitrate and not from the power of the State. A provision like Article 7 is unproblematic in a State or standing international court. Investment arbitration, as every arbitration, on the contrary, is based on party consent and serves the resolution of a particular dispute between the investor and the State. It might well be

[129] *Standard Chartered Bank* (n. 128), Procedural Order No. 1 (25 March 2011) [4] www.italaw.com/sites/default/files/case-documents/italaw1376.pdf; and Procedural Order No. 2 (29 April 2011) www.italaw.com/sites/default/files/case-documents/italaw1377.pdf.

[130] *Standard Chartered Bank* (n. 128); *Talbot & Pope Inc.* v. *Canada*, Cover letter by the Arbitral Tribunal to the Amended Procedural Order on Confidentiality No. 5 (17 September 2002) www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/pope-19.pdf.

[131] UNCITRAL (n. 60) UN Doc. A/CN.9/736 [134].

[132] UNCITRAL (n. 60) UN Doc. A/CN.9/736 [112], [129]; UNCITRAL (n. 43) UN Doc. A/CN.9/760 [115] *in fine*.

[133] UNCITRAL (n. 55) UN Doc. A/CN.9/765 [63]–[64].

that many arbitral tribunals will feel uncomfortable in taking a decision over the head of the parties. In a situation where there is no disagreement between the parties about how to deal with certain information, some arbitral tribunals might perceive it as counterproductive to the efficient resolution of the parties' dispute to overrule such a joint agreement by the parties. There might be cases in which such a decision will be perceived by the arbitral tribunal to run against the endeavour to maintain a civilised and constructive atmosphere. Practice will have to show how arbitral tribunals and parties deal with this new situation.

111. The corollary to the arbitral tribunal's power to solely decide on the confidential or protected nature of information is the duty of all participating parties (notwithstanding if disputing party, participating third party or participating non-disputing party to the treaty) to subordinate themselves to the arbitral tribunal in this respect. This means that the parties cannot unilaterally disseminate information before the arbitral tribunal has decided on it, as this would circumvent the sole authority of the arbitral tribunal in this respect.

112. Once the arbitral tribunal has decided that a particular information is not confidential or protected, the party that disagrees with such finding has only one possibility to prevent the publication of such information: the withdrawal of the information from the arbitration under Article 7(4) Rules.

9.5 Article 7(4): Withdrawal of information

113. Article 7(4) of the Rules is the safety break for a party that feels that the arbitral tribunal does not sufficiently protect its sensitive information. Article 7(4) of the Rules allows a party to withdraw from the arbitration any information, or the document in which the information is contained, for which the arbitral tribunal has found that it does not fall under any of the exceptions under Article 7(2).

114. At the same time, however, the party can no longer rely on the information in the scope of the presentation of its case. Due to that dual impact, the withdrawal of information requires careful consideration and balancing the consequences of a publication versus the consequences the non-reliance on this evidence might have for the party's case.

115. In its fifty-fifth session, the WG gave the Secretariat the mission to draft the procedural provisions of Article 7 in a way, *inter alia*, to include the possibility for 'the party that submitted the information [to] withdraw all or part of it, and not rely on it, when that party felt that

confidential and sensitive information would not be sufficiently protected' because the arbitral tribunal rejected granting protection to such information.[134] This solution is, basically, the one retained in Article 10.21 CAFTA-DR and Article 29 of the US Model BIT 2012. In its fifty-seventh session, however, the WG felt that this situation 'overlooked the circumstance whereby a party compelled to produce a document by the arbitral tribunal could subsequently withdraw that document on grounds of confidentiality. It was agreed that [the relevant paragraph] was only intended to apply in circumstances where a party had voluntarily submitted a document'.[135] The wording of Article 7(4) of the Rules was amended accordingly and adopted in its amended form.

116. The starting point for the possibility of withdrawing a document is a negative decision of the arbitral tribunal that a particular information is not confidential or protected by any of the exceptions under Article 7(2).

117. The party that has introduced the document can withdraw it either completely or partially. A partial withdrawal might be particularly suitable where the document also contains separate, valuable information on which the same party relies.

118. Article 7(4) restricts the possibility of withdrawing documents to situations in which the document was voluntarily filed into the record.

119. The term 'record' requires clarification. For instance, it is unclear whether a document is to be considered 'in the record' when one party provides it to the other in the scope of a (voluntary) document production, or if, on the contrary, a document is only 'in the record' once it is filed as evidence or presented otherwise to the arbitral tribunal. The distinction is important insofar as in the second case the party introducing any information or document is not necessarily the same as the party that has an interest to have that information protected.[136] In other words, is it the party that has produced the document to the other party voluntarily that can withdraw it from the arbitration, or only the other party that included said document in its exhibits?

120. Both interpretations have their pros and cons. The first makes sure that the party which considers that the arbitral tribunal does not

[134] UNCITRAL (n. 60) UN Doc. A/CN.9/736 [129].

[135] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [113].

[136] We have seen earlier that Article 7(3)(a) of the Rules does not limit the designation of sensitive information to documents a party has submitted itself, but that it can also designate information in submissions of other parties as requiring protection, see above section 9.4.4.

protect its information sufficiently can withdraw the information. This solution, however, would mean that the other party, i.e., the one that has filed the document as evidence, would have to bear the negative consequences of such withdrawal, as it could no longer rely on it as evidence. The second interpretation (thus that 'record' refers to what is presented as evidence) would guarantee the identity of the person who can withdraw it and the person that has to suffer the consequences of such withdrawal. It does, however, make it impossible for the party from which the document originated to withdraw it.

121. The second distinction is favourable as it minimises possible interferences into the way a party presents its case by another party. This interpretation is corroborated by the *travaux préparatoires*, according to which this provision shall prevent 'a party compelled to produce a document by the arbitral tribunal' to subsequently withdraw that document, not the party that voluntarily disclosed it. This solution might, however, diminish any desire of the parties to voluntarily disclose documents to the other party.

122. One possible way out of this dilemma might be that the arbitral tribunal deviates from Article 7(4) of the Rules applying its power to do so under Article 1(3)(b) of the Rules to prevent the situation discussed above.

123. In sum, Article 7(4) of the Rules amounts – for public interest considerations – to a limitation of a party's right to present its case in the way it chooses: While the party has a 'last resort' to prevent the publication of information it deems protection-worthy (but the arbitral tribunal does not), this will also prevent it from relying on that information in the arbitration proceedings. This means that the party's right to be heard is limited for a reason that has nothing to do with the dispute itself, but stems from the public interest in transparency.

124. The withdrawal of information by a party also has the consequence that the other parties cannot make reference to the information in question in their submissions. In this sense, the arbitral tribunal in *Philip Morris Asia Limited* v. *Australia* included in its confidentiality order a provision explicitly stating that '[i]f the information is withdrawn, it cannot be relied upon by the opposing Party or the Tribunal'.[137] Article 10.21(4)(d) of the CAFTA-DR states the same and even directs the opposing party to resubmit newly redacted versions of its

[137] *Philip Morris Asia Limited* (n. 64) [53.B.5.f].

submissions (deleting any reference to the withdrawn information[138]). The same principle has to be applied under the Rules. Otherwise the same information could be reintroduced by another party into the proceedings and Article 7(4) of the Rules would be emptied of any practical meaning.[139]

9.6 Article 7(5): The essential security interest exception

9.6.1 Introduction

125. Article 7(5) creates a distinctive category of information for which the rules set forth in Article 7(1) to (4) do not apply: information relating to essential security interests of the respondent State. Article 7(5) breaks with the principles put forward in the rest of Article 7: unlike the other exceptions in Article 7, the wording of Article 7(5) does not subject the (non-) disclosure of such information to the decision of the arbitral tribunal. It is left to the State to define the 'information the disclosure it considers to be contrary to its essential security interests' and for which 'nothing in these Rules require a respondent State to make [it] available to the public'.

126. The 'essential security interests' exception was not included in the first drafts of the Rules but put before the WG during its fifty-seventh session by some members of the WG in the scope of a proposal for an additional (and beforehand undiscussed) new paragraph also containing exceptions for public interest and law enforcement considerations.[140] Some delegations supported the view that these exceptions shall be determined by the State itself (and not the arbitral tribunal),[141] noting that the same wording is broadly applied in BITs and trade agreements, and arguing that the importance of these interests justified a self-judging exception.[142] In particular, some developing countries seemed to be concerned about the sufficient protection of their national security interests.[143] Other delegations opposed the introduction of these exceptions, stating that because they were overly broad, a State could give them practically any meaning in order to create a justification to withhold information and that such exceptions would thus contradict the very goal of the Rules.[144] It was argued that this would give any State the possibility

[138] See above, section 9.1.2. [139] Cf. *Biwater Gauff (Tanzania) Limited* (n. 57) [158].
[140] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [105]. [141] *Ibid.* [106].
[142] UNCITRAL (n. 55) UN Doc. A/CN.9/765 [65]–[66], [65]ff.
[143] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [103].
[144] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [106].

of circumventing the Rules unilaterally.[145] As no consent could be found, the paragraph was part of the compromise proposal, counter-proposal and a revised compromise proposal. The latter contained Article 7(5) as it was retained.[146] Thus, while the public policy exception was dropped and the law enforcement exception made subject to a decision by the Arbitral Tribunal by incorporating it under Article 7(2), essential security interests remain a self-judging exception withdrawn to the free consideration by the arbitral tribunal.

127. A discussion as to the content of the term 'essential security interests' or the extent of the self-judging character did not take place.

9.6.2 The notion of essential security interests

128. The WG did not define the term of essential security interests.

129. As had been stated by the WG, the notion of essential security interests is regularly found in BITs[147] or trade agreements.[148]

130. The definitions found therein regularly enclose the trafficking in arms, military materials or other goods, materials, services or technologies in relation to military or security establishments, issues related to war or other emergencies in international relation and issues relating to nuclear weapons.[149]

131. Where there is no definition of the term itself, the notion of essential security interests has to be interpreted according to customary international law.[150] In investment arbitrations the term has regularly been interpreted more broadly than in other cases, for example before the

[145] UNCITRAL (n. 55) UN Doc. A/CN.9/765 [66]. [146] *Ibid.* [69]–[78].

[147] For examples, see Katia Yannaca-Small, 'Essential Security Interests under International Investment Law' in OECD, *International Investment Perspectives 2007: Freedom of Investment in a Changing World* (OECD, 2007), 112ff. (annex 5.A2); OECD, *Security-related Terms in International Investment Law and in National Security Strategies* (OECD, 2009), 32ff. (annex 2).

[148] Cf. Article XXI(1) GATT 1994, Article 74(a) TRIPS, Article 2102(1)(b) NAFTA; Article XIV GATS.

[149] Cf. Article 38(7) of the Canadian Model BIT 2004, Article 26 of the Norway Model BIT 2007, Article 2102(1)(b) NAFTA, Article XXI GATT 1994, or Article 24(3)(a) Energy Charter Treaty.

[150] *Enron Corporation and Ponderosa Assets, L.P.* v. *Argentina*, ICSID Case No. ARB/01/3, Award (22 May 2007) [333] www.italaw.com/sites/default/files/case-documents/ita0293.pdf [annulled]; *Sempra Energy International* v. *Argentina*, Award (28 September 2007) [375]–[378] www.italaw.com/sites/default/files/case-documents/ita0770.pdf [annulled].

ICJ.[151] It is in particular controversial if an undefined security interest clause also encloses economic considerations.[152]

132. Thus, the extent a responding State can rely on the exception in Article 7(5) of the Rules depends on the extent the underlying treaty or customary international law defines the scope of essential security interests. In other words, while it is the respondent State which unilaterally decides if making available any information to the public is contrary to its essential security interests, it cannot unilaterally define the scope of these essential security interests beyond what these interests cover according to the treaty the arbitration is based on.

9.6.3 The arbitral tribunal's power to review an exception under Article 7(5): the 'good faith' test

133. The self-judging character of Article 7(5) of the Rules does not mean that the arbitral tribunal is completely excluded from reviewing an essential security interest exception raised by the responding State: the arbitral tribunal has to conduct a good faith review of such exception.[153]

134. Not allowing such minimal review would indeed open the door to possible abuse of Article 7(5) of the Rules, undermining the very purpose of the same.[154]

135. Conducting such a review, on the other hand, takes into consideration the concerns that the self-judging exception could be used by a State to circumvent the Rules by interpreting the notion of

[151] William J. Moon, 'Essential Security Interests in International Investment Agreements' (2012) *Journal of International Economic Law 15* (2) 481, 499–501.

[152] Pro: *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc.* v. *Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) www.italaw.com/sites/default/files/case-documents/ita0460.pdf; Contra: *CMS Gas Transmission Company* v. *Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005) www.italaw.com/sites/default/files/case-documents/ita0184.pdf; *Sempra Energy International* (n. 150); *Enron Corporation* (n. 150).

[153] *LG&E Energy Corp.*, *ibid.* [214], *CMS Gas Transmission Company*, *ibid.* [366]–[374]; *Sempra Energy International* (n. 150) [388]; *Enron Corporation* (n. 150) [339]; *Continental Casualty* v. *Argentina*, ICSID Case No. ARB/03/9, Award (5 September 2008) [182] www.italaw.com/sites/default/files/case-documents/ita0228.pdf; in relation to Article XXI GATT, which also contains a self-judging essential security interest exception: Peter Van Den Bossche, *The Law and Policy of the World Trading Organization* (2nd edn., Cambridge University Press, 2008) 666ff.

[154] Cf. Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 493.

essential security interests so broadly as to justify the non-publication of any information. It does make sense all the more as the exception of Article 7(5) applies to information that has already been disclosed in the arbitration procedure and that is thus known to the arbitral tribunal.

136. In summary, Article 7(5) of the Rules does not give a respondent State a free pass to take recourse to its essential security interests to prevent the publication of information:

– first, the respondent State is bound by the definition of essential security interests in the treaty, of which the Rules cannot derive; and
– second, any objection to publication based on essential security interests have to be made in good faith.

These two issues have to be reviewed by the arbitral tribunal facing an objection to transparency based on Article 7(5) of the Rules.

9.7 Articles 7(6) and 7(7): Integrity of the arbitral process

9.7.1 Introduction

137. Articles 7(6) and 7(7) provide for another category of exceptions to the principle of transparency. They are not concerned with the information as such and its protection, but with the possibly deteriorating effect their publication could have on the arbitral process itself.

138. The regulation of the integrity exception in Articles 7(6) and 7(7) falls somewhat short of the detailed framework provided for the exceptions made for confidential or protected information.

139. Article 7(6) contains the principle that the publication of information can be restricted due to integrity reasons, while Article 7(7) encloses both material and organisational guidance for the arbitral tribunal on when and how to do so.

140. Several past arbitral tribunals have restricted the dissemination of information by the parties due to considerations in connection with the integrity of the arbitral process.[155] This case law, however, dates

[155] See e.g. *AMCO Asia Corporation and others* v. *Indonesia*, ICSID Case No. ARB/81/1, Decision on the Request for Interim Measures (9 December 1983) in 24 *International Legal Materials* (1985) 365–9; *Metalclad Corporation* v. *Mexico,* ICSID Case No. ARB (AF)/97/1, Decision on a request by the Respondent for an order prohibiting the Claimant from revealing information regarding ICSID Case No. ARB/(AF)/97/1 (27 October 1997) www.italaw.com/sites/default/files/case-documents/ita0505_0.pdf; *World*

from before the Rules and does not, therefore, take into appropriate consideration the transparency principle of the Rules and the particular guidance given to the arbitral tribunal in Articles 7(6) and 7(7) of the Rules.

9.7.2 Analysis in view of the WG deliberations

141. Early on, the WG found that 'specific exceptions should be contemplated to deal with the question of protection of the integrity of the arbitral process'.[156] The wide discretion of the arbitral tribunal under Article 17(1) of the Arbitration Rules (2010) to conduct the arbitration in such manner as it considers appropriate was to form the basis of such exceptions.[157] To prevent this exception from becoming an overly broad and vague category inappropriately limiting the principle of transparency, the WG felt that it needed to define what the integrity of the arbitral process meant.[158] Different types of situations that could fall under this term were discussed, such as intimidation or physical threats to participants in the arbitration process, disruptions of hearings by the audience, general politicisation of the dispute or manipulation by the mass media.[159] After some discussion, the WG decided that a high threshold should be applied, rejecting wording used in the past by arbitral tribunals to define the term, such as 'risk of aggravation of the dispute' or 'rendering the resolution of the dispute difficult or impossible', as being too broad.[160] Similarly, 'issues of due process or disturbance of the hearings should not be understood as falling under the category of the protection of the integrity of the arbitral process'.[161] The WG decided that a short list of examples should be included to provide 'adequate guidance to the arbitral tribunal by clarifying that restrictions to

Duty Free Company Limited v. *Kenya*, ICSID Case No. ARB/00/7. Award (4 October 2006) [16] http://italaw.com/documents/WDFv.KenyaAward.pdf; *ADC and ADC & ADMC Management Limited* v. *Hungary,* ICSID Case No. ARB/03/16, Award (2 October 2006) [57]–[68] www.italaw.com/sites/default/files/case-documents/ita0006.pdf; *Biwater Gauff (Tanzania) Limited* v. *Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 (29 September 2006) www.italaw.com/sites/default/files/case-documents/ita0089.pdf; *EDF (Services) Limited* v. *Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 2 (30 May 2008) www.italaw.com/sites/default/files/case-documents/ita0263.pdf.

[156] UNCITRAL (n. 34) A/CN.9/712 [72].

[157] *Ibid.*; UNCITRAL (n. 56) A/CN.9/717 [142].

[158] UNCITRAL (n. 56) A/CN.9/717 [137], [139].

[159] *Ibid.* [138].

[160] *Ibid.* [139].

[161] *Ibid.* [140].

publication could only occur in circumstances that met the threshold of exceptional circumstances'.[162]

9.8 Article 7(6): The principle

9.8.1 'Information shall not be made available to the public pursuant to articles 2 to 6. . .'

142. This part of the provision clarifies that Articles 7(6) and 7(7) are only to guide the arbitral tribunal as far as transparency in the context of Articles 2 to 7 of the Rules is concerned. If the arbitral tribunal contemplates a measure to uphold the integrity of the arbitral process that does not impact on the publication of information under the Rules, it is not bound by Articles 7(6) and 7(7).

9.8.2 'where the information, if available to the public, would jeopardize the integrity of the arbitral process'

143. Although the WG discussed examples of when the integrity of the arbitral process would be jeopardised, it did not discuss what the integrity of the arbitral process encloses and protects.

144. In *EDF (Services) Limited* v. *Romania*, procedural integrity was regarded as an objective in itself 'meant to preserve the parties' rights to be heard on an equal footing and to be able to collect and provide the necessary evidence in support of their claims and defences'.[163] In *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún* v. *Bolivia*, the arbitral tribunal considered the procedural integrity of the arbitral proceedings as a right of the parties distinctive from the one to the non-aggravation of the dispute. The tribunal in particular considered it in connection with the parties' right to present their case by having access to documentary evidence, witnesses and evidence through potential witnesses.[164] The arbitral tribunal in *Biwater Gauff (Tanzania) Limited* v. *Tanzania* listed the following issues as falling into the scope of the integrity of the arbitral process:[165]

[162] UNCITRAL (n. 60) UN Doc. A/CN.9/736 [114].
[163] *EDF (Services) Limited* (n. 155) [46], [48]ff.
[164] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún* v. *Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010) [142], [148] www.italaw.com/sites/default/files/case-documents/ita0698.pdf.
[165] *Biwater Gauff* (n. 155) [135].

– to preserve the Tribunal's mission and mandate to determine finally the issues between the parties;
– to preserve the proper functioning of the dispute settlement procedure;
– to preserve and promote a relationship of trust and confidence between the parties;
– to ensure the orderly unfolding of the arbitration process;
– to ensure a level playing field;
– to minimise the scope for any external pressure on any party, witness, expert or other participant in the process; and
– to avoid 'trial by media'.

145. Arbitral tribunals might take inspiration from these interpretations when contemplating an exception to transparency for procedural integrity reasons.

146. The wording 'would jeopardize' clarifies that the arbitral tribunal will regularly have to initiate a measure to protect the integrity of the arbitral process before it has been endangered or even breached. The arbitral tribunal, thus, does not have to restrict itself to a reactive role, but is encouraged by the Rules to actively prevent any breaches of the procedural integrity.

147. Finally, the reference to 'information' clarifies again that the tribunal shall make exceptions to transparency based on an assessment of the information that might cause a problem (as opposed to making an exception for types of documents, as the *Biwater Gauff* tribunal had made).[166]

9.8.3 'as determined pursuant to paragraph 7'

148. This wording shows that the WG did not want the arbitral tribunal to have total discretion when it comes to an exception to transparency for reasons of procedural integrity. The reference to Article 7(7) serves to clarify that only under the conditions set forth in Article 7(7) shall the arbitral tribunal consider such an exception.

[166] See above, section 9.2.1.

9.9 Article 7(7): Directions as to the integrity of the arbitral process exception

9.9.1 Introduction

149. Article 7(7) contains both a substantive and an organisational part: on one hand it provides guidance as to what kind of circumstances shall give rise to an exception for procedural integrity reasons; on the other hand it indicates how the decision-making and implementation process shall work for such an exception.

9.9.2 'The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where applicable'

150. An exception due to the confidential or protected nature of information under Article 7(2) of the Rules will only be contemplated by the arbitral tribunal on the initiative of a party alleging that a certain information falls under any of the exceptions in Article 7(2)(a)–(d). Without a notification by a party to the procedure that it wishes certain information to be treated as confidential, the information will be published.[167] For exceptions to protect the integrity of the arbitral process under Articles 7(6) and 7(7) of the Rules, this is different: the arbitral tribunal can both initiate and take measures to implement such an exception on its own. As a matter of principle, the arbitral tribunal should consult the disputing parties (but not the other parties to the procedure, if any) before taking any measures to protect the integrity of the procedure. The arbitral tribunal shall do so 'where applicable'. Thus, where time is of the essence, it does not have to consult the parties beforehand. The WG found that 'in urgent situations, the arbitral tribunal would not necessarily have the ability to consult the parties' and that in such a situation 'the arbitral tribunal should, at a later stage, consult the parties on its proposed way forward'.[168]

9.9.3 'take appropriate measures to restrain or delay the publication of information'

151. In referring to 'appropriate measures', the Rules confer to the arbitral tribunal a large degree of discretion when deciding on how to

[167] See above, section 9.4.4. [168] UNCITRAL (n. 60) UN Doc. A/CN.9/736 [113].

prevent the violation of the procedural integrity. In line with the general principle of transparency in the Rules, this part of the provision ('restrain or delay') also directs the arbitral tribunal to choose the measure that will infringe least on this principle. As the arbitral tribunal in *Biwater Gauff* observed, restrictions for the sake of procedural integrity often become obsolete after a certain time.[169] This means that the arbitral tribunal will have to keep its measure under continued review and re-assess its appropriateness from time to time.

152. As discussed,[170] a measure would be emptied of any use if the parties were to be allowed to disseminate information. It might be cautious for the arbitral tribunal to remind the parties of their obligation in this respect.

9.9.4 Direction to the arbitral tribunal as to the kind of intensity of the danger for the integrity of the arbitral process

153. As discussed by the WG, possible attempts to endanger the integrity of the arbitral procedure have to feature a certain intensity to justify an exception.[171] The examples in Article 7(7) may serve as a model in connection with the degree of intensity required to trigger an exception under Articles 7(6) and 7(7).

9.9.4.1 'hamper the collection or production of evidence'

154. The parties' right to present their case and to present evidence is a basic necessity of due process. Where this is jeopardised, the proper course of an arbitral procedure is no longer guaranteed.

155. The use of the word 'hamper' indicates that it is not necessary that the collection of evidence is made downright impossible by the publication of a particular piece of information in order to justify its retention, but that it is enough if its publication would make the gathering of evidence more difficult.

156. Depending on the sequencing of the arbitral procedure, the collection and/or production of evidence takes place at a certain time, and not throughout the procedure. It might therefore be possible to limit in time a measure of information retention.

157. In view of the restricted publicity of expert reports and witness statements pursuant to Article 3(2) of the Rules, the situation might arise

[169] *Biwater Gauff* (n. 155) [140], [142], [162].
[170] See above, section 9.2.4.
[171] See above, section 9.7.2.

that an expert or witness requests that his or her written or oral testimony is not made public without his or her explicit consent. Where the expert or witness in question refuses such consent, the arbitral tribunal might want to consider granting an exception under Articles 7(6) and 7(7) of the Rules to ensure that the expert or witness evidence can be collected.

9.9.4.2 'an exception under intimidation of witnesses, lawyers acting for disputing parties or members of the arbitral tribunal'

158. Intimidation, harassment and/or repercussions taken against actors of an arbitral proceeding is not a new issue in investment arbitration.[172] Intimidation can be overt or subtle.[173] Not always does it become as apparent to the arbitral tribunal as when a witness threatens another witness during the hearing of 'obtaining satisfaction' and, to do so, requests a copy of the other witness's statement.[174] A more 'subtle' example can be found in *Libananco Holdings* v. *Turkey*, where one of the expert witnesses of the claimant withdrew from the arbitration for fear of Government reprisal and harassment after it transpired that the respondent held the claimant's witnesses and legal representatives under surveillance.[175] The examples are, sadly, abundant.[176] The parties involved in an investment arbitration are in particular exposed to the risk of intimidation when they are located in the respondent State and such respondent State is an authoritarian State.[177] Certain States have assembled a track record in using such means to influence investment arbitrations in their

[172] Abba Kalo, 'Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal' (2010) 26 *Arbitration International* 45ff.

[173] *Ibid*., 49. [174] See *ADC Affiliate Limited* (n. 155) [68].

[175] *Libananco Holdings Co. Limited* v. *Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues (23 June 2008), [72] www.encharter.org/fileadmin/user_upload/Investor-State_Disputes/Libananco-Turkey_decision_preliminary_issues.pdf.

[176] See e.g. the examples given by *Kalo* (n. 172) 49ff, Thomas W. Wälde, '"Equality of arms" in investment arbitration: procedural challenges' in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to Key Issues* (Oxford University Press, 2010) 168ff; or Günther J. Horvath, Stephan Wilske, Harry Nettlau and Niamh Leinwather, 'Categories of Guerrilla Tactics', Günther J. Horvath and Stephan Wilske (eds.), *Guerilla Tactics in International Arbitration* (Kluwer Law International, 2013) 6–8.

[177] Wälde (n. 176) 167ff.

favour.[178] This being said, it is evident that a powerful corporation can often apply the same pressure as a State.[179]

159. In any event, facing a risk of intimidation, the delay or restraint on releasing certain information seems to be one of the least drastic measures an arbitral tribunal can take. This might go from the delay of certain publications to the redaction of the names of witnesses in all documents.

9.9.4.3 'or in comparably exceptional circumstances'

160. This part of the provision shows that the two examples given in Article 7(7) are not to be understood as the only events in which the arbitral tribunal is allowed to limit the public access to certain information. Thus, it is up to the discretion of the arbitral tribunal to decide if a situation jeopardises the integrity of the arbitral process or not.

161. The wording 'comparably' does, however, indicate that any such situation needs to have a certain intensity, for which the intensity of the two examples given in Article 7(7) of the Rules shall serve as model. In other words, the application of Articles 7(6) and 7(7) by the arbitral tribunal shall serve to prevent a situation that has the same potential to jeopardise the integrity of the arbitral process as impediments to the collection and production of evidence or the intimidation of persons in the arbitration. There needs to be a real risk to the efficient and fair resolution of the parties' dispute.

9.10 The parties' unilateral dissemination of information

162. As we have seen, it was the clear intention of the WG to establish the arbitral tribunal as the decision maker and 'channel' when it comes to regulating access by the public to the arbitral procedure, the documents and the information in it.[180] A repository as provided in Article 8 of the Rules would not serve much use if this was not the case.[181] Transparency cannot be without limits. This is the very purpose of Article 7 of the Rules. Such purpose would be circumvented if the parties were free to

[178] Noah Rubins, 'Particularities when dealing with State entities' in Günther J. Horvath and Stephan Wilske (eds.), *Guerilla Tactics in International Arbitration* (Kluwer Law International, 2013) 86–90.

[179] Horvath, Wilske, Nettlau and Leinwather (n. 176) 6–7.

[180] See above, sections 9.2.3, 9.4 (in particular 9.4.7), 9.6.3.

[181] See Giuseppe Bianco, 'Article 2', [18]–[20]; Kathleen Claussen, 'Article 8', [6]–[13]; and also the Guidelines of the UNCITRAL Secretariat (Transparency Registry) on how to submit documents to the Registry www.uncitral.org/transparency-registry/en/guidelines.html.

disseminate information as they wish before the arbitral tribunal has ruled on the issue of protection as provided for in Article 7 of the Rules. Where a party disseminates information that is in the arbitration before the arbitral tribunal has ruled on its protection or if one party diffuses such protected information although the arbitral tribunal has decided that it shall be confidential, this violates the integrity of the arbitral procedure. Hence, the parties have to respect the decisions of the arbitral tribunal when it comes to confidentiality or protection of information and abstain from any behaviour that would render this power of the arbitral tribunal obsolete. This is a direct result of the Rules taking the power to decide on the confidentiality of given information from the parties and putting it into the hands of the arbitral tribunal.

163. This principle applies to both parties alike. If one of the parties is allowed to disseminate information while the other one is not, such a preferential treatment would undermine the fair and equal treatment of the arbitrating parties and, therefore, go against the fundamental principles of every arbitration proceeding.

164. We have seen that Article 7(2)(c) of the Rules directs national laws to define what confidential or protected information is.[182] For information of the respondent State, the arbitral tribunal is directed to apply the law of the respondent State. This option was retained to prevent the situation that the respondent State has to make information accessible to the public by virtue of the Rules that it is not allowed to publish under its national laws. This rule does not, however, give the respondent State the right to circumvent an order by the arbitral tribunal based on the ground that its national laws (such as any kind of freedom of information act) do not convey the same protection to an information the arbitral tribunal has protected.[183]

165. Some treaties do reserve the respondent State's right to do so. For example, Article 10.21(5) CAFTA-DR states:

> Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

166. More explicitly, the Canadian Model BIT 2004 provides in its Article 38(8):

> To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access

[182] See above, section 9.3.3.1. [183] See above, section 9.3.3.1.

> to that information, the Party's law on access to information shall prevail. However, a Party should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal.

167. In many treaties, however, the issue is not dealt with. During the deliberations of the WG the concern was raised that the State 'could be obliged under legislation to disclose information, and an arbitral tribunal could not be granted the power to prevent such disclosure'.[184] This is wrong. While arbitral tribunals have acknowledged the statutory duty of respondent States to disclose information under their national legislation for the public access to governmental information,[185] Articles 26 and 27 of the VCLT are very clear in this respect: a State cannot hide behind its national laws to neglect its international duties. As Article 7 of the Rules encloses a duty to not disclose information that has been declared as confidential by the arbitral tribunal, disclosing this information would not only violate any arbitral tribunal's order, but also the Rules and the Treaty they are included in.[186] This does not, however, necessarily have to become such a pressing issue in the scope of an application of Article 7 of the Rules.

168. First, many freedom of information acts leave a certain degree of discretion to the State when it comes to the granting of access to information based on requests in this respect.[187]

169. Second, it is not uncommon that national laws regulating access to information provide for explicit exceptions, e.g.: (i) information coming from an arbitration in which the State is a party; (ii) information upon which confidentiality has been ordered by a court or tribunal; or (iii) information that has been given to the State by a third party under an undertaking to keep it confidential.[188]

[184] UNCITRAL (n. 60) UN Doc. A/CN.9/736 [127].

[185] See e.g. *Mondev International Limited* v. *United States of America*, ICSID Case No. ARB (AF)/99/2, Award (11 October 2002) [29] www.state.gov/documents/organization/14442.pdf.

[186] *Pope & Talbot Inc.* v. *Canada*, Decision and Order by the Arbitral Tribunal (11 March 2002) [18] http://italaw.com/sites/default/files/case-documents/ita0683.pdf.

[187] See e.g. Australia's refusal to make accessible its Statement of Defence in an Investment Arbitration under UNCITRAL Rules upon a request made under the Australian Freedom of Information Law for what seem to be purely discretionary reasons; cf. Jarrod Hepburn, 'Australia denies access to its "plain packaging" arbitration defence under freedom of information law' (12 May 2014) *Investment Arbitration Reporter* www.iareporter.com/articles/20140512_1.

[188] See e.g. ss. 27, 32, or 41 of the UK Freedom of Information Act 2000; ss. 8(1)(b) and 8(2) of the Indian Right to Information Act 2005; or Article 3(1) of the Swiss Law on the Principle of Publicity in Public Administration.

170. Where the State can exercise any discretion to keep information which has been protected by the arbitral tribunal under Article 7 of the Rules confidential, the State shall act in a way so as to ensure the confidentiality of such information. In other words, where the statutory obligation to disclose certain information leaves any kind of discretion to the respondent State which it could use not to do so, the respondent State shall not release protected information.[189] Everything else would be contrary to the obligations undertaken by the respondent State in implementing the Rules and would seriously impede the arbitral procedure: a party has to make sure that the information it provided in good faith, and for which the arbitral tribunal has granted protection, remains protected. Otherwise, one party's interest in keeping any information confidential, certified by the arbitral tribunal as being protected under the Rules, is overridden by the other party's interest in full disclosure, which is not protected by the Rules. Such a selective adherence to the rule of law and international obligations endangers the integrity of the arbitral procedure and, in the end, results in a loss of trust in arbitration as a valid instrument to settle investment disputes.[190]

171. It has to be kept in mind that, according to the Rules, the parties are consulted before the arbitral tribunal decides on the status of information.[191] In doing so, the arbitral tribunal has to take into consideration the public interest in transparency in the given case and the disputing parties' interest in a fair and efficient resolution of their dispute.[192] This means that by virtue of the Rules, the arbitral tribunal will balance the public interest in transparency against the interest of the party requesting an exception. If now the respondent State was to make a second appreciation of these issues when facing an access to information request under its national laws, it renders the arbitral tribunal's decision obsolete, empties Article 7 of the Rules of any meaning and substitutes an arbitral tribunal established under an international treaty with a national court.

172. It is noteworthy that Article 1(8) of the Rules, an almost verbatim adoption of Article 1(3) of the Arbitration Rules (2010), does not apply to this case. Said rule only governs the law applicable to the arbitration from which a party cannot derogate, in particular the arbitration law at the seat

[189] *Metalclad Corporation* v. *Mexico* (n. 150) [10].
[190] J. Cameron Murphy, 'UNCITRAL's Efforts to Ensure Transparency: Right back where we started from' (2013) 16 *International Arbitration Law Review* 185–7.
[191] Article 7(3) UNCITRAL Transparency Rules; see above, section 9.4.1.
[192] Article 1(4) of the UNCITRAL Transparency Rules.

of the arbitration.[193] The freedom of information law of the respondent State is no such law. Nothing in the *travaux préparatoires* of the WG would allow such interpretation.

173. In any event it might be diligent to address the issue of the respondent State's law providing for access to information at an early stage of the arbitration, and also address the respondent State's discretion in dealing with such requests. This might be combined with an undertaking by the parties to keep any information for which the arbitral tribunal has determined that it shall be protected, confidential and/or that the respondent State will exercise any given discretion in a way as to keep such information confidential.[194] This might be best achieved in an (countersigned or agreed on) order providing for the arbitration proceeding's framework for public access and its limits.[195]

174. Where the respondent State cannot or will not give such undertakings, even footing and equal treatment can be achieved by another means: some information would not be shared with the respondent State, but only with its counsel. Both the arbitral tribunals in *Apotex Holdings Inc. and Apotex Inc.* v. *United States of America* and in *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.* v. *Canada* have chosen such an approach.[196] In this situation the information concerned would not come into the sphere of the government of the respondent State, so that it cannot produce this information under a freedom of information request, simply because it does not have it.

9.11 Case management and manageability of the procedure

175. In its first deliberation of the Rules, the WG intended for Article 7 of the Rules to enclose an additional exception: information not to be

[193] See David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules – A Commentary* (2nd edn., Oxford University Press, 2013) 22; Thomas H. Webster, *Handbook of UNCITRAL Arbitration* (Sweet & Maxwell, 2010) 1-111–1-114; Peter Binder, *Analytical Commentary to the UNCITRAL Arbitration Rules* (Sweet & Maxwell, 2013) 1-049–1-051.

[194] In this respect, see *Appleton & Associates and Barry Appleton* v. *Canada (Privy Council Office)* 2007 FC 640 [12]ff, according to which the wording of the order/undertaking can have a decisive effect.

[195] See below, section 9.13.

[196] *Apotex Holdings Inc.* (n. 7) Addendum; *Clayton* (n. 120) Procedural Order No. 2 (Confidentiality Order) [11]ff.

disclosed for the purpose of case management and the manageability of the arbitration procedure. The WG discussed to what extent efficiency reasons shall give rise to an exception in its own rights under Article 7. It was found that questions of case management are of enough importance 'to be further considered in respect of each substantive matter'.[197] The Rules should 'not create delays, increase costs or unduly burden the arbitral proceedings'.[198] Exceptions to transparency – and rules on transparency in general – 'should also aim at preserving the right of effective access to court'.[199] It was feared that the additional costs created in providing for a transparent proceeding under the Rules 'could jeopardize a party's human right to effective access to justice'.[200] The WG, thus, considered that a right balance had to be found between the public interest in having transparent procedures and the manageability of the procedure from a cost and efficiency point of view.[201] On the other hand, the WG raised concerns that including an explicit exception for case management reasons into Article 7 would 'contribute to a significant erosion of transparency'.[202] In the end, the WG did not attempt to reconcile these different views when redacting Article 7, but found that 'the right balance might well need to be found in relation to each provision in the rules on transparency, rather than as part of the limitations to transparency',[203] i.e., within Article 1(4)(b) of the Rules. This provision makes explicit reference to the disputing parties' interest in a fair and efficient resolution of their dispute'. Also, Article 1(3)(b) of the Rules gives the arbitral tribunal the power to adapt, where necessary, any provisions of the Rules to the particular circumstances of the case. Finally, Article 17(1) of the Arbitration Rules (2010) directs the arbitral tribunal to exercise its discretion so as to 'conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute'.

176. As a result, the arbitral tribunal has all the tools necessary to reduce costs, time and effort of the parties if the strict adherence to Articles 2 to 6 of the Rules would unduly burden the procedure and/or limit a party's right to access effective justice in the particular case. It might, for example, be too burdensome for an individual investor or a least developed country to undergo a fully fledged transparency procedure,

[197] UNCITRAL (n. 34) A/CN.9/712 [72]. [198] UNCITRAL (n. 56) A/CN.9/717 [144].
[199] *Ibid.* [145]. [200] *Ibid.* [145]. [201] *Ibid.* [144]. [202] *Ibid.* [146].
[203] *Ibid.* [147].

while a large corporation or a developed country would handle the same procedure without much effort.

9.12 Sanctions

177. At some point the WG discussed the issue of how to ensure the enforcement of the exceptions in Article 7 of the Rules and 'whether a sanction should be provided in case a party would breach confidentiality obligations'.[204] Possible sanctions contemplated were related to costs, as is, for example, provided for in Article 9(7) of the IBA Rules on the Taking of Evidence in International Arbitration (2010).[205] In another context, the WG contemplated that the non-compliance of a party with its duties could be sanctioned by drawing adverse inferences.[206] In general, however, the WG did not seem to be inclined to pursue the issue of sanctions or to provide for them in the framework of the Rules.

178. Article 7 of the Rules does not, therefore, contain a specific provision on the enforcement of the exceptions or the sanctions available to the arbitral tribunal should one of the parties not adhere to Article 7 or an order of the arbitral tribunal based on Article 7.

179. As the Transparency Rules do not contain any provisions dealing with the arbitral tribunal's powers to impose sanctions the next step is to turn to the applicable arbitration rules.

180. Neither the UNCITRAL nor the ICSID Arbitration Rules contain a specific provision dealing with the matter of enforcement or sanctions by the arbitral tribunal.

181. In general, the arbitral tribunal will not have the *imperium* to compel a party to comply with its orders.[207] The question of whether an arbitral tribunal can threaten the parties with a certain sanction, such as a fine, in the case of non-compliance with its orders is controversial.[208] It

[204] UNCITRAL (n. 34) A/CN.9/712 [71]. [205] *Ibid.*

[206] UNCITRAL (n. 43) UN Doc. A/CN.9/760 [115].

[207] Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn., Sweet & Maxwell, 2007) [538]; Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th edn., Oxford University Press, 2009) [5.17].

[208] Jean-François Poudret and Sébastien Besson, *ibid.* [540]; Jeffrey Waincymer (n. 5) 117–18; Gary Born, *International Commercial Arbitration* (2nd edn., Kluwer Law International, 2014) 2315–18; Lucy Reed, 'Sanctions available for Arbitrators to Curtail Guerilla Tactics' in Günther J. Horvath and Stephan Wilske (eds.), *Guerilla Tactics in International Arbitration* (Kluwer Law International, 2013) 101.

does, however, have the possibility of taking the behaviour of a party into consideration when deciding on how to conduct the arbitration, for example, appropriately changing an existing order on transparency. Where, for example, a party is disseminating information although such information has been decided by the arbitral tribunal to fall under an exception of Article 7 of the Rules, the arbitral tribunal could restrict the party's access to certain information by declaring it 'tribunal and counsel's eyes only'.[209]

182. A possibility of sanctioning the non-compliance with the tribunal's directions as to confidentiality is to take the party's behaviour into consideration in the cost decision.[210] Article 42(1) of the Arbitration Rules (2010) provides that the arbitral tribunal is free to apportion particular costs to a party 'if it determines that apportionment is reasonable, taking into account the circumstances of the case'. One of these circumstances is party conduct.[211] Article 42(2) of the Arbitration Rules (2010) gives the arbitral tribunal the possibility of issuing costs decisions in the course of the arbitration, so that it could use such costs decisions as sanctions.

183. In ICSID arbitration, arbitral tribunals can also take into consideration the misconduct of parties in the apportionment of costs and in practice do so.[212]

184. The arbitral tribunal in *Pope & Talbot Inc.* v. *Canada* found the claimant in breach of the confidentiality order issued earlier in the arbitration, because its counsel had disseminated to the press a letter he had received in error by counsel to the respondent. The arbitral tribunal directed the claimant to pay USD 10,000 to the respondent under the cover of a cost decision. The *Pope & Talbot* tribunal did little to conceal that this decision on costs was in fact a sanction of the claimant's (or rather its counsel's) behaviour.[213] In the same arbitration, Canada had revealed documents in the scope of an access to information request, although the arbitral tribunal had explicitly designated these documents as being confidential and prohibited Canada from making them

[209] See e.g. the solution retained by *Apotex Holdings Inc.* (n. 7) Addendum; *Clayton* (n. 120) Procedural Order No. 2 (Confidentiality Order) [11]–[14].

[210] Reed (n. 208) 100. [211] Caron and Caplan (n. 193) 871–3.

[212] See Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) 1227–32; Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International, 2011) 156.

[213] *Pope & Talbot Inc.* v. *Canada*, Decision by the Arbitral Tribunal (27 September 2000) [11]–[13] www.italaw.com/sites/default/files/case-documents/ita0677.pdf.

available. As Canada had not adhered to this order, the arbitral tribunal took this behaviour into consideration in its award on costs.[214]

185. In summary, the Rules give no direction on how the exceptions in Article 7 shall be enforced and a non-compliance sanctioned. The arbitral tribunal will have to do so taking recourse to the means at its disposal under the applicable arbitration rules.

9.13 The need for a procedural order on transparency

186. As we have seen above, Article 7 of the Rules directs the arbitral tribunal to make the necessary arrangements in connection with exceptions to transparency. While at some points Article 7 of the Rules directs the arbitral tribunal to take a certain approach, it nonetheless leaves much to the arbitral tribunal to decide when it comes to the administrative and logistical details of such arrangements. In many cases it will therefore be necessary to provide a comprehensive framework for this issue in the arbitration.

187. The scope of such a transparency order will largely depend on three factors:

– first, the wording of the underlying treaty, superseding the Rules;
– second, the nature of the case; and
– third, the behaviour of the parties.

188. For example, the Peru–United States Trade Promotion Agreement does contain a very detailed provision not only regarding transparency, but also regarding the procedure the arbitral tribunal and the parties are to follow to detect, redact and protect confidential or protected information.[215] In view of those detailed treaty provisions, the arbitral tribunal in *The Renco Group, Inc.* v. *The Republic of Peru* did not see it necessary to address the issue of public access and the limits thereto further than by simply referring to the treaty provisions.[216]

[214] *Ibid.*, Award in Respect of Costs (26 November 2002) [11] http://italaw.com/sites/default/files/case-documents/ita0688.pdf.

[215] Articles 10.21, 22.2 and 22.4 of the Peru–United States Trade Promotion Agreement (12 April 2006) www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text.

[216] *The Renco Group, Inc.* v. *Peru*, ICSID Case No. UNCT/13/1, Procedural Order No. 1 (22 August 2013) http://italaw.com/sites/default/files/case-documents/italaw5006.pdf; see also the discussion regarding transparency during the first session of the arbitral tribunal held on 18 July 2013, Transcript of the First Session of the Arbitral Tribunal, 114:4–119:4 http://italaw.com/sites/default/files/case-documents/italaw3266.pdf.

Most treaties will not, however, provide such a comprehensive regulation of the matter.

189. On the other hand, the nature of the case will have an impact on the extent of a possible transparency order. Where the case involves delving into sensible areas where many different issues of confidential or protected information have to be considered, it might be valuable to set a more comprehensive set of rules from the start to avoid later delay during the procedure.

190. Finally, the approach of the parties will be of significant importance. Some parties tend to include the media and the public in their dispute resolution strategy.[217] Where mediatisation of the dispute is an issue, the arbitral tribunal might want to establish a clear level playing field for the parties from the start.

191. As we have seen, the framework provided for the protection of confidential or protected information in the Rules can in some instances become obsolete if the national laws of a respondent State do not provide for the same protection as Article 7 of the Rules.[218] In such instances it might be adequate to set the record straight from the start and to provide, if possible, for ways to ensure the respect of any confidentiality duty under Article 7 of the Rules.[219] At least this would ensure that the parties are aware of the *de facto* protection they can (or cannot) expect from their counterpart. Otherwise the parties might rely on the protection provided for in Article 7 of the Rules, when in fact such protection is not given.

192. A 'catch all' template of a transparency order is difficult to provide, as such an order will have to be carefully crafted around the specifics of the particular case. An arbitral tribunal might, however, want to draw inspiration from the work of past tribunals when contemplating an order regulating public access for the sake of the exceptions in Article 7 of the Rules.[220]

[217] Meg Kinnear and Aïssatou Diop, 'Use of the Media by Counsel in Investor-State Arbitration' in Albert Jan van den Berg (ed.), *Arbitration Advocacy in Changing Times*, ICCA Congress Series, 2010 Rio Volume 15 (Kluwer Law International, 2011) 40.

[218] See above, section 9.10.

[219] See above, section 9.10.

[220] Such as, e.g., *Clayton* (n. 120) Procedural Order No. 2 (Confidentiality Order); *Philip Morris Asia Limited* (n. 64); *Apotex Holdings* (n. 7); *Windstream Energy LLC* v. *Canada*, Confidentiality Order (16 December 2013) www.italaw.com/sites/default/files/case-documents/italaw1587.pdf; *Detroit International Bridge Company* (n. 127) Confidentiality Order (27 March 2013) www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/detroit-po-07.pdf.