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A Transnational Legal Process Perspective on Norm-Making in International Arbitration

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지도교수 장 승 화

이 논문을 법학박사학위논문으로 제출함

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Abstract

The procedural framework of international arbitration is comprised of a vast amount of different types of norms that have been formulated by a wide range of actors through diverse processes. While the study originates from the question of how norms applicable to the procedural aspect of arbitration (hereinafter "norms") should be made, it ultimately addresses ways international organizations, broadly defined, can formulate effective norms in an efficient manner.

While much effort has been made to understand the formulation and application of individual norms, there has been very little research on their making in a comprehensive manner. Moreover, such norms do not easily fall under the traditional categories of international or domestic law, nor under public or private law. In fact, they do not easily fit into the traditional notion of "law." Therefore, the notion of transnational legal process is used to provide a theoretical framework for examining and understanding the formulation of the procedural framework of international arbitration as well as individual norm-making. Transnational legal process refers to the theory and practice of how public and private actors (nation-states, international organizations, multinational enterprises, NGOs and private individuals) interact in a variety of public and private, domestic and international fora to make, interpret, enforce and ultimately, internalize rules of transnational law.

Party autonomy forms the basis of the procedural aspects of international arbitration. Just as parties agree on arbitration to resolve disputes, its procedure is also determined by the parties. This allows for procedural flexibility, one of the advantages of arbitration as a dispute resolution method.

A consequence of the parties' procedural autonomy is that the application of the norms to international arbitration generally requires some sort of consent, agreement or opt-in (hereinafter, generally referred to as "acceptance") by the parties. This acceptance-based characteristic of the norms requires certain adjustments to the transnational legal process, particularly in norm-making.

Suggestions with regard to norm-making can only be made after a detailed examination and assessment of past norm-making. For that purpose, the study undertakes an empirical survey of the making of key norms in international arbitration since 2006. While the actors involved and the process leading to those norms differed to a certain degree, contemporary norm-making has generally aimed at addressing the integrity of the arbitration procedure as well as its procedural efficiency, while maintaining a balance between the two. Norms responding to the practical needs of international arbitration were formulated by international inter-governmental and non-governmental organizations through a dynamic and recursive cycle. This involved a preparatory stage where the desirability and feasibility of norms were considered, followed by substantive deliberations and public consultations, with the resulting norm formally adopted by the respective international organization.

The study reveals that a distinctive aspect of norm-making in international arbitration is the extensive role of non-State actors. Not only were they the preponderant users of the norms, but also the prevailing actors in norm-making. Whereas the negotiations leading to the New York Convention, enactments of national arbitration legislation and the preparation of the Model Arbitration Law involved mostly States, contemporary norm-making indicates a more significant role of non-State actors. Almost all recent

procedural norms were formulated by international organizations, some with the involvement of States and some without. International organizations not only formulate norms but also take part in norm-making in other fora as well. They also provide the setting for other non-State actors to actively participate in norm-making. That is why the study pays particular attention to the increasing role of international organizations in norm-making.

The irony of the study may be that normativity is not derived directly from the norm itself. While circumstances may vary, acceptance by parties of a norm is generally required for any norm to become applicable in arbitration practice. This additional element required for obtaining normativity provides a further explanation of why norm-making resembles a transnational legal process. Even when an international organization has the authority to formulate norms, the legitimacy of the norms is derived from the actors involved and the process leading to the norms. Moreover, the interaction among the actors involved in norm-making to reflect practical needs and diverse interests as well as the consensus obtained in the final adoption of the norms have an impact on the acceptability of norms and thus their normativity. In summary, transnational legal process ensures that the norm is *en route* to obtaining both legitimacy and normativity.

The international political and economic landscape is changing constantly. Nonetheless, the study concludes that international organizations will continue to play a significant role in support of international arbitration through their formulation of procedural norms applicable to international arbitration. The answer to the ultimate question on how international organizations can make effective norms lies in the tool used for the purposes of the study: realization of a transnational legal process. Norm-making must

further take into account the peculiarities of the norms as well as the relevant actors both in international arbitration and in norm-making. International organizations must aim at providing a multilateral and inclusive forum for discussing the practical needs of norms and their contents. The study draws the attention of international organizations, in particular, to engage States that are still in their earlier stages of developing an international arbitration regime and to seek the perspectives of corporations and businesses, the main users of international arbitration. Such efforts by international organization will not only ensure the effectiveness of norms but also contribute to the broader transnational legal process leading to the overall procedural framework for international arbitration.

Realization of a transnational legal process in a multilateral and inclusive forum, adoption of norms by consensus and further promotion of norms are the ideal elements for norm-making. However, they also pose a practical challenge, the need for extensive human and financial resources. In this respect, the study includes some practical suggestions to ensure the efficiency of the norm-making itself, which include, among others, coordination among the number of norm-making initiatives by international organizations.

In summary, the study provides a transnational legal process perspective on norm-making in international arbitration. Transnational legal process has provided the overarching theoretical framework for understanding norm-making in the field of international arbitration as well as the rationale for norm-making to be conducted in such manner. The study concludes that transnational legal process further provides the necessary guidance to international organizations involved in norm-making in the field of

international arbitration, which would assist them in contributing to the formation of a sound procedural framework for international arbitration.

Keywords: **International arbitration, norm-making, transnational legal process, international organizations, non-State actors, procedural norms**
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Chapter I Introduction

1. Objective and outline of the study

Disputes are inevitable in international transactions and there is a constant need to resolve them. Arbitration has been often used to resolve trade, investment as well as commercial disputes (hereinafter referred to generally as "economic disputes") and it has proven effective particularly with respect to economic disputes with cross-border aspects.

The histories of arbitration and of international arbitration deserve a study of its own.[1] Nonetheless, article 33(1) of the United Nations Charter (San Francisco, 26 June 1945, the "UN Charter") highlights the usefulness of arbitration as one of the peaceful means to settle disputes.[2] As much as States endeavour to achieve peaceful settlement of disputes, entities involved in cross-border economic transactions attempt to do the same. They aim to avoid disputes and to resolve them in an efficient manner, as disputes and uncertainty may result in added transactional costs, which eventually lead to

[1] See for example, Derek Roebuck, Sources for the History of Arbitration: A Bibliographical Introduction, ARBITRATION INTERNATIONAL, Vol. 14, No. 3 (1998), pp. 237-344.

[2] Article 33(1) of the UN Charter reads: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, *arbitration*, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice (emphasis added)." The full text of the UN Charter is available at http://www.un.org/en/charter-united-nations/index.html. Article 33(1) of the UN Charter can be further traced back to article 12 of the Covenant of the League of Nations, which reads: "The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to *arbitration* or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute (emphasis added)."

economic loss. Hence, there is a crucial need for those entities to resolve cross-border economic disputes in a quick, effective and constructive manner. Under such circumstances, international arbitration has gradually gained its position as the preferred resolution mechanism for economic disputes.[3] In a recent survey, more than 90% of businesses worldwide selected international arbitration as the preferred mode of cross-border dispute resolution.[4]

The study originates from the question of how norms applicable to the procedural aspect of international arbitration should be made. To address that question, one must examine what the relevant norms are and further analyse how norms have been made. In order to deduce any implication for future norm-making, such an assessment needs to be based on a theoretical framework. However, norms applicable to the procedural aspect of international arbitration, both collectively and individually, do not easily fall under the traditional categories of international or domestic law, nor under public or private law. In fact, they do not easily fit into the traditional notion of "law" due to the underlying principle of parties' procedural autonomy and consequentially, the acceptance-based character of the norms.

Therefore, the study uses the notion of "transnational legal process" as a theoretical framework for examining and understanding the formulation of norms in international arbitration. The aim is to assess to what extent norm-

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[3] Queen Mary University of London and PricewaterhouseCoopers, 2008 International Arbitration Study - Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards (2008), p. 5 available at http://www.arbitration.qmul.ac.uk/research/2008/index.html.
[4] Queen Mary University of London School of Arbitration and White & Case, 2015 International Arbitration Study - Improvements and Innovations in International Arbitration (2015), p. 5 available at http://www.arbitration.qmul.ac.uk/research/2015/.

making in international arbitration resembles a transnational legal process and its distinctive features. Building on that assessment, the study identifies peculiarities of norm-making in international arbitration, to ultimately address ways international organizations, broadly defined, can formulate effective norms in an efficient manner.

For that purpose, the section 2 of this chapter sets forth the scope of the study including terminology used and section 3 of this chapter introduces the notion and key features of "transnational legal process" as conceptualized by Harold Koh.[5]

Chapter II first highlights the underlying principle of party autonomy with regard to the procedural aspects of international arbitration and then provides a general overview of the existing procedural legal framework for international arbitration by mapping the myriad of norms applicable to the procedural aspects of international arbitration. The transnational and acceptance-based characteristics of the norms are featured, both essential and relevant for understanding the norm-making.

Chapters III and IV are based on an empirical survey of the actors involved and the process leading to some of the key procedural norms in international arbitration. The objectives of the survey were to identify contemporary trends in norm-making and to examine to what extent such norm-making resembled the features of a transnational legal process. Chapter III provides a descriptive illustration of the norm-making cycle, which has

[5] Harold Hongju Koh, Transnational Legal Process, NEBRASKA LAW REVIEW, Vol. 75, No. 1 (1996), pp. 181-207 available at http://digitalcommons.unl.edu/nlr/vol75/iss1/7/.

been both dynamic and recursive. It examines the entire cycle from the initiation to the final adoption of the norm-making as well as the interaction among the norms. Particular attention is given to the desirability and feasibility assessment prior to norm-making and to the importance of norm-making through consensus.

Chapter IV highlights the features of norm-making in international arbitration which distinguish it from transnational legal process as further elaborated by Koh and others. One is the declining role of States in contrast to the increasing role of non-State actors, particularly international organizations, in norm-making. Norm-making at UNCITRAL is further provided as evidencing this trend. Another relates to the notion of "normativity", which needs to be understood in conjunction with the need for acceptance of norms in international arbitration practice, in most cases by non-State actors. This distinction also arises from the fact that for the purposes of this study, normativity is a goal to be achieved through norm-making rather than a result of it. In that context, an analogy is made to the formulation of customary international law, and the need for promotion of, and the monitoring the use, of norms is highlighted.

While the study surveys the current norm-making landscape through the eyes of transnational legal process, it does so with a prospective intention. Chapter V sets out the implications for future norm-making and the role to be played by international organizations in norm-making. As these implications cannot be considered in vacuum, particular attention is given to UNCITRAL, one of the most influential actors in norm-making. Emphasis is on further

realization of a transnational legal process taking into account the distinctive features of norm-making as outlined in chapter IV. The chapter emphasizes the need for UNCITRAL to continue to provide a forum for discussing multilateral approaches among States and to ensure an inclusive norm-making process reflecting the diverse interests of the increasing non-State actors in this field. Just as norm-making should safeguard the effectiveness of the norms, chapter V stresses that norm-making process must also be efficient and suggestions are made, including coordination of existing norms as well as of norm-making initiatives.

Chapter VI provides a summary of and conclusions derived from the study with an illustration of how norm-making in international arbitration can be perceived from a transnational legal process perspective.

2. Scope of the study

Parties to international arbitration possess considerable autonomy with regard to the procedural aspects. The agreement between the parties usually governs such aspects. There is no uniform or standard method of procedure or formula to be followed. Each and every arbitration is unique. Parties and arbitrators can tailor the procedure to fit the dispute and to their needs, which provides for flexibility, one of the apparent advantages of arbitration.

Notwithstanding, there are a number of legal instruments, which may be applicable to the procedural aspects of international arbitration. A point of departure of this study was to identify the sources of such legal instruments. A

pursuit for a definitive statement like article 38(1) of the Statute of the International Court of Justice (ICJ)[6] revealed that a number of different laws, both international and domestic, as well as a wide range of other legal instruments, which did not necessarily fit into the category of "law", could potentially become applicable and binding on the parties as well as the arbitral tribunal. Furthermore, the apparent hierarchical structure found in the realm of public international law or domestic law did not avail itself in this field. The hierarchy among norms differed according to the respective circumstances of the arbitration.

The study examines the making of norms applicable to the procedural aspects of international arbitration (hereinafter, referred to simply as "norm-making" or "norm-making in the field of international arbitration"). For the purposes of this study, the phrase "norm applicable to" is used to encompass the wide array of legal instruments, which address the procedural aspects of international arbitration. The term "norm" is used broadly to refer to legal instruments or a set of legal standards, regardless of its form, denomination or binding nature, that constrain, empower, structure or impact the behaviour of those involved in international arbitration. The term "norm" is chosen particularly to avoid the traditional dichotomy that exists between public and

[6] Article 38(1) of the ICJ Statute reads: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

private laws, international and domestic laws as well as hard and soft laws.[7] The words "applicable to" is used to indicate that a number of norms could potentially impact the procedural aspects of international arbitration at different stages and that these norms seldom apply by default and require some type of a consent, agreement, choice, opt-in or selection by its users, mostly the parties to arbitration, to apply (see chapter II, section 1.4).

In light of proliferation of norms, this study focuses on their making, with particular attention to the actors involved in, and the process leading to, their formulation. Accordingly, norms are broadly categorised as: (i) national arbitration and other legislation (*lex arbitri*); (ii) international conventions and treaties; (iii) arbitration rules and other norms formulated by arbitral institutions; and (iv) norms formulated by professional organizations. While acknowledging the importance of judicial and arbitral decisions (or case law) as another source of norms applicable,[8] the study limits its scope to norms that have been codified.[9]

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[7] However, the term "norm" does not necessarily imply that the legal instrument or the set of legal standards has achieved broad acceptance in arbitration practice.

[8] Decisions by arbitral tribunals and national courts (such as challenges to arbitrators, anti-suit injunctions by courts and decision by an enforcing court on the effect of an award set aside by the court at the place of arbitration) may constitute another source of norms applicable to the procedural aspect. While not binding, they may still be persuasive and be referred to by parties and tribunals. Some notable decisions are the US Supreme Court Decision of *Mitsubishi v Chrysler*,, the English House of Lords decision of *Premium Nafta v Fiona Trust*, the French Cour de Cassation decision of *Dalico* and *Dutco*, the European Court of Justice decision of *Eco Swiss v Benetton*, the Singapore Court of Appeal decision of *PT Garuda Indonesia v. Birgen Air* and the Indian Supreme Court decision of *SBP v Patel Engineering*.

[9] "Codification" refers to the process through which rules of law are committed to written form (see Annemarieke Vermeer-Künzli, Oxford Bibliographies available at DOI: 10.1093/OBO/9780199796953-0079). "Codification" is a process by which a collection of norms are assembled into a logical, coherent structure (see Gabrielle Kaufmann, Soft Law in International Arbitration: Codification and Normativity, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2010), p. 4.

The boundary between the "substantive" and the "procedural" aspects of international arbitration may not always be clear. The former relates to the merits of the dispute including the underlying contract or treaty as well as the determination of the applicable substantive law. In contrast, the latter deals with the arbitration process from the notice of arbitration, the composition of the arbitral tribunal (appointment and challenges), the extent of judicial intervention, jurisdiction of the tribunal, interim measures, the conduct of arbitral proceedings, decision-making by the tribunal, as well as the form and contents of the award. Whether a matter is of substance or of procedure may also differ according to the jurisdiction. In practice, there is little or almost no need to characterize an aspect of international arbitration as procedural or not.[10] As the study does not intend to cover norms applicable to the substance of the dispute, for the purposes of the study, the phrase "procedural aspects" is used to include issues arising from the constitution of the tribunal to the rendering of the award as well as those that may arise prior to the constitution (for example, arbitration agreement, emergency arbitrators and third-party funding) and subsequent to the rendering of the award (for example, annulment or setting aside of as well as recognition and enforcement of awards). The phrase intends to cover both internal and external procedural issues that arise in international arbitration: the former concerning the overall

[10] Georgios Petrochilos, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION, Oxford University Press (2004), pp. 169-170.

conduct of arbitral proceedings and the latter concerning the relationship between the arbitration process and courts.[11]

There is no authoritative definition of "arbitration." The Oxford English Dictionary defines it as "the settlement of a dispute or question at issue by one to whom the conflicting parties agree to refer their claims in order to obtain an equitable decision." The Black's Law Dictionary states "the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties and called arbitrators or referees." The most authoritative text on arbitration, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"),[12] does not include a definition of arbitration, though some guidance could be derived from its article II on the agreement to arbitrate.[13] For the purposes of the study, "arbitration" is understood as a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving the dispute in accordance with neutral, adjudicatory procedures affording each party the opportunity to present its case.[14]

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[11] Gary Born, INTERNATIONAL ARBITRATION: LAW AND PRACTICE (2nd ed.), Kluwer Law International (2016), p. 118.
[12] United Nations, Treaty Series, Vol. 330, No. 4739.
[13] Article II(1) of the New York Convention reads: "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration *all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration* (emphasis added)."
[14] Born, *supra* note 11, p. 2.

3. Transnational legal process

This section aims at introducing the concept or notion of transnational legal process which is used throughout the study as a theoretical framework for examining and understanding the formulation of norms in international arbitration and for setting forth its hypotheses. As mentioned, there is lack of literature providing a theoretical framework to understand norm-making, which strongly inspired this study.

Books and articles referring to the procedural law of international arbitration normally do not go further in detail than listing the various types and sources of such law (see chapter II, section 2).[15] Research papers and commentaries have generally focused on individual norms rather than the norms collectively and their focus has been on the contents and the practical significance rather than on their making. Much of the current literature about the formulation of *lex mercatoria*[16] or transnational private law[17] do not shed much guidance, as they tend to focus on the substantive law, which do not resemble the features of norms in international arbitration.

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[15] See, for example, Born, *supra* note 11, pp. 118-119 and 155-163 and Simon Greenberg, Christopher Kee, J. Romesh Weeramantry, INTERNATIONAL COMMERCIAL ARBITRATION – AN ASIA PACIFIC PERSPECTIVE, Cambridge University Press (2011), pp. 28-33.
Greenberg et al., *supra* note 54, pp. 28-33.

[16] See, for example, Klaus Peter Berger, THE CREEPING CODIFICATION OF THE NEW LEX MERCATORIA, Kluwer Law International (2010); and Thomas Schultz, The Concept of Law in Transnational Arbitral Legal Order and Some of its Consequences, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT, Vol. 2, Issue 1 (2011), pp. 59-85.

[17] See, for example, Gralf-Peter Calliess and Peer Zumbansen, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW, Oxford University Press (2010) and Robert Wai, The Interlegality of Transnational Private Law, LAW AND CONTEMPORARY PROBLEMS, Vol. 71 (2008), pp. 107-128.

Legal theories on domestic law-making may provide guidance on how national arbitration legislations are formulated. Realism, liberalism and other international legal theories shed light on the formation of the few international norms in this area but their perspectives tend to be state-centric. Because norms, which are transnational in nature, do not easily fall under the category of international or domestic law, such theories could only provide a partial explanation of the overall norm-making. The underlying principle of parties' procedural autonomy and consequentially, the acceptance-based characteristic of the norms make it more difficult to directly apply any of the theories (see respectively, chapter II, sections 1 and 4).

Developments in international arbitration practice have also added more complication. With regard to the procedural aspects, the boundaries between inter-State, investor-State and commercial arbitration have somewhat diminished. Arbitration at the Permanent Court of Arbitration (PCA) is no longer limited to inter-State arbitration, whereas International Chamber of Commerce (ICC) aims at administering more arbitration involving State and State-entities.[18] States and state-owned entities are becoming common users of arbitration in disputes with private businesses and arbitral institutions have also begun to promulgate rules to administer investment arbitration involving States.

[18] The 2012 ICC Rules of Arbitration contain provisions that are intended to facilitate and further the participation of states and state entities in ICC arbitration. See, ICC, ICC Arbitration Commission Report on Arbitration Involving States and State Entities under the ICC Rules of Arbitration (2012), available at https://iccwbo.org/publication/icc-arbitration-commission-report-on-arbitration-involving-states-and-state-entities-under-the-icc-rules-of-arbitration/.

Nonetheless, an overarching theoretical framework that could apply generally to the entire array of norms and one that could also provide the structure for illustrating and better understanding the norm-making in a comprehensive manner was necessary. That search led its way to an article written some twenty years ago by Harold Koh entitled "Transnational Legal Process."[19] In that article, Koh mentions that that the idea of transnational legal process has been overlooked because it is not new and that the idea had not been widely recognized, accepted or specifically developed as a way of understanding and affecting the world - it had been latent and inchoate. From a similar standpoint, the study revisits the old notion of transnational legal process as a tool to better understand norm-making in international arbitration.[20] And by focusing on a specific area of law, the study hopes to overcome the often-reiterated criticism of transnational legal process theories as lacking conceptual clarity or blurring the lines.

Koh refers to transnational legal process as "the theory and practice of how public and private actors (nation-states, international organizations, multinational enterprises, NGOs and private individuals) interact in a variety of public and private, domestic and international fora to make, interpret, enforce and ultimately, internalize rules of transnational law."[21] He explains the significance of transnational legal process in an era of globalization, where

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[19] Koh, *supra* note 5.
[20] For a general outline of transnational legal process theories in the context of dispute resolution, see Maya Steinitz, Transnational Legal Process Theories, THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (chap. 16), Ceasre Pr Romano, Karen J Alter, Yuval Shany (eds.), Oxford University Press (2014).
[21] Koh, *supra* note 5, pp. 183-184.

the realist order dominated by sovereign states has been supplanted by a complex new order. The new order still characterized by intense state activity, embraces proactive international institutions, multinational enterprises and non-governmental organizations, regional and global markets; a plethora of new decisional fora; transnational networks that link governmental and non-governmental entities, and an exploding information technology that has all but deterritorialized global communication, commerce and finance.[22]

Building on Koh's notion of transnational legal process, Shaffer defines transnational legal process as "the process through which the transnational construction and conveyance of legal norms takes place."[23] He further explains: "Transnational norms are constructed, conveyed, and carried by actors, including by government officials, members of international secretariats, professionals, business representatives, and civil society activists. Legal norms maybe carried less consciously as a reflection of intensified cross-border interaction characterizing economic and cultural globalization." Shaffer argues that, transnational legal processes, through the ongoing articulation of legal norms and their application, eventually constitute "a collection of more or less codified transnational legal norms and associated institutions within a given functional domain", which he conceptualizes as "a transnational legal order."[24] Transnational legal processes occur differently in

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[22] Harold Koh, Opening Remarks: Transnational Legal Process Illuminated in Michael Likosky (ed.) TRANSNATIONAL LEGAL PROCESSES: GLOBALIZATION AND POWER DISPARITIES, Butterworths (2002).
[23] Gregory Shaffer, Transnational Legal Process and State Change, LAW & SOCIAL INQUIRY, Vol. 37, Issue 2 (Spring 2012), pp. 235-236.
[24] *Ibid*.

legal areas, potentially constituting distinct transnational legal orders that are semi-autonomous. [25] As such, transnational legal orders can subsume international law but also encompass legal rules and norms that have effects across borders without any binding agreement among states, regardless of whether they are created by international organizations, inter-governmental networks or private actors, and regardless of whether they are of a hard or soft law nature.

Norm-making in international arbitration seemingly resembles a transnational legal process as States (including their courts), the PCA, the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), arbitral institutions, professional organizations, arbitral tribunals and academics (thus, public and private actors) interact in a variety of public and private, domestic and international fora, to make, interpret, enforce (including the resulting arbitral award) and ultimately, internationalize norms in international arbitration. The procedural framework of international arbitration and the norms constituting it fit Shaffer's description of "a collection of more or less codified transnational legal norms and associated institutions."

Koh highlights four distinctive features of transnational legal process. "First, it is *non-traditional*: it breaks down two traditional dichotomies that

[25] *Ibid*. Schaffer notes that transnational legal orders may include global, multilateral, regional, and bilateral norms and institutions. The existence of transnational legal orders may be reflected in treaties, non-binding standards, model codes, institutional monitoring, and different forms of monitoring and dispute settlement.

have historically dominated the study of international law: between domestic and international, public and private. Second, it is *non-statist*: the actors in this process are not just, or even primarily, nation-states, but include non-state actors as well. Third, transnational legal process is *dynamic*, not static. Transnational law transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again. Fourth and finally, it is *normative*. From this process of interaction, new rules of law emerge, which are interpreted, internalized, and enforced, thus beginning the process all over again." [26] The notion of transnational legal process embraces not just the descriptive workings of a process, but the normativity of that process. It focuses not only on how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions.[27]

Whereas Jessup's concept of transnational law focused on the subject of the norms (transnational activities and situation),[28] Koh's transnational legal process conceptualizes transnational law as a construction and flow of legal norms, focusing on the transnational production of legal norms and their migration across borders.[29] Transnational legal processes are considered form of governance that mimics, or more precisely, functionally replaces the three branches of government, which do not exist in the international sphere. Such

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[26] Koh, *supra* note 5, p. 184.
[27] *Ibid*.
[28] Philip C. Jessup, Transnational Law, Yale University Press (1956).
[29] Shaffer, *supra* note 24, p. 234. In tracing the origins of transnational legal process, Koh refers to the concepts of transnational law by Philip Jessup and of international legal process by Abram Chayes, Tom Ehrlich and Andreas Lowenfeld. See Koh, *supra* note 5, p. 186.

conceptualization is sufficiently comprehensive to include the entire array of norm-making in the field of international arbitration.

While Koh notes the transnational, normative and constitutive character of transnational legal process, he focuses on why States obey international law, particularly in the traditional fields of public international law (arms control, international criminal law and international human rights).[30] Transnational legal process is a way of understanding the critical issue of compliance with international law by States. As such, the normative nature of transnational legal process, how law shapes and guides interaction among transnational actors, is particularly emphasized.

A key to understanding whether and when States will comply is norm-internalization: the complex process of institutional interaction by which State come to incorporate international law concepts into their domestic law and practice. [31] Koh observes a cycle of interaction-interpretation-internalization in transnational practice: "repeated *interactions* among states and a variety of domestic and transnational actors produce *interpretations* of applicable norms which can be and are eventually *internalized* into states' domestic values and processes."[32] Through internalization, States move from grudging compliance to habitual internalized obedience with international norms. Subsequent studies have also focused mainly on how transnational

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[30] Koh, *supra* note 5. See also Harold Hongju Koh, Why Do Nations Obey International Law?, YALE LAW JOURNAL, Vol. 106 (1997) pp. 2599-2646 available at http://digitalcommons.law.yale.edu/fss_papers/2101.
[31] Koh, *supra* note 22, p. 328.
[32] Harold Hongju Koh, Why Transnational Law Matters, PENN STATE INTERNATIONAL LAW REVIEW, Vol. 24 (2006), p. 747.

legal process affects the behaviour of States.[33] For example, Shaffer and other socio-legal studies conceive transnational law and legal norms in terms of the source of legal change within a "national" legal system.[34]

In short, studies on transnational legal process have generally focused on internalization by and conveyance to States. Accordingly, the "normative" nature of transnational legal process may need to be adjusted for the purposes of this study, as norms in the field of arbitration are not necessarily those that need to be complied by States or conveyed into the national legal system (only the Model Arbitration Law fall under that category). Furthermore, in most cases, norms need to be accepted by non-State private parties to become applicable. This calls for a careful examination when transposing the notion of transnational legal process to norm-making in the field of international arbitration (see chapter IV, section 2).

As the focus of the study is on norm-making, it also gives more emphasis on the constitutive nature of transnational legal process, how public and private actors interact in the fora of international organizations, to make, shape and construct norms.[35] Through an empirical survey, it examines to

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[33] In contrast, literature applying transnational legal process to dispute settlement has generally focused on the functioning of international courts and tribunals. See, for example, Robert O. Keohane, Andrew Moravcsik and Anne-Marie Slaughter, Legalized Dispute Resolution: Interstate and Transnational, INTERNATIONAL ORGANIZATION, Vol. 54 Issue 3 (July 200), pp. 457-488 available at https://doi.org/10.1162/002081800551299; and Eric A. Posner and John C. Yoo, Judicial Independence in International Tribunals, CALIFORNIA LAW REVIEW, Vol. 93 Issue 1 (January 2005) pp. 1-74 available at http://dx.doi.org/doi:10.15779/Z38070P.

[34] See, for example, Michaeld Likosky (ed.) TRANSNATIONAL LEGAL PROCESSES: GLOBALIZATION AND POWER DISPARITIES, Butterworths, (2002).

[35] Koh does refer to transnational contract law and its codification the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (the "CISG"). See Koh, *supra* note 5, p. 185, footnote 11.

what extent norm-making resembled the features of transnational legal process (see chapter III and chapter IV, section 1).

Chapter II Procedural Framework of International Arbitration

The complexity of contemporary international relations and the evolving international environment have generated arguments in favour of expansion of law-making as well as the form and substance of international regulation.[36] The same is true in the field of international arbitration as witnessed through the vast amount of norms being generated through diverse processes involving a wide range of actors. More recently, there has been an exponential increase in norm-making leading to an ever-increasing bewildering web of norms.[37] Through much institutional norm-making, a global normative web has emerged.[38]

International arbitration is increasingly recognized as a transnational system of justice, if not a genuinely autonomous transnational legal order.[39] A delocalized conception of international arbitration makes more sense with the harmonization achieved through the UNCITRAL Model Law on International Commercial Arbitration (the "Model Arbitration Law")[40], and the decline of the seat of arbitration. International arbitration has evolved from an artisanal

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[36] Alan Boyle and Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press (2007), p. 19.
[37] Toby Landau, Keynote speech at the 5th Asia Pacific ADR Conference (12-13 October 2016, Republic of Korea).
[38] For the illustration of a global normative web, see Ramses A Wessel, Institutional lawmaking: The emergence of a global normative web in C. Brollman and Yannick Radi (eds.), RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAW-MAKING, Edgar Elgar Publishing (2016).
[39] Emmanuel Gaillard, International Arbitration as a Transnational System of Justice in Albert Jan van den Berg (ed.), ARBITRATION – THE NEXT FIFTY YEARS, ICCA Congress Series No. 16, Kluwer Law International (2012), p. 66.
[40] United Nations publication, Sales No. E.08.V.4.

to an industrial phase, and continues to evolve into a cosmopolitan phase, where practitioners are familiar with transnational norms and practices and as comfortable with their application as they are with norms and practices of their own jurisdiction.[41] While the existence of a *procedural lex mercatoria may* be far-fetched, there has definitely been a growing trend towards a transnational procedural framework for international arbitration. [42] This chapter provides an overview of the existing procedural legal framework and the norms that comprise it. It first examines the procedural autonomy of the parties which underlies the procedural framework.

1. The procedural autonomy of the parties

Party autonomy forms the basis of for the procedural aspects of international arbitration. [43] Just as parties agree on arbitration to resolve disputes, the procedure is also determined by the will of the parties, which is the basis for procedural flexibility. While philosophical notions of autonomy

[41] Tom Cummins, The IBA Guidelines on Party Representation in International Arbitration – Levelling the Playing Field?, ARBITRATION INTERNATIONAL, Vol. 30, No. 3, LCIA (2015), p. 433 available at https://doi.org/10.1093/arbitration/30.3.429.

[42] Gabrielle Kaufmann-Kohler, Globalization of Arbitral Procedure, VANDERBILT JOURNAL OF TRANSNATIONAL LAW, Vol. 36 (2003), pp. 1322 and 1333.

[43] In preparing the Model Arbitration Law, it was stated: "Probably the most important principle on which the model law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitration according to their expectations. This would allow them to freely submit their disputes to arbitration and to tailor the 'rules of the game' to their specific needs. It would also enable them to take full advantage of rules and policies geared to modern international arbitration practice …" See UNCITRAL, Report of the Secretary-General – Possible features of a model law on international commercial arbitration (A/CN.9/207), para. 17.

and freedom lie at the heart of international arbitration,[44] tracing the origins of the principle of party autonomy in international arbitration would require a study of its own. Party autonomy applies to all types of international arbitration rooting from its consensual nature. To a certain extent, arbitration can be said to be the product of party autonomy.[45]

The principle of party autonomy gives the parties the right to determine the essential elements of arbitration, both procedural and substantive. To elaborate, it provides the parties the freedom to enter into an agreement to resolve their dispute by arbitration (or contract out of national courts) and to decide, either by agreement or by operation of the agreed arbitration rules, the law(s) applicable to the substance of the dispute as well as to the procedural aspects. This study focuses on party autonomy as the fundamental guiding principle with regard to the procedural aspects of international arbitration, mainly on how it impacts the norms and its making.

The principle of party autonomy has been generally accepted and recognized in national laws and embodied in a number of international instruments. For example, article 2 of the Protocol on Arbitration Clauses (Geneva, 1923, the "1923 Geneva Protocol") provides that arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration

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[44] Emmanuel Gaillard, LEGAL THEORY OF INTERNATIONAL ARBITRATION, Martinus Nijhoff Publishers (2010), p. 2.
[45] Karl-Heinz Bockstiegel, Major Criteria for International Arbitrators in Shaping an Efficient Procedure, ICC BULLETIN – ARBITRATION IN THE NEXT DECADE SPECIAL SUPPLEMENT (1999).

takes place.[46] The New York Convention does not contain such a direct statement but instead provides in article V(1)(d) that the recognition and enforcement of an award may be refused if the arbitral procedure was not in accordance with the agreement of the parties. In addition, article II of the New York Convention requires courts to recognize valid arbitration agreements and refer parties to arbitration, which generally extends to the procedural arrangements. Furthermore, article 19(1) of the Model Arbitration Law provides positive confirmation that the parties are free to agree on the procedure to be followed by the parties and the tribunal in conducting the arbitral proceedings.[47] Rule 20(2) of the ICSID Arbitration Rules states that in the conduct of the proceeding, the tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the ICISD Convention or the Administrative and Financial Regulations. Article 19 of the ICC Arbitration Rules states that the proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

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[46] For the full text of the 1923 Geneva Protocol, see League of Nations, TREATY SERIES, Vol. 27, pp. 157-166 available at https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2027/v27.pdf.

[47] The *travaux préparatoires* of the Model Arbitration Law indicates that the principle of party autonomy was adopted without any opposition during the deliberations of the Model Law. As a further illustration, the following terms are used in the Model Arbitration Law confirming the autonomy of the parties with regard to the procedural aspects: "unless otherwise agreed by the parties" (in articles 3, 11(1), 17(1), 17B(1), 20(2), 21, 23 (2), 25, 26, 29 and 33(3)); "unless the parties have agreed" (in articles 24(1) and 31(2)); "the parties are free to agree" (in articles 11(2), 13(1), 19(1), 20(1) and 22); "failing such agreement" (in articles 11(3), 13(2) and 19(2)); "unless the agreement on the appointment procedure provides other means" (in article 11(4)); and "subject to any contrary agreement by the parties" (in article 24(1)).

As recognized in numerous norms, parties' procedural autonomy is of special importance in international arbitration as it allows the parties to select and tailor the procedure according to their specific wishes and needs, unimpeded by possibly conflicting legal practices and traditions.[48] To the extent that the parties have not agreed on the procedure to be followed or on a set of arbitration rules, the arbitral tribunal usually has the discretion to conduct such proceedings in the manner it considers appropriate, subject to any mandatory rules.[49] Arbitration laws generally grants the arbitral tribunal such discretion and flexibility in the conduct of arbitral proceedings, provided that a fair, equitable and efficient process is observed.[50] This supplementary discretion of the arbitral tribunal is equally important, as it allows the tribunal to tailor the conduct of the proceedings to the specific features of the dispute without being hindered by any restraint that may stem from national laws[51] and to take initiatives to solve any procedural questions neither agreed by the parties nor dealt in the applicable law.[52]

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[48] UNCITRAL, Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, para. 35. (the "Explanatory Note"). The Explanatory Note is available along with the text of the Model Arbitration Law (see *infra* note 185).

[49] UNCITRAL, NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (2016), para. 8 available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2016Notes_proceedings.html.

[50] For example, article 19(2) of the Model Arbitration Law reads: "Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

[51] UNCITRAL, *supra* note 48, para. 35.

[52] For example, article 17(1) of the UNCITRAL Arbitration Rules reads: Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

However, party autonomy in international arbitration is not infinite and may be restricted or limited.[53] For example, party autonomy is subject to due process requirements. In accordance with article V(1)(b) of the New York Convention, an award may be refused enforcement if the party against whom the award is invoked was not given proper notice of the arbitral proceedings or was otherwise unable to present his case. Article 18 of the Model Arbitral Law states that the parties shall be treated with equality and each party shall be given a full opportunity to present his/her case. The consensus in virtually all systems of law is that these principles are essential requirement akin to basic human rights that cannot be overridden by private agreement.[54] If the procedural aspects agreed by the parties conflict with the mandatory provisions of the law at the place of arbitration, the latter would prevail. In essence, parties' procedural freedom is limited by mandatory provisions designed to prevent or to remedy major defects in procedure, for example, any denial of justice or violation of due process. Such restrictions are justified as they would not be contrary to the interest of the parties and would also meet the legitimate interest of the State concerned.[55] Striking a balance between the interest of the parties to freely determine the procedure and the interests of the legal system expected to give recognition and effect thereto is one of the

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[53] For a general discussion, see Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (4th ed.), Oxford University Press (2004), pp. 267-269; Michael Pryles, Limits to Party Autonomy in Arbitral Procedure, JOURNAL OF INTERNATIONAL ARBITRATION, Vol. 24, Issue 3 (2007), pp. 327-339 and Mia Louise Livingstone, Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact, JOURNAL OF INTERNATIONAL ARBITRATION, Vol. 25, Issue 5 (2008), pp. 529-535.

[54] Greenberg et al., *supra* note 15, pp. 306-307.

[55] UNCITRAL, *supra* note 43(A/CN.9/207), para. 19.

delicate and complex problems to address in international arbitration.[56] Public policy at the place of arbitration or in the State where the recognition and enforcement of an arbitral award is sought may also restrict party autonomy.

Arbitration rules and institutional requirements may also constrain party autonomy, while it is only by the virtue of party autonomy that such rules or requirements apply. For example, article 17 of the UNCITRAL Arbitration Rules provides that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.[57] Under some institutional rules, parties may not deviate from certain provisions to ensure efficiency of the arbitration process or exclude the supervision or the scrutiny process, both of which are embodied in the institutional procedure.[58]

2. An overview of norms in international arbitration

This section provides a general overview of norms applicable to the procedural aspects of international arbitration with some historical background. Parties to international arbitration are free to choose and usually

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[56] *Ibid*., para. 21.

[57] See also article 10(3) of the UNCITRAL Arbitration Rules, which reads: "In the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, *in doing so, may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator* (emphasis added)."

[58] See, for example, article 34 of the ICC Arbitration Rules, which reads: "Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form."

agree on a neutral place or seat of arbitration,[59] the jurisdiction to which the arbitration is associated legally.[60] The place of arbitration determines the law applicable to the arbitration (*lex arbitri*), most likely the arbitration legislation of that State. Apart from when the parties select a procedural law that is different from the *lex arbitri*,[61] the *lex arbitri* provides the procedural framework for international arbitration. Therefore, the selection by the parties of the place of arbitration[62] and in default, by the arbitral tribunal[63] or an arbitral institution,[64] has significant consequences on the procedural aspects of international arbitration.

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[59] The words "place" and "seat" are often used interchangeably and are distinguished with the venue or the physical location where arbitral hearings or meetings are held.

[60] This is not the case for inter-State arbitration or for ICSID arbitration. However, investor-State arbitration not governed by a treaty such as ICSID and chosen to be under any other arbitration rules containing a default place of arbitration, the national arbitration legislation may become relevant. See article 1 of the ICSID Additional Facility Arbitration Rules, which reads: "Where the parties to a dispute have agreed that it shall be referred to arbitration under the Arbitration (Additional Facility) Rules, the dispute shall be settled in accordance with these Rules, save that if any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail." For a discussion on the place of arbitration under the ICSID Additional Facility Arbitration Rules, see Frauke Nitschke and Kamel Aït-El-Hadj, Determining the Place of Arbitration in ICSID Additional Facility Proceedings, ICSID Review, Vol. 30, Issue 1 (Winter 2015), pp. 243-259.

[61] While the choice of a procedural law different from the *lex arbitri* raises complex issues, there are two instances where it may be warranted. The first is when the award needs to be enforced in a State not a party to the New York Convention; choosing the procedural law of that State may provide recourse to the enforcement procedure in that State. The second is when the place of arbitration is chosen despite the unsuitability of the arbitration legislation to avoid enforcement problems based on the reciprocity reservations made under the New York Convention. For discussion, see Greenberg et al, *supra* note 15, pp. 60-63; Blackaby, supra note 53, pp. 87-88.

[62] For prominent legal factors to be considered in selecting the place of arbitration, which include the suitability of the *lex arbitri*, see UNCITRAL, *supra* note 49, para. 29.

[63] See article 18(1) of the UNCITRAL Arbitration Rules, which reads: "If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration."

[64] See article 18(1) of the ICC Arbitration Rules, which reads: "The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties." Article 16.2 of the LCIA

The contents of *lex arbitri* may vary depending on the jurisdiction but generally deal with the definition and form of arbitration agreements, arbitrability, composition of the tribunal including challenge of arbitrators, jurisdiction of the tribunal, interim measures, the conduct of arbitral proceedings, the extent of judicial intervention including judicial review or setting aside of an arbitral award, the court competent with respect to the arbitral proceedings and court assistance, the form and contents of the award as well as the conditions for recognition and enforcement of arbitral awards.[65] Of particular importance in defining the procedural aspects are the mandatory provisions in the *lex arbitri*, which the parties may not derogate from. For example, the due process requirement (also referred to as procedural fairness or equal treatment) is a typical provision found in national legislation which the parties cannot override.[66]

There are also international conventions and treaties applicable to the procedural aspects of international arbitration. For the purposes of this study, numerous conventions and treaties that merely include a reference to the

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Arbitration Rules (2014) reads: "In default of any such agreement, the seat of the arbitration shall be London (England), unless and until the Arbitral Tribunal orders, in view of the circumstances and after having given the parties a reasonable opportunity to make written comments to the Arbitral Tribunal, that another arbitral seat is more appropriate."

[65] The form of *lex arbitri* may also vary. It could be a separate legislation covering international arbitration (for example, Australia and Singapore) or a single legislation covering both domestic and international arbitration (For example, Japan, Korea, Malaysia and New Zealand). It could be part of another legislation, for example, the civil procedure law and may also be spread out in a number of relevant legislations.

[66] While the principle of due process is generally recognized, the exact parameters may fluctuate from one legal system to another. See Kaufmann-Kohler, *supra* note 42, p. 1322.

possible use of arbitration as a dispute resolution method are not considered.[67] Once such conventions and treaties are excluded, only a handful of international instruments contain specific provisions on the procedural aspects of international arbitration.

Long before the Convention for the Pacific Settlement of International Disputes (1899 and revised in 1907),[68] which established the PCA,[69] there were a number of treaties between States that included provisions on the procedural aspects (for example, the 1794 Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America (the "Jay Treaty")[70] and the 1871 Treaty Between Her Majesty and the United States of America (the "Treaty of Washington").

Under the auspices of the League of Nations, the 1923 Geneva Protocol[71] and the Convention on the Execution of Foreign Arbitral Awards (Geneva, 1927)[72] were prepared, eventually paving the way for the New York Convention. The General Act of Arbitration (Pacific Settlement of

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[67] The UN Charter, for example, makes a reference to arbitration as one of the options for pacific settlement of disputes (*supra* note 2). Many bilateral and regional treaties contain dispute resolution provisions referring to the possible use of arbitration between States.
[68] Part IV (articles 37 to 90) of the Convention deals with international arbitration. The full text of the Convention is available at https://pca-cpa.org/en/documents/pca-conventions-and-rules/.
[69] Established in 1899 to facilitate arbitration and other forms of dispute resolution between states, the PCA has developed into a modern, multi-faceted arbitral institution that is situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community (see PCA website available at https://pca-cpa.org/en/about/).
[70] The text of the Jay Treaty is available at http://avalon.law.yale.edu/18th_century/jay.asp.
[71] See *supra* note 46.
[72] For the text, see League of Nations, TREATY SERIES, Vol. 92, pp. 301-311 available at https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2092/v92.pdf.

International Disputes) (Geneva, 1928)[73] also prepared by the League of Nations contained detailed provisions on the procedural aspects (articles 21-28).

One of the most significant incidents in the development of international arbitration was the adoption of New York Convention by the United Nations Conference on International Commercial Arbitration in 1958 based on discussions at the United Nations Economic and Social Council (ECOSOC).[74] ICC played a significant role in the process. A drafting committee of the ICC had prepared a draft of the proposed convention in 1953, which was submitted to ECOSOC in October that year.[75] The ICC was also engaged in the discussions leading to the New York Convention.

With 157 State Parties, the New York Convention has achieved universal adoption.[76] The Convention provides common legislative standards for the recognition of arbitration agreements embodying the principle of party autonomy as well as court recognition and enforcement of foreign and non-

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[73] For the text, see League of Nations, TREATY SERIES, Vol. 93, pp. 343-363 available at https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2093/v93.pdf. The General Act was revised under the auspices of the United Nations with provisions on arbitration contained in chapter III. The Revised General Act for the Pacific Settlement of International Disputes (New York, 1949) has eight State parties (Belgium, Burkina Faso, Denmark, Estonia, Luxembourg, Netherlands, Norway and Sweden). For the text, see United Nations, TREATY SERIES, Vol. 71, p. 101-127 available at https://treaties.un.org/doc/Publication/UNTS/Volume%2071/v71.pdf.

[74] The *travaux préparatoires* of the New York Convention is available at http://newyorkconvention1958.org/?opac_view=5&menu=492. See also Martin Domke, The United Nations Conference on International Commercial Arbitration, *The American Journal of International Law*, Vol. 53, No. 2 (April 1959), pp. 414-426 available at http://www.jstor.org/stable/2195817.

[75] Report and Preliminary Draft Convention Adopted by the Committee on International Commercial Arbitration at its meeting of 13 March 1953 available at http://newyorkconvention1958.org/index.php?lvl=notice_display&id=2698&opac_view=6.

[76] As of July 2017. The status of the New York Convention is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

domestic arbitral awards. The Convention obliges State Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. Yet, the New York Convention provides little guidance on the procedural aspects. Rather, the Convention touches upon them only negatively, by stipulating that the recognition and enforcement of the award would be denied, if the award is based on unfair, arbitrary or unbalanced procedure.[77] The requirements of procedural fairness and regularity of the arbitral proceedings are given effect through articles V(1)(b) and V(2)(b), which allow courts to refuse recognition and enforcement of an award under certain circumstances.[78]

In 1961, the European Convention on International Commercial Arbitration (Geneva, 1961, the "ECICA") was concluded under the auspices of the Trade Development Committee of the UN Economic Commission for Europe aimed at regulating certain procedural aspects of international arbitration.[79] While there was some overlap between ECICA and the New York Convention, the scope of ECICA was broader as it attempted to regulate

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[77] Blackaby, supra note 53, p. 71.

[78] Born, *supra* note 11, p. 160. Article V(1)(b) reads: "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) …; (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; (c)…" Article V(2)(b) reads: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) …; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

[79] The Council of Europe had adopted the European Convention for the Peaceful Settlement of Dispute in 1957 which contained several articles on arbitration. For a brief introduction, see United Nations, HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES (OLA/COD/2394) (1992), pp. 286-287.

issues such as the appointment of arbitrators, the applicable law, objections to jurisdiction and competing competences of state courts.[80]

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington, 1965, the "ICSID Convention") is another notable instrument[81] with 153 contracting States with 8 other signatory States.[82] The ICSID Convention deals with the arbitration procedure in chapter IV.[83] The ICSID Regulations and Rules complement the provisions of the ICSID Convention.[84] The ICSID Convention establishes de-localization as it contains no reference to any national arbitration legislation.[85] If a party fails to comply with the award, the other party can seek to have the

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[80] United Nations, TREATY SERIES, Vol. 484, pp. 349-403. ECICA has 31 State Parties and entered into force in 1964. See Christian W. Konrad, Buried in Oblivion? The Significance and Limitations of the European Convention on International Commercial Arbitration, Kluwer Arbitration Blog (2 November 2010) available at http://kluwerarbitrationblog.com/2010/11/02/buried-in-oblivion-the-significance-and-limitations-of-the-european-convention-on-international-commercial-arbitration/.

[81] The ICSID Convention was prepared by the Executive Directors of the International Bank for Reconstruction and Development (IBRD). On 18 March 1965, the draft Convention was submitted to member governments of the World Bank. Information about the ICSID Convention and the text is available at https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf. See generally, Antonio R. Parra, THE HISTORY OF ICSID, Oxford University Press (2012) and Christoph H. Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, THE ICSID CONVENTION: A COMMENTARY (2ND ED.), Cambridge University Press (2009).

[82] As of 30 April 2017. The ICSID Convention entered into force on 14 October 1966. A list of all ICSID Contracting States and Signatories is available at https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx. The eight signatory states are Belize, Dominican Republic, Ethiopia, Guinea-Bissau, Kyrgyz Republic, Namibia, Russian Federation and Thailand.

[83] Provisions on replacement and disqualification of conciliators and arbitrators (chapter V), on cost (chapter VI) and on the place of proceedings (chapter VII) are also found throughout the ICSID Convention.

[84] See article 6(1)(a), (b) and (c) of the ICSID Convention.

[85] Although the seat is formally Washington, D.C., the law of the place of proceedings has no impact on the arbitration, which is exclusively governed by the ICSID Convention and Arbitration Rules. See Article 44 of the ICSID Convention.

pecuniary obligations recognized and enforced in the courts of any ICSID member State as though it were a final judgment of that State's courts.[86]

The Inter-American Convention on International Commercial Arbitration (Panama, 1975) and the Algiers Accords between the United States and Iran (1981) also included procedural provisions.[87]

There are also more than 3,000 bilateral and regional investment treaties and free trade agreements (FTAs) including the Energy Charter Treaty[88] with dispute resolution provisions, which permit foreign investors to apply for arbitration to raise a claim against a State.[89] A 2012 survey of the investment treaties provided that 93% of the treaties contained provisions on investor-State dispute settlement (ISDS).[90] When ISDS sections emerged in bilateral investment treaties in the 1970s, they were fairly short and only aimed at providing access to arbitration; most treaties dealt with only a few ISDS issues.[91] On many basic issues (remedies, allocation of costs, applicable law, composition of tribunals), the treaties were often silent and reference was made to the ICSID Convention, the ICSID Arbitration Rules, the UNCITRAL

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[86] Article 54(1) of the ICSID Convention. In accordance with article 53(1) of the ICSID Convention, an award of a tribunal is binding on all parties to the proceeding and each party must comply with the award pursuant to its terms.

[87] The Algiers Accord set out the procedure of Iran-United States Claims Tribunal to decide, among others, claims of United States nationals against Iran and of Iranian nationals against the United States, which arose out of debts, contracts, expropriations or other measures affecting property rights. Additional information is available at http://www.iusct.net/.

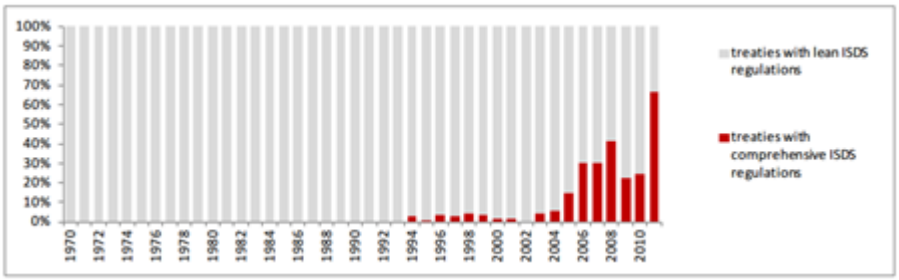
[88] See article 26 on Settlement of Disputes between an Investor and a Contracting Party.

[89] Joachim Pohl, Kekletso Mashigo and Alexis Nohen, DISPUTE SETTLEMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS: A LARGE SAMPLE SURVEY, OECD Working Papers on International Investment, OECD Publishing (2012) available at http://dx.doi.org/10.1787/5k8xb71nf628-en.

[90] Pohl et al, *supra* note 89 pp. 7-8, 40-43.

[91] *Ibid*. Provisions on the legal quality of the awards and on enforcement appeared more than half of the treaties. Seventeen ISDS issues were identified in the treaty sample, but countries' propensity to cover individual issues varies widely.

Arbitration Rules or national arbitration laws.[92] However, there is a broad and steady upward trend in the regulation of parameters of ISDS[93] since the North American Free Trade Agreement (1994, the "NAFTA"),[94] which introduced innovative and comprehensive provisions on ISDS. While the number of treaties with comprehensive ISDS provisions remains low, their proportion in newly concluded treaties has grown quickly since 2005 to about 25%.



<Share of treaties with detailed ISDS provisions> [95]

Upon the entry into force of the Treaty of Lisbon on 1 December 2009,[96] which shifted the competences for foreign direct investment from EU member States to the European Union, the EU has also become active in

[92] *Ibid*. 56% of the treaties offer investors the possibility to choose from among at least two arbitration fora and the number of fora that treaties offer investors to choose from has increased. ICSID and *ad hoc* arbitral tribunals established under the UNCTRAL Arbitration Rules are by far the most frequently proposed fora.
[93] See for example, Australia-Mexico BIT (1994); Mexico-Bolivia FTA (1994); Costa Rica-Mexico FTA (1994); Colombia Peru BIT (1994); Peru-United States FTA (2006); Investment Agreement for the COMESA Common Investment Area (2007); Canada-Colombia FTA (2008).
[94] See chapter 11, section B of NAFTA.
[95] Pohl et al, *supra* note 89, p. 43.
[96] Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (13 December 2007), OJ C 306 of 17 December 2007 (entry into force: 1 December 2009).

negotiating a number of FTAs including comprehensive provisions on the procedural aspects of ISDS. The Comprehensive and Economic Trade Agreement (CETA) concluded with Canada is one example. [97]

After the adoption of the New York Convention, it took more than 55 years for the United Nations to prepare another international convention relating to international arbitration. In 2014, the General Assembly adopted the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014, the "Transparency Convention"), an instrument by which States and regional economic integration organizations to investment treaties concluded before 1 April 2014 express their consent to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "UNCITRAL Transparency Rules"). [98] The Transparency Convention provides a flexible mechanism for recording such consent and supplements existing investment treaties with respect to transparency-related obligations. With the ratification by Switzerland on 18 April 2017, the Convention will enter into force on 18 October 2017.[99]

Parties, including States, may exercise their procedural autonomy by agreeing to a set of arbitration rules to apply to the arbitral proceeding.[100]

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[97] See chapter 8, section F of CETA.

[98] The UNCITRAL Transparency Rules, effective as of 1 April 2014, are a set of procedural rules for making publicly available information on investor-State arbitrations arising under investment treaties. For detailed information, see Annex, section G.

[99] Switzerland was the third State to ratify the Convention, following ratifications by Canada on 12 December 2016 and by Mauritius on 5 June 2015. The Convention has 16 other signatories (Australia, Belgium, Congo, Finland, France, Gabon, Germany, Iraq, Italy, Luxembourg, Madagascar, Netherlands, Sweden, Syria, the United Kingdom and the United States).

[100] In addition to the selection of the place of arbitration, the arbitrator(s) and the arbitral institution, the selection of the arbitration rules is one of the key decisions that parties make with regard to the procedural aspect of international arbitration.

Arbitration rules are a set of provisions or rules, which the parties to arbitration may agree on for the conduct of arbitral proceedings. To the extent permitted, the arbitration rules may be further modified by the parties. Arbitration rules are not binding on the parties or the tribunal until opted into by the parties. Once the parties make the choice to be bound (for example, by including a reference to that set of rules in their arbitration agreement or even agreeing after the commencement of the arbitration), the arbitration rules apply contractually and govern the arbitration. Some national arbitration legislations include default arbitration rules to apply when the parties have not agreed on a set of arbitration rules.

The selected set of arbitration rules prevails over the non-mandatory provisions of the applicable arbitration law, as it better corresponds to the objectives of the parties than the default provisions of that law. However, the mandatory provisions of the applicable arbitration law would prevail over any conflicting provisions in the arbitration rules.[101]

A wide range of arbitration rules has contributed to forming the structural framework of international arbitration. With increasing number of arbitral institutions and institutional rules, parties generally have more options to choose from. The essential benefit of selecting a set of arbitration rules are

[101] For example, section 15A of the International Arbitration Act (the "Act") of Singapore clarifies the relationship between arbitration rules agreed by the parties and the Model Arbitration Law, which is incorporated into the Act, with the exception of Chapter VIII. Subsection 1 reads: "It is hereby declared for the avoidance of doubt that a provision of rules of arbitration agreed to or adopted by the parties, whether before or after the commencement of the arbitration, shall apply and be given effect to the extent that such provision is not inconsistent with a provision of the Model Law or this Part from which the parties cannot derogate."

that the procedure becomes more predictable. The contents of the arbitration rules differ but typically address the conduct of arbitration from its initiation to the rendering of an award. Parties and the arbitral tribunal can save time and cost by using an established set of arbitration rules that is familiar to the parties, has been widely applied and interpreted by arbitral tribunals and courts and has been commented on by practitioners and academics.[102]

While ICC launched its first Arbitration Rules in 1922, efforts to codify the arbitral procedure also began under the auspices of the United Nations. In 1949, the International Law Commission (ILC) selected arbitral procedure as one of the topics for codification and appointed Georges Scelle as the Special Rapporteur.[103] In 1958, the Model Rules on Arbitral Procedure[104] were adopted by ILC to apply to inter-State arbitration.[105] The Model Rules had a dual aspect, representing both a codification of existing law on international arbitration and a formulation of what was considered to be desirable developments in the field. After extensive discussions at the Sixth

[102] UNCITRAL, *supra* note 49, para. 7.
[103] Summary of the work of the ILC is available at http://legal.un.org/ilc/summaries/10_1.shtml.
[104] United Nations, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1958, Vol. II (New York: United Nations, 1958), pp. 83-88. The text of the Model Rules on Arbitral Procedure is available at http://legal.un.org/ilc/texts/instruments/english/commentaries/10_1_1958.pdf.
[105] With reference to the scope and purpose of the Model Rules, the ILC observed: "... now that the draft is no longer presented in the form of a potential general treaty of arbitration, it may be useful to draw attention to the fact that, if the parties so desired, its provisions would, with the necessary adaptations, also be capable of *utilization for the purposes of arbitrations between States and international organizations or between international organizations. In the case of arbitrations between States and foreign private corporations or other juridical entities, different legal considerations arise. However, some of the articles of the draft, if adapted, might be capable of use for this purpose also*" (emphasis added). United Nations, *ibid.* p. 82 (footnote 16 in document A/3859).

Committee, the General Assembly brought the draft articles on arbitral procedure to the attention of Member States for their consideration and use.[106]

In 1976, the UNCITRAL Arbitration Rules were adopted to provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings.[107] The Rules were revised in 2010.[108] The preparation of the 1976 UNCITRAL Arbitration Rules took a period of three years involving extensive consultations with experts representing key arbitral institutions and traditions, drawing upon the experience of existing arbitration regimes.[109] Incorporating procedures from both common and civil law systems, the 1976 UNCITRAL Arbitration Rules struck a balance between providing sufficient guidance and procedural protections for the disputing parties on the one hand and providing the parties with maximum flexibility to respond to their particular circumstances on the other. The UNCITRAL Arbitration Rules formed the backbone of international commercial arbitration

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[106] General Assembly Resolution 1262 (XIII) of 14 November 1958. Unfortunately, the Model Rules were never put to practice in any arbitration.

[107] Official Records of the General Assembly, Thirty-first session, Supplement No. 17 (A/31/17), paras. 56. The Commission established Committee of the Whole to consider the draft arbitration rules, which held 16 meetings from 12 to 23 April 1976. The *travaux préparatoires* of the 1976 UNCITRAL Arbitration Rules is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules_travaux.html. Throughout this study, reference is made to annual reports of UNCITRAL, which are referred to as "Official Records of the General Assembly, *** session, Supplement No. 17 (A/**/17)". The numbering indicates the session of the General Assembly and does not match with that of the Commission session. All report of the Commission are available at http://www.uncitral.org/uncitral/en/commission/sessions.html.

[108] For detailed information, see Annex, section D.

[109] At the sixth session of UNCITRAL (2-13 July 1973, Geneva), the Secretariat was requested to prepare a draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (For the relevant discussion, see Official records of the General Assembly, Twenty-eighth session, Supplement No. 17 (A/ 9017), paras. 71-78 and 85). The initial draft was prepared in consultation with Pieter Sanders, who served as a consultant to the Secretariat on the subject.

by providing a comprehensive and universal set of rules for *ad hoc* arbitration and have been adopted under various arbitration regimes including investor-State and State-to-State disputes as well as arbitration administered by arbitral institutions.[110] Furthermore, the UNCITRAL Arbitration Rules provided a useful benchmark to institutions in the development of their own arbitration rules. A number of institutions administer arbitral proceedings or provide administrative services under the UNCITRAL Arbitration Rules, and/or act as an appointing authority under the Rules.[111]

Arbitral institutions, the number of which currently exceed 200, also promulgate their own set of procedural rules.[112] According to a survey in 2015, the five most preferred institutions for commercial arbitration were the ICC, London Court of International Arbitration (LCIA), the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC) and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).[113] In addition, ICSID, which administers investment arbitrations pursuant to the ICSID Convention and the PCA are also notable arbitral institutions. There are other global/regional arbitral institutions: the International Centre for Dispute Resolution (ICDR), the Cairo

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[110] In revising the 1976 UNCITRAL Arbitration Rules, it was noted that, in practice, there were at least four types of arbitration where the 1976 UNCITRAL Arbitration Rules were used; namely, disputes between private commercial parties where no arbitral institution was involved, investor-state disputes, state-to-state disputes and commercial disputes administered by arbitral institutions. UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session (A/CN.9/614), para. 17.

[111] For the status of the UNCITRAL Arbitration Rules, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules_status.html.

[112] For an overview of the arbitral institutions and their rules, see Born, *supra* note 11, pp. 28-33.

[113] Queen Mary University of London, *supra* note 4, p. 17.

Regional Centre for International Commercial Arbitration (CRCICA), the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the Korea Commercial Arbitration Board (KCAB), the China International Economic and Trade Arbitration Commission (CIETAC), the Dubai International Arbitration Centre (DIAC) and the list continues.[114] There are also specialized arbitral institutions, for example, the Court of Arbitration for Sport (CAS),[115] the World Intellectual Property Organization Arbitration and Mediation Center (WIPO AMC)[116] and the Panel of Recognised International Market Experts in Finance (P.R.I.M.E. Finance).[117]

Arbitration rules prepared by these institutions set out the procedural framework for arbitral proceedings and typically authorize the institutions to assist in selecting arbitrators, to designate the place of arbitration and to fix the fees payable to arbitrators. The ICC Arbitration Rules (2017),[118] the LCIA Arbitration Rules (2014),[119] the HKIAC Administered Arbitration Rules

[114] For example, the second African Consultative Workshop on Cooperation among African Arbitral Initiatives noted that there are more than 70 arbitration centres/institutions/associations in Africa. The Asia Pacific Regional Arbitration Group (APRAG) consists of more than 30 arbitration centres and associations.

[115] See the website available at http://www.tas-cas.org/en/index.html.

[116] See the website available at www.wipo.int/amc/en/.

[117] See the website available at http://primefinancedisputes.org/.

[118] The ICC Arbitration Rules are available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/.

[119] The LCIA Administered Arbitration Rules are available at http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

(2013), [120]the SIAC Arbitration Rules (2016),[121] the SCC Arbitration Rules (2017)[122] and the PCA Arbitration Rules (2012)[123] are just few examples.

Such arbitration rules can be perceived as strengthening or enhancing the autonomy of the parties, as parties can choose the set of rules that best shape the conduct of the arbitral proceedings. Innovative features are introduced by arbitral institutions to improve the efficiency of the arbitral proceedings through the revision of their arbitration rules or slightly modified or simplified versions of their rules (for example, expedited or simplified procedures[124], consolidation, early dismissals and emergency arbitrators).[125] However, arbitration rules once opted into by the parties may limit their procedural autonomy, for example, with regard to procedures of appointment and challenge of arbitrators, arbitration costs and fees as well as scrutiny of the awards, which generally aim at ensuring the effectiveness of arbitration. In some cases, the selection of an arbitral institution could limit the parties'

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[120] The HKIAC Administered Rules are available at http://www.hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules.
[121] The SIAC Arbitration Rules are available at http://www.siac.org.sg/our-rules/rules/siac-rules-2016.
[122] The SCC Arbitration Rules are available at http://www.sccinstitute.com/dispute-resolution/rules/.
[123] PCA has also prepared a number of rules to address different circumstances as well as different topic: Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States; Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State; Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States; and Permanent Court of Arbitration Optional Rules for Arbitration between International Organizations and Private Parties.
[124] For example, the Australian Centre for International Commercial Arbitration (ACICA) Expedited Arbitration Rules and the Japan Commercial Arbitration Association (JCAA) Commercial Arbitration Rules (2015), chapter VI.
[125] Queen Mary University of London, *supra* note 4, pp. 24-29.

ability to agree on the proceedings being conducted under another arbitral institutions rules.

Arbitral institutions have gone further to provide additional guidance with respect to arbitration under their rules. These texts take various forms (notes, recommendations, guidelines, checklists, standards or best practices) and are updated regularly. The following provides a non-exhaustive list of guidance text prepared by arbitral institutions.

ICC[126]

- Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration
- Note to Parties and Arbitral Tribunals on ICC Compliance
- ICC Award Checklist (1998, 2012 and 2017 ICC Arbitration Rules)
- ICC Checklist on Correction and Interpretation of Awards (1998, 2012 and 2017 ICC Arbitration Rules)
- ICC Emergency Arbitrator Order Checklist
- The Secretariat's Guide to ICC Arbitration

LCIA[127]

- Notes for Parties (2016)

[126] The texts are available at https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists/#note3). In addition, the ICC Commission on Arbitration and ADR issued the following publications: Report on Financial Institutions and International Arbitration (2016) Report on Decisions on Costs in International Arbitration (2015), Effective Management in Arbitration - A Guide for In-House Counsel and other Party Representatives (2015), Report on States, State Entities and ICC Arbitration (2012) and Report on Techniques for Controlling Time and Costs in Arbitration (2012).

[127] The texts are available at http://www.lcia.org/adr-services/guidance-notes.aspx.

- Notes for Arbitrators (2016)
- Notes on Emergency Procedures (2016)

HKIAC[128]

- Practice Note on the Costs of Arbitration (2016)
- Practice Note on the Challenge of an Arbitrator (2014)
- Practice Note on Consolidation of Arbitration (2016)

SIAC[129]

- Code of Ethics for an Arbitrator (2016)
- Practice Note for UNCITRAL Cases (2014)
- Practice Note for Administered Cases (2014)

SCC[130]

- SCC Arbitrator Guidelines (2017)

ICSID

- Practice Notes for Respondents in ICSID Arbitration

PCA[131]

- Explanatory Note of the International Bureau of the PCA Regarding Time Periods Under the PCA Arbitration Rules 2012
- Guidelines for Adapting the PCA Rules to Disputes Arising Under Multilateral Agreements and Multiparty Contracts.

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[128] The texts are available at http://www.hkiac.org/arbitration/rules-practice-notes.
[129] The texts are available at http://www.siac.org.sg/our-rules/practice-notes.
[130] The texts are available at http://www.sccinstitute.com/about-the-scc/legal-resources/arbitrators-guidelines/.
[131] The texts are available at https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/.

In addition to national arbitration laws, international conventions and treaties, arbitration rules and other norms prepared by arbitral institutions, another category of norms has emerged. These norms, prepared by mainly professional organizations, provide guidance with respect to the conduct of arbitrators, taking of evidence and other procedural aspects of international arbitration. Such norms provide guidance where little or none exists for parties, arbitral tribunals and other relevant stakeholders,[132] thus enhancing the integrity, efficiency as well as the predictability of the process. They also assist in establishing a level playing field for participants from different legal backgrounds as well as for those new to the field of international arbitration.

While non-binding in nature, such guidance texts may have far-reaching effects, as they may be adopted by the parties in their arbitration agreement or by the tribunal, or may be cited for lack of anything better (*faute de mieux*). [133] They may be persuasive and functioning as an intermediary towards a more rigorous norm.[134] Some view these norms as an attempt at industry self-regulation.[135] However, they may have a chilling effect on the

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[132] Lawrence W. Newman and David Zaslowsky, Soft Law Guides Parties on Procedures in International Arbitration, NEW YORK LAW JOURNAL, Vol. 245, No. 56 (24 March 2011).
[133] Kaufmann, *supra* note 9, p. 16.
[134] Hugh Thirway, THE SOURCE OF INTERNATIONAL LAW, Oxford University Press (2014), p. 164.
[135] See for example, Sundaresh Menon, Opening speech at the International Council for Commercial Arbitration ("ICCA") Congress 2012 available at http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf. In his speech, Menon emphasized the need for a regulatory framework to govern arbitrators (*Ibid.*, pp. 25-27) and Simon Greenberg et al, *supra* note 15, p. 32. In general terms, industry self-regulation complements government policies and provides benefits to both the industry and consumers while posing a number of challenges. The success of such industry self-regulation depends on a number of factors including the strength of the commitments made by participants: the industry coverage of the self-regulation, the extent to which participants adhere to the commitment and the consequences of non-compliance. For an overview of industry self-

parties' procedural autonomy as well as the discretion of the tribunal. States had deliberately left a wide range of the procedural aspects of international arbitration unregulated, giving way to the parties' autonomy. But this intentional vacuum is becoming gradually occupied by such norms.[136] These norms by introducing so-called 'best practices' have also been criticized as formalizing or judicializing the arbitral process and disregarding the cultural diversity that exist in and benefit international arbitration.

Whereas the emergence of such guidance texts is comparatively recent, it can be traced back to the American Bar Association/American Arbitration Association (ABA/AAA) Code of Ethics for Arbitrators in Commercial Disputes in 1977.[137] Among the professional organizations, the International Bar Association (IBA) [138] has been quite active and effective in formulating such norms.[139] The following provides a non-exhaustive list of

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regulation, see OECD, Industry Self-regulation: Role and Use in Consumer Interests (DSTI/CP(2014)/4/FINAL) (23 March 2015) available at http://www.oecd-ilibrary.org/science-and-technology/industry-self-regulation_5js4k1fjqkwh-en. The term industry self-regulation concerns groups of firms in a particular industry, entire industry sectors or professional groups that agree to act in prescribed ways, according to a set of rules or principles decided by themselves. The groups can be wholly responsible for developing the self-regulatory instruments, monitoring compliance and ensuring enforcement, or they can work with government entities and other stakeholders in these areas, in a co-regulatory capacity.

[136] William W. Park, The Procedural Soft Law of International Arbitration: Non-governmental Instruments in Loukas A. Mistelis and Julidan D.M Lew (eds.), PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION, Kluwer Law International (2006), p. 142. See also Kaufmann, *supra* note 9, p. 16: "Even though the law may be soft, even though it need not be incorporated into the parties' contract, soft law exercises a significant influence over the way arbitration proceedings are conducted."

[137] Howard M. Holtzmann, The First Code of Ethics for Arbitrators in Commercial Disputes, THE BUSINESS LAWYER, Vol. 33, No. 1 (1977), pp. 309-320.

[138] The IBA, established in 1947, is an organization of international legal practitioners, bar associations and law societies. It has a membership of more than 80,000 individual lawyers and more than 190 bar associations and law societies spanning over 160 countries.

[139] IBA's broad network allows practitioners from different jurisdictions to discuss and exchange their views about developments in arbitration practice, based upon which the norms

norms formulated by professional organizations with respect to the procedural aspects of international arbitration.[140]

American Bar Association/American Arbitration Association (ABA/AAA)

- ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes (2004)

College of Commercial Arbitrators (CCA)[141]

- CCA Guide to Best Practices in Commercial Arbitration (2013)[142]
- CCA Protocols for Expeditious, Cost-effective Commercial arbitration (2010)[143]

Chartered Institute of Arbitrators (CIArb)[144]

- International Arbitration Guidelines (2016)[145]

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are formulated. See for example, Eduardo Zuleta, The Contribution of the IBA to an Evolving World of International Arbitration in Jan Paulson, Emmanuel Gaillard, David W Rivkin (eds.), CURRENT ISSUES AND FUTURE CHALLENGES IN INTERNATIONAL ARBITRATION (e-book), IBA (2016).

[140] For an overview see Daniele Favalli (ed.), THE SENSE AND NON-SENSE OF GUIDELINES, RULES, AND OTHER PARA-REGULATORY TEXTS IN INTERNATIONAL ARBITRATION, JurisNet (2005).

[141] Established in 2001, the CCA is a US-based organization of commercial arbitrators. The CCA promotes the highest standards of conduct, professionalism and ethical practice, develops "best practices," provides peer training and professional development and offers effective means to identify elite arbitrators with professional training and experience to handle complex arbitration matters. Information available at the CCA website at: http://www.thecca.net/).

[142] The text is available at http://www.thecca.net/the-college-of-commercial-arbitrators-guide-best-practices.

[143] The text is available at http://www.thecca.net/cca-protocols-expeditious-cost-effective-commercial-arbitration.

[144] CIArb, with membership of 14,000 professional in the area of alternative dispute resolution, is based across 133 States and is supported by a network of 37 branches. It is a not-for-profit, UK registered charity.

[145] The CIArb's Guidelines are produced by the Institute's Practice and Standards Committee (PSC) which is charged with the development and promotion of best practice worldwide through research and guidance. Shortly after the enactment of the English Arbitration Act 1996, the first edition of the Guidelines was published in 1998 focusing exclusively on the practice of arbitration in England. When reviewing the Guidelines in 2012 the PSC recognised that

International Bar Association (IBA)[146]

- Guidelines on Conflicts of Interest in International Arbitration (2014)[147]
- Guidelines on Party Representation in International Arbitration (2013)[148]
- Rules on the Taking of Evidence in International Arbitration (2010)
- Guidelines for Drafting International Arbitration Clauses (2010)

International Council for Commercial Arbitration (ICCA)[149]

- ICCA's Guide to the Interpretation of the 1958 New York Convention (2011)
- Young ICCA Guide on Arbitral Secretaries
- The ICCA Drafting Sourcebook for Logistical Matters in Procedural Order (2015)
- ASIL-ICCA Task Force Report on Issue Conflicts in Investor-State Arbitration (2013)

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uniformity in the treatment of procedural issues and the conduct of arbitration can make the process more predictable, effective and expeditious. The PSC decided it could help the arbitration community achieve these objectives by revising its Guidelines to reflect best practice in international commercial arbitration without reference to particular requirements of any applicable law(s) and/or rules. The CIArb Guidelines, which deal with terms of appointment including remuneration, jurisdictional challenges, applications for interim measures, applications for security costs, documents-only arbitration procedure, party non-participation and drafting arbitral awards, are available at http://www.ciarb.org/guidelines-and-ethics/guidelines/practice-guidelines-protocols-and-rules.

[146] The IBA Guidelines and Rules are available at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[147] See Annex, section F.

[148] See Annex, section E.

[149] ICCA undertakes projects aimed at harmonizing arbitral practices and promoting understanding of dispute resolution processes. The publication below are available at http://www.arbitration-icca.org/publications.html.

UNCITRAL also adopted a revised version of its Notes on Organizing Arbitral Proceedings in 2016 reflecting the amendments to the Model Arbitration Law and the revisions to the UNCITRAL Arbitration Rules in 2010 as well as developments in arbitration practices, since the initial adoption of the Notes in 1996.[150] The purpose of the Notes is to list and briefly describe matters of relevance to the organization of arbitral proceedings.[151] Given that the procedural styles and practices in arbitration do vary and that each of them has its own merit, the Notes do not seek to promote any practices as best practice.[152]

3. Transnational norms

To embark on a comprehensive study on norm-making, there is first the need to identify any common characteristic of the norms, which may be relevant to their making. Since the rise of sovereign states in the seventeenth century, "law" has been associated with state law and national legal systems.[153] Public international law was based on and came into existence with the creation of states to govern their relations. Private international law provided complementary rules and standards to govern situations where more

[150] UNCITRAL, *supra* note 49. The Notes list and describe the typical matters for consideration in the organization of an arbitral proceeding and cover a broad range of situations. The Notes, prepared with a focus on international arbitration, are intended to be used in a general and universal manner, regardless of whether the arbitration is administered on an *ad hoc* basis or by an arbitral institution.
[151] For an overview of the Notes and the process leading to the revision, see Jae Sung Lee, Reflecting current arbitration practice: The revision of the UNCITRAL Notes on Organizing Arbitral Proceedings, ADVANCED COMMERCIAL LAW REVIEW, Vol. 72 (2015).
[152] UNCITRAL, *supra* note 49, para. 2.
[153] Shaffer, *supra* note 23, p. 232.

than one state asserted jurisdiction over a transaction or event. The concepts of public and private international law were thus both state-centric, addressing relations between states and between national legal systems.[154]

In 1956, Philip Jessup used the term "transnational law" to refer to "all law which regulates actions or events that transcend national frontiers, which include both public and private international law and other rules, which do not wholly fit into such standard categories."[155] In search of an appropriate term for "law applicable to the complex interrelated world community which may be described as beginning with the individual and reaching on up to the so-called 'family of nations' or 'society of states,'" Jessup noted that the used of term "international law" would be misleading and inadequate.[156]

Therefore, Jessup's concept of "transnational law" is a functional and practical one: since both international and national law are inadequate to address the flow of actions and the impact of events across borders, a more accurate and useful concept was sought.[157] In short, Jessup's notion of "transnational law" comprises broadly of rules applicable to or bearing upon transnational activities and situations, which involve individuals, corporations, states, organizations of states or groups.[158]

While the study focuses on norms applicable to the procedural aspects of "international" arbitration, it is not limited to inter-State arbitration. Rather the characterization of arbitration as being "international" can be attributed to

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[154] Ibid.
[155] Jessup, *supra* note 28, p. 2
[156] Ibid.
[157] Schaffer, *supra* note 23, p. 233.
[158] Jessup, *supra* note 28,, pp. 3-4

the nature of the dispute and/or to the parties involved in arbitration.[159] As such, international arbitration if often categorized as inter-State arbitration, investor-State arbitration and private arbitration. Inter-state (state-to-state or public) arbitration[160] involves disputes between two or more States or state entities typically concerning treaty obligations or issues of public international law[161] and seldom deal with economic disputes.[162] Inter-state arbitration has been conducted mostly under the procedural rules agreed by States in a *compromis* and a number of cases have been handled under the auspices of the PCA.[163] Investor-State (investment, mixed or hybrid) arbitration involves a dispute relating to an investment between a foreign investor and a State or a

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[159] For a general discussion on the meaning of "international" see Blackaby, *supra* note 53, p. 265.

[160] The ILC, in preparing the Model Rules on Arbitral Procedure (*supra* note 104), described international arbitration as a procedure for the settlement of disputes between States by a binding award on the basis of law and as the result of an undertaking voluntarily accepted. It further noted that the arbitrators chosen should be either freely selected by the parties or, at least, that the parties should have been given the opportunity of a free choice of arbitrators. See United Nations, Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456) - Report of the International Law Commission Covering the Work of its Fifth session (A/CN.4/76), para. 16.

[161] For a historical overview, see Christine Gray and Benedict Kingsbury, Developments in Dispute Settlement: Inter-State Arbitration since 1945, BRITISH YEARBOOK OF INTERNATIONAL LAW (1992).

[162] See, for example, article 21.3(c) of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. Thus far, arbitrations under article 21.3(c) have been conducted by an Appellate Body Member acting in his individual capacity. List of the arbitrations under article 21.3(c) is available at https://www.wto.org/english/tratop_e/dispu_e/arbitrations_e.htm.

[163] As of April 2017, PCA is administering four inter-State arbitrations. Three are under the United Nation Convention on the Law of the Sea: (i) the Enrica Lexie Incident (Italy v. India), (ii) the Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe) and (iii) the Artic Sunrise Arbitration (Netherlands v. Russia). The fourth deal with territorial and maritime dispute between Croatia and Slovenia. Although PCA's initial activity focused exclusively on inter-State disputes, it has expanded to administering cases involving various combinations of States, State-controlled entities, international organizations and private parties. Among the 135 cases administered by the PCA in 2015, only 8 were inter-State arbitration. See PCA, ANNUAL REPORT 2015, p. 20-22 available at https://pca-cpa.org/wp-content/uploads/sites/175/2016/10/PCA-annual-report-2015.pdf .

State-entity, based on a treaty providing for the protection of investments or investors, on domestic investment protection legislation or on a contract between those parties. Private (commercial) arbitration involves disputes between private individuals or businesses arising out of a commercial relationship,[164] which is characterized as being "international" when the parties have their places of business in different States.[165]

Using Jessup's terms, international arbitration is a typical "transnational activity, which involves individuals, corporations, States, organizations of states or groups" and norms applicable to its procedural aspects are those "applicable to the complex interrelated world community which may be described as beginning with the individual and reaching on up to the so-called 'family of nations' or 'society of states."[166]

Moreover, such norms as outlined in section 2 do not easily fall under the traditional categories of international or domestic law, nor under public or private law. In fact, they do not easily fit into the traditional notion of law, the

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[164] The footnote to article 1 of the Model Arbitration Law provides a broad definition of "commercial". It reads: "The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road."

[165] See article 1(3)(b) of the Model Arbitration Law, which further provides: "An arbitration is international if: (a) … (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country."

[166] Jessup, *supra* note 28.

rationale behind the study using the broader term "norm" instead. As such, attention is drawn to the third category mentioned by Jessup in describing transnational law: "other rules, which do not wholly fit into such standard categories." Scott's third conception of transnational law also homes in on this quote.[167] Rather than perceiving transnational law as an umbrella concept within which such "other rules" fall alongside public and private international law, Scott views these "other rules" as the true, or at least the quintessential, transnational rules.

With the spread of globalization, there has been increasing scholarly work referring to "transnational law" but often without clear conceptualization. However, as explained above, norms applicable to the procedural aspects of international arbitration can be characterized as being "transnational."[168] Whereas previous researches on this topic have focused on individual or a group of norms, none have attempted to conceptualize the norms in a comprehensive manner. The body of norms as a whole, in other words, the procedural legal framework of international arbitration constitutes a sub-category of Jessup's transnational law, which is autonomous from international and domestic law and occupies a sphere of its own. Using Scott's words, the procedural legal framework for international arbitration is "*neither* national nor international nor public not private at the same time *both* national and international as well as public and private."[169] It is a distinct body

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[167] Craig Scott, Transnational law as Proto-Concept: Three Conception, GERMAN LAW JOURNAL Vol. 10 (2009), p. 873.
[168] Math Noortmann, August Reinisch and Cedric Ryngaert (eds.), NON-STATE ACTORS IN INTERNATIONAL LAW, Hart Publishing (2015), pp. 68-69.
[169] Scott, *supra* note 167.

of norms, relatively coherent and systematized, developed by ongoing interaction of public and private actors across states, including through international norm-making institutions.[170]

4. Acceptance-based norms

Section 2 above has provided an overview of the norms comprising the procedural framework and section 3 has identified the transnational character of the procedural framework of international arbitration as well as the norms that comprise it. This section identifies another characteristic common to such norms.

While norms are formulated with the anticipation of being used broadly in international arbitration, their target users vary. For example, the Model Arbitration Law is intended for use mainly by State legislators, the Recommendation regarding the Interpretation of Articles II(2) and VII(1) of the New York Convention (the "Recommendation")[171] is aimed at courts in interpreting the New York Convention, and the Transparency Convention is for States to consider become parties to. Some norms are addressed to arbitrators, some to party representatives and some to arbitral institutions. Despite this divergence, it can generally be said that the main intended users of the norms are the parties to arbitration and the arbitral tribunal.

A common characteristic is that it is rare for the norms to apply automatically to arbitration. Some may apply in default, but in general, the

[170] Shaffer, *supra* note 23, pp. 233-234.
[171] See Annex, section B.

application of any specific norms requires some type of consent, agreement, choice, opt-in, selection or acceptance (hereinafter referred to broadly as "acceptance") by parties to arbitration and/or arbitral tribunals. The need for voluntary acceptance is a significant aspect that impacts not only the application of the norms but also their making.

The concept of "soft law" is often used to describe this characteristic,[172] but the study takes a sceptical view as the term is vague and raises questions about the meaning of "law." Moreover, apart from the mandatory provisions found in national arbitration legislation, it is doubtful that any "hard" law exists in this field.[173] Therefore, the study considers that the term "norms" is broad enough to include what others have referred to as soft law as well as other norms that do not necessarily fall under that category.

The acceptance-based characteristic of the norms stems from the procedural autonomy of the parties and the flexibility embodied in international arbitration. This may be apparent as whether to resort to arbitration itself requires a choice to be made by the parties to the dispute. In addition to the acceptance by the parties, for certain norms, acceptance by States may be further required for the norm to eventually apply to the arbitration.

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[172] See generally, William W. Park, *supra* note 136, pp. 141-154; Kaufmann, *supra* note 9, pp. 1–17 and Lawrence W. Newman and Michael J. Radine (eds.), SOFT LAW IN INTERNATIONAL ARBITRATION, Jurisnet (2014).

[173] For discussions about the use of soft law in public international law, see Diana Shelton (ed.), COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM, Oxford University Press (2000).

To elaborate, parties are in a position to choose the national arbitration legislation applicable to their arbitration, by selecting the place of arbitration.[174] The same applies to the numerous arbitration rules as well as other norms illustrated in section 2. For example, the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules and the ICC Arbitration Rules all require consent by the parties to become applicable and binding on the parties. Parties have a choice whether to seek enforcement of an award and in which State. Whereas the New York Convention might be binding on States parties to the Convention, it does not apply until parties invoke it.

States can choose whether to adopt the Model Arbitration Law in their legislation. States have a choice whether the UNCITRAL Transparency Rules would apply to investor-State arbitration pursuant to an investment treaty concluded after 1 April 2014.[175] For investors that do not wish to have the Transparency Rules apply, they can choose other options provided in the investment treaty when pursuing its claim. States also have a choice whether to utilize the mechanism provided in the Transparency Convention to apply the UNCITRAL Transparency Rules to its investment treaties concluded prior to 1 April 2014.[176]

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[174] It is, however, also argued that such a statement is too elliptical as what the parties have done is to choose a place of arbitration and that choice brings with it submission to the laws of that State. See Blackaby, *supra* note 53, p. 87.

[175] See article 1(1) of the UNCITRAL Transparency Rules. See also *infra* note 674.

[176] This sovereign right of States is highlighted in the General Assembly resolution adopting the Transparency Convention, which states that the Convention would not create any expectation that States would necessarily use the mechanism offered by the Convention. See General Assembly Resolution 69/116 (10 December 2014), preamble.

The IBA Guidelines on Party Representation highlights its contractual nature by stating that parties may adopt the Guidelines or a portion thereof by agreement and that arbitral tribunals, after consultation with the parties, may apply the Guidelines in their discretion.[177] The term guidelines is used instead of rules to highlight its acceptance-based nature.[178]

5. Interplay of multiple norms

This first four sections of this chapter has illustrated that the quote by Paulsson that "arbitration derives its legitimacy and effectiveness from an unknown number of potentially relevant legal orders" is indeed accurate.[179] The procedural legal framework for international arbitration involves interplay of complementary norms evolving around the guiding principle of party autonomy. There is no single authoritative norm, rather multiple norms overlap and interact with each other to govern the procedural aspects. And the overall framework has become more complex with a flood of new norms.

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[177] Preamble of the IBA Guidelines on Party Representation. See also Guideline 1, which reads: "The Guidelines shall apply where and to the extent that the parties have so agreed, or the arbitral tribunal, after consultation with the parties, wishes to rely upon them after having determined that it has the authority to rule on matters of party representation to ensure the integrity and fairness of the arbitral proceedings." The Guidelines are silent on whether arbitral tribunals have the authority to rule on matters of party representation, and that determination, including whether to apply the Guidelines, is left to the arbitral tribunal.

[178] Preamble of the IBA Guidelines on Party Representation. See also Guideline 3, which reads: "The Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules, in matters of Party representation. The Guidelines are also not intended to derogate from the arbitration agreement or to undermine either a party representative's primary duty of loyalty to the party whom he or she represents or a party representative's paramount obligation to present such party's case to the arbitral tribunal."

[179] Jan Paulsson, Arbitration in Three Dimensions, LSE Legal Studies Working Paper No.2 (2010), p. 2 available at https://www.lse.ac.uk/collections/law/wps/WPS2010-02_Paulsson.pdf.

From the parties' perspective, there is plenty of, possibly too many guidance with regard to the procedural aspects.

The norms that constitute the procedural framework and the provisions therein serve different purposes throughout the arbitration process. They have been embodied into different forms and have been formulated by different actors. Some address the overall conduct of arbitration while others address specific aspects, which Landau referred to as "micro" issues.[180] Some address the needs or conduct of the parties and arbitrators while others, for example, the UNCITRAL Transparency Rules, also address the public interest.

Some are generally applicable to international arbitration whereas some apply only in the context of commercial arbitration and others in the contexts of investment arbitration.[181] Similarly, the intended targets differ and may not necessarily be the parties to arbitration or the arbitrators. The UNCITRAL Arbitration Rules, prepared mainly for private users to resolve dispute arising out of their commercial relationship, have been put to use in investor-State as well as inter-State arbitration. Some of the provisions therein have found their way into national legislation. Some norms aim at harmonization, while others try to distinguish themselves from others. Some are complementary, while others may be exclusive and in competition. Some attempt to incorporate technological developments. Some are used more often

[180] Landau, *supra* note 37.
[181] For a general overview on the differences between commercial and investment arbitration, see Karl-Heinz Bockstiegle, Commercial and Investment Arbitration: How Different are they Today, ARBITRATION INTERNATIONAL, Vol. 28, No.4, LCIA (2012), pp. 577-590.

in certain jurisdictions, while others have gained a broader acceptance globally.

Despite the variations highlighted above, a common feature underlying the norms is their general recognition of the parties' procedural autonomy and of the need to preserve flexibility of international arbitration. Norms have aimed at addressing the integrity of the arbitration procedure as well as its procedural efficiency while maintaining a balance between the two aspects. Moreover, norm-making has been generally based on the need to ensure that international arbitration continues to be a useful and effective means to resolve cross-border economic disputes. It can be said that norm-making has generally been facilitative or arbitration-friendly rather than being regulatory in nature.

While the procedural framework for international arbitration can be described as pluralistic and non-hierarchical, it is also important to note that despite the abundant number of norms, those that are applicable to individual arbitral proceedings are limited. It is the parties and the tribunal that determine which norms would become applicable to their respective arbitration, as they tailor it to fit the dispute they seek to resolve. Once the norms applicable to the respective arbitration are determined, it would then be possible to set out a quite convoluted hierarchy among those applicable norms.[182] The agreement of the parties as well as the supplementary discretion

[182] The 2017 ICC Arbitration Rules attempts to establish some hierarchy in article 19, which reads: "The proceedings before the arbitral tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national

of the arbitral tribunal on the procedural aspects would form the foundation, though they would be subject to the mandatory provisions of *lex arbitri*. If the parties had agreed on norms to be applicable including a set of arbitration rules, those norms would prevail, in certain cases even over the procedural autonomy of the parties. Yet the application of the agreed norms would also be subject to the mandatory provisions of *lex arbitri* and may be further limited, if it results in being contrary to the public policy of a State where enforcement of the award is sought. In general, there are too many ifs and buts to set out a clear hierarchy among the norms even in individual arbitration.

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law to be applied to the arbitration." However, it does not provide a hierarchy among the entire array of norms that may be applicable. See also Pryles, supra note 53, pp. 8-9.

Chapter III A Dynamic Norm-making Cycle

This chapter provides a descriptive illustration of the norm-making cycle based on an empirical survey of the actors involved and the process leading to some of the key norms addressing the procedural aspects of international arbitration. It focuses on their "making" and the complete cycle is examined with the aim of identifying contemporary trends in norm-making. It reveals a "dynamic" norm-making cycle resembling one of the features of the transnational legal process.

1. A survey of the making of key norms in international arbitration

A feature of transnational legal process is that it is dynamic, "transforming, mutating, and percolating up and down, from the public to the private, from the domestic to the international level and back down again."[183] Norm-making in the field of international arbitration has also been dynamic. The need for cross-border recognition and enforcement of arbitral awards resulted in the New York Convention. Developments in national arbitration legislation and international arbitration practice provided the background to the Model Arbitration Law. Enactments of the Model Arbitration Law by States had further impact on other States' legislation and eventually led to the

[183] Koh, *supra* note 5, p. 184. For a description of dynamic, cross-border and social processes in other fields of law, see Terence C. Halliday and Gregory Shaffer (eds.), TRANSNATIONAL LEGAL ORDERS, Cambridge University Press (2013).

amendments to the Model Arbitration Law. More than 30 years of use of the UNCITRAL Arbitration Rules by States and private entities initiated its revision process, which in turn influenced the revisions of many institutional arbitration rules. Innovative features in one institutional arbitration rules impact others. Guidance texts prepared by professional organizations are referred to not only in arbitration practice but also by States in treaties. Provisions on transparency in investor-State arbitration were a normative response to concerns from the public about the ISDS. In summary, there has been an immense amount of interaction among the norms vertically and horizontally. Nonetheless, in order to reach a firm conclusion that norm-making in international arbitration resembles a transnational legal process, particularly its dynamic feature, the study takes a close examination of the process leading to the norms.

Chapter II, section 2 provided an overview of the norms applicable to the procedural aspects of international arbitration and the remaining parts of that chapter set forth some of their key characteristics. A comprehensive survey of the making of all those norms would be impossible and therefore, this study undertakes an empirical survey of the making of key norms that have been formulated or revised since 2006.[184]

- UNCITRAL Model Arbitration Law (with amendments as adopted in 2006)
- Recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, Paragraph 1, of the Convention on the

[184] An outline of the norms surveyed and their content is provided in the Annex.

Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (the "Recommendation")

- ICSID Arbitration Rules (2006) (the "2006 ICSID Arbitration Rules")
- Revised UNCITRAL Arbitration Rules (2010) (the "2010 UNCITRAL Arbitration Rules")
- IBA Guidelines on Party Representation in International Arbitration (2013) (the "IBA Guidelines on Party Representation")
- IBA Guidelines on Conflicts of Interest in International Arbitration (2014) (the "IBA Guidelines on Conflicts")
- UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) (the "Transparency Rules")
- United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2014) (the "Transparency Convention")
- ICC Arbitration Rules (2017) (the "2017 ICC Arbitration Rules")

The sampling may require some justification. These norms form the essential components of the procedural legal framework for international arbitration. With the aim of identifying recent norm-making trends, norms with a global focus and a certain degree of influence on international arbitration were chosen. For the purposes of this study, their promulgation or revision over the past ten or more years was considered to be indicative of the contemporary norm-making. In addition, norms were selected to allow for a comparative analysis reflecting the diversity of actors and processes involved in norm-making. Consideration was also given to the intended users, which

were different depending on the norm (law-makers, government policy-makers, foreign investors, private businesses, arbitrators, counsel and even generally the international arbitration community) and to their form (model law, convention, arbitration rules and guidelines).

In lieu of the developments in numerous national arbitration laws, the study examines the process leading to the amendments to the Model Arbitration Law (the "2006 Amendments") adopted by UNCITRAL on 7 July 2006.[185] Despite its significance, *lex arbitri* had become less influential due to a certain degree of harmonization achieved through the Model Arbitration Law.[186] The Model Arbitration Law constitutes a sound basis for the desired harmonization and modernization of arbitration legislation covering all stages of the arbitral process. As a model instrument, it does not have the force of law and provides only a template for States to adopt in their legislation.[187] In

[185] United Nations publication, Sales No. E.08.V.4. The text of the Model Arbitration Law with the 2006 amendments is available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf. The General Assembly recommended that all States give favourable consideration to the enactment of the revised articles of the Model Arbitration Law, when they enact or revise their laws in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. See General Assembly Resolution 61/33 (4 December 2006), para. 1.

[186] The Model Arbitration Law was initially adopted by UNCITRAL in 1985 (the "1985 version" or the "1985 Model Arbitration Law"). United Nations publication, Sales No. E.95.V.18. The text of the 1985 version is available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf The General Assembly recommended that all States give due consideration to the Model Arbitration Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. See General Assembly Resolution 40/72 (11 December 1985).

[187] While flexibility is given to States, in order to increase the likelihood of achieving a satisfactory degree of harmonization, States are encouraged to make as few changes as possible when incorporating the Model Arbitration Law into their legal systems. See UNCITRAL, Explanatory Note, *supra* note 48, para. 3.

conjunction with the 2006 Amendments, UNCITRAL also adopted the Recommendation.[188]

Instead of examining the full range of arbitration rules, the study focuses on the revisions of three notable arbitration rules: the 2006 ICSID Arbitration Rules, the 2010 UNCITRAL Arbitration Rule and the 2017 ICC Arbitration Rules. They were chosen as they are the most-often referred to rules for investment and commercial arbitration as well as for *ad hoc* and institutional arbitration.

Under the ICSID Convention, ICSID is mandated to provide facilities for the conciliation and arbitration of investment disputes between member countries and nationals of other member countries.[189] The ICSID Regulations and Rules complement the provisions of the ICSID Convention.[190] While the ICSID Regulations and Rules were amended several times,[191] the ICSID Arbitration Rules were made by the ICSID Administrative Council on 26

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[188] Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17), Annex II. The text of the Recommendation is available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf. The General Assembly noted that in connection with the modernization of articles of the Model Arbitration Law, the promotion of a uniform interpretation and application of the New York Convention was particularly timely. See General Assembly Resolution 61/33 (4 December 2006), para. 1.

[189] Article 1(2) of the ICSID Convention.

[190] The ICSID Regulations and Rules provisions were first adopted by the Administrative Council in 1967. The ICSID Regulations and Rules comprise of: (i) Administrative and Financial Regulations of ICSID; (ii) Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules); (iii) Rules of Procedure for Conciliation Proceedings (Conciliation Rules); and (iv) Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

[191] Amendments were mostly with regard to the Administrative and Financial Regulations. For an overall account of the development of the ICSID Regulations and Rules, see Antonio R. Parra, The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes, ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL, Vol. 22, No.1 (2007), pp. 55-68 available at https://doi.org/10.1093/icsidreview/22.1.55.

September 1984 (with immediate effect)[192] and on 29 September 2002 (with effect on 1 January 2003).[193] With the increased calls for efficiency and transparency, the ICSID Arbitration Rules and the Additional Facility Arbitration Rules were further amended in 2006 to provide for preliminary procedures concerning provisional measures, expedited procedures for dismissal of unmeritorious claims, access of non-disputing parties to proceedings, publication of awards and additional disclosure requirements for arbitrators.[194]

The 2010 UNCITRAL Arbitration Rules have been effective since 15 August 2010. Like the 1976 version, the 2010 UNCITRAL Arbitration Rules cover all aspects of the arbitral process, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings and establishing rules in relation to the form, effect and interpretation of the award.[195]

In November 2016, ICC announced amendments to its Rules of Arbitration with the aim of increasing the efficiency and transparency of

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[192] The 1984 amendments allowed for pre-hearing conferences (Rule 21), made it clear that interim measures could only be sought from national courts if the parties so agreed (Rule 39(5)) and dispensed ICSID from seeking the consent of the parties for its public of excerpts of the legal reasoning of the tribunal (Rule 48(4)). The 1984 amendments were to streamline the Regulations and Rules and to inject into them a greater degree of flexibility. See Antonio R. Parra, Revised Regulations and Rules, News from ICSID, Vol. 2, No. 1 (1985).

[193] The 2002 amendments related to the nationality of arbitrators (Rule 1(3)), time limits on appointment and disqualification (Rules 4 and 9), time period for filling vacant positions on tribunals (Rule 11), and time limit for the preparation of the arbitral award (Rule 46). See Antonio R. Parra, New Amendments on the Regulations and Rules of the International Centre for Settlement of Investment Disputes, News from ICSID, Vol. 19, No. 2 (2002).

[194] See generally Aurélia Antonietti, The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, ICSID REVIEW, Vol. 21, No. 2 (2006), pp. 427-448 available at https://doi.org/10.1093/icsidreview/21.2.427 and ICSID, Annual Report 2006, p. 3. See also Annex, section C.

[195] See Annex, section D.

arbitrations administered by the ICC International Court of Arbitration. The 2017 ICC Arbitration Rules are in force from 1 March 2017.[196]

As indicated in chapter II, professional organizations have prepared a number of practice rules and guidelines in the field of international arbitration. In order to capture norm-making by such organizations, the preparation of the IBA Guidelines on Party Representation and the revision of the IBA Guidelines Conflicts are analysed.[197]

As with other type of norms, it would be an enormous task to ascertain the negotiation process of all the conventions and treaties containing provisions relating to the procedural aspects of international arbitration. Taking into account the growing public interest in investment arbitration and noting that the issue of transparency was dealt with in the NAFTA, the ICSID Arbitration Rules as well as the CETA, the study examines the process leading to the Transparency Rules and the Transparency Convention (hereinafter referred to collectively as the "Transparency Standards"). The Transparency Rules, containing the substantive provisions on transparency, aim at providing a framework to make public information on disputes arising from investments in response to increasing challenges regarding the legitimacy of investor-State dispute settlement. The Transparency Convention is the only multilateral convention applicable to the procedural aspects of

[196] See Annex, section I.
[197] See Annex, sections E and F, respectively. Both texts are available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

international arbitration concluded since the New York Convention in 1958 and the ICSID Convention in 1965.[198]

While the study undertook an empirical survey, there were certain limitations. Despite the significant number of articles and commentaries on the practical application of the norms surveyed, there was very little documentation, official or unofficial, recording the norm-making process. Whereas information about deliberations at UNCITRAL were publicly available, it was generally difficult to gain access to information about who participated, what role they played, how deliberations were held and how decisions were made in other fora. For example, article 6 of the ICC Court Statute (Appendix I to the ICC Arbitration Rules) and article 1 of the Internal Rules of the ICC Court (Appendix II to the ICC Arbitration Rules) reiterate the confidential nature or character of the work of the ICC Court, making it difficult to gain access to information about the process that led to the revision of the 2017 ICC Arbitration Rules. The study, therefore, relied on official documentation and *travaux préparatoires* to the extent available, supplemented by literature survey and interviews with those who participated in the process. Such lack of information is a challenge that needs to be taken into account in furthering research in this area.

[198] It is also the only convention prepared by UNCITRAL in the area of international arbitration, 56 years after the New York Convention, which was prepared under the auspices of the United Nations.

2. Addressing practical needs: the role of an epistemic community

Broadly speaking, all of the norms applicable to the procedural aspects of international arbitration aim at responding to the needs and reflecting the developments in international arbitration practice. In other words, these norms are not a creature of their own, but are deeply embedded in the reality of arbitration practice. Two main themes that have dominated the contemporary norm-making were the need to increase the efficiency of arbitration and the need to ensure its integrity by addressing the conduct of arbitrators and by enhancing transparency, particularly with regard to investment arbitration.

Norm-making in the field of international arbitration has been driven by practical problem solving and can be conceptualized as a dynamic, recursive cycle, in which norms are applied in practice and practice feeds back into the norm-making cycle.[199] This can be evidenced from the fact that norm-making in the recent ten years have focused on revising or amending existing norms. This section examines how the norms were formulated to address the practical needs and the role of practitioners and professional that form an epistemic community or transnational network, which was the driving force behind the norm-making.

The 2006 Amendment of article 7 was an attempt to reflect evolving practices in international trade and technological developments by

[199] Bruce Carruthers and Terence Halliday, Rescuing Business, Claredon Press (1998), p.53.

recognizing the validity of an arbitration agreement where the willingness of the parties to arbitrate was not questioned. Article 7 of the 1985 version had required that an arbitration agreement be in writing,[200] closely following the language in Article II(2) of the New York Convention.[201] However, such a strict form requirement provided grounds for parties to object to the jurisdiction of the arbitral tribunal. The increased use of interim measures in international arbitration practice also made it necessary to formulate more detailed provisions in the Model Arbitration Law. [202]

With the increased caseload of ICSID particularly since 2001[203] and the broadening of its jurisprudence, it became apparent that the ICSID Arbitration Rules needed to be amended to adequately meet the needs of ICSID's users.[204] Calls for greater efficiency and transparency expressed by

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[200] Article 7 (2) (Definition and form of arbitration agreement) of the 1985 version reads: "(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

[201] Article II(2) of the New York Convention reads: "The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

[202] Article 17 (Power of arbitral tribunal to order interim measures) of the 1985 version reads: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure."

[203] See World Bank, The ICSID caseload statistics (No. 2016-1), World Bank Group (2016) available at http://documents.worldbank.org/curated/en/372121468186843932/The-ICSID-caseload-statistics.

[204] ICSID, Possible Improvements of the Framework for ICSID Arbitration (Discussion Paper) (2004), para. 5 available at https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Arbitration-Rules.aspx. See also ICSID, Possible Improvements of the Framework for ICSID Arbitration, News from ICSID, Vol 21, No. 2 (2004) available at

practitioners and academics in papers and commentaries motivated the process, and subsequent changes were proposed to meet those needs and to reflect current practice of the tribunals and parties.

The revisions to the UNCITRAL Arbitration Rules,[205] initially adopted in 1976, aimed at reflecting changes in arbitral practice and enhancing the efficiency of arbitration, without altering the original structure of the text, its spirit or drafting style.[206] Upon engaging in its work, the Working Group agreed that the focus of the revision should be updating the 1976 version to meet the changes that have occurred over the previous 30 years in arbitral practice.[207]

Providing an expedited procedure seeking to achieve efficiency and economy of international arbitration and following the path of other arbitral institutions with a similar mechanism[208] (such as SIAC, HKIAC, SCC,

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http://documents.worldbank.org/curated/en/968951468139207338/News-from-ICSID-Vol-21-No-2.

[205] The revision of the 1976 UNCITRAL Arbitration Rules was proposed as a topic for future work by the Commission at its thirty-sixth session in 2003 (see Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17), para. 204). It continued to be mentioned as possible future work by both the Commission and the Working Group. Both support and hesitations were expressed during the discussion.

[206] See generally, Corinne Montineri, The UNCITRAL arbitration rules and their use in ad hoc arbitration in Giuditta Cordero-Moss (ed.), INTERNATIONAL COMMERCIAL ARBITRATION: DIFFERENT FORMS AND THEIR FEATURES, Cambridge University Press (2013).

[207] UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session (A/CN.9/614), para. 16.

[208] The ICC Court has been active in exploring practical ways to reduce time and cost of international commercial arbitrations, especially with regard to small claims. In 2001, the ICC Court formed a Task Force (comprised of nearly 60 representatives from different countries), which published the ICC Court's Guidelines for Arbitrating Small Claims under the ICC Arbitration Rules in March 2003 (For the deliberations at the task force, see Louise Barrington, ICC's New Guidelines for Arbitrating "Small" Claims – A view from behind the scenes in a global task force, LAWASIA Update (May 2003), p.11). The Guidelines were elaborated as a list of suggestions and were intended to assist the parties who seek to rationalize or to reduce cost and time. During the revision of the ICC Arbitration Rules in 2012, it was debated whether

ACICA, ICDR and DIS) were the two motives behind the 2017 ICC Arbitration Rules.[209] The 2017 ICC Arbitration Rules introduce an expedited procedure and the Expedited Procedure Rules (Appendix VI to the ICAA) and the arbitration procedure is further streamlined.[210] Another key improvement relates to parties' request to the ICC Court to provide reasons for its decisions on the appointment, confirmation, challenge or replacement of an arbitrator, which will further enhance the transparency and clarity of the arbitration process. Withholding the reasons behind these types of decisions was subject of criticism, given the seriousness of such challenges for the parties and tribunal involved.[211] In fact, in response to growing user demand, the ICC Court had announced in October 2015 that as a policy, it would communicate reasons for many of its administrative decisions.[212] Though not reflected in the 2017 ICC Arbitration Rules, the ICC Court has implemented various policy changes aimed at fostering transparency and efficiency, for example by publishing the names, nationality and the appointment procedure of the

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a special regime for small claims disputes should be introduced but the idea was not pursued. Instead, article 22 was revised, providing solutions also beneficial for small claim disputes.

[209] ICC, ICC Court amends its Rules to enhance transparency and efficiency (4 November 2016) available at https://iccwbo.org/media-wall/news-speeches/icc-court-amends-its-rules-to-enhance-transparency-and-efficiency/.

[210] See Annex, section I.

[211] See David Hacking, Challenges: Theirs is to Reason Why, GLOBAL ARBITRATION REVIEW, Vol. 1 Issue 6 (December 2006) and Margaret L. Moses, Reasoned Decisions in Arbitrator Challenges, III YEARBOOK ON INTERNATIONAL ARBITRATION 199 (2013) available at https://ssrn.com/abstract=2114551.

[212] It was under the condition that all the parties to a case so agreed. ICC, ICC Court to communicate reasons as a new service to users (8 October 2015) available at https://iccwbo.org/media-wall/news-speeches/icc-court-to-communicate-reasons-as-a-new-service-to-users/.

arbitrators and imposing fee consequences for unjustified delays in submitting awards.[213]

Party representatives[214] in international arbitration may be subject to diverse and potentially conflicting bodies of domestic and international norms, for example, those of the party representative's home jurisdiction, of the place of arbitration and of the place where hearings take place.[215] The IBA Guidelines on Party Representation provide guidance on ethical standards applicable to such representatives.[216]

Article 12 of the Model Arbitration Law requires a person, when approached in connection with his possible appointment as an arbitrator, to disclose any circumstances likely to give rise to justifiable doubts as to his

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[213] See ICC, ICC Court announces new policies to foster transparency and ensure greater efficiency (5 January 2016) available at https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/.

[214] Party representatives are defined as any person, including a party's employee, who appears in an arbitration on behalf of a party and makes submissions, arguments or representations to the arbitral tribunal on behalf of such party, other than in the capacity as a witness or expert, and whether or not legally qualified or admitted to a domestic bar (see IBA Guidelines on Party Representation, p. 4).

[215] For a summary of the discussions and initiatives prior to the IBA Guidelines on Party Presentation, see Cummins, *supra* note 41, pp. 430-432 and 443-445. Some notable initiatives are the Checklists of Ethical Standards for Counsel in International Arbitration (see Cyrus Benson, Can Professional Ethics Wait? The Need for Transparency in International Arbitration, DISPUTE RESOLUTION INTERNATIONAL, Vol. 3, No.1 (March 2009), pp. 88-94) and the Hague Principles on Ethical Standards for Counsel appearing before International Courts and Tribunals prepared by a study group of the International Law Association (available at http://www.ucl.ac.uk/laws/cict/docs/Hague_Sept2010.pdf).

[216] See generally, Perter Ashford, THE IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION – A GUIDE, Cambridge University Press (2016). The IBA Guidelines on Party Representation are inspired by the principle that "party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings (see IBA Guidelines on Party Representation, preamble). In 2011, the IBA had adopted the International Principles on Conduct for Legal Profession.

impartiality or independence.[217] This requirement is found in a number of national arbitration laws and in a wide range of arbitration rules. However, arbitrators are often unsure about the scope of their disclosure obligations. Similarly, parties, arbitral institutions and courts face complex decisions about information that arbitrators should disclose and the standards to apply to such disclosures.[218] In that context, the IBA Guidelines on Conflicts addresses the increasing use of advance declarations by arbitrators and the significance of arbitral secretaries and third-party funders.[219]

The paragraphs above illustrate the importance of input from practitioners into norm-making cycle. Rather than being top-down, norms are being developed bottom-up with legal professionals providing the impetus for the norm-making. It has been hinted that the driving force behind norm-making is a global arbitration community[220] and borrowing the words of legal theorists, an "epistemic" community.

As defined by Haas, an epistemic community (a transnational network) is a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge

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[217] It further provides that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. See also articles 11 and 12 of the 2010 UNCITRAL Arbitration Rules.

[218] IBA Guidelines on Conflicts, Introduction, p. 1.

[219] See generally, Khaled Moyeed, Clare Montgomery and Neal Pal, A Guide to IBA's Revised Guidelines on Conflicts of Interest, Kluwer Arbitration Blog (29 January 2015) available at http://kluwerarbitrationblog.com/2015/01/29/a-guide-to-the-ibas-revised-guidelines-on-conflicts-of-interest/.

[220] Kaufmann, *supra* note 9, p. 13 and Katherine Lynch, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law International (2003).

within that domain or issue-area.[221] Members of epistemic communities not only hold in common a set of principles and causal beliefs but also have shared notions of validity and a shared policy enterprise.[222]

However, as Haas noted, demonstrating the impact of epistemic communities is painstaking.[223] It involves identifying community membership, determining the community members' principled and causal beliefs, tracing their activities and demonstrating their influence on decision makers at various points in time, identifying alternative credible outcomes that were foreclosed and exploring alternative explanations for the actions of decision makers.[224]

One cannot deny the existence of a transnational global community of individuals devoted to international arbitration, which is constantly reinforced through what Gaillard referred to as "rituals including periodic mass gathering."[225] While there is diversity in their beliefs, interests and practices, these individuals constitute an epistemic community with knowledge and

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[221] Peter M. Haas, Epistemic Communities and International Policy Coordination, INTERNATIONAL ORGANIZATION, Vol. 46, No. 1 (Winter, 1992), pp. 1-35.
[222] *Ibid*., p. 3. Although an epistemic community may consist of professionals from a variety of disciplines and backgrounds, they have (i) a shared set of normative and principled beliefs, which provide a value-based rationale for the social action of community members; (ii) shared causal beliefs, which are derived from their analysis of practices leading or contributing to a central set of problems in their domain and which then serve as the basis for elucidating the multiple linkages between possible policy actions and desired outcomes; (iii) shared notions of validity that is, intersubjective, internally defined criteria for weighing and validating knowledge in the domain of their expertise; and (iv) a common policy enterprise – that is, a set of common practices associated with a set of problems to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a consequence.
[223] Ibid., p. 34.
[224] Ibid.
[225] Emmanuel Gaillard, Sociology of International Arbitration, ARBITRATION INTERNATIONAL, Vol. 31, Issue 1 (2015), pp.12-13.

competence as well as a shared belief that international arbitration is an effective method of resolving cross-border disputes. The community is composed of individuals devoted to building a system of coherence and authority of international arbitration, both of which allows the governance of international arbitration as a community.

Calls for norm-making by this epistemic community are reflected in articles, books and other publications on existing norms or their non-existence[226] and are discussed in numerous conferences around the world. Decisions by courts and arbitral tribunals stimulate discussion among scholars and practitioners, which have recently been facilitated further through the use of information and communication technologies. Blogs, e-mail lists and social media with a specific focus on international arbitration have gained influence, with almost real-time responses by commentators.[227]

It is a difficult task to verify when norm-making begins or what initiates norm-making. However, it is said that process leading to the 2006 Amendments and the Recommendation began as a result of the New York Convention Day (10 June 1998) to celebrate the fortieth anniversary of the

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[226] For example, the Redfern Schedule is a collaborative document which seeks to facilitate the discovery process. It is a tabular document logging requests for disclosure of documents in a convenient manner by setting out: (i) a description of the document being requested; (ii) the requesting party's justification for the request; (iii) the opposing party's reasons for refusing the request, if any; and (iv) the tribunal's decision on the request (see Blackaby, supra note 53]). The Sachs Protocol addresses a problem prevalent in complex disputes which is the difficulty that arbitrators face in discerning the credibility of evidence rendered by party-appointed experts. (see Klaus Sachs and Nils Schmidt-Ahrendts, Protocol on Expert Teaming: A New Approach to Expert Evidence in Albert Jan van den Berg (ed.), ARBITRATION ADVOCACY IN CHANGING TIMES, Kluwer Law International (2011), pp. 135-149).

[227] See for example, Kluwer Arbitration Blog (http://kluwerarbitrationblog.com/), Global Arbitration Review (http://globalarbitrationreview.com/) and OGEMID (https://www.transnational-dispute-management.com/ogemid/).

New York Convention.[228] On that occasion, leading arbitration experts presented papers relating to the significance of the New York Convention, including its promotion, enactment and application, as well as the interplay between the New York Convention and other international legal texts on international commercial arbitration.[229]

The call to update the 1976 UNCITRAL Arbitration Rules was also raised by arbitration practitioners. As the year 2006 marked the thirtieth anniversary of the 1976 UNCITRAL Arbitration Rules, numerous conferences were organized in different regions to exchange information on the application and possible areas of revision to the 1976 version.[230] For example, suggestions made by practitioners during a conference held by the International Arbitral Centre of the Austrian Federal Economic Chamber to better align a number of articles with then current international arbitration practice and the relevant provisions of the 2006 Amendments were conveyed to UNCITRAL.[231] In the preparatory stage, a study was conducted by Jan

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[228] UNCITRAL held a special commemorative event during its thirty-first session (1-12 June 1998, New York) (see Official Records of the General Assembly, Fifty-third Session, Supplement No. 17 (A/53/17), paras. 257-259). The Secretary-General of the United Nations, Kofi Annan, delivered the opening speech (the text of the speech is available at http://www.un.org/press/en/1998/19980610.sgsm6593.html).

[229] See United Nations, ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS, Sales No. E. 99 V.2 (1999) available at https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf. Presentations by Neil Kaplan (New developments on written form), Jean-Louis Delvolvé (Third parties and the arbitration agreement), V.V. Veeder (Provisional and conservatory measures) Sergei N. Lebedev (Court assistance with interim measures) and Jan Paulsson (Awards set aside at the place of arbitration) during the session on enforceability of arbitration agreements and arbitral decisions formed the basis for future work discussion. *Ibid.* pp. 17-26.

[230] See Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17), para. 179.

[231] A brief overview of these suggestions was presented to UNCITRAL at its thirty-ninth session in 2006. UNCITRAL, Note by the Secretariat – Possible future work in the field of

Paulsson and Georgios Petrochilos to suggest possible revisions to the 1976 UNCITRAL Arbitration Rules.[232]

While the preparation of the Transparency Standards was a policy response to concerns from the public about investment arbitration, it was arbitration practitioners that pointed to the non-existence of relevant provisions in the UNCITRAL Arbitration Rules and a need for clear rules.

Overall, it can be said that a network of international arbitration experts played a key role in providing the initial input to norm-making through a process of "intellectual cross-fertilization."[233] While the role of the epistemic community may vary (for example, the IBA Guidelines are examples where the epistemic community functioned as norm-makers), its contribution to norm-making is another evidence of the increasing role of non-State actors (see chapter IV, section 1).[234] While some may even suggest a paradigm shift in norm-making from States to the international arbitration community, the cautious conclusion of this study is that the international arbitration epistemic community has a particularly important role to play in 'initiating' the norm-making. The caution is linked with the perception or misperception that the international arbitration community is relatively small

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settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules (A/CN.9/610/Add.1).

[232] Jan Paulsson and Georgios Petrochilos, Report - Revision of the UNCITRAL Arbitration Rules (September 2006) The Report was not an official document of UNCITRAL but was referred to in the deliberations leading to the revisions in 2010 and is mentioned in the travaux prepartoire. The report is available at http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2010Arbitration_rules_travaux.html.

[233] Kaufmann, *supra* note 9, p.13.

[234] On the role of arbitration epistemic community at UNCITRAL, see Stacie I. Strong, Clash of Cultures: Epistemic communities, Negotiation Theory and International Law Making at UNCITRA, 50 ARKON LAW REVIEW (2016).

and linked together rather closely, with members of the inner circle and outsiders referring to this group as a "mafia" or a "club."[235] The international investment arbitration industry is described as being dominated by a small and tight-knit Northern hemisphere-based community of law firms and elite arbitrators.[236] Such perceptions may lead to a misleading argument that it is through the formulation of norms that the arbitration mafia or elite maintains its power and control over international arbitration, which amplifies concerns about the legitimacy of international arbitration. The empirical survey of this study concludes that that is not the case.

3. Preparatory stage: desirability and feasibility

Once the need for norm-making is raised, it is brought to a forum for discussion. All of the norms surveyed were brought to an international organization. Subsequently, the secretariat or a small group of individuals is tasked with undertaking preliminary research. This preparatory stage, which tends to be quite informal, involves identifying issues, gathering ideas and suggestions, including information about existing norms and norm-making initiatives of other organizations. It also involves seeking preliminary views from relevant stakeholders including States, IGOs, NGOs and practitioners.

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[235] Yves Dezalay and Bryant Garth, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER, University of Chicago Press (1996), p. 10.
[236] Corporate Europe Observatory, PROFITING FROM INJUSTICE (2012), p.8.

For example, upon request from the Commission in 2008,[237] the UNCITRAL Secretariat undertook preliminary research and compiled information regarding current practices on transparency, including by circulating a questionnaire to States.[238] The responses by 28 States were provided to the Working Group when it embarked on the preparation of Transparency Rules in 2010.[239]

The questions of whether it is desirable, and whether it is feasible, to proceed with norm-making need to be addressed during this preparatory stage. Both questions of desirability and feasibility are closely linked with the support for norm-making (including during its substantive deliberations) and with the eventual acceptance of the resulting norm.

The first question of desirability addresses whether the identified practical needs justify the need for norm-making. This requires a careful analysis of the underlying problems that need to be addressed and whether a new or revision of the existing norm is the appropriate tool to address them. This entails a comprehensive study of the existing legal framework and its deficiency. In essence, desirability is a question of balancing of the needs and the status quo. Regardless of whether the aim is to address uncertainties, to

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[237] Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17), para. 314.

[238] The questionnaire was sent to States via note verbale on 31 July 2008. Questions raised related to examples of transparency in arbitral proceeding (including access to documents and hearings), amicus curiae briefs and other interventions and provisions in treaties regarding transparency and third party involvement.

[239] Responses were received from Algeria, Argentina, Armenia, Australia, Bahrain, Belarus, Canada, China, Chile, Czech Republic, Denmark, Dominican Republic, El Salvador, Finland, France, Germany, Greece, Iraq, Lebanon, Luxembourg, Mauritius, Norway, Poland, Russian Federation, Spain, Tunisia, Turkey and the United States of America. See UNCITRAL, Transparency in treaty-based investor-State arbitration - Compilation of comments by Governments (A/CN.9/WG.II/WP.159 and Add.1-4).

reflect changing arbitration practice or to adapt to technological developments, it is when there is a shared understanding for the need to embark on norm-making, and when it is expected that the resulting norm would not disrupt the legal certainty provided by the status quo, that norm-making would be considered desirable. While not applicable to all norms (in particular, arbitration rules), the existence of similar norm-making initiatives is an aspect to be considered, as it would generally not be desirable to have duplication of work and inconsistency among the resulting norms.

The second question of feasibility is related both to the content and the form of the norm. The question is not likely to arise when norm-making involves revisions to existing texts. However, in the context of UNCITRAL, the question of feasibility typically relates to whether consensus could be foreseen on the various approaches possible, including the final form. It is essential to consider such aspects in advance and prepare possible options for norm-making to be effective.

With respect to desirability and feasibility of norm-making, work conducted jointly by American Society of International Law (ASIL) and ICCA deserves mentioning. Mounting discussion and concerns regarding "issue conflict" led the then-presidents of ASIL [240] and ICCA [241] (Donald Francis Donovan and Jan Paulsson, respectively) to initiate a joint task force

[240] Founded in 1906, the American Society of International Law (ASIL) is a non-profit, non-partisan, educational membership organization. ASIL's mission is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. See https://www.asil.org/

[241] ICCA is a worldwide NGO devoted to promoting the use and improving the processes of arbitration, conciliation and other forms of resolving international disputes. See http://www.arbitration-icca.org/

composed of members of the two organizations. There had been a rise in challenges to arbitrators based on allegations of issue conflict, but the topic remained under-examined.[242] The mission of the Task Force was to evaluate and report on issue conflicts in investor-state arbitration and to make recommendations on best practices.

The Task Force was co-chaired by Laurence Boisson de Chazournes and John R. Crook and 12 other experts.[243] All participants were engaged in the practice or the study of international dispute settlement.[244] The co-chairs with the assistance of the rapporteurs, prepared a draft of the report to be circulated for comments and suggestions by Task Force members. [245] In

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[242] ASIL-ICCA Task Force Report on Issue Conflicts in Investor-State Arbitration, ICCA Reports No. 3 (17 March 2016) available at http://www.arbitration-icca.org/publications/ASIL-ICCA_Report.html.. p. 8 citing the ASIL President Donald Donovan's letter of October 2013. The letter also provides specific issues to be addressed by the Task Force and further notes that the topic is an especially compelling one not simply for its practical import, but because its examination will require the Task Force to consider the fundamentals of the investor-state arbitration system itself.

[243] Stanimir Alexandrov, Brooks Daly, Joan Donoghue, Marcelo Ferro, Dominique Hascher, Andrés Jana, Jean Kalicki, Gabrielle Kaufmann-Kohler, Meg Kinnear, Marc Lalonde, Sundaresh Menon and Hi-Taek Shin. Three others were part of the task force *ex officio (*Donald Francis Donovan, Jan Paulsson and Albert Jan van den Berg) and three rapporteurs (Christian Leathley, Ina C. Popova and Ruth Teitelbaum) assisted the process. The rapporteurs collected and reviewed existing cases and literature and a detailed questionnaire was circulated to Task Force Members, eliciting thoughtful anonymous responses from all Members in November 2013.

[244] The co-chairs held academic positions in Switzerland and in the United States also with practice in international dispute settlement. Although it is difficult to make a clear distinction, approximately half of the twelve Task Force members were arbitration practitioners (some also with academic positions) with the other half holding positions at the ICJ, national courts, PCA and ICSID. The Task Force members held positions, practiced or were from the Brazil, Canada, Chile, France, Republic of Korea, Singapore, Switzerland and the United States.

[245] Upon its establishment in November 2013, the Task Force carried out its work with the support of staff at ICCA and at ASIL's Howard M. Holtzmann Research Center for the Study of International Arbitration and Conciliation. Information about the Howard M. Holtzmann Research Center for the Study of International Arbitration and Conciliation is available at https://www.asil.org/resources/howard-m-holtzmann-research-center-study-international-arbitration-and-conciliation. The Task Force held an initial meeting and discussion in February

March 2015, a discussion draft was published on the ICCA and ASIL websites for public comment.[246] The draft Report was revised taking into account comments received and further consultation with the Task Force members. After two and a half year of work, the ASIL-ICCA Task Force Report on Issue Conflicts in Investor-State Arbitration (the "ASIL-ICCA Report on Issue Conflicts") was published on 17 March 2016.[247] Taking note of the recent cases where challenges to disqualify arbitrators based on grounds of "issue conflicts" were upheld,[248] and in the context of growing concerns about investment arbitration, the ASIL-ICCA Report on Issue Conflicts analyzed the contours and significance of "issue conflicts" in investment arbitration. The underlying question of the Report is whether one can or should attempt to define distinctions between forms of predisposition that are unobjectionable and those offering reasonable grounds for concern.[249]

The Report recognizes the difficulties in defining the term "issue conflicts" and also recognizes that there was no consensus, in the Task Force,

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2014 (Washington D.C.). The co-chairs led briefings on the work of the Task Force and informative discussions of key issues at the 2014 ICCA Congress (6-9 April 2014, Miami) and at the Joint ASIL-ILA Meeting in April 2014 (Washington, D.C.). Reports of the meeting are available at http://www.arbitration-icca.org/projects/Issue_Conflict.html.

[246] The discussion draft is available at http://www.arbitration-icca.org/media/2/14260745308760/discussion_draft_-_10_march_2015-3.pdf

[247] Ibid.

[248] The following are some notable cases cited in the ASIL-ICCA Report on Issue Conflicts: (i) CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India, UNCITRAL, Decision on the Respondent's Challenge to the Hon. Mark Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator (Sept. 30, 2013); (ii) Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (Mar. 20, 2014); and (iii) Blue Bank International & Trust (Barbados) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Decision on the Challenge to José Maria Alonso (Nov. 12, 2013).

[249] ASIL-ICCA Report on Issue Conflicts, p. 61.

among practitioners, or among scholars and commentators, regarding the definition.[250] The Report concludes with three recommendations: (i) that formal "bright line" rules regulating inappropriate prejudgment are unnecessary and would be counterproductive; (ii) that the limited number of reasoned challenge decisions that are publicly available is a significant obstacle to further analysis; and (iii) that the boundary marking the contours of inappropriate prejudgment becomes clearer over time, difficulties will likely remain in practice stemming from the timing of both disclosures and challenges.[251] In short, the Report concludes that it would not be desirable nor feasible to proceed with the norm-making in this area.[252]

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[250] *Ibid.*, p. 6. The Report also discusses the underlying tension between party autonomy to select arbitrators and the expectations that an award would be rendered by an impartial arbitrator. The Report seeks guidance from existing rules and principles *(Ibid.*, pp. 14-21. Reference is made to the United Nations Basic Principles on the Independence of the Judiciary, Burgh House Principles on the Independence of the International Judiciary, the Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals, the UNCITRAL Arbitration Rules and the ICSID Convention, AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes and the IBA Guidelines on Conflicts) as well as rules and case law of international courts and tribunals (*Ibid*., pp. 21-34). Most importantly, the Report provides a review of and draws insights from challenge decisions in investor-State cases (*Ibid.*, pp. 34-60)

[251] *Ibid.*, pp. 64-67.

[252] For example, with respect to counsel ethics, the Swiss Arbitration Association ("ASA"), in September 2014, had proposed the creation of a transnational body, the Global Arbitration Ethics Council, to which matters of alleged unethical conduct would be referred (available at http://www.arbitration-ch.org/en/asa/asa-news/details/979.asa-proposes-global-arbitration-ethics-counsel-to-apply-and-enforce-ethical-principles.html). This entity was to provide a solution to a global problem and overcome one of the main criticisms levelled against both the IBA Guidelines on Party Representation and the 2014 Arbitration Rules of the London Court of International Arbitration (the "LCIA Rules") and their Annex, namely that they place on arbitrators responsibilities for ethical issues that are alien to the arbitration process (The report of an informal working group on the topic (27 November 2015) is available at http://www.arbitration-ch.org/en/asa/asa-news/details/983.statement-on-the-global-arbitration-ethics-council-discussions.html). On 3 October 2016, the ASA working group on counsel ethics in arbitration concluded that the creation of the Global Arbitration Ethics Council was an idea whose time has not yet come (Available at http://www.arbitration-ch.org/en/asa/asa-news/details/993.asa-working-group-on-counsel-ethics-releases-latest-findings.html).

To the contrary, norms surveyed in this chapter were formulated or revised because there was a conviction that norm-making was desirable and feasible.

With regard to the possible amendments to the Model Arbitration Law, the UNCITRAL Secretariat prepared a note in 1999 addressing the issues and problems identified in arbitral practice.[253] Based on that note, the Commission considered that the time had come to assess the extensive and favourable experience with national enactments of the 1985 Model Arbitration Law as well as the use of the UNCITRAL Arbitration Rules and to evaluate, in the universal forum of the Commission, the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[254]

The process leading to the 2006 ICSID Arbitration Rules also provides a good example. On 22 October 2004, the ICSID Secretary-General[255] sent to the members of the Administrative Council an ICSID Secretariat Discussion Paper titled "Possible Improvements of the Framework for ICSID Arbitration," suggesting changes to the ICSID Arbitration Rules

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[253] The note entitled "Possible future work in the area of international commercial arbitration (A/CN.9/460)" drew on ideas and suggestions made in international conferences and forums, such as the New York Convention Day (*supra* note 228), the Congress of the International Council for Commercial Arbitration (ICCA) on "Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention" (3-6 May 1998, Paris) as well as selected articles. Notes prepared by the Secretariat had the heading of "Report of the Secretary General" until the thirty-fifth session of the Working Group (19-30 November 2001, Vienna), when the heading changed to "Note by the Secretariat."

[254] Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17), paras. 337, 340-379..

[255] Roberto Dañino (Peru) was the Secretary-General of ICSID from 2003 to 2006, during which he held positions as both the General Counsel of the World Bank and the Secretary-General of ICSID. This had been the case till the election of Meg Kinnear as Secretary-General in February 2009 (see Parra, *supra* note 81, p. 241-242).

and to the corresponding provisions of the Additional Facility Arbitration Rules.[256] The Discussion Paper also considered the possibility of establishing a mechanism for the appeal of awards in investment arbitrations within ICSID.[257] In addition to sending the Discussion Paper, the ICSID Secretariat sought comments from business and civil society groups [258] and from arbitration experts and institutions around the world. [259] Whereas the suggestions for changes to the ICSID Arbitration Rules and to the Additional Facility Arbitration Rules received favourable reactions (thus leading to the 2006 ICSID Arbitration Rules),[260] the possibility of establishing an appeals mechanism was considered premature, thus not feasible.[261]

Ten years after the 2006 ICSID AR, ICSID began work on further updating and modernizing the ICSID Rules and Regulations in October 2016. [262] The ICSID Secretariat launched the process by asking its 153 member

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[256] ICSID, *supra* note 204, p. 5-13.
[257] *Ibid.*, p. 14-16 and Annex (Possible features of an ICSID Appeals Facility).
[258] For example, see International Institute for Sustainable Development (IISD) comments available at http://www.iisd.org/pdf/2004/investment_icsid_response.pdf
[259] ICSID Secretariat, Suggested Changes to the ICSID Rules and Regulations (12 May 2005), para. 3 available at https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Arbitration-Rules.aspx.
[260] *Ibid.* para. 6.
[261] There was general agreement that the establishment of an appeals mechanism might be best done through a single ICSID mechanism rather than through separate mechanisms contained in different instruments. *Ibid.* para. 4. The Secretariat proposed to continue to study such issues to assist member countries when and if it decided to proceed towards the creation of an ICSID appeal mechanism.
[262] The overriding goals of the amendments are to modernize the rules based on case experience, to make the process increasingly time and cost effective while maintaining due process and a balance between investors and States and to make the procedure less paper-intensive and more environmentally friendly. Potential areas for amendment are appointment of arbitrators, code of conduct for arbitrators, challenge of Arbitrators, third party funding, consolidation, preliminary objections, discontinuance, awards and dissents, security for costs, allocation of costs, annulment and publication of decisions and ordersList of Topics for Potential ICSID Rule Amendment is available at

States for preliminary suggestions of topics or themes for possible amendments.[263] In January 2017, the ICSID Secretariat further invited others interested in the ICSID process to provide suggestions regarding potential amendments. [264] The ICSID Secretariat collected these comments and is preparing background papers on potential amendments.[265] ICSID hopes to publish these papers by early 2018 so that they can serve as the basis for consultation and next steps.[266] While the ICSID Convention amendments are not contemplated, ICSID plans to note areas governed by the Convention where change would have to be effected through an amendment of the Convention. This is a typical feasibility question, as it is generally considered difficult to amend the ICSID Convention.[267]

The Task Force on Counsel Ethics on International Arbitration (subsequently renamed the Task Force on Counsel Conduct in International Arbitration), established by the IBA's Arbitration Committee in 2008,[268] also

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https://icsid.worldbank.org/en/Documents/about/List%20of%20Topics%20for%20Potential%20ICSID%20Rule%20Amendment-ENG.pdf

[263] See ICSID, Updating ICSID Regulations and Rules available at https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/January%2017/Updating-ICSID-Regulations-and-Rules.aspx.

[264] See ICSID News Release, Invitation to File Suggestions for Rule Amendments available at https://icsid.worldbank.org/en/Pages/News.aspx?CID=213.

[265] ICSID, The ICSID Rules Amendment Process (April 2017), p.1 available at https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf

[266] ICSID also plans to highlight improvements that could be effected through a practice change rather than a rule amendment and mention specific choices that could be left to States. See supra note 265, p.3.

[267] In accordance with article 66(1) of the ICSID Convention, the ICSID Convention may only be amended by unanimous ratification of all Contracting States and the Convention has not been amended so far.

[268] The mandate of the Task Force was to focus on issues of counsel conduct and party representation in international arbitration that are subject to, or informed by, diverse and

tackled the desirability question. As an initial inquiry, it attempted to determine whether differing norms and practices on party representation may undermine the fundamental fairness and integrity of international arbitration and whether international guidelines on party representation may assist parties, counsel and arbitrators.[269] The Task Force held a number of meetings to develop initial views on the threshold question of whether ethical issues arise in such a manner or with sufficient frequency that they required to be considered further. These initial assessments suggested that further investigation was required. Therefore, in 2010, the Task Force commissioned an on-line survey to develop more comprehensive information about the impact of ethical constraints on arbitral proceedings, including by soliciting the arbitral community to identify specific cases where ethical issues arise in international arbitration.[270] The results of the survey revealed a high degree of uncertainty among respondents regarding what rules govern party representation in international arbitration and respondents expressed support

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potentially conflicting rules and norms. According to the survey conducted in 2010 by the Task Force (infra note 270), the Task Force was formed for the purpose of investigating the different and often contrasting ethical and cultural norms, standards and disciplinary rules that may apply to counsel in international arbitrations. The mandate of the Task Force focused on whether the lack of international guidelines and conflicting norms in counsel ethics undermines the fundamental protections of fairness and equality of treatment and the integrity of international arbitration proceedings. The wording is slightly different from mandate provided in the preamble of the IBA Guidelines on Party Representation It is also made clear that mandate of the Task Force does not include arbitrator conflicts of interest, which are addressed by the Conflicts of Interest Subcommittee.

[269] IBA Guidelines on Party Representation, Preamble, p. 9.

[270] IBA, IBA Task Force on Counsel Ethics in International Arbitration Survey, available at http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=610BBF6E-CF02-45AE-8C3A-70DFDB2274A5. The on-line survey is available at http://www.surveygizmo.com/s3/331908/IBA-Arbitration-Committee-Counsel-Ethics-in-International-Arbitration-Survey.

for the development of international guidelines.[271] This eventually led to the IBA Guideline on Party Representation.

On the eve of the tenth anniversary of the 2004 IBA Guidelines on Conflicts of Interest, it was considered appropriate to reflect on the accumulated experience and to identify areas of possible clarification or improvement.[272] Accordingly, the IBA Arbitration Committee initiated a review of the Guidelines, which was conducted by an expanded Conflicts of Interest Subcommittee representing diverse legal cultures and a range of perspectives, including counsel, arbitrators and arbitration users. The Subcommittee carefully considered a number of issues that received attention since 2004.[273] For example, the Subcommittee considered whether the revised Guidelines should impose stricter standards with regard to disclosure and concluded that while the basic approach of the 2004 Guidelines should not be altered, disclosure should be required in certain circumstances not contemplated in the 2004 Guidelines. This was an expression of the desirability to revise the revised IBA Guidelines on Conflicts.

[271] IBA Guidelines on Party Representation, Preamble, p. 9.
[272] The 2004 Guidelines included a statement that the IBA and the Working Group viewed the Guidelines as a beginning, rather than an end, of the process (2004 IBA Guidelines on Conflicts of Interest, p.5).
[273] Such as the effects of so-called 'advance waivers', whether the fact of acting concurrently as counsel and arbitrator in unrelated cases raising similar legal issues warrants disclosure, 'issue' conflicts, the independence and impartiality of arbitral or administrative secretaries and third party funding. IBA Guidelines on Conflicts of Interest, pp. ii–iii.

4. Substantive deliberations including drafting

When it is considered desirable and feasible to embark on norm-making, a decision is made to engage in substantive deliberations for norm-making. At this stage, the objective and possible scope of work as well as issues to be addressed were usually defined. The survey revealed that a Working Group (UNCITRAL), the Secretariat (ICSID), Task Forces and the Arbitration Committee (IBA), ICC Court and the Commission on Arbitration and ADR (ICC) were designated to engage in substantive deliberations. For the sake of efficiency, initial drafts of text to be considered were prepared by a secretariat or a smaller group of individuals (for example, chairs of the task forces).

As a technical point, deliberations on norm-making were conducted mostly in English. While the official languages of ICSID are English, French and Spanish, the revision process was conducted in English. It was only when the revision was completed that the norms were translated into other languages. In contrast, the deliberations at UNCITRAL were conducted in all six UN official languages (Arabic, Chinese, English, French, Russian and Spanish) with the relevant documentation and publications also available in those languages.[274]

With regard to the 2006 ICSID Arbitration Rules, elaborating on the feedback received on the Discussion Paper, the ICSID Secretariat issued a Working Paper on 12 May 2005.[275] The Working Paper contained drafts of

[274] UNCITRAL, A Guide to UNCITRAL (2013), p. 8. English and French are the working languages of the UN Secretariat.
[275] ICSID, Suggested Changes to the ICSID Rules and Regulation, Working Paper of the ICSID Secretariat (12 May 2015), para. 3 available at

the suggested changes to the ICSID Arbitration Rules and of the corresponding provisions of the Additional Facility Arbitration Rules.[276] As with the Discussion Paper, the Working Paper was published on the websites and calls for comments were made till 30 June 2005.[277] The ICSID Secretariat received and reviewed responses to the proposed amendments. The reactions of Administrative Council members were favourable with regard to the proposals for the mandatory publication of excerpts of awards, the expanded disclosure requirements for arbitrators and the fees of arbitrators, and the arbitrators' fees. The proposed access of third parties to proceedings and the expedited process for dismissal of claims elicited, however, received differing views.[278]

IBA Guidelines were prepared mostly in informal settings making use of different occasions where the task force members could get together. For example, the IBA Task Force on Counsel Conduct in International Arbitration prepared the draft IBA Guidelines on Party Representation after several meetings and submitted it to the IBA Arbitration Committee in October 2012. The IBA Arbitration Committee reviewed the draft guidelines and consulted with arbitration practitioners and arbitral institutions before submitting it to all members of the IBA Arbitration Committee for consideration.

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https://icsid.worldbank.org/en/Documents/resources/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf

[276] The Working Paper also contained a proposal to amend the Administrative and Financial Regulation concerning the fees of arbitrators. The texts of the proposed amendments were accompanied by explanatory notes giving the background and rationale for each proposed amendment. *Ibid.* pp. 6-13.

[277] See ICSID, "Possible Improvements of the Framework for ICSID Arbitration", News from ICSID, Vol. 22, No. 1 (2005) available at http://documents.worldbank.org/curated/en/668751468324270999/News-from-ICSID-22-1.

[278] Antonietti, *supra* note 194, p. 430.

As indicated in section 1, there is an imbalance of information on the substantive deliberations between those that took place at UNCITRAL and those that took place in other organizations, which may be due to the rather formal nature of the UNCITRAL process. In the following, this section looks more closely at the deliberations at UNCITRAL, where work was conducted at both the Commission and the Working Group level.

The Commission made the formal decisions to engage in norm-making based on the preliminary research by the secretariat, which may or may not have been accompanied by a proposal by a State. In so doing, it entrusted the work to a Working Group with a quite broadly defined mandate giving it discretion with regards to the implementation of the mandate.

For example, with regard to the 2006 Amendments and the Recommendation, the Commission entrusted the work to the Working Group on Arbitration [279] and decided that the priority items should be (i) conciliation, [280] (ii) requirement of written form for arbitration agreement

[279] In the early years of the Commission, it was assumed that working groups were created for a particular task and that they would be dissolved upon completion of that task. The names of the three working groups indicated a specific mandate given to that working group (see UNCITRAL, Notes by the Secretariat – Rules of procedure and methods of work (A/CN.9/638/Add.1), para. 28). The Working Group on International Contract Practices was renamed the Working Group on Arbitration. Following the decision by the Commission to have six instead of three working groups (see Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17), paras. 376-383 and 425), the Working Group on Arbitration was renamed Working Group II (Arbitration and Conciliation) from its forty-first session in 2004. The task of Working Group II in parentheses was changed to "dispute settlement" in 2016 (see Official Records of the General Assembly, Seventy-first Session, Supplement No. 17 (A/71/17), para. 351).

[280] As this section focuses on the process that led to the 2006 Amendments and the Recommendation, the following provides a brief summary of the process on the topic of conciliation. The Working Group had a preliminary discussion on issues to be considered at its thirty-second session (see UNCITRAL, Report of the Working Group on Arbitration on the work of its thirty-second session (A/CN.9/468), paras.18-59). During the thirty-third and thirty-

contained in Article 7(2) of the 1985 Model Arbitration Law and Article II(2) of the New York Convention (hereinafter, referred to simply as the "written form requirement"), (iii) enforceability of interim measures of protection (hereinafter, referred to simply as "interim measures") and (iv) enforceability of an award set aside in the State of origin.63/[281]

At its thirty-ninth session, in 2006, the Commission considered possible future work in the field of settlement of commercial disputes[282] and agreed that priority should be given to the revision of the 1976 UNCITRAL Arbitration Rules.[283] In recognition of that success and status of the Rules, the Commission stated that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit nor its drafting style, and should respect the flexibility of the text rather than make it more complex.[284]

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fourth sessions, the Working Group considered model legislative provisions on conciliation (see UNCITRAL, Report of the Working Group on Arbitration on the work of the thirty-third and thirty-fourth sessions, respectively (A/CN.9/485), paras. 78-106 and (A/CN.9/487), paras. 88-159). The thirty-fifth session of the Working Group was devoted entirely to those provisions, including the draft guide to enactment (see UNCITRAL, Report of the Working Group on Arbitration on the work of the thirty-fifth session (A/CN.9/506)). The Commission adopted the UNCITRAL Model Law on International Commercial Conciliation at its thirty-fifth session (17-28 June 2002, New York) (see Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 13-177).

[281] See *supra* note, para. 380. The Commission also discussed items such as arbitrability, sovereign immunity, consolidation of cases, confidentiality of information in arbitral proceedings, raising claims for purpose of set-off, decisions by truncated arbitral tribunals, liability of arbitrators, power of the arbitral tribunal to award interest, cost of arbitral proceeding and review and possible revision of the European Convention on International Commercial Arbitration (*Ibid.* paras. 339 and 351-379). Those topics were accorded lower priority and the Commission decided that the Working Group would decide on the time and manner of dealing with them (*Ibid.*, para. 380).

[282] UNCITRAL, Note by the Secretariat - Possible future work in the field of settlement of commercial disputes (A/CN.9/610 and Corr.1 and A/CN.9/610/Add.1).

[283] *Supra* note 185 (A/61/17), para. 184. For the discussion, see *Ibid.*, para. 182-187.

[284] *Supra* note 185, para. 184.

The Commission had provided the principle that should guide the norm-making process at the Working Group level.

As to the Transparency Standards, the Commission had agreed that the topic of transparency in investor-State treaty-based arbitration should be dealt with as a matter of priority immediately after the completion of the revision of the UNCITRAL Arbitration Rules. Upon completing the work in 2010, the Commission recalled its decision and entrusted Working Group II (Arbitration and Conciliation) with the task of preparing the Transparency Standards.[285]

During the substantive deliberations at the Working Group, the Commission took note of the progress made by the Working Group, reaffirmed the mandate given to the Working Group, provided necessary guidance and in certain instances, prioritized the work of the Working Group[286] including its timeframe.[287]

During the process leading to the 2006 Amendments, the Commission expressed the view that postponing the discussions regarding the written form requirement may be preferable.[288] The Commission, in 2003, noted that a

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[285] Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), para. 190.

[286] See, for example, Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17), para. 315; *Ibid*., Fifty-eighth Session, Supplement No. 17 (A/58/17), para. 203; *Ibid*., Fifty-ninth Session, Supplement No. 17 (A/59/17), para. 58; *supra* note *230* (A/60/17), para. 177.

[287] It has been the practice for the Commission to establish a timeframe for the completion of the project by its working group with flexibility, on the basis of the prevailing view that the quality should not be jeopardized by establishing an unrealistic deadline (see UNCITRAL, Note by the Secretariat – UNCITRAL rules of procedure and methods of work (A/CN.9/638/Add.1), para. 29).

[288] *Ibid.*, para. 183. In fact, the topic of written form requirement (both in the Model Law and in the New York Convention) was not considered by the Working Group until its forty-third

degree of priority should be given to the topic of interim measures and that the controversial issue of *ex parte* interim measures should not delay any progress.[289] In 2004, the Commission reiterated the view that *ex parte* interim measures, which remained to be a point of controversy, should not delay progress and expressed hope for a consensus at the Working Group.[290] The Commission, however, also provided delegations the opportunity to re-open discussions on matters to which consensus was obtained at the Working Group.[291] While such an opportunity ensured a genuine consensus, it resulted in delays.

During the process leading to the 2010 UNCITRAL Arbitration Rules, the Commission, in 2008, further provided guidance with respect to the need to preserve the generic nature of the Rules (that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves and that any work on investor-State disputes should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form).[292] With regard to a proposal raised at the Working Group aimed at expanding the role of the Secretary-General of the

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session (3-7 October 2005, Vienna), the penultimate Working Group session before the adoption by the Commission.

[289] Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17), para. 203. Accordingly, the following four Working Group sessions focused on interim measures.

[290] Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17), para. 58.

[291] Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17), para. 175.

[292] *Supra* note 237(A/63/17), para. 314.

PCA under the UNCITRAL Arbitration Rules at its forty-ninth session,[293] the Commission considered that the proposal would constitute not a mere technical adjustment, but a change in the nature of the Arbitration Rules, which would run contrary to the guiding principle set by the Commission.[294] It was said that PCA had been established to deal with disputes involving States and that expanding the role of the Secretary-General of the PCA would appear as favouring the PCA over other arbitral organizations, despite it having little experience in the area of private commercial disputes.[295] It was further emphasized that the UNCITRAL Arbitration Rules should not contain a default rule, to the effect that one institution would be singled out as the default appointing authority.[296] The Commission agreed to retain the existing mechanism on designating and appointing authorities under the 1976 version.[297]

With regard to the process leading to the Transparency Rules, the Commission confirmed in 2011 that the question of applicability of the legal standard on transparency to investment treaties concluded before the date of adoption of the rules was part of the mandate of the Working Group as it was

[293] UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session (A/CN.9/665), paras. 47-50.
[294] Official Records of the General Assembly, Sixty-fourth session, Supplement No. 17 (A/64/17), para. 294. See also *supra* note 284.
[295] *Ibid.* (A/64/17), para. 295.
[296] *Ibid.* para. 297
[297] *Ibid.* para. 293. The Commission agreed that the Secretary-General of the PCA should be mentioned in the 2010 UNCITRAL Arbitration Rules as one example of who could serve as appointing authority.

deemed a question of great practical interest, taking account of the high number of investment treaties currently in existence.[298]

Once assigned a topic, the Working Group is generally left to complete its substantive task without intervention from the Commission, unless it asks for guidance or requests the Commission to make certain decisions with respect to its work, such as clarification of the Working Group's mandate on a particular topic or approval of the policy settings of a particular text as mentioned above. The substantive deliberations took place at the Working Group, which held biannual sessions,[299] once in New York and once in Vienna. The deliberations were based on draft texts prepared by the Secretariat and in certain instances, drafting proposals made by States and international organizations (United States, Mexico and ICC for the 2006 Amendments and Switzerland for the 2010 UNCITRAL Arbitration Rules).[300] In carrying out its work, the Working Group requested information and input from States on certain issues to assist the Secretariat, engaged in reaching compromises and building consensus (particularly with regard to preliminary order and maintaining the generic nature of the UNCITRAL AR[301]) and coordinated with other Working Groups on relevant matters.[302]

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[298] Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17), para. 200. For the relevant discussion in the Working Group, UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (A/CN.9/717), paras. 42-46.

[299] The Working Group session were held during a period of two weeks from the thirty-second to thirty-fifth session. From the thirty-sixth session, the Working Group met for a one-week period instead.

[300] See *infra* note 449.

[301] UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session (A/CN.9/614), para. 20.., para. 18. The Working Group took note that the Rules had been easily adapted to be used in a wide variety of circumstances covering a broad

Considering that most of the norm-making were revisions to existing texts, questions about the final form were generally pre-determined or a non-issue. The issue arose in the context of the interpretative instrument on the New York Convention,[303] the rules on transparency and of the instrument which would allow States to retroactively apply the Transparency Standards.

For example, while differing views were expressed with regard to the form of the Transparency Rules, the Working Group agreed to proceed on the basis that the legal standard would be drafted in the form of clear rules.[304] This was a delicate compromise reached as delegations that had expressed a strong preference for guidelines (which would only apply where there was clear and specific reference to it), agreed to the formulation of clear rules rather than looser and more discursive guidelines in spirit of cooperation.[305]

In these instances, deliberations usually began on the substance of the text and decisions on the form were made in parallel or at a later stage. While such an approach did not pose problems, when the form has a direct impact on the substantive provisions of the norm, it would be preferable to decide on the form prior to the deliberations. It should also be noted that IBA used the term "guidelines" instead of "rules" to highlight its contractual.[306]

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range of disputes and that this quality should be retained. See UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session (A/CN.9/646), para. 69.

[302] *Supra* note 343.

[303] See *supra* note 321.

[304] UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (A/CN.9/717), para. 58.

[305] *Ibid.*, para. 26.

[306] See supra note

5. Finalization and adoption

Upon conclusion of the substantive deliberations, there is usually a phase of open consultations where inputs are received from the public in large about the final draft. In the case of UNCITRAL, the Secretariat is requested to prepare a final draft for circulation and comments are sought from States as well as IGOs and NGOs invited to the Commission session. For example, on the 2006 Amendments, comments were received from eight States.[307] On the 2010 UNCITRAL Arbitration Rules, nineteen States, [308] two inter-governmental organizations[309] and eight non-governmental organizations[310] submitted comments on the revised version of the Rules.[311] On the draft rules on transparency,[312] thirteen States responded with comments.[313] Prior to the session finalizing the Transparency Convention, Israel, Japan and the European Union submitted comments about the draft convention.[314]

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[307] Austria, Belgium, China, France, Germany, Guatemala, Italy and United Kingdom. See UNCITRAL, Comments received from Member States and international organizations (A/CN.9/609 and Add.1 to 6).

[308] Argentina, Belarus, Belgium, China, Colombia, Czech Republic, El Salvador, Greece, Indonesia, Laos, Lebanon, Malaysia, Mexico, Netherlands, Norway, Philippines, Senegal, Slovenia and the United States

[309] PCA and the World Bank.

[310] American Bar Association (ABA), Arab Association for International Arbitration (AAIA) Association of the Bar of the City of New York, Comité Français de l'Arbitrage, Corporate Counsel International Arbitration Group (CCIAG), Council of Bars and Law Societies of Europe (CCBE), Forum for International Conciliation and Arbitration (FICACIC), International Bar Association (IBA) and the Milan Club of Arbitrators see A/CN.9/704 and Add.1 to 10.

[311] The comments submitted are contained in UNCITRAL, Compilation of comments by Governments and international organizations (A/CN.9/704 and Add.1 to 10).

[312] UNCITRAL, Note by the Secretariat (A/CN.9/783).

[313] Canada Colombia Dominican Republic, El Salvador, Germany, Japan, Kenya, Liberia, Qatar, Russian Federation, Singapore, Slovakia and United States of America submitted comments (see UNCITRAL, Draft UNCITRAL rules on transparency in treaty-based investor-State arbitration (A/CN.9/787 and Add. 1 to 3)).

[314] A/CN.9/813 and 813 Add. 1

ICSID and ICC also had a stage of public consultation at the final stages. Views of leading arbitral institutions, corporate counsel and other persons involved in international arbitration were sought with regard to the proposed drafts of the IBA Guidelines and public consultations also took place during IBA meetings.[315]

The finalization or formal adoption of the norm is done by the governing body of the international organization: The Commission or the General Assembly (UNCITRAL), the ICSID Administrative Council, [316] IBA Council[317] and the ICC Executive Board.

Finalization and adoption by the governing body enhances the legitimacy of the norm-making process as it usually entails a larger group of actors and is conducted through a formal procedure respectively required in the international organization. The governing bodies usually have a mechanism to monitor the progress and to be engaged during the substantive deliberations (for example, through *ex officio* positions). The following

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[315] IBA Guidelines on Conflicts of Interest, p. 2.

[316] In addition to this norm-making function, the Administrative Council carries out other overarching functions such as approving arrangements for the use of the World Bank's administrative facilities and services, electing the ICSID Secretary-General and of any Deputy Secretary-General and approving the annual budget and report of ICSID. Article 6 of the ICSID Convention and information on the ICSID website https://icsid.worldbank.org/en/Pages/about/Administrative-Council.aspx.

[317] After two years of work, the 2014 IBA Guidelines on Conflicts were adopted by resolution of the IBA Council on 23 October 2014.
The council's membership comprises up to two representatives (IBA Councillors) of each Member Organisation, the present and immediate past IBA Officers, the three senior Officers of each Division and their immediate past Chairs, Deputy Secretary Generals (DSGs), Chairs of all the IBA Standing Committees, Honorary life members and Honorary Life Presidents. The Council meets twice each year, once during the IBA mid-year meetings and again during the IBA Annual Conference in September/ October of each year. Additional information about the IBA Council is available at http://www.ibanet.org/About_the_IBA/IBA_council.aspx.

provides an illustration of the final stages of the norm-making by the governing bodies.

At the session adopting the 2006 Amendments,[318] the Commission made decisions on the presentation of the text[319] and also agreed that the Secretariat should prepare a draft supplementary document to guide the revised Model Arbitration Law for national legislators and other users, which could further foster harmonization.[320] As to the declaration on the interpretation of Articles II(2) and VII(1) of the New York Convention, questions were raised as to whether it would be appropriate for the Commission to issue a declaration on the interpretation of a multilateral treaty. Recalling its mandate to promote "ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade," the Commission concluded that issuing a Recommendation, that was persuasive rather than binding in nature, would be more appropriate.[321]

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[318] Arbitration-related topics were considered from 26 to 28 June 2006 and the report containing a summary of the discussions and the decisions made by the Commission were adopted on 30 June and 7 July 2006. UNCITRAL, Summary Records of the 821st to 827th and the 835th meetings (A/CN.9/SR.821-827 and 835). In total, it took only eight meetings (or half-day sessions), as many of the contentious issues had already been resolved at the Working Group level.

[319] During the adoption of the report on 7 July, it was decided that the provision on interim measures should be presented as Article 17 followed by Articles 17A to 17J to make it user-friendly. (*Ibid.* (A/CN.9/SR. 835), paras. 37-46.) The Commission also decided to present both options of the revised draft Article 7. (*Supra* note 185, paras. 168-170.)

[320] *Ibid.*, para. 176. The 1985 Model Arbitration Law contained an explanatory note providing a background of the Model Arbitration Law and its salient features.

[321] *Ibid.*, paras. 178-180. It was stated that a recommendation would be of benefit to users of the treaty, including law-makers, arbitrators, judges and commercial parties and that it would encourage the development of rules favouring the validity of arbitration agreements and encourage States to adopt the revised version of Article 7 of the Model Arbitration Law.

With respect to the 2006 amendments to ICSID Arbitration Rules, the Secretariat finalized the suggested amendments based on feedback received during consultations and a number of meetings with arbitration experts. The proposed amended texts were transmitted to the members of the Administrative Council, together with a draft resolution for the approval of the amendments on 17 November 2005.[322] The adoption of an amendment to the ICSID Regulations and Rules requires a resolution of the ICSID Administrative Council, taken by a positive vote of two-thirds of its members.[323] After almost two years of consultations, the 2006 Amendments were approved by Resolution AC/C/RES2006[324] through a written vote by the Administrative Council members,[325] and the 2006 ICSID Arbitration Rules came into effect on 10 April 2006.[326]

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[322] The members were invited to vote by mail on the proposal by 10 January 2006, which was later extended to 24 February 2006. *Ibid.* Article 7 (3) of the ICSID Convention reads: "The Administrative Council may establish, by a majority of two-thirds of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure." See also ICSID Administrative and Financial Regulation 7 (3).

[323] Article 6(1) of the ICSID Convention. In comparison, an amendment to the Additional Facility Rules requires a resolution by a simple majority vote, like many other decisions by the Administrative Council. Administrative and Financial Regulation 7(1) reads: "Except as otherwise specifically provided in the Convention, all decisions of the Administrative Council shall be taken by a majority of the votes cast …" Resolutions of the Administrative Council are published in the Annual Report of ICSID. Cannot find AC/C/RES2006 in the 2006 ICSID Report.

[324] Not available publicly. See Parra, *supra* note 81, p. 256.

[325] The necessary majority was obtained on 5 April 2006.

[326] This is the date the date on which the Secretary-General certified the adoption of the Resolution. The amended Rules and Regulations apply to proceedings for which consent was given after their entry into force. Pursuant to Article 44 of the ICSID Convention, arbitration proceedings are to be conducted in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration.

At the session adopting the 2010 UNCITRAL Arbitration Rules,[327] the Commission focused its discussion on articles which have not been fully discussed or where consensus has not been achieved at the Working Group.[328] The Commission established a Committee of the Whole to consider the matter, which was chaired by Michael Schneider in his personal capacity.

As a multilateral convention, the draft Transparency Convention was finalized by the Commission[329] and submitted to the General Assembly.[330] Delegations of the Sixth Committee of the United Nations General Assembly welcomed the approval by the Commission of the draft convention as constituting an important addition to the investor-State dispute resolution framework.[331] Regret was nevertheless also expressed on the inclusion of an

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[327] The Commission considered the revision of the Arbitration Rules from 21 to 25 June 2010 during ten meetings (or half-day sessions) and the relevant portions of the report were adopted on the last day (25 June 2010)..UNCITRAL Summary Records of the 901st to 910th meeting (A/CN.9/SR.901-910).

[328] draft Article 2 on notice and calculation of time, (*Supra* note 285 (A/65/17), paras. 17-28. draft Article 6 on designating and appointing authorities, *Ibid.* paras. 42-51. The Commission agreed that the Secretary-General of the PCA should be mentioned in the 2010 UNCITRAL Arbitration Rules as one example of who could serve as appointing authority. draft Article 34(2) on possible waiver *Ibid.*, paras. 141-151. draft Article 41(4) on cost review *Ibid.*, paras. 168-174.

[329] Officials Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17), paras. 13-105. The deliberations were based on A/CN.9/812. The Commission held four meetings (or half-day sessions) from 7 to 8 July to consider the draft convention. Summary records (A/CN.9/984 – 987)) and relevant portions of the report were adopted on 9 July 2014. Summary records (A/CN.9/988 – 989)

[330] The Commission recommend that the General Assembly to consider the draft convention with a view to: (a) adopting the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration; (b) authorizing a signing ceremony to be held on 17 March 2015 in Port Louis, Mauritius, upon which the Convention would be open for signature; and (c) recommending that the Convention be known as the "Mauritius Convention on Transparency" in English and "La Convention de l'Ile Maurice sur la Transparence" in French. See *supra* note 329 (A/69/17), paras. 106.

[331] While many comprehensive multilateral reforms are slow to progress, the Mauritius Convention has relatively quickly resulted in a consented text by focusing on a clearly defined and narrow, but no less important issue. Its exclusive focus on a single issue (transparency and

"opt-out" instead of an "opt-in" provision in the draft convention. Resolution 69/116 was eventually adopted by the General Assembly on 10 December 2014 at the 68th plenary meeting of the General Assembly without a vote.[332]

6. Norm-making through consensus

This section a takes a closer look at the notion of consensus in norm-making. Allowing for diverse views to be presented on equal terms, consensus is a touchstone of norm-making in most international organizations, including UNCITRAL. Consensus-building generally contributes to the development of a "commonly acceptable solution" and reflects the genuine notion of a transnational legal process. This section looks at how consensus operates within the realm of UNCITRAL.

At its first session, in 1968, the Commission agreed that its decisions should as far as possible be reached by way of consensus, but in the absence of a consensus, decisions should be made by a vote as provided for in the relevant rules of procedure of the General Assembly.[333] The agreement of the

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third-party participation) prevented cross-deals with other issues on the reform agenda and helped to streamline negotiations. See Stephan W. Schill, The Mauritius Convention on Transparency A Piece of Constitutional Reform of the International Investment Regime, THE JOURNAL OF WORLD INVESTMENT & TRADE, Volume 16, Issue 2.

[332] The Generally Assembly called upon governments and regional economic integration organizations that wished to make the UNCITRAL Transparency Rules applicable to arbitrations under their existing investment treaties to consider becoming a party to the Convention. It further authorized a ceremony for the opening for signature of the Convention in Port Louis on 17 March 2015.[332] Sam Kahamba Kutesa (Uganda) was the President of the 69th session of the General Assembly.The theme of the 69th session was "Delivering on and implementing a transformative post-2015 development agenda". Resolution available at http://www.un.org/en/ga/69/resolutions.shtml

[333] Official records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), paras. 18, 35, 40 V and 44. In this regard, the conspicuous lack of formal voting at

Commission to take decisions as a general rule by consensus was hailed by representatives of the General Assembly as a method conducive to achieving a larger cooperation among States with different legal, economic and social systems, and one that would ensure that the uniform rules elaborated by UNCITRAL were generally acceptable.[334] This also corresponds to Franck's statement that international norms developed through "discursive synthesis", that is, the interaction of many different legal traditions and principles, are always "more likely to be implemented in national legal systems and less likely to be disobeyed on the international level."[335]

Consensus is generally understood to mean adoption of a decision without formal objection and vote.[336] This is possible only when no delegation formally objects to a consensus being recorded, though some delegations may have reservations to the substantive matter at issue or a part thereof. Those dissenting from the general trend are prepared simply to make their position or reservation known and placed on the record. Thus a reservation made

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UNCITRAL is telling. A formal vote has been taken at UNCITRAL only once, at the Commission's eleventh session in 1978, in relation to the possible transfer of International Trade Law Branch (which serves as the Secretariat of the Commission) from New York to Vienna (See Official records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17), paras. 97 and 101-102).

[334] UNCITRAL, Note by the Secretariat - UNCITRAL rules of procedure and methods of work (A/CN.9/638/Add.4), para. 7.

[335] Thomas M. Franck, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS, Oxford University Press (1995), p.481.

[336] The United Nations Office of Legal Affairs, in its legal opinions on the subject, has repeatedly noted that there was no definitive or authoritative interpretation of the notion consensus. It has also noted that nevertheless, it has been the long-established and common practice in the General Assembly, its Committees, subsidiary organs and plenipotentiary conferences convened under United Nations auspices to operate on the basis of consensus. See for example, United Nations, UNITED NATIONS JURIDICAL YEARBOOK 1974 (Sales No. E.76.V.1), pp. 163-164; and United Nations, UNITED NATIONS JURIDICAL YEARBOOK 1987 (Sales No. E.96.V.6), p. 174.

formally at the time of decision-making, while indicative of a qualified assent, does not prevent the adoption of the consensus text in question. Definitions of consensus are found in the rules of procedure of some United Nations organs.[337] Some organs refer to decision-making "without a vote"[338] or other terms having the same legal and practical effect.[339]

Yet consensus is a form of decision-making that lends itself to debate. Both at the Sixth Committee discussions at the inception of UNCITRAL, and still today, it is not unusual for delegations to state that consensus should not be reached at all costs, and that nor should its purpose be to satisfy a "dissident minority". Consensus-making process may lead to the exclusion of important issues on which consensus cannot be achieved, or worse still, be conducive to reliance on compromise language that leaves an issue either unresolved or muddier than before.[340] Decisions taken by consensus are sometimes are also said to result the in "lowest common denominator" of the positions of the participants.[341] It has also been stated that it is perhaps best to have consensus made the preferred method rather than the only method of

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[337] See for example, the United Nations Convention on the Law of the Sea (1982), article 161 (7) (e). Consensus is defined as "the absence of any formal objection" and a procedure to achieve consensus is set out.

[338] See for example, the Rules of Procedure of the Economic and Social Council (E/5715/Rev.2), Rule 59.

[339] Some organs use these terms interchangeably. In other organs, including in the Sixth Committee of the General Assembly, a distinction has been drawn between adoption of a decision "without a vote" and "by consensus" (see e.g., A/C.6/41/SR.35, para. 6).

[340] Susan Block-Lieb and Terence Halliday, Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law, TEXAS INTERNATIONAL LAW JOURNAL, Vol. 42 (2007), p. 479.

[341] UNCITRAL, Note by the Secretariat - Rules of Procedure and Methods of Work (A/CN.9/638/Add.4), para. 24.

taking decisions, since if consensus is the only method, any one participant can "hold the others to ransom."

Language recording a spirit of cooperation or compromise is often a deliberate nod to concessions made in achieving consensus. During the preparation of the Transparency Convention, the number of State parties required for the convention to enter into force was the subject of divergent views. After much discussion, the number settled upon was three. At the request of a delegation advocating a higher number, the report of the Commission acknowledges the "goodwill of delegations in arriving at that consensus."[342]

Consensus may be obtained at the Working Group level but is obtained usually at the end of the deliberations whereby States, as well as invited IGOs and NGOs, together debate, negotiate and consult, to achieve a universally accepted standard. This feat of political and legal diplomacy comprises not only an outcome, but indeed a process that contributes to the acceptance of the resulting norm. While one may take acceptance for granted, it is facilitated when consensus-building that provides a foundation of legitimacy in the process leading to the norms.

For example, during the deliberation on the 2006 Amendments, there was a wide divergence of views on preliminary orders. After a heated debate during many Working Group sessions, a compromise was reached that the provision on preliminary order would apply unless otherwise agreed by the

[342] UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-ninth session (A/CN.9/794), para. 174.

parties, that it should be made clear that preliminary orders were procedural orders in nature and not awards, and that no enforcement procedure would be provided for such orders.[343]

This section has discussed the notion of consensus within the context of UNCITRAL, but the survey indicates that norm-making in international arbitration has generally been conducted through consensus-building. It is unlikely that a norm that was adopted by a majority vote would be widely accepted in arbitration practice, as the minority views expressed during the norm-making are an indication of the possible hesitance in acceptance. This is why it is important for norm-making to be a consensus-building exercise, where the diverse perspectives are fully taken into account.

[343] *Ibid.*, para. 27. During the forty-first and forty-second sessions, the Working Group considered and expressed support for the possible inclusion of a reference to the New York Convention in a draft convention being prepared by Working Group IV (Electronic Commerce), as it would provide clarity to the writing requirements in the New York Convention. *Supra* note (A/CN.9/569), paras. 73-79 and *supra* note (A/CN.9/573), paras. 96-97. The draft convention eventually became the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005). Information is available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html.

Chapter IV Non-state actors and normativity

Based on the empirical survey of actors involved and the process leading to key norms applicable to the procedural aspects of international arbitration, this chapter highlights two distinct features of norm-making, both stemming from the involvement of non-State actors. In a nutshell, norms surveyed were formulated largely by non-States actors for use primarily by non-State actors.

One of the features of transnational legal process is that "actors in the process are not just States but include non-State actors as well."[344] This statement proves true also with regard to norm-making in the field of international arbitration. However, what the survey indicates is a significantly increasing role of non-State actors in recent years, to the extent that all norms surveyed were formulated under the auspices of international organizations. Non-state actors have also become actively involved in norm-making forums such as UNCITRAL. This is one distinctive feature of contemporary norm-making.

As briefly discussed in chapter I, section 4, the normative feature of transnational legal process has to be nuanced in the context of norm-making in the field of international arbitration. As norms are being formulated by international organizations, the legitimacy of the norms depends on the process employed and the actors involved in the norm-making. Furthermore, their normativity relies on their acceptance in arbitration practice. Both

[344] Koh, *supra* note 5, p. 184.

aspects underscore the significance of norm-making process and suggest the need to employ a transnational legal process in formulating effective norms. Therefore, while Koh and others view "normativity" as a result of transnational legal process, for the purposes of this study, it is a goal or means to ensure that the norms being formulated obtain the legitimacy and normativity required to be widely accepted in international arbitration practice.

1. Non-State actors and norm-making

The survey confirms that a diverse group of actors are directly or indirectly involved in norm-making. The norm-making arena has changed quite considerably compared to when the New York Convention was adopted.[345] States, regional economic integration organizations (the European Union), IGOs, NGOs (which include, among others, arbitral institutions and professional organizations), practitioners and academics, arbitral tribunals, national courts and the civil society have all contributed to norm-making, resembling the non-statist feature of a transnational legal process. Moreover, there is a significant increase in the participation of non-State actors in

[345] During the United Nations Conference on International Commercial Arbitration adopting the New York Convention, a total of 48 States were represented. 3 IGOs (The Hague Conference, Unidroit and OAS) and 10 NGOs (ICC, American Foreign Insurance Association, Chamber of Commerce of the United States, Consejo Interamericano de Comercio y Porducción, International Association of Legal Science, IBA, International Federation of Women Lawyers, International Law Association, Junior Chamber International and Société de Legislation Comparée) participated. See Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards (E/CONF.26/8/Rev.1), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_travaux.html.

contemporary norm-making whereas the role of States as norm-makers have declined. [346]

1.1 Declining significance of States as norm-makers

A brief survey of legal theories or representation on international arbitration may be necessary. [347] The traditional view of international arbitration has been based on the territorial theory, which considers the sole source of legitimacy and validity of international arbitration to be the law at the place of the arbitration (*lex arbitri*). This view was reflected in article 2 of the 1923 Geneva Protocol[348] and article 9 of the resolution adopted by the Institute of International Law in 1957.[349] The national arbitration legislation provides the exclusive basis for the binding nature of arbitration and provides the parties with the procedural autonomy. In short, international arbitration derives its basis from States and to avoid chaos from one particular State. A quote by Francis Mann illustrates this view eloquently: "It would be

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[346] On non-State actor participation, see generally, Julie Mertus, Considering Non-State Actors in the New Millenium: Toward Expanded Participation in Norm Generation and Norm Application, NYU JOURNAL OF INTERNATIONAL LAW AND POLITICS, Vol. 32 (2000), pp. 537-566. Mertus refers to the deliberations involving non-State actors as a "kitchen table."

[347] For a general description of the legal theories on international arbitration see Gaillard, *supra* note 44, Paulsson, *supra* note 179 and Roy Goode, The Role of the *Lex Loci Arbitri* in International Commercial Arbitration, ARBITRATION INTERNATIONAL, Vol. 17, Issue 1 (2001), pp. 19-40, available at https://doi.org/10.1023/A:1008973626914. See also Emmanuel Gaillard, Three Philosophies of International Arbitration in Arthur W. Rovine (ed.), CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION –THE FORDHAM PAPERS, Martinus Nijhoff Publishers (2009), pp. 305-310. See Gaillard, *supra* note 39, p. 68

[348] Article 2 of the 1923 Geneva Protocol reads: "the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties *and by the law of the country in whose territory the arbitration takes place*" (emphasis added). Supra note 46.

[349] The resolution adopted in Amsterdam gives a predominant role to the law of the place of arbitration in procedural matters by stating: "the law of the place of the seat of arbitral tribunal shall determine whether the procedure to be followed by the arbitrators may be free established by the parties." See Institute of International Law, Yearbook, 1957, vol. 47, part II, p. 419. [update].

intolerable if the country of the seat could not override whatever arrangement the parties may have made. The local sovereign does not yield to them except as a result of the freedom granted by himself."[350] Taking this traditional view, States would continue to play the most important role in norm-making through the *lex arbitri*.

Another view perceives international arbitration as an autonomous legal order. According to this transnational perspective, States collectively (rather than individually or pluralistically) recognize the legitimacy and validity of international arbitration as rooted in the views developed jointly by the community of States through collective norm-making; the New York Convention and the Model Arbitration Law exemplifying this view. The Institute of International Law, recognizing that its resolution of 1957 no longer reflected the dominant view, acknowledged that "parties have full autonomy to determine the procedural … rules and principles that are to apply in the arbitration. In particular, … these rules and principles may be derived from different national legal systems as well as from non-national sources such as principles of international law, general principles of law, and the usages of international commerce."[351] In a sense, the place of arbitration was replaced by party autonomy and the arbitration agreement displaced the law

[350] Francis Mann, Lex Facit Arbitrum in P. Sanders (ed.), INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE, Martinus Nijhoff (1967), pp. 161-162 as reflected in Roy Goode, The Role of Lex Loci Arbitri in International Commercial Arbitration, ARBITRATION INTERNATIONAL, Vol. 17, No. 1 (2001), p. 19 -. [update].

[351] Article 6 of "Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises" available at Institute of International Law, Yearbook 1989, Vol. 63, part I. p. 330.

of the place of arbitration.[352] Such a delocalized conception of international arbitration does not necessarily mean that arbitration proceedings exist on their own: rather, they are attached to national legal order of the jurisdiction where enforcement of the award is sought.[353]

While the latter view provides a better explanation of the wide-ranging norm-making by non-State actors, the movement towards liberalization in international arbitration may imply that the adoption of a particular view on international arbitration has become irrelevant when it comes to the procedural aspects.[354] With almost universal adoption of the New York Convention and harmonization of national arbitration law achieved through the Model Arbitration Law, the significance of the law at the place of arbitration and the State as norm-makers of those laws has gradually declined.[355]

Despite the above, States continue to play a role in norm-making as they have both the legitimacy and the ability to influence the manner in which norms develop.[356] While harmonization of national arbitration legislation may have been achieved, some States have attempted to create a more favourable regime for parties which allows parties to invoke article VII(1) of the New

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[352] See A.T. von Mehren, "Arbitration Between States and Foreign enterprises: The Significance of the Institute of International Law's Santiago de Compostela Resolution, ICSID REVIEW (1990), p. 54.
[353] Jan Paulsson, Delocalization of International Commercial Arbitration: When and Why it Matters, INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, Vol. 32, Issue 1 (1983), p. 53-61.
[354] Gaillard, *supra* note 44, p. 99.
[355] Kaufmann-Kohler explains that among others, the legal fiction involved in the seat of arbitration and a growing consensus among national legal systems about general principles of arbitration procedure are reasons behind national legislations have less influence over arbitral proceedings. See Kaufmann-Kohler, *supra* note 42, pp. 1317-1322.
[356] Gaillard, *supra* note 225, p. 7.

York Convention (often referred to as the "more-favourable-law provision") [357] or to introduce innovative provisions not dealt with in the Model Arbitration Law.[358] While such efforts have typically aimed at attracting international arbitration rather than addressing the procedural aspects,[359] such legislative practice may function as a model for other States to follow and possibly lead to further amendments to the Model Arbitration Law, particularly if harmonization is deemed necessary.

The number of States ratifying or acceding to the New York Convention has constantly grown, whereas there have been both accession to and withdrawal from the ICSID Convention by States. The Transparency Convention will enter into force with 3 instruments of ratification having been deposited.[360] States as well as the European Union, as potential respondents in investment arbitration, have also been involved in norm-making by including detailed provisions on the procedural aspects in their bilateral or regional investment treaties, CETA being just one example.

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[357] Article VII (1) of the New York Convention reads: "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

[358] For example, provisions on third-party funding were introduced in Singapore and Hong Kong.

[359] See, for example, Christophe Seraglini Damien Nyer, Paul Brumpton, John Templeman and Lucas de Ferrari, The Battle of the Seats: Paris, London or New York?, Thompson Reuters Practical Law (6 December 2011) available at https://www.whitecase.com/publications/article/battle-seats-paris-london-or-new-york.

[360] For both the New York Convention and the Transparency Convention, entry into force requires the deposit of third instrument of ratification or accession (respectively, article XII and article 9).

As illustrated in section 1.3, States participate in deliberations at UNCITRAL and other international organizations to engage in norm-making. The 2006 amendments to the ICSID Arbitration Rules involved extensive consultations with ICSID member States and were eventually adopted by the ICSID Administrative Council consisting of government representatives.

National courts also contribute to norm-making through their involvement in the arbitration procedure. While broad procedural autonomy is given to parties in tailoring the arbitration procedure, article V of the New York Convention provides limited grounds for the competent authority to refuse recognition and enforcement of an award.[361] The existence of such grounds provides a mechanism for States to address any serious procedural concerns at the final stages of the arbitration proceedings. From the State's perspective, its national legislation and the New York Convention provides the minimum safeguards. Court's interpretation of norms including the agreement between the parties impacts how international arbitration is conducted and may have further implications outside their jurisdiction.[362] Such case law is reinforced through compilation from different jurisdictions as well as through detailed analysis by academics and application by practitioners.[363]

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[361] Article 36 of the Model Arbitration Law provides grounds for refusing recognition and enforcement of arbitral awards identical to article V of the New York Convention.
[362] Gaillard, *supra* note 225, p. 7.
[363] The UNCITRAL Digest of Case Law on the Model Arbitration Law (available at http://www.uncitral.org/uncitral/en/case_law/digests.html) and the UNCITRAL Secretariat Guide on the New York Convention (available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf) are just some examples.

1.2 Increasing role of international organizations

While the ICJ Judge Higgins once noted that "States are, at this moment of history, still at the heart of the international legal system,"[364] that statements may not be so accurate, particularly with respect to norm-making in the field of international arbitration.

Public international law scholars have acknowledged the broad range of participants in the contemporary international law making. They note the growing importance of non-State actors in certain specific areas and refer to IGOs, NGOs, global economic players and the media.[365] Michael Reisman asserted the importance of actors, which lack formal decision-making competence but nevertheless influence decisions.[366] It is inevitable that non-States actors have contributed in different ways to the emergence of different international norms,[367] and the field of international arbitration provides a very good example.

Even if it is understood that it is ultimately States that confer international arbitration its legitimacy, individually or collectively, norm-

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[364] Higgins, *supra* note 473, p. 39.

[365] Bruno Simma and Andreas Paulus, The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 93, Issue 2 (1999), p. 306 available at https://doi.org/10.2307/2997991.

[366] Michael Reisman, The View From the New Haven School of International Law, AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS, Vol. 86 (1992), p. 122 available at http://digitalcommons.law.yale.edu/fss_papers/867/. See generally, Math Noortmann, August Reinisch and Cedric Ryngaert (eds.), NON-STATE ACTORS IN INTERNATIONAL LAW, Hart Publishing (2015).

[367] For an overview of NGOs involvement in law-making across a number of areas of international law see Andreas Zimmermann and Rainer Hoffmann, UNITY AND DIVERSITY IN INTERNATIONAL LAW, Duncker & Humblot (2005).

making, particularly with regard to the procedural aspects, does not fall within the exclusive authority of States. There is a clear trend that non-State actors have been the most active in contemporary norm-making. All of the norms surveyed were prepared under the auspices of international organizations (IGOs and NGOs). While these international organizations all share an interest in the field of international arbitration, it would be unreasonable to group them as a homogenous group, as their interest and role in norm-making varies. The following will analyse the actors behind the norm-making by these international organizations.

1.2.1 Inter-governmental organizations

Among the IGOs, ICSID, PCA and UNCITRAL stand out with their orientation for norm-making in the field of international arbitration, whereas UNCTAD and OECD have contributed to the development of norms through policy research, exchange of information and data collection. IGOs provide a platform for multilateral norm-making where States and to the extent permissible, non-State actors engage in the preparation of such norms.[368]

Considering that norm-making at IGOs involves a collective process involving mainly States, it could be questioned whether these IGOs can be construed as non-State actors. Without going into a theoretical discussion of this question,[369] this study suggests that they should be. While it is true that

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[368] On this topic, see generally, José Alvarez, International Organizations as Law-Makers, Oxford University Press (2005).

[369] On this topic, see Ramses Wessel, International Governmental Organizations as Non-State Actors in Noortmann et al (eds.), *supra* note 366, pp. 185-203.; J Wouters and Ph. De Man, International Organizations as Law-Makers in J Clabbers and A Wallendahl (eds.), RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS, Edward Elgar Publishing (2011), pp 190- 199. Furthermore, technically speaking, UNCITRAL is a subsidiary of the United

member and observer States of UNCITRAL and contracting Parties to the ICSID Convention continue to play an essential role in the norm-making process, the norms formulated do not necessarily have a binding effect on States participating in the norm-making process and are generally presented as a norm formulated by the autonomous IGO rather than by a group of States. It is less about the norm-making 'through' IGOs but more 'by' IGOs.[370]

In the case of ICSID, the governing body is the Administrative Council.[371] Each State has one vote at the Administrative Council.[372] The President of the World Bank Group is the Chairman of the Administrative Council[373] and performs certain functions as the Chairman in the operation of the ICSID Convention.[374] As mentioned in chapter III, section 5, the amendments in 2006 were formally adopted by the Administrative Council,[375] through a resolution taken by a positive vote of two-thirds of its members.[376]

Nations Generally Assembly and not an inter-governmental organization. ICSID is further limited in its norm-making activity as it operates under the ICSID Convention.

[370] Wessel, supra note 38, p.

[371] The composition, functions and decision-making procedure of the Administrative Council are provided for in articles 4 to 8 of the ICSID Convention.

[372] The Administrative Council consists of one representative of each Contracting State (See Article 4 of the ICSID Convention. States may designate any official as their representative on the Council and may designate an alternate representative to act when the designee is unable to act. If a State does not designate a representative or alternate, the World Bank Governor and Alternate Governor for that State are its representatives on the ICSID Administrative Council.) On the composition of the Administrative Council see, for example, Christoph H. Schreuer, Loretta Malintoppi and August Sinclair, COMPOSITION OF ADMINISTRATIVE COUNCIL, IN THE ICSID CONVENTION: A COMMENTARY, Cambridge: Cambridge University Press (2009), pp. 16-17.

[373] Article 5 of the ICSID Convention. See also Regulation 4 of the Administrative and Financial Regulations providing for a temporary Presiding Officer to chair the Administrative Council.

[374] See for example, articles 14, 30, 38, 52, 58 of the ICSID Convention.

[375] Article 6(1) of the ICSID Convention. In addition to this norm-making function, the Administrative Council carries out other overarching functions such as approving arrangements for the use of the World Bank's administrative facilities and services, electing the ICSID

However, with regard to amendments to the Rules, it was the ICSID Secretariat that played a crucial role in reflecting the wide range of views into a discussion paper, carrying out public consultations and eventually preparing and circulating the draft amendments. The ICSID Secretariat consists of a Secretary-General, one or more Deputy Secretaries-General and approximately 70 staff members.[377] While the ICSID Regulations and Rules and the Additional Facility Rules have been amended several times by the Administrative Council on the proposal by Secretariat, [378] the ICSID Convention nor the Administrative and Financial Regulation indicate a specific role to be played by the ICSID Secretary-General or the Secretariat in that regard.

1.2.2 Non-governmental organizations

This study does not engage in the difficult task of defining NGOs, which tend to be described as what they are not: "organizations which have not been established with the involvement of a government or through an inter-governmental agreement."[379] Taking a similar approach, this study uses

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Secretary-General and of any Deputy Secretary-General and approving the annual budget and report of ICSID. Article 6 of the ICSID Convention and information on the ICSID website https://icsid.worldbank.org/en/Pages/about/Administrative-Council.aspx.

[376] Article 6(1) of the ICSID Convention. In comparison, an amendment to the Additional Facility Rules requires a resolution by a simple majority vote, like many other decisions by the Administrative Council. Administrative and Financial Regulation 7(1) reads: "Except as otherwise specifically provided in the Convention, all decisions of the Administrative Council shall be taken by a majority of the votes cast …"

[377] ICSID Convention Article 9. Additional information about the ICSID Secretariat is available at https://icsid.worldbank.org/en/Pages/about/Secretariat.aspx. In addition to general function of supporting disputing settlement, it also undertakes activities relating to institutional matters and knowledge dissemination.

[378] Parra, *supra* note 191, p. 57.

[379] With regard to the consultative status of non-governmental organizations in the United Nations see, ECOSOC resolution 1296 (XLIV) of 23 May 1968 on "Arrangements for

the term "NGOs" to refer to all organizations that do not fall within the category of States and IGOs as discussed above. In the field of international arbitration, NGOs have been involved in norm-making by formulating norms themselves and by participating in norm-making processes at IGOs. This section will analyse the former.

NGOs that have been actively involved in norm-making can be broadly categorized into arbitral institutions, professional organizations and academic or research institutions. Accordingly, such NGOs are different from the typical NGOs with a specific agenda on political, social or environmental issues that participate in broader policy discussions at the UN or other fora. A comparison of the list of NGOs given legal status under article 71 of the UN Charter[380] and the list of NGOs invited to attend the sessions of UNCITRAL on the topic of dispute settlement indicates that ICC (general consultative status at ECOSOC), CRCICA (roster status at ECOSOC), ICCA (roster status at ECOSOC) and Moot Alumni Association (roster status at ECOSOC) are the few on both lists.

Arbitral institutions are the most active in norm-making.[381] Norm-making by arbitral institutions generally involves preparing their own

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consultation with non-governmental organizations", resolution 1993/80 of 30 July 1993 and resolution 1996/31 of 25 July 1996 (which updates the arrangements set out in resolution 1296 (XLIV)).

[380] Article 71. The Economic and Social Council (ECOSOC) may make arrangements for consultations with non-governmental organizations which are concerned with matters within its competence. As of 22 August 2016, 4,507 NGOs enjoy active consultative status with ECOSOC. The list is available at http://csonet.org/

[381] It should however be noted that some arbitral institutions fall within the grey area as they have been established by a State initiative or is operated with extensive support from the government. ICSID and PCA are excluded as they have been established through an inter-governmental agreement.

institutional rules and other guidance texts specific to their proceedings. More recently, norm-making by these arbitral institutions have focused on introducing innovative features to improve the procedural efficiency of arbitration under their rules as well as to provide guidance to its users. A few arbitral institutions have been more ambitious with the aim of assuming a more prominent role in setting industry standards and practices.

ICC is one example.[382] As to norm-making, the amendments to the ICC Arbitration Rules were proposed in May 2016 by the ICC Court, [383] laid before the ICC Commission on Arbitration and ADR at its Washington session on 17 September 2016 and finally approved by the ICC Executive Board[384] in Bangkok on 20 October 2016. This was in accordance with article 7 of Appendix I to the ICC Arbitration Rule.[385]

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[382] ICC is a global business organization working to promote international trade, responsible business conduct and a global approach to regulation to accelerate inclusive and sustainable growth to the benefit of all. See generally https://iccwbo.org/. ICC was the first organization granted general consultative status with the United Nations Economic and Social Council and was granted Observer status by the United Nations General Assembly on 13 December 2016 (A/RES/71/156).

[383] The ICC Court is an independent arbitration body of the ICC. As a non-profit organization established in 1923, the ICC Court is responsible for supervising and administering ICC arbitrations throughout all stages of the process. All proceedings are conducted under ICC Arbitration Rules, which only the Court is empowered and authorized to administer. See Article 1 of the Statutes of the International Court of Arbitration (Appendix I to the ICC Arbitration Rules) available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/

[384] The ICC Executive Board is responsible for developing and implementing ICC's strategy, policy and programme of action and for overseeing the financial affairs of the ICC. It is responsible for recommending to the ICC World Council the appointment of the ICC Chairmanship and Secretary General as well as approving all policy documents.

[385] "Any proposal of the Court for a modification of the Rules is laid before the Commission on Arbitration and ADR before submission to the Executive Board of the ICC for approval, provided, however, that the Court, in order to take account of developments in information technology, may propose to modify or supplement the provisions of Article 3 of the Rules or any related provisions in the Rules without laying any such proposal before the Commission."

In essence, it is the ICC Court and the ICC Commission on Arbitration and ADR[386] that undertakes norm-making functions. At present, the ICC Court consists of a president (Alexis Mourre, France), 17 vice-presidents as well as 126 members, all of whom are appointed for three-year terms.[387] A total of 18 nationalities are represented in the group of vice-presidents[388] and 83 nationalities are represented in the composition of the 126 members.[389] Decisions at the plenary sessions of the ICC Court are taken by a majority vote, with the president or the vice-president, as the case may be, having a casting vote in the event of a tie.[390] The ICC Commission on Arbitration and drafts and revises the various ICC rules for dispute resolution and produces reports, guidelines and best practices on legal, procedural and

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[386] According to the ICC website, the Commission provides for a global forum of around 1,000 members coming from more than 92 countries including lawyers, in-house counsel, arbitrators, mediators, law professors and experts in various dispute resolution fields. These members include partners from international law firms, university professors, arbitrators and general counsel representing global corporations. Members are appointed to the Commission by their respective countries' national committee to the ICC. In its research capacity, it proposes new policies in the interest of efficient and cost-effective dispute resolution and provides useful tools for the conduct of dispute resolution.

[387] List of current ICC Court members are available at http://www.iccwbo.org/About-ICC/Organization/Dispute-Resolution-Services/ICC-International-Court-of-Arbitration/List-of-Current-Court-Members/. Members of the ICC Court are appointed by the ICC World Council on the proposal of national committees and groups (one member for each committee and group). Once appointed, Court members must remain independent from national committees in the performance of their functions. Alternate members are appointed by the World Council on the proposal of the Court's President. The World Council is the supreme authority of the ICC. The Council ensures the implementation of the provisions of the ICC Constitution and Charter and exercises all the prerogatives with which it is vested and meets once a year. Delegates to the World Council are business executives appointed by national committees.

[388] One of the vice-presidents has a dual nationality of France/Iran. In accordance with the UN Regional Grouping, nationals of Western European and others are dominant with 9.5 and 2 respectively from Latin America, Eastern Europe, Africa and Asia.

[389] Including Hong Kong, Chinese Taipei and Palestine The members show a better geographical balance. In accordance with the UN Regional Grouping, 15 are nationals of Western European and others States, 23 from Asia, 14 from Latin America, 13 from Eastern Europe and 7 from Africa.

[390] Article 4 of Appendix I to the ICC Arbitration Rules.

practical aspects of dispute resolution of current relevance, with a view to improving ICC dispute resolution services and responding effectively to users' needs.[391] The Commission is chaired by Christopher Newmark with 10 other vice-chairs.[392] The specific work of the Commission on Arbitration and ADR is often carried out in smaller task forces, consisting of members who are appointed by the ICC's national committees.[393]

Recently, professional organizations, such as the CIArb, IBA and ICCA, have become vigorously involved norm-making by developing guidance texts on a number of features of international arbitration. IBA has been the most active and influential with its Guidelines. Legal practitioners

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[391] The Commission holds two plenary sessions per year at which proposed rules, reports and guidelines are discussed, debated and voted upon. Of the two annual plenary sessions of the Commission, one normally takes place in Paris where the ICC is headquartered and the other elsewhere in the world.

[392] The Commission is headquartered in Paris and is run by its Chairman together with permanent staffs (Helene van Lith is the Secretary to the ICC Commission on Arbitration and ADR) who coordinate day-to-day activities, in addition to organising the semi-annual meetings of members, other task force meetings and any other administrative aspects of the commission's activities. A steering committee comprised of the Chairman and the Vice-Chairmen of the Commission, along with other representatives of ICC dispute resolution services, meets twice a year to discuss and agree on the overall action plan for the Commission, including the proposal of task forces. For information about the chair and vice-chairs see http://www.iccwbo.org/about-icc/policy-commissions/arbitration/leadership/.

[393] Task Forces are usually chaired by two members who guide the form and substance of the work. A Task Force may have a specific, dedicated mission - such as the publication of a set of rules or guidelines - or may be put into place to study a certain aspect of arbitration, without a precast idea of the end result of its work. List of current task forces and co-chairs: Task Force on IT and Arbitration (Erik Schäfer and David Wilson); Task Force on Trusts and Arbitration (Sophie Nappert and Tina Wuestemann); Task Force on National Rules of Procedure for Recognition and Enforcement of Foreign Arbitral Awards Pursuant to the New York Convention of 1958 (Geoffroy Lyonnet and David Roney); Task Force on Financial Institutions and International Arbitration (Georges Affaki and Claudia Salomon); Task Force on Emergency Arbitrator Proceedings (Marnix Leijten and Diana Paraguacuto-Maheo); Task Force on the Revision of the Rules of ICC as Appointing Authority in UNCITRAL or other Ad Hoc Arbitration Proceedings (Anne-Véronique Schläpfer and Victoria Orlowski); and Task Force on Maximizing the Probative Value of Witness Evidence (Ragnar Harbst and José Astigarraga).

with expertise and experience in international arbitration usually take the lead in preparing such Guidelines under the auspices of the IBA Arbitration Committee.[394]

The IBA Guidelines on Party Representation was prepared by a Task Force established by the IBA Arbitration Committee. At the preparatory stage in 2010, the Task Force on Counsel Conduct in International Arbitration consisted of 13 individuals, including the chair, Julie Bédard.[395] The Task Force was subsequently expanded to 23 members[396] to reflect better representation[397] and to include the co-chairs of the IBA Arbitration Committee.[398] When the Task Force adopted the Guidelines, it consisted mostly of arbitration practitioners, with the three holding academic positions.[399] The 2014 version of the IBA Guidelines on Conflicts was

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[394] The IBA Arbitration Committee is one of the five committees under the Dispute Resolution Section of the Legal Practice Division. As of 2013, the IBA Arbitration Committee had over 2,600 members from 115 countries with the membership increasing steadily (See IBA Guidelines on Party Representation, p.iv.) The Committee maintains standing subcommittees and, when required, establishes task forces to address specific issues. Information about the IBA Arbitration Committee is available at http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx.

[395] 11 of the 13 members were arbitration practitioners with practices in France, Germany, Mexico, Singapore, Spain, Switzerland, the United Kingdom, the United States, the remaining two with academic positions but working as independent arbitrators. José María Alonso, Julie Bédard, Cyrus Benson, Judith Gill, Christopher Lau, Torsten Lörcher, Fernando Mantilla-Serrano, William Park, Osma Rajah, Kenneth Reisenfeld, Pierre Tercier, Claus von Wobeser and Alvin Yeo.

[396] In addition to the initial 13 members, Funke Adekoya, Louis Degos, Paul Friedland, Mark Friedman, Laurent Levy, Alexis Mourre, Yoshimi Ohara, Catherine Rogers, Arman Sarvarian, Anne-Véronique Schlaepfer, Margrete Stevens and Eduardo Zuleta joined the Task Force. In the meantime, Osma Rajah and Pierre Tercier left the Task Group. See IBA Guidelines on Party Presentation, pp. i-ii.

[397] The geographical representation improved with members from Colombia, Japan and Nigeria.

[398] Alexis Mourre and Eduardo Zuleta.

[399] William Park, Catherine Rogers and Arman Sarvarian.

prepared by the Expanded Subcommittee on Conflicts of Interest.[400] The expanded Subcommittee on Conflicts of Interest consisted of 27 members and was chaired by David Arias, later co-chaired by Julie Bédard.[401] Pierre Bienvenu and Bernard Hanotiau functioned as the co-chair of the review process.

1.2.3 Investment arbitration rules by arbitral institution: positive development or further fragmentation

In the realm of investment arbitration, ICSID and UNCITRAL Arbitration Rules have been most often used, with 62% of all known ISDS cases filed with ICSID.[402] In 2015, 68% of the ISDS cases were filed with ICSID (either under the ICSID Arbitration Rules or under the ICSID Additional Facility Rules), 26% under the UNCITRAL Rules and 5% under the SCC Arbitration Rules. This demonstrates that rules formulated by IGOs

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[400] The 2004 version of the IBA Guideline on Conflicts of Interest was prepared by a Working Group consisting of 19 individuals, chaired by Otto de Witt Wijnen. It consisted of mostly arbitration practitioners with practices in 14 jurisdictions (Australia, Belgium, Canada, France, Germany, Mexico, Netherlands, New Zealand, Singapore, South Africa, Sweden, Switzerland, the United Kingdom and the United States): Henri Alvarez; John Beechey; Jim Carter; Emmanuel Gaillard; Emilio Gonzales de Castilla; Bernard Hanotiau; Michael Hwang; Albert Jan van den Berg; Doug Jones; Gabrielle Kaufmann-Kohler; Arthur Marriott; Tore Wiwen Nilsson; Hilmar Raeschke-Kessler; David W Rivkin; Klaus Sachs; Nathalie Voser; David Williams; Des Williams; and Otto de Witt Wijnen.

[401] The members of the expanded Subcommittee were mostly arbitration practitioners with practices in 17 jurisdictions (Argentina, Belgium, Brazil, Canada, China, France, Germany, India, Japan, Netherland, Nigeria, Republic of Korea, Spain, Switzerland, UAE, the United Kingdom and the United States). The members of the expanded Subcommittee on Conflicts of Interest were: Habib Almulla; David Arias; Julie Bédard; José Astigarraga; Pierre Bienvenu; KarlHeinz Böckstiegel; Yves Derains; Teresa Giovannini; Eduardo Damião Gonçalves; Bernard Hanotiau; Paula Hodges; Toby Landau; Christian Leathley; Carole Malinvaud; Alexis Mourre; Ciccu Mukhopadhaya; Yoshimi Ohara; Tinuade Oyekunle; Eun Young Park; Constantine Partasides; Peter Rees; Anke Sessler, Germany; Guido Tawil; Jingzhou Tao; Gäetan Verhoosel; Nathalie Voser; and Nassib Ziadé.

[402] UNCTAD, IIA Issue Note No. 2: Investor-State dispute settlement: Review of Development in 2015, (June 2016), p. 4 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d4_en.pdf.

with the involvement of States have been most often used for investment arbitration.

A notable development in this regard is the release of the first edition of the Investment Arbitration Rules of SIAC (the "SIAC IA Rules"), a set of rules to address the conduct of international investment arbitration, which came into effect on 1 January 2017.[403] The SIAC IA Rules are the first of its kind by an arbitral institution addressing issues unique to investment arbitration, such as concerns regarding inefficiency and lack of transparency.

The SIAC IA Rules contain significant modifications to the Arbitration Rules of SIAC (6th Edition, 1 August 2016) (the "SIAC Rules 2016")[404] to reflect the special features and concerns arising from arbitration proceedings involving States, State-controlled entities and intergovernmental organizations.[405] The President of the SIAC Court of Arbitration, Gary Born, mentioned that States and investors can be confident that, in resolving investment disputes under the SIAC IA Rules, they will be provided with a neutral, balanced, transparent and efficient procedural framework that addresses issues that ordinarily arise in international investment arbitration law. The SIAC IA Rules are applicable by agreement of the parties in disputes involving a State, State-controlled entity or intergovernmental organisation, whether arising out of a contract, treaty, statute or other instrument.[406]

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[403] SIAC, "SIAC Announces Official Release of the SIAC Investment Arbitration Rules" (30 December 2016) available at http://www.siac.org.sg/69-siac-news/505-siac-announces-official-release-of-the-siac-investment-arbitration-rules. The text of the SIAC IA Rules 2017 is available at http://www.siac.org.sg/our-rules/rules/siac-ia-rules-2017.
[404] Available at http://www.siac.org.sg/our-rules/rules/siac-rules-2016
[405] *Supra* note 403.
[406] SIAC IA Rules 1.1 and 1.2

As to the norm-making, the draft IA Rules were produced in consultation with the SIAC Court of Arbitration Rules Revision Executive Committee,[407] working closely with the Court of Arbitration Subcommittee on Investment Arbitration.[408] The Committee is said to have been composed of leading practitioners from all over the world.[409]

SIAC announced the commencement of the public consultation process on its draft IA Rules on 1 February 2016 (extensive consultation with SIAC's global Users Council as well as a public consultation exercise). SIAC invited all interested users and practitioners to review the draft IA Rules and to send in their comments during the consultation period (1 February to 29

1.2 An agreement to refer a dispute to arbitration in accordance with the SIAC Investment Arbitration Rules may be expressed in a contract, treaty, statute or other instrument, or through an offer by a Party in a contract, treaty, statute or other instrument which is subsequently accepted by the other Party by any means, including by the other Party's commencement of arbitration.

[407]The SIAC Court of Arbitration Rules Revision Executive Committee was chaired by Gary Born (President, SIAC Court of Arbitration) and consisted of Cavinder Bull, John Savage, Michael Pryles, Cao Lijun, Paul Friedland and Lim Seok Hui. All were members of the SIAC Court of Arbitration or held positions of President, Vice President or CEO of the SIAC Arbitration Court.

[408] The SIAC Court of Arbitration Subcommittee on Investment Arbitration was chaired by Claudia Annacker and consisted of Gary Born, John Savage, Toby Landau and Jan Paulsson. All were members of the SIAC Court of Arbitration or held positions of President or Vice President of the SIAC Arbitration Court.

[409] Gary Born, President of the SIAC Court, chaired the SIAC Rules Revision Executive Committee, and was a member of the SIAC Court of Arbitration Subcommittee on Investment Arbitration. Senior Associate Jonathan Lim and Associate Dharshini Prasad, members of Wilmer Cutler Pickering Hale and Dorr's International Arbitration Practice Group, worked closely with the SIAC Secretariat and Subcommittee on Investment Arbitration in all aspects of the Rules' drafting process. Gary Born, Jonathan Lim and Dharshini Prasad, "New SIAC Investment Arbitration Rules" (January 25, 2017) available at https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDfs/2017-01-25-new-SIAC-investment-arbitration-rules.pdf

February 2016).[410] It is stated that numerous comments were received from law firms and in-house counsel based in more than 10 jurisdictions across Asia, Europe, the Middle East, Africa and North America.[411]

It remains to be seen how States will view the Rules, and whether they will include the Rules in bilateral and multilateral treaties currently under negotiation. Despite the public consultations undertaken, it is quite doubtful whether the perspectives and the official views of States were captured during that process. As one commentator noted, there is also the more esoteric question of whether the proliferation of another set of rules for investment arbitration is a positive development, providing greater choice and competition among institutions, or a negative development, exacerbating the fragmentation of international law.[412]

1.2.4 *De facto* actors

A closer look at the actors behind the norm-making reveals that in the case of ICSID, its Secretariat plays a central role. While the Administrative Council is the body that adopts the amendments, the entire norm-making from initiation, preparatory work, drafting, substantive deliberations and public consultations heavily relies on the Secretary-General and its staff. This is

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[410] SIAC, "Public Consultation on Draft SIAC Investment Arbitration Rules" (1 February 2016) available at http://www.siac.org.sg/113-resources/press-releases/press-release-2016/469-public-consultation-on-draft-siac-investment-arbitration-rules.

[411] https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDfs/2017-01-25-new-SIAC-investment-arbitration-rules.pdf

[412] See Baker & McKenzie, "Launch of the SIAC Investment Arbitration Rules 2017" (January 2017) available at http://www.bakermckenzie.com/-/media/files/insight/publications/2017/01/al_singapore_investmentarbitration_jan17.pdf?la=en

another reason why ICSID, at least in its norm-making function, can be considered a non-State actor, somewhat autonomous from its member States.

While the case varies for ICC, IBA and SIAC, norm-making at these organizations is handled by a small group of individuals with expertise and experience as well as reputation in international arbitration and/or with specific functions within the respective organization. As mentioned above, efforts are being made to enlarge those involved in the norm-making, to improve the representation and to engage in broader public consultation, but these initiatives remain in the hands of a few and are conducted in informal, sometimes closed, settings, which naturally raises questions about the legitimacy of the norm-making process as well as the norm itself. Although norm-making by arbitral institutions and professional organizations form an essential part of the transnational legal process formulating the procedural framework of international arbitration, their respective norm-making do not resemble all the features of a transnational legal process.

1.3 Actors involved in UNCITRAL norm-making

UNCITRAL has been influential in preparing key norms constituting the procedural framework for international arbitration. When finalizing or adopting its texts, the Commission often recalls that the formulation of the legal instrument had benefited from consultations with governments and interested IGOs and NGOs, and had received sufficient consideration,

reaching the level of maturity for it to be generally acceptable.[413] This section takes a closer look at the actors involved in the norm-making at UNCITRAL, which also illustrates a gradual increase in participation by non-State actors.

1.3.1 State participation

Norm-making at UNCITRAL is a classic example of an inter-governmental process, where States take a substantive role in norm formulation. States make proposals to initiate the process take part in the deliberations, make drafting proposals, participate in the consensus building, and eventually finalize and adopt the norms, sometime more broadly in the General Assembly.

For example, Canada submitted a paper at the forty-first session (16 June-3 July 2008, New York) of the Commission supporting the view that provisions on transparency in relation to treaty-based investor-State arbitration should form part of the UNCITRAL Arbitration Rules revision.[414] The paper suggested that failing to promptly include provisions that enhance transparency would give the impression that the United Nations approves of a lack of transparency in investor-state arbitration and that such an effective endorsement of secrecy in investor-State arbitration would be contrary to the fundamental principles of good governance and human rights being the foundation of the United Nations.[415] While the Secretariat is tasked with

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[413] See *supra* note 329 (A/69/17), paras. 106.
[414] UNCITRAL, Revisions of the UNCITRAL Arbitration Rules – Observations by the Government of Canada (A/CN.9/662).
[415] *Ibid.* para. 20.

preparing the drafts for consideration by the Working Group, States had submitted drafting proposal during the 2006 Amendments, [416] the 2010 Arbitration Rules [417] and the Transparency Convention. [418]

The following tables respectively provide an overview of States as well as IGOs and NGOs participating in the Working Group discussion at UNCITRAL, respectively for (i) the 2006 Amendments and the Recommendation (2000-2006)[419] (ii) the 2010 UNCITRAL Arbitration Rules (2006-2010) and (iii) the Transparency Standards (2010-2014).

WG Sessions	32	33	34	35	36	37	38	39	40	41	42	43	44
Member States	23	27	29	25	26	24	24	22	27	37	49	33	38
Observer States	22	28	25	23	22	23	20	27	28	13	19	13	14
IGOs	7	14	11	7	18	4	3	4	3	4	5	2	5
NGOs						11	19	13	12	17	20	13	17
Total	52	67	65	54	67	62	66	66	70	71	93	62	74

Table IV.1: 2006 Amendments and the Recommendation

[416] On the 2006 Amendments and Recommendation, see (USA and Mexico) *Supra* notes 449 and UNCITRAL, Proposal by Mexico (A/CN.9/WG.II/WP.137 and A/CN.9/WG.II/WP.137/Add.1).- a proposal by Mexico to omit the reference to written form entirely.

[417] UNCITRAL, Proposal by the Government of Switzerland (A/CN.9/WG.II/WP.152).

[418] USA – (A/CN.9/WG.II/LIX/CRP.2) Japan submitted drafting proposals on an additional reservation clause, which necessitated other changes to the draft convention. A/CN.9/WG.II/LX/CRP.3

[419] *Supra* note 185, paras. 181.

WG Sessions	45	46	47	48	49	50	51	52
Member States	35	38	38	51	41	45	40	48
Observer States	16	20	24	26	22	27	27	21
IGOs	1	3	2	5	1	8	4	5
NGOs	18	21	26	25	20	28	26	35
Total	70	82	90	107	84	108	97	109

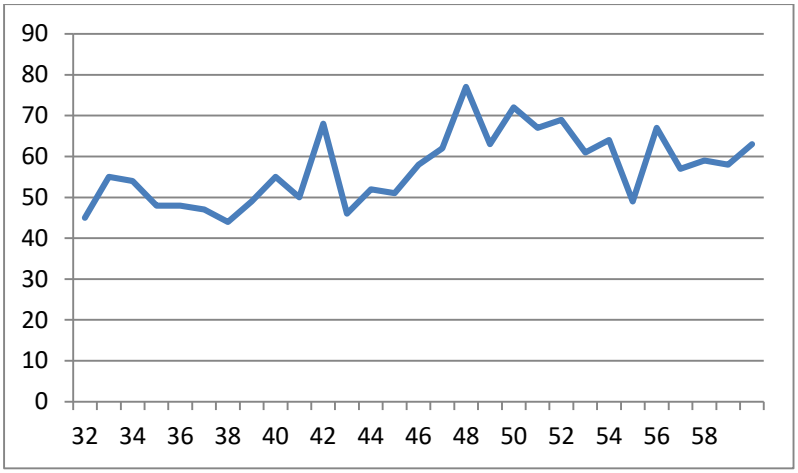
Table IV.2: 2010 UNCITRAL Arbitration Rules

WG Sessions	53	54	55	56	57	58	59	60
Member States	43	45	35	45	39	38	40	43
Observer States	18	19	14	22	18	21	18	20
IGOs	9	9	3	6	6	8	4	7
NGOs	30	31	28	37	26	32	26	26
Total	100	104	80	110	89	99	88	96

Table IV.3: Transparency Standards

As seen from the table above, State participation increased gradually from 45 States at the thirty-second session of the Working Group in 2000 to 63 States at the sixtieth session in 2014. The sudden increase in the number of member State participation at the forty-first session of the Working Group is due to the expansion of the membership of UNCITRAL from 36 to 60 States.[420]

[420] Due to the expansion of membership, there is a sharp increase in the number of member States at the forty-first session, but the overall number of States participating in the sessions did not change much.



<Overall participation of States from 32nd to 60th WG session>

The revisions to the UNCITRAL Arbitration Rules were most attended with an average of 65 States participating per session. The largest attendance by States (77) was at the forty-eighth session when the issue of transparency in investor-State arbitration was first raised during the revision of the UNCITRAL Arbitration Rules. An average of 51 States participated in the thirteen sessions leading to 2006 Amendment and Recommendation and 60 States in the eight sessions leading to the Transparency Standards.

In addition to gradual increase in participation, there was also improved consistency in State participation. States that participate throughout the entire norm-making process form the core group of States with a keen interest and stake in the resulting norm. For the 2006 Amendments and the Recommendation, 16 States participated in all thirteen sessions[421] with 14

[421] Austria, Canada, China, Finland, France, Germany, Japan, Mexico, Republic of Korea, Russian Federation, Singapore, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland and the United States of America. Due to the change in delegation composition, it was rare that the same representatives attended the entire thirteen sessions.

other States represented in ten or more sessions.[422] For the 2010 UNCITRAL Arbitration Rules, 30 States participated in all eight sessions,[423] with 17 other States represented in six or more sessions. For the Transparency Standards, 32 States participated in all eight sessions[424] with 14 others participating in six or more sessions. This illustrates a continued interest on the part of States in norm-making, which also ensured consistency in the deliberations.

State representatives also played a key role in the preparation of the instruments. For the 2006 Amendment and Recommendation, José María Abascal Zamora (Mexico) chaired all thirteen sessions of the Working Group[425] and twelve different State representatives functioned as rapporteurs.[426] For the UNCITRAL Arbitration Rules, Michael Schneider (Switzerland) chaired all eight sessions of the Working Group leading to the

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[422] Cameroon, Italy, Thailand, Turkey (12 out of 13 sessions), Colombia, Croatia, Czech Republic, Iran (Islamic Republic of), Philippines (11 out of 13 sessions) and Argentina, India, Nigeria, Venezuela and Peru (10 out of 13 sessions).

[423] Member States: Australia, Austria, Belarus, Cameroon, Canada, China, Czech Republic, France, Germany, Iran (Islamic Republic of), Italy, Japan, Mexico, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela.
Observer States: Argentina, Croatia, Finland, Mauritius, Netherlands, Romania and Turkey.

[424] Argentina, Australia, Austria, Belarus, Brazil, Canada, China, Colombia, France, Germany, Italy, Japan, Mauritius, Mexico, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, United States of America, Venezuela, Chile, Czech Republic, Finland, Indonesia, Netherlands, Slovakia, Norway, Poland, Switzerland and Ecuador.

[425] Mr. Abascal, an arbitration practitioner with extensive experience continues to represent Mexico at UNCITRAL. His short profile is available at http://abascalsegovia.com/jose-maria-abascal-en/.

[426] Ten of the twelve rapporteurs were from the Asia-Pacific Group with one from the African Group and another from the Eastern European Group. The following is a list of the rapporteurs in the order they served the Working Group sessions [Name (State, Working Group session)]: V.G Heged (India, 32 & 35), Sani L. Mohammed (Nigeria, 33), Hossein Ghazizadeh (Iran, 34), Koichi Miki (Japan, 36), Prem Kumar Malhotra (India, 37), Pakvipa Ahviphan (Thailand, 38), Vilawan Mangklatanakul (Thailand, 39), Sundaresh Menon (Singapore, 40), Il Won Kang (Republic of Korea, 41), Lawrence Boo (Singapore, 42), Izabela Weresniak (Poland, 43), Mostafa Dolatyan (Iran, 44).

revision [427] and seven different State representatives functioned as rapporteurs.[428]

For the Transparency Standards, Salim Moollan (Mauritius) chaired all eight sessions [429] and six different State representatives functioned as rapporteurs. [430] The Commission session adopting the UNCITRAL Transparency Rules was chaired by Michael Schöll (Switzerland). During the Commission session, representatives of 35 States (including the EU) made statements, with four States very active in the discussion intervening more than 10 times.[431] Eleven other representatives intervened at least 5 times.[432] The Commission session approving the draft Convention was chaired by Choong-hee Hahn (Republic of Korea).[433] During that Commission session,

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[427] Mr. Schneider is an arbitration practitioner with extensive experience in international arbitration and continues to represent Switzerland at UNCITRAL. His short profile is available at http://www.lalive.ch/en/people/index.php?lawyer=164.

[428] Five of the eight rapporteurs were from the Asia-Pacific Group with one from the Latin American and Caribbean Group (GRULAC) and two others from the Western European and Others Group (WEOG). The following is a list of the rapporteurs in the order they served the Working Group sessions [Name (State, Working Group session)]: Trumph Jalichandra (Thailand, 45), Andrés Jana (Chile, 46), Abbas Bagherpour Ardekani (Iran, 48), Shavit Matias (Israel, 48), Sainivalati Navoti (Fiji, 49), Abbas Bagherpour Ardekani (Iran, 50), Iftikharuddin Riaz (Pakistan, 51), Susan Downing (Australia, 52).

[429] Mr. Moollan, an arbitration practitioner with extensive experience in international arbitration and continues to represent Mauritius at UNCITRAL. His short profile is available at https://essexcourt.com/barrister/salim-moollan/.

[430] Three of the six rapporteurs were from the Western European and Others Group (WEOG). The others rapporteurs respectively were from the Latin American and Caribbean Group (GRULAC), the Asia-Pacific Group, the Eastern European Group and the African Group. The following is a list of the rapporteurs in the order they served the Working Group sessions [Name (State, Working Group session)]: Isabel Soares da Costa (Brazil, 53), Shane Spelliscy (Canada, 54), Markus Maurer (Germany, 55), Shotaro Hamamoto (Japan, 56), Muhammad Mustaqeem De Gama (South Africa, 57) and David Brightling (Australia, 58), Shotaro Hamamoto (Japan, 59) and Yeghishe Kirakosyan (Armenia, 60).

[431] Switzerland, Israel, United States, Canada.

[432] Japan, Singapore, India, Netherlands, Czech Republic, European Union, France, Ecuador, Republic of Korea, Brazil, United Kingdom.

[433] The rapporteur for the Commission session was Maria del Pilar Escobar Pacas (El Salvador).

representatives of 26 States (including the EU) made statements, with 8 States making more than five interventions.[434]

The following tables illustrate how States composed their delegations during the Working Group sessions. During the thirteen Working Group sessions leading to the 2006 Amendments and the Recommendations, States were generally represented by government officials and in more than half of the instances by those stationed at the permanent missions either in Vienna or New York. Arbitration practitioners and academics included in State delegations respectively constituted 19% and 10% of more than 1,181 State representatives that participated throughout the thirteen sessions.

WG Sessions	32	33	34	35	36	37	38	39	40	41	42	43	44
Gov. officials	33	37	16	34	30	37	18	30	19	36	28	32	34
Perm. Mission	39	47	16	47	37	40	13	32	20	35	56	34	42
Practitioners	16	20	14	16	16	17	9	22	9	22	18	19	21
Academic	8	10	3	10	12	13	6	7	6	11	11	13	10
Total	96	114	49	107	95	107	46	91	54	104	113	98	107

Table IV.4: Composition of State delegations (MAL)

During the eight sessions leading to the 2010 Arbitration Rules, the number of delegations increased approximately by 54%.[435] The number of practitioners participating in the eight sessions also increased constituting

[434] Canada, Germany, Israel, Japan, Singapore, Spain, United States, European Union.
[435] During the thirteen session of the Model Arbitration Law amendment, at least 1,181 State representatives participated. During the eight session of the UNCITRAL Arbitration Rules revision, at least 1,125 State representatives participated.

about 17% of the State representatives with a constant number of academics (10 to 14 per session) participating, constituting about 8% of the State representatives.

WG Sessions	45	46	47	48	49	50	51	52
Gov. officials	41	37	56	50	52	64	55	56
Perm. Mission	36	39	41	64	59	57	67	55
Practitioners	20	21	26	23	29	31	25	24
Academic	9	10	12	15	12	14	13	12
Total	106	107	135	152	152	166	160	147

Table IV.5: Composition of States delegations (UNCITRAL Arbitration Rules)

During the eight Working Group sessions devoted to the Transparency standards, States were represented more by government officials from their capital than those stationed at the permanent missions. Government officials from the capital accounted for approximately 42% of the entire State delegations. This was a response to the Commission's call that member and observer States should seek to achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration when creating its delegations.[436] Practitioners constituted about 16% of the State representatives with a constant number of academics (on average 11 per session) participating, constituting about 9% of the State representatives.

[436] *Supra* note 237 (A/63/17), para. 314. Compared to the revision of the UNCITRAL Arbitration Rules, the overall number of State delegations decreased slightly with approximately 135 representatives attending each session.

WG Sessions	53	54	55	56	57	58	59	60
Gov. officials	59	54	60	54	59	49	52	53
Perm. Mission	41	50	42	43	42	42	46	40
Practitioners	22	31	23	25	16	23	16	17
Academic	12	11	12	13	12	12	7	12
Total	134	146	137	135	129	126	121	122

Table IV.6: Composition of State delegations (Transparency Standards)

Government officials in the above tables refer to those officials that participated in the deliberations from their capital. It should, however, be noted that: (i) States compose their delegations quite differently including the overall number of the representatives (for example, whereas one State may have one representative attending a session, another State may have ten or more representatives on the list of participants with none of them actually attending the session),[437] (ii) participants have multiple status for example, as an advisor to the government, a professor as well as a practitioner at a law firm; (iii) some participants have dual status as a representative of a State as

[437] For the purposes of preparing the data, the number of representatives from one government entity including its permanent mission was limited to two to ensure that a delegation with a large number of participants consisting of more than two government officials from the capital or its permanent mission would not inadvertently impact the overall composition rate. For example, if State A had 8 representatives, 3 from the Ministry of Justice, 1 from the judiciary, 1 from an arbitral institution and 3 from the permanent mission, they were counted as 3 government officials from capital, 2 from the permanent mission and 1 practitioner. Therefore, the number of participants on the table is likely to lower than that indicated in the list of participants.

well as of an IGO or NGO (for example, the Secretary-General of an arbitral institution may participate as a State representative).

A simple increase in the number of States participating in UNCITRAL Working Group sessions does not necessarily mean that all those States are actively involved in norm-making. Some representatives may merely observe the deliberations making no intervention, while representatives of a few States may lead the process, for example, by submitting proposals for topics as well as drafts, taking official roles as the chairperson or rapporteur, and constantly making interventions during the process. However, this should not overshadow the "presence" of other less active State representatives, who were still part of the deliberation and had a role to play in consensus building (see chapter III, section 6).

1.3.2 Non-state actor participation

As with norm-making by non-State actors, non-state actors have increased their participation in norm-making initiatives by other international organizations, most notably those of UNCITRAL. It should be recalled that ICC was a key proponent of the process leading to the New York Convention.[438] Similar to States, non-State actors (IGOs and NGOs) have participated in the UNCITRAL process by taking part in the deliberations and making drafting proposals,[439] expressing their perspectives and providing their expertise.

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[438] See the *travaux préparatoires* of the New York Convention, available at http://newyorkconvention1958.org/. The documents submitted by the ICC are E/C.2/373 and E/C.2/373/Add.1.

[439] *Supra* notes 449. For example, ICC submitted its drafting proposal on the Model Arbitration Law.

For example, statements by Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises and written submission by two NGOs (Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD)) strongly advocated for including provisions on transparency, on the basis of public interest and public policy issues raised in treaty-based arbitration. While not discussed in the formal setting of the Working Group, these inputs contributed to formulating a general concern about the need for promoting greater transparency,[440] and were referred to in Canada's proposal to the Commission session.[441]

Non-state actors also contributed to the substantive discussion, for example, when a suggestion was made that the UNCITRAL Transparency Rules ought to provide for the possibility of a tribunal ordering costs against an *amicus curiae* making a frivolous submission, one NGO observed that such a possibility, particularly where an *amicus* was a non-profit organization, would likely have a chilling effect on their participation in the arbitral process, thereby undermining the public interest of transparency.[442] The Working Group supported this view and consequently did not pursue a provision on third-party cost orders.

Non-state actor participation in UNCITRAL norm-making increased from 7 at the thirty-second session of the Working Group in 2000 to 33 at the

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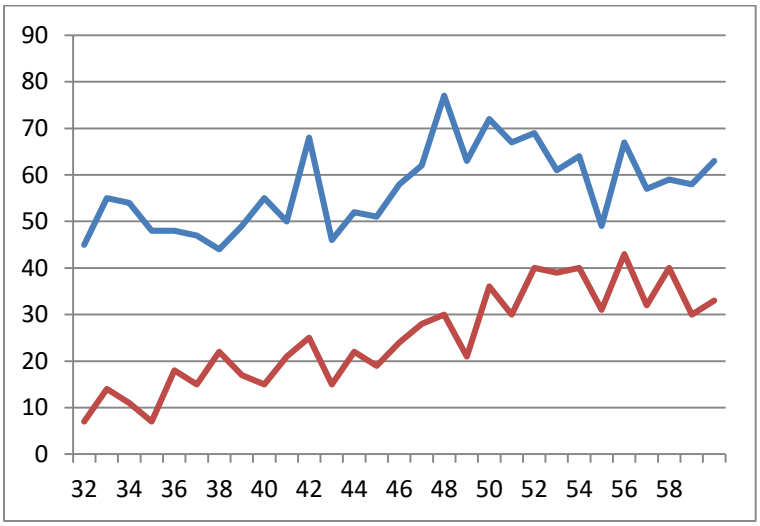
[440] See UNCITRAL, *supra* note 301 (A/CN.9/646), paras. 54-69, Annexes I and III.
[441] UNCITRAL, Revisions of the UNCITRAL Arbitration Rules – Observations by the Government of Canada (A/CN.9/662).
[442] UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-seventh session (A/CN.9/760), para. 129.

sixtieth session in 2014. The sessions dealing with Transparency Standards were most attended with an average of 36 IGOs and NGOs participating per session. In contrast, an average of 16 participated in the sessions leading to 2006 Amendment and Recommendation and an average of 29 in the sessions leading to the 2010 UNCITRAL Arbitration Rules. The largest attendance by IGOs and NGOs (43) was at the fifty-sixth session. The graph below indicates the comparatively fast-growing participation of IGOs and NGOs in the UNCITRAL norm-making.



< Comparison of State and non-State actor participation>

The following three tables indicate the number of IGOs and NGOs participating in the Working Group discussion, respectively for (i) the 2006 Amendments and the Recommendation [443] (ii) the 2010 UNCITRAL

[443] *Supra* note 185, paras. 181.

Arbitration Rules and (iii) the Transparency Rules and the Transparency Convention.

WG Sessions	32	33	34	35	36	37	38	39	40	41	42	43	44
IGOs	7	14	11	7	18	4	3	4	3	4	5	2	5
NGOs						11	19	13	12	17	20	13	17

Table IV.7: Participation during the Working Group sessions (MAL amendment) [444]

WG Sessions	45	46	47	48	49	50	51	52
IGOs	1	3	2	5	1	8	4	5
NGOs	18	21	26	25	20	28	26	35

Table IV.8: Participation during the Working Group sessions (UNCITRAL Arbitration Rules)

WG Sessions	53	54	55	56	57	58	59	60
IGOs	9	9	3	6	6	8	4	7
NGOs	30	31	28	37	26	32	26	26

Table IV.9: Participation during the Working Group sessions (Transparency Standards)

Among the IGOs, PCA was represented in all of the Working Group sessions surveyed. Other IGOs have been represented on topics of their interest. During the 2006 Amendments and the Recommendation, 14 IGOs

[444] The report and the list of participants began to distinguish inter-governmental organizations and non-governmental organizations from the thirty-seventh session.

participated at least once, with the NAFTA Article 2022 Committee [445] attending all thirteen sessions along with the PCA. The European Community was represented for the first time at the forty-fourth session of the Working Group in 2006. During the sessions on 2010 UNCITRAL Arbitration Rules, Asian African Legal Consultative Organization (AALCO) was represented in five instances. On the Transparency Standards, ICSID, the United Nations Conference on Trade and Development (UNCTAD), OECD and the European Commission was extensively involved participating in almost all sessions.

Whereas the number of IGOs participating in the Working Group was steady, that of NGOs has been growing. The overall number of NGOs participating in the 2006 Amendment was 36,[446] which increased to 43 during the UNCITRAL Arbitration Rules revision process.[447] That number increased to 52 during which the Transparency Standards were prepared. [448]

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[445] Information available at https://www.nafta-sec-alena.org/Home/Alternative-Dispute-Resolution/NAFTA-2022-Committee.

[446] Among the 36 NGOs that participated at least once during the thirteen sessions, AAA, CRCICA, CIArb, Club of Arbitrators of the Milan Chamber of Commerce, ICC, ICCA, Regional Centre for International Commercial Arbitration – Lagos (RCICAL) and the Queen Mary University of London (QMUL) School of International Arbitrationwere represented in more than half of the sessions. Representatives of CIArb and ICC attended almost all of the sessions.

[447] Among the 43 NGOs participating in the revision, representatives of APRAG, ASA, Milan Club of Arbitrators, LCIA and KLRCA attended all eight sessions. AAA, Asia Pacific Regional Arbitration Group (APRAG), Association Suisse de l'Arbitrage (ASA), ABA, ABCY,[447] Arab Union of International Arbitration (AUIA), Association for the Promotion of Arbitration in Africa (APAA),[447] CRCICA, CIEL,[447] CIArb, Club of Arbitrators of the Milan Chamber of Commerce, Center for International Legal Studies (CILS), [447] Forum of International Conciliation and Arbitration (FICA),[447] International Arbitration Institute (IAI),[447] IBA,[447] ICC, London Court of International Arbitration (LCIA), Kuala Lumpur Regional Centre for Arbitration (KLRCA), QMUL School of International Arbitration and UIA[447] participated in five or more sessions

[448] Among the 52 NGOs represented during the six sessions, ASA, SCC, Barreau de Paris, CIEL, Construction Industry Arbitration Council (CIAC), CEPANI, FICA, IBA and International Insolvency Institute (III) participated in all sessions. AAA, ABA, APAA,

Arbitral institutions have been constantly represented in deliberations at UNCITRAL either individually or as a group, while participating institutions or groups changed depending on the topic. For example, for the amendment of the Model Arbitration Law, representatives of AAA, CRCICA, ICC, and RCICAL attended most of the session. The Secretary-General of the ICC International Court of Arbitration submitted a proposal on draft Articles 17 and 17 bis.[449] For the amendment of the UNCITRAL Arbitration Rules, which was of key interest to arbitral institutions, AAA, APRAG, ASA, CRCICA, ICC, LCIA and KLRCA were represented in most of the sessions. For the deliberations on the transparency standards, AAA, ASA, SCC, CEPANI, CIETAC, SAA and TRAC regularly sent their representatives.

Professional organizations have also taken part in norm-making initiatives at UNCITRAL, where they relay the voice of practitioners in international arbitration. For example, ABA, ABCNY, APAA, ASA, AUIA, CCIAG, CFA, CIArb, Club of Arbitrators of the Milan Chamber of Commerce, IABA, IAI, IBA, ICCA, FICA, III, NYSBA, UIA have constantly attended UNCITRAL working group sessions preparing a series of texts on international arbitration.

In addition to arbitral institutions and professional organizations, academic and/or research institutions have also been involved in norm-

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CIETAC, Comité Francais de l'Arbitrage (CFA), Club of Arbitrators of the Milan Chamber of Commerce, Corporate Counsel International Arbitration Group (CCIAG), Inter-American Bar Association (IABA), IAI, ICCA, IISD, New York State Bar Association (NYSBA), QMUL School of International Arbitration, Swedish Arbitration Association (SAA) and Tehran Regional Arbitration Centre (TRAC) attended four or more sessions.

[449] UNCITRAL, Proposal by the International Chamber of Commerce (A/CN.9/WG.II.WP.129).

making by providing background studies, advocating for adoption of certain norms and preparing drafts for consideration. Such activities were carried out on their own or in conjunction with IGOs or professional organizations mentioned above. Some of the notable academic or research institutions that have regularly contributed to norm-making at UNCITRAL were the QMUL School of International Arbitration, CIEL, CILS and IISD.

The interaction between NGOs and UNCITRAL has developed particularly due to a mutual interest. UNCITRAL acquires additional legitimacy of its norm-making from participation of NGOs as their participation provides a gateway to incorporate the views of non-State actors. NGOs attain a certain status by taking part in that process, improving their overall reputation which may appeal to its users in the case of arbitral institutions and members in the case of professional organizations. The mutually reinforcing relationship between UNCITRAL and NGOs would be worth a study of its own.

Participation of NGOs generally enhances the richness of the debate and may reflect concerns different from those brought by States. In this context, the role of NGOs with regard to the making of the UNCITRAL Transparency Rules and the Transparency Convention was unique as NGOs, whose main sphere of activity did not relate to arbitration, provided their perspectives and expertise. CIEL [450] and IISD, [451] well-known for their

[450] According to the CIEL website, CIEL uses the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL pursues its mission through legal research and advocacy, education and training, with a focus on connecting global challenges to the experiences of communities on the ground. Available at http://www.ciel.org/about-us/our-mission/.

activities in the field of sustainable development or environmental law, strongly advocated for the inclusion of transparency-related provisions on the basis inter alia of the public interest and public policy issues raised in treaty-based investment arbitrations. IISD and CIEL continued to actively contribute during the norm-making process, quite different from other IGOs and NGOs, which provided invaluable support both conceptually and in terms of content based on their own research or experience in the field of arbitration or transparency. The rich and multifaceted layers to the debate provided by a very different range of NGOs reflected cooperation, resulted in a much broader scope of debate, and ultimately, a much richer consensus engendered by that diversity of view.

2. Legitimacy and normativity

2.1 Status of the norms and monitoring use

The norms surveyed in this study have been put to use in different degrees. The Model Arbitration Law has come to represent the accepted international legislative standard for international arbitration. It has been enacted in more than 70 States in a total of approximately 104 jurisdictions. Many States have also implemented legislative reforms reflecting the 2006

[451] According to the IISD website, IISD is an independent, non-profit organisation that provides practical solutions to the challenge of integrating environmental and social priorities with economic development. We report on international negotiations, conduct rigorous research, and engage citizens, businesses and policy-makers on the shared goal of developing sustainably. Available at http://www.iisd.org/about/about-iisd.

Amendments.[452] While case law indicates a trend toward liberalization of written form requirements, there is no clear information about how the Recommendation was received or applied by courts in interpreting the New York Convention.

According to the database of international investment agreements maintained by UNCTAD,[453] more than 110 investment agreements, including FTAs concluded by Korea with Australia (8 April 2014) and with Canada (22 September 2014), have been concluded since 1 April 2014 including a reference to the UNCITRAL Arbitration Rules.[454] This means that unless the Parties to those agreements have agreed otherwise, for example by referring to the 2010 UNCITRAL Arbitration Rules,[455] the UNCITRAL Transparency Rules would become applicable in investor-State arbitrations initiated under those agreements. With three ratifications by Mauritius (5 June 2015), Canada (12 December 2016) and Switzerland (18 April 2017), the Transparency Convention will enter into force on 18 October

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[452] As of July 2017, more than 80 jurisdictions have adopted the Model Arbitration Law. The status is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. There are a few States that have chosen not to adopt the Model Arbitration Law, including, for example, France, Switzerland and the United Kingdom (excluding Scotland). Nonetheless, the arbitration legislation in those jurisdiction resemble the general principles underlying the Model Arbitration Law. The status of the Model Arbitration Law is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

[453] Available at http://investmentpolicyhub.unctad.org/IIA.

[454] UNCITRAL, Note by the Secretariat - Status of conventions and model laws (A/CN.9/909), pp. 25-29. The note presents a non-exhaustive list of investment treaties concluded after 1 April 2014 where the UNCITRAL Transparency Rules, or provisions modelled on the UNCITRAL Transparency Rules, are applicable in some instances of investor-State dispute resolution.

[455] FTA between Korean and China.

2017.[456] The Transparency Registry established under article 8 of the Transparency Rules is a central repository for the publication of information and documents in treaty-based investor-state arbitration. the Transparency Registry publishes information and documents where Transparency Rules apply pursuant to article 1; or where the Transparency Registry is appointed for the publication, either by Parties to an investment treaty or by the parties to a dispute.[457]

ICSID and ICC continue to be the preferred arbitral institution respectively for investor-State[458] and for commercial arbitration,[459] which

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[456] When the Transparency Convention opened for signature in Port Louis, Mauritius, on 17 March 2015, eight States signed the Convention (Canada, Finland, France, Germany, Mauritius, Sweden, the United Kingdom and the United States). The Convention has 15 other signatories (Belgium, Congo, Finland, France, Gabon, Germany, Iraq, Italy, Luxembourg, Madagascar, Netherlands, Sweden, Syria, the United Kingdom and the United States).

[457] The online Transparency Registry is available at http://www.uncitral.org/transparency-registry/. When adopting the UNCITRAL Transparency Rules in 2013, the Commission expressed its strong and unanimous opinion that the UNCITRAL secretariat should fulfil the role of a transparency repository of information under the rules. It was said that the United Nations, as a neutral and universal body, and its secretariat, as an independent organ under the Charter of the United Nations, should be expected to undertake the core functions of a repository under the rules on transparency, as a public administration directly responsible for the servicing and proper operation of its own legal standards. However, in light of possible budget constraints, ICSID and PCA were also considered as temporary, back-up options should UNCITRAL not obtain the necessary resources. At present, the UNCITRAL Secretariat operates the Transparency Registry based on financial contribution from the European Commission and the OPEC Fund for International Development (OFID). For the discussions at UNCITRAL, see Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17), paras. 79-98. See also United Nations, Press release - European Union and OPEC Fund to support the operation of UNCITRAL Transparency Registry (15 January 2016) available at http://www.unis.unvienna.org/unis/en/pressrels/2016/unisl227.html.

[458] In 2016, a total of 48 cases were registered at ICSID. The total number as of 31 December 2016 is 597 cases under the ICSID Convention and the Additional Facility Rules. See ICSID, the ICSID Caseload – Statistics (Issue 2017-1), p. 7 available at https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx.

[459] In 2016, 966 new cases were filed involving 3,099 parties from 137 countries and territories. See ICC, ICC reveals record number of new Arbitration Cases filed in 2016, available at https://iccwbo.org/media-wall/news-speeches/icc-reveals-record-number-new-arbitration-cases-filed-2016/

indicates the extensive use of the respective rules. The Queen Mary Survey indicates the most preferred arbitral institution as being ICC followed by LCIA, HKIAC and SIAC.[460] UNCITRAL Arbitration Rules maintains its role for *ad hoc* arbitration in both investor-State and commercial arbitration[461] and have also been used as a model for arbitral institutions drafting their own rules. For example, the revision of the UNCITRAL Arbitration Rules in 2010 flared up revisions to rules of key arbitral institutions including the ICC in 2012, LCIA in 2014,[462] HKIAC in 2013,[463] SIAC in 2016,[464] and SCC in 2010.[465]

When IBA adopted its Guidelines, it expressed hopes that the sets of rules and guidelines of the IBA Arbitration Committee will find broad acceptance within the international arbitration community, and that they will assist parties, practitioners, arbitrators, institutions and courts in dealing with these important questions of impartiality and independence. In fact, they have generated not only substantial interest within the arbitration community but also has been referred to in a number of cases. The Queen Mary Survey indicates that 71% of its respondents have seen the IBA Guidelines on Conflicts used in practice and 24% responded the same for the IBA

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[460] Queen Mary University of London, *supra* note 4, p. 17.
[461] While there is no concrete data on how often the UNCITRAL Arbitration Rules are used in international arbitration, more so on how often they are referred to in business contracts or treaties or agreement between States, it is reported that approximating 10% of commercial arbitration is conducted under the UNCITRAL Arbitration Rules. QMUL, supra note 3, p. ** See also UNCITRAL, Note by the Secretariat - Status of conventions and model laws (A/CN.9/909).., pp. 22-24. The note presents a non-exhaustive list of arbitration centres which (i) have institutional rules based on, or inspired by, the UNCITRAL Arbitration Rules, (ii) administer arbitral proceedings or provide administrative services under the Rules, and/or (iii) act as an appointing authority under the Rules.
[462] See supra note 119.
[463] See supra note 120.
[464] See supra note 121.
[465] See supra note 122.

Guidelines on Party Representation.[466] The IBA Guideline on Party Representation was an attempt by IBA to find a uniform set of ethical standards and rules of professional conduct that can cut across the differing landscape of legal systems across the globe, helping to level the playing field for new entrants into the market. However, it remains to be seen whether the Guidelines will be commonly used considering that arbitral institutions have respectively begun to regulate counsel conduct similar to that of LCIA. Since their issuance in 2004, the IBA Guidelines on Conflicts have gained wide acceptance. Arbitrators use the Guidelines when making decisions about prospective appointments and disclosures. Likewise, parties and their representatives use the Guidelines in assessing the impartiality and the independence of arbitrators, and arbitral institutions and courts also consult the Guidelines in considering challenges to arbitrators.

The dynamic norm-making cycle should end and begin with monitoring of the status of norms. This is also in line with the transnational legal process. Systematic tracking of relevant developments including the acceptance and use of norms provide the evidence need to support the assessment of the norm-making as well as the actors involved. While a comprehensive assessment on the impact or benefit of norms in international arbitration would prove useful, due to their acceptance-based or voluntary characteristics, it would be a pose methodological challenges. As a general point, monitoring of norms should be understood as an extension of the norm-

[466] Queen Mary University of London, *supra* note 4, p. 35

making possibly leading to the commencement of another or a revision of the existing norms.

In that context, the approach taken by IBA is worth noting. Following the adoption of the IBA Guideline on Conflicts of Interest in 2004, a task force[467] was set up to monitor the extent to which the Guidelines were achieving their goal of general acceptance.[468] In June 2015, the IBA Arbitration Committee formed a Subcommittee on IBA Arbitration Guidelines and Rules to conduct a worldwide survey on the use of the IBA arbitration practice guidelines and rules. A report was issued in September 2016 outlining the reception of each of the IBA Rules and Guidelines in arbitral practice, case law, and legal publications.[469] The report provides a comprehensive analysis of the survey results and a series of recommendations mainly, the need for harmonization of the IBA Rules and Guidelines, their promotion and periodic review. Similarly, in September 2015, SIAC established its Users Council to provide feedback on the SIAC Rules and international arbitration process from users of international arbitration.[470]

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[467] The Monitoring Subcommittee of the IBA's Task Force on the Guidelines on Conflicts of Interest in International Arbitration.

[468] Feedback was sought on the extent to which the Guidelines were being used by arbitrators, counsel, parties, institutions and the courts in various jurisdictions. A survey was carried out among working group members, institutions and individuals in the targeted jurisdictions. See Judith Gill, The IBA Conflicts Guidelines – Who's Using Them and How?, DISPUTE RESOLUTION INTERNATIONAL, Vol. 1, No. 1 (June 2007), pp. 58-72. Responses were received from 19 jurisdictions: Australia, Austria, Canada, China, Czech Republic, France, Germany, Hong Kong, India, Italy, Netherlands, New Zealand, Sweden, Singapore, Spain, Switzerland, Thailand, United Kingdom and United States.

[469] See IBA, IBA Arbitration Guidelines and Rules Subcommittee – Report on the Reception of the IBA Arbitration Soft Law Products (16 September 2016) available at https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx.

[470] For information, see http://siac.org.sg/69-siac-news/443-siac-announces-establishment-of-users-council.

Surveys conducted by the QMUL School of International Arbitration also provide information about the use of different norms.[471] UNCITRAL, through its Secretariat, also monitors developments with respect to its texts including norm in the field of international arbitration.[472] Such monitoring and compilation of relevant information allows UNCITRAL to keep abreast of the developments and respond to any further needs of norm-making when necessary.

2.2 Acceptance and normativity

It is quite rare in other fields of law that surveys are conducted on the acceptance or usage of norms and that so much significance is attached to their status. Also uncommon in other fields of law are the numerous articles and commentaries that provide a comparison of the different norms setting forth the advantage and disadvantages of each. In a sense, it resembles a very competitive market or norms. The quote by Higgins that "international law has to be identified by reference to what the actors (most often States), often without the pronouncement by the International Court of Justice, believe normative in their relationship with each other" may also have some implication for norm-making in international arbitration.[473]

As noted by Koh, one of the features of a transnational legal process is that it is *normative*. He states: "From this process of interaction, new rules

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[471] The surveys are available at http://www.arbitration.qmul.ac.uk/research/index.html.
[472] See generally, UNCITRAL, Note by the Secretariat - Status of conventions and model laws (A/CN.9/909). The status of UNCITRAL texts is updated regularly on its website.
[473] See Rosalyn Higgins, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, Oxford University Press (1994), p. 18.

of law emerge, which are interpreted, internalized, and enforced, thus beginning the process all over again." Koh focused not simply on how interactions among transnational actors shape law (discussed in section 2 above) but also on how law shapes and guides future interactions (referred to as the "*normativity"* of that process). This last feature has to be nuanced to the peculiarity of the focus of this study. Whereas Koh understands rules of law as the "result" of the process of interaction among transnational actors, in the context of norm-making, "norms" are the objective. A transnational legal process is intentionally undertaken to formulate and codify norms.

A concern that is often raised with regard to some of the norms is that they lack of legitimacy. In that context, a seemingly paradoxical question must be addressed. Where does a norm applicable to the procedural aspects of international arbitration derive its normativity?

The answer to that question lies in the "legitimacy" of the norm-making, to be distinguished with the "legitimacy" of international arbitration.[474] There is no centralized legislative body with the norm-making authority or competence. Sovereignty endows States the authority to legislate national arbitration laws and to conclude and to become parties to treaties including provisions on the procedural aspects of international arbitration. As

[474] See for example, Stephan W. Schill, "Conceptions of Legitimacy of International Arbitration" in David D Caron, Stephan W Schill, Abby Cohen Smutny and Epaminontas E Triantafilou (eds.), PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION, Oxford University Press (2015), pp. 106-124 available at https://ssrn.com/abstract=2932147. For a critical perspective on international arbitration, see Dezalay et al. *supra* note 235.

such, the legitimacy of national arbitration legislation, conventions and treaties can be said to have derived from the sovereignty of the States.[475]

The question is not so simple for other norms, particularly those formulated by non-State actors, in particular international organizations. It is usually the constituting document of such organizations that defines their mandate and provides the source of authority for them to engage in norm-making. For example, UNCITRAL has a very broad mandate of progressive harmonization and unification of the law of international trade given to it by the United Nations General Assembly;[476] the ICSID Administrative Council is endowed with the power to adopt and revise the Arbitration Rules under article 6 of the ICSID Convention; the ICC Executive Board is vested with the power to approve modifications to the ICC Arbitration Rules; and IBA's norm-making authority can be found in article 1 of its Constitution, which is termed very broadly.[477] However, this authority does not automatically lend legitimacy to the resulting norm.

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[475] With regard to CETA, the European Commission is given the mandate to negotiate trade agreements from the European Council, which poses interesting questions. However, the study does not attempt to deal with those issues.

[476] General Assembly Resolution 2205(XXI) (17 December 1966), para. 8(c), which reads: The Commission shall further the progressive harmonization and unification of the law of international trade by: … (c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field.

[477] Article 1 of the IBA Constitution reads: "Its objects are: …. 1.3 to assist Members of the Legal Profession throughout the world, whether in the field of legal education or otherwise, to develop and improve their legal services to the public … 1.5 by common study of practical problems to promote uniformity and definition in appropriate fields of law. The IBA Constitution and relevant documents are available at http://www.ibanet.org/About_the_IBA/governance_and_management.aspx.

It is rather the process employed and the actors involved in the norm-making that determines its legitimacy. This is why international organizations engage in a seemingly painstaking process leading to the norms, one that attempts to be as inclusive and involving extensive consultations with stakeholders. They dynamic norm-making process as illustrated in chapter III reinforces the norm-making authority, from which legitimacy is derived from. The formal adoption by governing bodies is an effort to signal the legitimacy of the norm-making process. In other words, legitimacy is a sociological question about the norm-making "process" rather than the outcome of that process. As the "process" is interactive among those involved in the norm-making, the actors become critical.

There is another layer to be uncovered. Chapter II, section 4 mentioned the "acceptance-based" characteristic of the norms. In this context, acceptance, by definition, implies the existence of users of those norms, which are not limited to simply parties to arbitration but a broad range of relevant stakeholders from arbitrators, counsel, government officials and arbitral institutions. And thus, the "acceptance-based" characteristic requires the consideration of a new element: "the convincing value or the perceived usefulness" of norms by it users and defined broadly, the international arbitration community. It is this element that determines the "normativity" of a norm.

Understood in this fashion, the notion of normativity may differ with respect to norms in the field of international arbitration. For example, the almost universal adoption by States of the New York Convention and the

increasing enactments of the Model Arbitration Law solidify their normative nature in international arbitration practice. It remains to be seen whether the UNCITRAL Transparency Rules or the SIAC IA Rules could achieve the level of normativity that the ICSID Convention and the ICSID Arbitration Rules have been able to obtain in the field of investment arbitration. In comparison, it can be said that the IBA Guidelines on Conflicts have greater normativity than that of the IBA Guideline on Party Representation. While the UNCITRAL Notes on Organizing Arbitral Proceedings may be a useful text, it is questionable whether it has attained any normativity in arbitration practice.[478]

Introducing the notion of normativity allows for a better explanation and profound understanding of the norm-making in the field of international arbitration. This is because norm-making does not simply end with its formulation or codification. It has to have a convincing value and has to be perceived as useful, and eventually put to use.

In summary, international organizations have the authority to make the norms. However, it is the process leading to it and actors involved that endows the norm its legitimacy. Furthermore, the normativity of any given norm depends on their acceptance in international arbitration practice, which in turn impacts the norm-making process. It must aim at ensuring that the resulting norm is accepted and useful in international arbitration practice. This

[478] In fact, this may not be the objective of the Notes, which state in paragraph 2, "given that procedural styles and practices in arbitration do vary and that each of them has its own merit, the Notes do not seek to promote any practice as best practice." See UNCITRAL, *supra* note 49, para. 2.

requires taking into account the practical needs of its users and to incorporate their perspectives. This is where the need to employ a transnational legal process comes into the picture.

2.3 An analogy to customary international law

An analogy may be made to the formation of customary international law. Article 38(1) of the ICJ Statute provides as one of the two primary sources of international law, "international custom, as evidenced of a general practice accepted as law." While typically defined as a "customary practice of States followed from a sense of legal obligation," some customary international laws rise to the level of *jus cogens* through broad acceptance by the international community, while others law may be followed by a small group of states.

The criteria for recognition of international custom are that there should be widespread and consistent State practice and that this practice be accompanied by so-called *opinio juris*, or a belief in legal obligation. "Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it… The States concerned must feel that they are conforming to what amounts to a legal obligation."[479] Applying the criteria to norms in the field of international arbitration, it can be said that if there is widespread and consistent acceptance

[479] See International Court of Justice, Reports of Judgments, Advisory Opinions and Order, North Sea Continental Shelf cases (Judgment of 20 February 1969), p. 44, available at http://www.icj-cij.org/docket/files/51/5535.pdf.

or use of a norm and this acceptance or use is accompanied by a sense of belief in their normative nature, that norm has obtained a degree of normativity similar to that of international custom.

The analogy may be far-stretching due to the obvious differences. It is not "practice" that is recognized as international custom but "norms" that have been formulated. Reference is made not to settled practice of "States" but acceptance or use of the norms by non-States actors (parties to arbitration and relevant stakeholders). It is also not based on a belief that the practice is obligatory but rather a belief about the usefulness of the norm or a belief that the norms and its use conform to international arbitration practice. As a general point, because the acceptance of the norms is by non-State actors and only as a second step by States through their judicial and legislative bodies, the analogy to the formation of customary international law may seem implausible.[480]

However, the purpose of making the analogy is not to argue that such norms have achieved or will achieve the status of international custom or quasi international customary law.[481] Rather the analogy attempts to utilize the criteria employed for identifying customary international law as a useful yardstick in assessing the normativity of norms applicable to the procedural aspects of international arbitration. When there is general acceptance of the norms and continued use, it can be said that their normativity has enhanced. For example, using this criteria, it can be said that the consistent enactment of

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[480][480] Kaufmann, *supra* note 9, p. 15.

[481] Ignaz Seidl-Hohenveldern, International Economic ''Soft Law'', COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, Vol. II (1979), p. 212-213.

the Model Arbitration Law in national legislation by a number of States has made it a general practice of States and that there is acceptance of the normative value of the Model Arbitration Law not only by those States that have adopted it but also others. This may be why some academics refer to the Model Arbitration Law as a supranational source of international arbitration law reflecting its general principles. Again, it is important to emphasize that such a reference is not simply based on the fact that the Model Arbitration Law was formulated by UNCITRAL or through a process which involved States and non-State actors. It is rather the numerous adoption of the Model Arbitration Law by States and constant reference to the Model Arbitration Law by tribunals and courts which justifies such a reference.

The same may be said of the well-known provisions of the UNCITRAL Arbitration Rules (for example, article 17(1)), which reflect general principles of international arbitration.[482] In a similar fashion, if the IBA Guidelines continue to be referred to by users and relevant stakeholders including States (see for example, article 8.30 of CETA) and there is general acceptance of the normative nature of those Guidelines, they could escalate from merely being a standard adopted by an international organization to something more.

[482] Article 17(1) of the UNCITRAL Arbitration Rules reads: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

In this context, it is interesting to note the caveat that exists with regard to the Transparency Convention. Upon adopting the UNCITRAL Transparency Rules in 2013, the Commission had before a note by the Secretariat on the applicability of the Rules to the settlement of disputes arising under investment treaties concluded before 1 April 2014.[483] This was to address the non-retroactive application of the Transparency Rules, because the Transparency Rules were to apply to arbitration arising under investment treaties concluded after they came into effect. The Working Group had discussed the options of making the Transparency Rules applicable to existing investment treaties either by way of a convention, whereby States could express consent, or by a recommendation urging States to make the rules applicable in the context of treaty-based investor-State dispute settlement. The possibility of making the Transparency Rules applicable to existing investment treaties by joint interpretative declaration pursuant to Article 31(3)(a) of the Vienna Convention on the Law of Treaties (the "Vienna Convention"), or by an amendment or modification of a relevant treaty pursuant to Articles 39-41 of the Vienna Convention, was also considered. [484]

After a heated debate on 10 and 11 July 2013, the Commission reached a consensus to entrust its Working Group II with the task of drafting a

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[483] UNCITRAL, Note by the Secretariat - Applicability of the UNCITRAL rules on transparency to the settlement of disputes arising under existing investment treaties (A/CN.9/784).

[484] References to the reports of the Working Group where application of the UNCITRAL Transparency Rules to existing investment treaties was discussed: A/CN.9/712, paras. 85-94; A/CN.9/717, paras. 42-46; A/CN.9/736, paras. 134 and 135; A/CN.9/760, para. 141; A/CN.9/765, para. 14. Notes by the Secretariat on the matter: A/CN.9/WG.II/WP.162, paras. 22-40; A/CN.9/WG.II/WP.166/Add.1, paras. 10-23; A/CN.9/WG.II/WP.169/Add.1, paras. 36-41; A/CN.9/WG.II/WP.176/Add.1, paras. 14-34.

convention on the application of the UNCITRAL Transparency Rules to existing investment treaties.[485] However when the Commission decided to prepare the Convention, it noted that the Convention would not create any expectation that other States would use the mechanism offered by that mechanism.[486] The intention was not to prepare a binding international instrument, but an instrument which States that wished that wished to make the UNCITRAL Transparency Rules applicable to their existing investment treaties an efficient mechanism to do so. This was based on a compromise reached by the Commission noting the concern by some that the transparency standards embodied by the Transparency Rules were new, that all States might not be ready to apply those standards at that time, that a convention could be perceived as changing dynamics in terms of negotiating bilateral investment treaties and that pressure could be brought on States to adopt it.[487] Considering that the General Assembly recalled the decision of the Commission (without creating any expectation that other States would use the mechanism offered by the convention) when adopting the Convention,[488] it would be interesting to see whether those States not wishing to use the mechanism provided in the Convention could avoid the interaction and

[485] Officials Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17), para. 127. See also summary records A/CN.9/XLVI/SR.963 paras. 5-56 and 964 paras, 1-11.
[486] Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17), para. 127. The mandate of the Commission to the Working Group reflects a consensus achieved in relation to proceeding to undertake the drafting the convention. That mandate clarifies that the purpose of a convention would be "to give those States that wished to make the UNCITRAL Transparency Rules applicable to their existing treaties an efficient mechanism to do so, without creating any expectation that other States would use that mechanism.
[487] *Ibid*. paras. 122-123.
[488] General Assembly Resolution 69/116 (10 December 2014), preamble.

internalization, if and when many States do become parties to the Convention. Recalling the analogy to the formation of customary international law made above, the inclusion of such a phrase in the General Assembly resolution adopting the Convention can be interpreted as "persistent objector" blocking the emergence of the general acceptance of the Convention as a mechanism to incorporate the transparency standards.

2.4 Internalization and the need for promotion

In explaining why States obey international law, Koh refers to notions of "interest" and "identity" putting more emphasis on "interaction" and "internalization".[489] Similar notions can be used to explain not the observance but rather the acceptance of the norms by users in international arbitration.

States have increasingly adopted the Model Arbitration Law because it is within their "interest" to modernize their national arbitration legislation based on international standards. It may do so to "identify" itself as an arbitration-friendly jurisdiction. With the growing number of enactments and increased "interaction" among actors in international arbitration practice, a pattern of behaviour may generate additional pressure on those States that have yet to "internalize" the Model Arbitration Law into their national legislation to do so, be it only a model text.

The acceptance or use of the different arbitration rules and other norms can also be explained in the sense that it is within their interest and that it results from interaction with the various stakeholders in international

[489] Koh, *supra* note 5, pp. 199-205.

arbitration practice including party representative, arbitrators and arbitral institutions. It is through such interaction that parties, when signing a sales contract, includes a reference to a specific place of arbitration, a specific set of rules as well as an arbitral institution.

This explains the immense amount of promotion that takes place in this field as well as the importance of such promotion activities. For example, the persuasive value of the effectiveness of the ICC or ICSID arbitration is often enriched through interaction between in-house counsels, potential arbitrators and other stakeholders at international conferences, resulting in the internalization of the respective norms by its users through incorporation into contracts and investment agreements.

Norm-making does not end with the codification of a norm. Its acceptance and use has to be encouraged through interaction with different stakeholders and eventually internalized by the intended users. It is no wonder why all international organization involved in norm-making make significant efforts to stimulate the use of their norms. In particular, those of arbitral institutions in promoting their rules as well as their services quite resemble the marketing strategies of ordinary businesses. The guidance texts formulated by such arbitral institution can also be better understood in this context. Despite the comparatively limited resources, UNCITRAL, through it secretariat, also undertakes a range of so-called technical assistance and cooperation activities to promote the use and adoption of its texts, as a means to further its mandate of the progressive harmonization and modernization of international trade law.

The Secretariat Guide on the New York Convention [490] and the UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration[491] are some examples. Considering the above, it seems necessary to construe promotion of norms as constituting the finishing touch of the norm-making, one that adds to the normative value.

The concluding remarks of this section may be circular. Norm-making obtains its legitimacy through the norm-making process and norms obtain their normativity through their acceptance in international arbitration practice. Once there is widespread acceptance of a norm through various interaction among the transnational actors, the norm becomes more embedded in international arbitration practice or using transnational legal process terms, is internalized by its users. This is what allows the norm to acquire its stickiness,[492] a considerable degree of normativity.

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[490] Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), paras. 40 and 48. The Secretariat of UNCITRAL continues to promote and monitor the implementation of the New York Convention and recently published the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf.

[491] See *supra* note 363.

[492] Koh, *supra* note 5, p.204.

Chapter V Implications for norm-making

The political and economic landscape of the world is changing constantly. In the field of trade and investment, the rise of mega-FTAs (Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP)) and the increasing role of regional economic integration organizations, especially the European Union, were the catchword just few months ago. But with the withdrawal of the United States from the TPP and the withdrawal of the United Kingdom from the EU, only uncertainty lies ahead.

However, as the phrase goes "business as usual." There will continue to be international transactions and there will be economic disputes. To businesses, uncertainty arising from such disputes is more at their heart than how world politics will change in the next few months or years. There will be a continuing role for international arbitration as a method of resolving cross-border economic disputes and thus a continued demand for norms applicable to its procedural aspects.

It is expected that the number of norms in the field of international arbitration would continue to grow. Almost every week, there is news about a proposal for or an enactment of a new international arbitration legislation, revisions of arbitration rules, a notable procedural order no. 1 by an arbitral tribunal and court decisions on arbitral awards. Endless series of conferences and so-called "arbitration weeks" span throughout the entire calendar year addressing such developments.

The study has shown that there exists no overarching norm for international arbitration, possibly with the exception of the New York Convention. The study has further illustrated that the current procedural framework consists of multiple norms based on the recognition of and supplementing the parties' procedural autonomy. The nature and form of such norms vary to a wide extent. Recently, there has been a flood of norms formulated by and involving a number of non-State actors, with no single global body having the authority to codify or formulate such norms. This phenomenon has raised questions about the legitimacy of such norms as well as their making.[493]

It is doubtful that norm-making in the field of international arbitration will change dramatically in the near future. The conventional wisdom of the New York Convention will continue to form the backbone. Legislators will revise their arbitration laws to meet international standards and to address their particular needs. Arbitral institutions will consistently improve their rules to make them more attractive to users and will prepare guidance material relating to the application of such rules. Professional organizations will continue to make efforts to contribute to the development of international arbitration, standard-setting perceived as one of the means for such contribution. Reflecting international arbitration practice, the general objective of such norms would continue to be ensuring the integrity of, and

[493] See for example, the preliminary program of the 2018 ICCA Conference (15-18 April 2018, Sydney, Australia) available at http://www.icca2018sydney.com/program.php.

enhancing the effectiveness of, international arbitration on the basis of recognition of parties' procedural autonomy.

In that context, this chapter examines the future of global norm-making in the field of international arbitration, which has become institutionally crowded. Despite the increasing number of actors involved, there have not been any calls for establishing a single legislative body for formulating norms, which probably is a reflection of the diversity in arbitration practice and of the flexibility upon which international arbitration is based. Noting the peculiar and continued role to be played by international organizations, this chapter outlines some implications and makes suggestions with regard to norm-making.

The conclusion of the study is that in order to make effective norms that is as widely accepted in international arbitration practice as possible, international organizations must realize a transnational legal process in their norm-making, yet taking into account the peculiarities of the specific norm to be formulated. Norm-making must engage those that will eventually accept them. Norms need to be formulated considering their potential acceptance which would addresses any possible concerns about their legitimacy and normativity. In short, international organizations must aim at realizing a transnational legal process and more specifically, ensuring that the end-result, the norm is eventually widely accepted in international arbitration.

As these suggestions cannot be considered in vacuum, the study takes UNCITRAL as an example to see how these suggestions could be implemented. While particular attention is given to UNCITRAL in realizing a

transnational legal process to norm-making, the considerations outlined below are as pertinent to norm-making by other international organizations and may well be to norm-making in other fields of law as well.

1. Transnational legal process and beyond

Transnational legal process supposes the existence of a "forum" where public and private actors interact to make, interpret, enforce and ultimately, internalize rules of transnational law. Only a handful of actors in the field of international arbitration have both the authority and the capacity to bring together States and a wide range of non-State actors with substantially different views to generate a consensus or a compromise in norm-making.[494]

Among them, UNCITRAL has provided a universal forum for discussing the acceptability of ideas and proposals to improve norms in the field of international arbitration and has been successful in creating a favourable environment for international arbitration. In so doing, UNCITRAL has been able to absorb even the most extreme form of challenges and to foster cooperation within this field, allowing its perpetuation in a manner acceptable by the largest possible actors.[495]

ICSID and PCA have a more direct interest in formulating their respective procedural rules, under which they administer arbitral proceedings. UNCITRAL is distinct as it does not administer international arbitration. Moreover, it was established as a norm-making body with a mandate to

[494] Gaillard, *supra* note 225, p. 16.
[495] Ibid. p. 17.

prepare legal instruments in the broader field of international trade law. Therefore, it formulates international legal standards in other fields such as sale of goods, electronic commerce, transport law, procurement, insolvency and secured transactions.

Norm-making at UNCITRAL can be seen as a concrete example of transnational legal process in action. In a narrow sense, it is an international "forum" where States and non-State actors engage in norm-making. Once transnational norms are formulated, they are interpreted, internalized and enforced in arbitration practice. When the need for a revision or a new norm arises, it is again brought to the forum of UNCITRAL, reinitiating the norm-making cycle.

In this regard, it is worth exploring the historical background of UNCITRAL. UNCITRAL was established by the General Assembly of the United Nations in 1966 to pursue the goal of the progressive harmonization and unification of international trade law.[496] It is one of the six commissions subsidiary to the General Assembly, which also include the ILC.[497]

In 1965, the General Assembly had requested the Secretary-General to submit a report for consideration of steps to be taken for progressive development in the field of private international law with a particular view to promoting international trade (the "Report").[498] The Report provided a survey of the work in the field of harmonization and unification of international trade

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[496] General Assembly Resolution 2205 (XXI) of 17 December 1966.
[497] The Commissions were established in accordance with Rule 161 of the General Assembly Rules of Procedure. Additional information is available at http://www.un.org/en/ga/about/subsidiary/commissions.shtml.
[498] General Assembly Resolution 2102 (XX) of 20 December 1965.

law[499] by IGOs, regional IGOs and NGOs,[500] identified methods, approaches and topics suitable for harmonization and unification[501] and the role of the United Nations in that context.[502] Noting the development of international trade law, the Report made some interesting observations, which are closely relevant to this study.

First, in explaining the reasons for the universal similarity of international trade law, it noted that parties are free, subject to limitations imposed by the national laws, to contract on whatever terms they are able to agree. It also noted that arbitration is widely used in international trade for the settlement of disputes, and arbitral awards command far-reaching international recognition and are enforceable abroad.[503] Second, it observed that the modern international trade law is not imposed by an international legislator nor applied *pro prio vigore* (by its own force) as part of the *jus gentium*. Rather it is applied by leave and license of national sovereigns to incorporate it within their legislative frameworks and national public policy will, in principle, override or qualify any rule of international trade law.[504] Lastly, it observed that the formulation of international trade rules by international "formulating" agencies (UN organs, IGOs, agencies formed by

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[499] United Nations, Report of the Secretary General (A/6396), paras. 10 and 12. The expression "the law of international trade" was defined as "the body of rules governing commercial relationships of a private law nature involving different countries." It further provided that "international commercial relations on the level of private law entered into by governmental and other public bodies (…) are deemed to be included within the definition of the law of international trade."
[500] *Ibid*. paras. 190-207.
[501] *Ibid*. paras. 208-235.
[502] Ibid. paras. 26-189.
[503] *Ibid*. para. 23.
[504] *Ibid*. para. 24.

"merchants" and other international jurists) is the outstanding characteristic of the modern development of international trade law. These observations made some fifty years ago continue to stand, particularly in the field of international arbitration.

Upon such observations and noting the shortcomings of the previous work by formulating agencies, UNCITRAL was born out of the perceived necessity respecting the existing balance between international standard-setting on the one hand, and sovereign jurisdiction on the other, as well as the autonomy of the parties to adopt the relevant regime applicable to the transaction at hand.[505]

While UNCITRAL was established 30 years prior to Koh's article, the expectations of the General Assembly was that UNCITRAL functions as a forum[506] realizing a transnational legal process, particularly with regard to the norm-formulation. And as outlined briefly in chapter II, section 2, UNCITRAL's efforts in norm-making have been wide-ranging touching upon contractual, national and international framework for international arbitration as well as providing necessary guidance texts.[507] While the New York

[505] *Ibid*., para. 195.
[506] Koh, *supra* note 5, pp. 183-184.
[507] The following lists key legal instruments prepared by UNCITRAL in the field of international arbitration since its inception.

- UNCITRAL Arbitration Rules (1976)
- UNCITRAL Model Law on International Commercial Arbitration (1985)
- UNCITRAL Notes on Organizing Arbitral Proceedings (1996)
- Amendments to UNCITRAL Model Law on International Commercial Arbitration (2006)
- Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006)
- Revised UNCITRAL Arbitration Rules (2010)

Convention was prepared prior to the establishment of UNCITRAL, UNCITRAL also plays a significant role in monitoring developments relating to the Convention.

UNCITRAL has provided a universal forum for preparing norms in the field of international arbitration and has been successful in creating widely accepted norms. However, this does not mean the UNCITRAL will continue to be called upon to formulate norms nor guarantee its prominence in norm-making. Like any other international organization, it must continue to identify a role to play in the dynamic norm-making cycle, prioritize its work and continue to make efforts to provide an effective forum for norm-making.

Norms formulated by UNCITRAL in the field of international arbitration have generally aimed at achieving harmonization. Harmonization of national arbitration legislation has been achieved through the Model Arbitration Law. Convergence of institutional arbitration rules has also been promoted through the UNCITRAL Arbitration Rules. The remaining terrain, particularly where arbitral institutions and professional organizations have become more active, resemble a marketplace, where norms are supplied according to the demand of the users like any other product and where diversity is valued by its users.

- UNCITRAL Transparency Rules on Treaty-based Investor-State Arbitration (2013)
- UN Convention on Transparency in Treaty-based Investor-State Arbitration (2014)
- Revised UNCITRAL Notes on Organizing Arbitral Proceedings (2016)
- UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016)

A fundamental question with regard to norm-making is whether to pursue convergence or to accommodate divergence,[508] which is closely related to the objective of the norm. A convergence-pursuing approach would seek to counter or overcome differences and create a commonly acknowledged framework. Such an approach would likely involve some authoritative norm-making or cross-border endorsement of basic elements. A divergence-accommodating approach would recognize differences and aim at confining the diversity. Such an approach would take a more horizontal perception and recognize separate elements within the broader legal framework.

It must not be forgotten that one of the virtues of international arbitration is its flexible nature allowing parties to structure the procedure as they wish. It is somewhat natural that norms have also taken a wide range of approaches and the benefit of such diversity is worth noting.[509] First, not all parties have identical preferences for a specific procedure and parties generally prefer to tailor it to meet their own needs. Second, diversity allows for improvement and fosters innovation, which has been evidenced in the recent developments in institutional rules. Just as being around people who are different from us makes us more creative, diligent and hard-working,[510] diversity of norms encourages and promotes the search for novel solutions to

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[508] Neil Walker, INTIMATIONS OF GLOBAL LAW, Cambridge University Press (2015), p. 55.
[509] For an analysis of the issue with regard to national arbitration legislation, see Christopher R. Drazohal, Diversity and Uniformity in International Arbitration Law, EMORY INTERNATIONAL LAW REVIEW, Vol. 31, Issue 3 (2016), p. 14 available at http://law.emory.edu/eilr/_documents/volumes/31/3/drahozal.pdf.
[510] Katherine W. Phillips, *How Diversity Makes Us Smarter* (1 October 2014), available at https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/.

old and new procedural issues arising in international arbitration. This is an aspect to be borne in mind when embarking on any norm-making.

As Gaillard noted, UNCITRAL is one of the few actors in the field of international arbitration that has the authority and the capacity to bring together States and a wide range of non-State actors with substantially different views to generate a consensus.[511]

2. A multilateral forum for States

UNCITRAL is comprised of sixty member States elected from States Members of the United Nations representing various geographic regions[512] and economic and legal systems.[513] The expansion of the membership to 60 States in 2002 reflected the aspiration for broader participation and contribution by States beyond the then existing member States.[514]

UNCITRAL adopts a flexible and inclusive approach with respect to non-member (or observer) States and all United Nations State members of the are invited to the sessions of UNCITRAL. This openness to observer States is widely recognized as a key element in maintaining the high quality and the practical relevance of the work of the Commission. The participation of observer States in the formation of consensus is also viewed as being

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[511] Gaillard, *supra* note 225, p. 16.
[512] The 60 member States include 14 African States, 14 Asian States, 8 Eastern European States, 10 Latin American and Caribbean States and 14 Western European and other States.
[513] Its original membership in 1966 comprised 29 States (General Assembly resolution 2205 (XXI) of 17 December 1966, sect. II, para. 8) and was expanded in 1973 by the General Assembly to 36 States (General Assembly resolution 3108 (XXVIII) of 12 December 1973, para. 8).
[514] General Assembly resolution 57/20, para. 2. The expansion was effective from the opening day of the thirty-seventh annual session of UNCITRAL, in 2004. [Commission report A/56/17]

consistent with the Commission's aspiration to achieve universal acceptability of its standards.[515]

In that context, a key role of UNCITRAL that needs to be highlighted and maintained is its ability to allow for a multilateral approach to norm-making taking into account the interests of all States involved. Such an approach results in norms premised on legal inter-operability, not only between national legislations but also between bilateral and regional legal frameworks. This is a peculiar function of UNCITRAL that cannot be replicated by other international organizations. As such, UNCITRAL should continue to provide a platform for States to discuss ideas and suggestions about future norms, to determine their feasibility and desirability and if found appropriate, to proceed with the norm-making.

As illustrated in chapter IV, section 1.1, it is encouraging to note the gradual increase in the number of States taking part and those constantly participating in the norm-making at UNCITRAL. States, by participating in the norm-making process, obtain a better understanding of the norms as well as the process leading to it, which increases the possibility of their acceptance.

Despite the growth of international arbitration, not all States have in place a modern legislative framework for international arbitration.[516] International arbitration practice have yet to develop in those States and they may have different perspectives on norm-making as well as to the contents of the norms. While the argument by few that norms are a tool by which the

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[515] *Supra* note 237(A/63/17), para. 378.

[516] In this context, the continued need to provide technical assistance and capacity building for States in law reform and interpretation of norms should be highlighted.

arbitration elites maintain their power and control over international arbitration[517] may not be true, norm-making should have a broad foundation to embrace the views of as many States. It should be based on inputs from States with different levels of economic development and legal traditions. Representation between States with a well-developed international arbitration regime and those still developing one would need to be balanced. Language should not be a barrier to participating in norm-making. In essence, the diversity of legal traditions and of arbitration experience should eventually form the nucleus of the consensus in norm-making. Recalling what Franck noted, international norms developed through discursive synthesis are more likely to be implemented in the end. [518]

As the study has illustrated, a multilateral approach may not be necessary for all types of norms. In most cases, norm-making will take place in a sphere of its own involving relevant stakeholders, the ICSID and ICC Arbitration Rules being some examples. Yet, when it is deemed desirable to formulate a norm that would be acceptable to a large number of States, it might be prudent to consider the forum of UNCITRAL, where a multilateral approach to norm-making is possible.

An example might be the role of UNCITRAL in the context of the proposed reforms to improve the investment arbitration procedural framework, where States have particular interest not only as norm-makers but also as respondents in arbitration. Growing criticism over investor-state arbitration

[517] Dezalay, *supra* note 235.
[518] Franck, *supra* note 335.

has triggered demands for reforms of the existing framework from States, international organizations and civil society groups.[519] Such demands has also caught the attention of the media which have resulted in increased coverage of investment arbitration cases and ISDS-related negotiations.[520]

The initial advances in responding to concerns about investment arbitration were through enhanced transparency. This was pursued through provisions in chapter 11 of the NAFTA and furthered through the 2003 Canadian Model FIPA[521] and the 2004 U.S. Model BIT.[522] In 2012, only eight bilateral treaties contained provisions regarding public access to hearings of arbitral tribunals.[523] Likewise, only thirty-five bilateral treaties provided for publication of awards and only twenty-five treaties contained provisions on the participation of non-disputing parties, experts, amici curiae or other interested individuals or entities.

These efforts by States were later captured partially in the 2006 revisions of the ICSID Arbitration Rules, which introduced transparency to

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[519] Gabrielle Kaufmann-Kohler and Michele Potestà, Challenges on the road toward a multilateral investment court, Columbia FDI Perspectives No. 201 (5 June 2017), available at http://ccsi.columbia.edu/files/2016/10/No-201-Kaufmann-Kohler-and-Potesta-FINAL.pdf.

[520] The media factor in norm-making may be particularly important because it forms the basis of the public perception on international arbitration, regardless of whether the contents are entirely factual or not. The downside is that the media tends to be topical and selective as well as being short-lived.

[521] See Canada's Foreign Investment Protection and Promotion Agreement Model, 2003, arts. 20-47 available at http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf.

[522] US Model Bilateral Investment Treaty 2004, arts. 28-29 available at https://www.state.gov/documents/organization/117601.pdf and US Model Bilateral Investment Treaty 2012 available at https://www.state.gov/documents/organization/188371.pdf.

[523] See Pohl et al, supra note 89, pp. 37-38. Canada-Jordan BIT (2009); Canada-Panama FTA (2010); Canada-Romania BIT (1996); Chile-Colombia FTA (2006); Korea-United States BIT (2007); Mexico-Switzerland BIT (1995); Morocco-United States FTA (2004); Peru-United States FTA (2006). CAFTA (2004), Investment Agreement for the COMESA Common Investment Area (2007) the and the ASEAN Comprehensive Investment Agreement (2009) contain provisions on open hearing to the public.

the ICSID proceedings. However, this change was limited to the ICSID sphere. It did not apply to investment arbitration conducted under other rules, which accounted for approximately 23% of the known investment arbitration cases till 2005.[524]

For States that wanted to ensure a similar degree of transparency in non-ICSID proceedings, one approach would have been to propose amendments to each of its existing investment agreements to incorporate relevant provisions. This would, however, require a substantial effort and still be limited in scope. As illustrated in chapter III,[525] the multilateral approach undertaken in preparing the UNCITRAL Transparency Rules and the Transparency Convention allowed for the establishment of substantive rules on the topic as well as a mechanism for States to incorporate those rules into their existing treaties, both deemed acceptable by States preparing the norms and readily available for States wishing to adopt them.[526]

To deal with the systemic deficiencies in the investment arbitration regime, the introduction of an appeal mechanism or the creation of a standing

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[524] UNCTAD, RESEARCH NOTE – RECENT DEVELOPMENTS IN INTERNATIONAL INVESTMENT AGREEMENTS (UNCTAD/WEB/ITE/IIT/2005/1) (30 August 2005), p.14. Of the 183 known ISDS cases till June 2005, 123 were conducted under the ICSID Rules and 39 were conducted under the UNCITRAL Arbitration Rules.

[525] See Annex, sections G and H.

[526] The Transparency Convention effectively modifies a number of first-generation international investment agreements (IIAs) (of those countries that have ratified the Convention), which turns it into a collective IIA reform action. Future IIA reform actions could draw upon (i) the process of multilateral negotiations that led to the UNCITRAL Transparency Rules and the Transparency Convention and (ii) the Transparency Convention's opt-in mechanism, which modifies certain aspects of pre-existing IIAs. See UNCTAD, WORLD INVESTMENT REPORT 2017, p. 141 available at http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

investment court were considered as possible options.[527] The reforms pursued by the EU and Canada in CETA,[528] which include such elements, can be seen as an effort to move forward with further reforms.

CETA establishes a new system for resolving investment disputes between investors and States in its chapter 8, section F,[529] which contains a number of provisions that distinguish it from existing investment treaties.[530] CETA creates a permanent investment tribunal[531] and an appellate tribunal. [532] Unlike the traditional system, investors and respondent States will not be involved in the appointment. This raises concerns as it would be contrary to

[527] See generally UNCTAD, Investor-state dispute settlement: A sequel - UNCTAD Series on Issues in International Investment Agreements II (2014), pp. 191-195 available at http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf.

[528] CETA is a comprehensive free trade agreement consisting of thirty chapters on market access for goods, services, investment and government procurement, as well as on intellectual property rights, sanitary and phytosanitary measures, sustainable development, regulatory cooperation, mutual recognition, trade facilitation, cooperation on raw materials, dispute settlement and technical barriers to trade. CETA was concluded in September 2014 and signed in October 2016. Since 2006, the European Union has negotiated a number of so-called "new generation" FTAs as part of the 2006 Global Europe Strategy, which were "to be comprehensive and ambitious in coverage, aiming at the highest possible degree of trade liberalization." This has led to a number of major agreements including with the Republic of Korea, which entered into force on 13 December 2015, as well as with Singapore and Vietnam.

[529] The text is available at http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/.

[530] The ISDS system in CETA is expected to ultimately replace the eight existing bilateral investment agreements between EU Member States and Canada, which have been based on the traditional approach.

[531] Article 8.27 of CETA reads: "The Tribunal will be composed of fifteen members nominated by the CETA Joint Committee. For each claim, a division consisting of three members randomly-selected will hear the case."

[532] The appellate tribunal will review awards rendered by the investment tribunal. CETA clearly defines the grounds for review, which are (i) errors in the application or interpretation of applicable law, (ii) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law and (iii) grounds set out in Article 52(1)(a) to (e) of the ICSID Convention, in so far as they are not covered by the first two categories. See Article 8.28 of CETA.

the principle of party autonomy and leads question whether the procedure envisaged in CETA can be characterized as arbitration at all.

CETA also introduces a code of ethics for tribunal members (independence, conflict of interest and challenge procedure) and makes an explicit reference to the IBA Guidelines on Conflicts.[533] As to the conduct of the proceedings, reference is made to the UNCITRAL Transparency Rules.[534] CETA addresses the issue of parallel proceedings[535] and introduces a system for rejecting claims manifestly without legal merit[536] and claims unfounded as matter of law.[537] CETA also address third-party funding requiring a party benefiting from it to disclose to the other party and to the Tribunal the name and address of the third party funder.[538] As regards the award, punitive damages and awards that require repeal of a measure are prohibited.[539]

In a nutshell, CETA is an initiative to formulate new norms applicable to the procedural aspects of investment arbitration, if it can the mechanism can be characterized as "arbitration." While the provisions of CETA have yet to be put into practice, it could potentially have repercussions on the conduct

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[533] Tribunal members, upon appointment, are required to refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under CETA or any other international agreement. See article 8.30 of CETA.

[534] Article 8.36 of CETA reads: "The UNCITRAL Transparency Rules, as modified by this Chapter, shall apply in connection with proceedings under this Section." CETA provides a list of documents to be made publicly available under article 3 of the Transparency Rules and confirms that hearings shall be open to the public. Interested parties including non-governmental organizations and trade unions can make amicus curiae submissions. The need to protect confidential or protected information is also mentioned.

[535] Article 8.24 of CETA.

[536] Article 8.32 of CETA.

[537] Article 8.33 of CETA.

[538] The disclosure is to be made at the time of submission of the claim or without delay as soon as the agreement is concluded with the third party funder or the donation or grant is made. See article 8.26 of CETA.

[539] Article 8.39, paras. 1, 3 and 4 of CETA.

of investment arbitration.[540] From the standpoint of this study, CETA is a norm agreed to by Canada and the EU through a long negotiation process and one that is applicable only to investor-State disputes involving investors from Canada and the EU. It does not have global implications. Noting this limitation, CETA includes a provision stating that EU and Canada shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes.[541]

In January 2015, the European Commission had issued a report on the on the public consultation on investor-state dispute settlement in the Transatlantic Trade and Investment Partnership (TTIP).[542] In May 2015, the EC Commissioner, Cecilia Malmström stated that one of her priorities would be to thoroughly modernise the traditional form of ISDS[543] and the European Commission issued a concept paper chartering the path for an ambitious reform.[544] Acknowledging that reform of investor-States dispute settlement

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[540] UNCTAD, supra note 526, p. 141.
[541] Article 8.29 of CETA.
[542] European Commission, Report - Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP) (13 January 2015) available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf. The consultations were launched in March 2014. See European Commission, European Commission launches public online consultation on investor protection in TTIP (27 March 2014) available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1052&title=European-Commission-launches-public-online-consultation-on-investor-protection-in-TTIP.
[543] Available at https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en.
[544]The concept paper declares openly for the first time the Commission's desire to explore the creation of an international investment court and of a future multilateral setting for the resolution of investment disputes (See European Commission, Investment in TTIP and beyond – the path for reform (12 May 2015) available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf). Detailed proposals for

may be best undertaken multilaterally rather than bilaterally, the European Commission indicated that, in parallel to the reform process undertaken in bilateral EU negotiations, work should start on the establishment of a multilateral system for the resolution of international investment disputes.[545] In December 2016, the European Commission launched a public consultation on a multilateral reform of investment dispute resolution.[546]

It remains to be seen how the European Commission would pursue this further but concluding bilateral and regional treaties with a number of their trading partners may only result in further fragmentation of the procedural framework for investment arbitration. Rather it might be worth considering "engaging multilaterally" to establish a common understanding or new rules among a multitude of States, coupled with a mechanism that brings about change "in one go".[547] UNCTAD highlights that the advantage of such an approach stating that if successful, it would be the most efficient way to address the inconsistencies and overlap, and could help avoid further

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a new Investment Court System for TTIP and other EU trade and investment negotiations were presented on 16 September 2015 (see European Commission, Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations (16 September 2015) available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364).

[545] European Commission, Concept Paper - Investment in TTIP and beyond – the path for reform (5 May 2015).

[546] See European Commission, European Commission launches public consultation on a multilateral reform of investment dispute resolution, (21 December 2016) available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1610. See generally, Catherine Titi, The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead, TRANSNATIONAL DISPUTE MANAGEMENT (2017).

[547] UNCTAD, IIA Issues Note Issue 2, Phase 2 of IIA Reform: Modernizing the existing stock of old-generation treaties (June 2017), p. 8 available at http://investmentpolicyhub.unctad.org/Upload/Documents/diaepcb2017d3_en.pdf. See also UNCTAD, IIA Issues Note No.1, Taking stock of IIA reforms (March 2016) http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d3_en.pdf.

fragmentation arising from individual states' piecemeal reform actions.[548] At the same time, it is noted that a multilateral reform would be the most challenging path as consensus among many States is hard to achieve and at least at this stage, is more likely to result in a non-binding instrument with a narrow scope having has a limited impact on international investment agreements overall. [549]

In a way, reform of investment arbitration might be "elaborated best in a forum such as UNCITRAL that is global; inclusive; state-run, yet open to other stakeholders; and has procedures in place for writing international instruments."[550] Regardless of whether the discussions result in norm-making or not, UNCITRAL could, at least, provide the forum to discuss the issues underpinning the reforms. During the consultations conducted by the UNCITRAL Secretariat leading to the discussion, it was underlined that efforts to proceed with a reform of the current investment arbitration regime should be transparent, undertaken on a multilateral basis in order to avoid fragmentation, and should provide the opportunity for non-State actors to give their views.[551]

At its fiftieth annual session, UNCITRAL considered the topic of reforms of investor-State dispute settlement during its Commission session in

[548] UNCTAD, *supra* note 547, p. 16.
[549] *Ibid*.
[550] Kaufmann-Kohler, supra note 519.
[551] See UNCITRAL, Note by the Secretariat - Reforms of investor-State dispute settlement (ISDS) (A/CN.9/917).

July 2017 as an agenda for possible future work.[552] After considerable debate, UNCITRAL decided to entrust its Working Group III with a mandate to work on the possible reform of investor-State dispute settlement (ISDS). The Working Group will identify concerns regarding ISDS and consider whether reform is desirable. If so, the Working Group will develop relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate. It was further agreed that any recommended solutions would be designed taking into account the ongoing work of relevant international organizations and would allow each State the choice of whether and to what extent it wishes to adopt the relevant solutions.[553] It was reiterated that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, will be government-led, consensus-based and be fully transparent. International inter-governmental and non-governmental organizations invited by the Commission will be able to participate in the deliberations.

3. An inclusive forum involving non-State actors

Chapter IV, section 1.3 illustrated the increasing role and participation of non-State actors in norm-making, which is expected to grow in the future. This section emphasizes the continued role of non-State actors in

[552] UNIS Press Release, UNCITRAL to consider possible reform of investor-State dispute settlement (14 July 2017) available at http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl250.html.
[553] Ibid.

the UNCITRAL norm-making process and why it is necessary for UNCITRAL to provide an inclusive global forum which encompasses such non-States actors in addition to States. The need for coordination of different norm-making initiatives by such non-State actors is dealt separately in section 5 below.

Considering that norm-making will continue to aim at addressing the needs of and reflecting international arbitration practice (see chapter III, section 2), the experience and expertise that IGOs, arbitral institutions and professional organizations possess with respect to its procedural aspects are essential to the ensuring the quality of the norms formulated by UNCITRAL. Their participation allows for the norm-making process to take into diverse perspectives and achieves a balanced representation of the major viewpoints or interests from all areas and regions of the world, as not all States may be present during the deliberations.

In fact, efforts to increase the representativeness of actors involved have been made in all norm-making fora. For example, ICSID has broadened their public consultation process to all those interested. The Task Force for the preparation of the IBA Guidelines on Party Representation and the Subcommittee on Conflicts of Interest revising the IBA Guidelines on Conflicts were both expanded with improved geographical representation, which seemingly advocates for more inclusiveness in the process.[554]

In that sense, the fact the number of non-State actors present at Working Group grew from 7 at its thirty-second session in 2000 to 40 at the fifty-eighth

[554] See respectively supra note 396.

session in 2013 is promising. The total number of non-State actors participating in the making of the UNCITRAL Transparency Rules and the Transparency Convention surpassing 55 also indicates the growth and diversity of views.

The Commission has repeatedly recognized that participation of non-State was crucial for the quality of texts formulated by UNCITRAL, which has been reaffirmed by the General Assembly.[555] Building on that practice, UNCITRAL should continue to take a flexible and permissible approach as regards participation of non-State actors drawing on their expertise and ensuring appropriate level of cooperation, particularly with regard to the promotion of the formulated norms.[556] Non-State actors should be given the opportunity to participate in the deliberations on substantive matters to the same extent as State members by making oral statements and submitting drafting proposals.[557] The order of their statements, including in reply to statements made by States, should be a question left to the chairperson with a view to ensuring comprehensive, uninterrupted and structured debates that benefit from expert contributions of those organizations.[558] What may need to be further considered is a mechanism for non-State actors to also be able to suggest and bring norm-making initiatives to UNCITRAL, just as the ICC had done in the process leading to the New York Convention.

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[555] See for example, General Assembly resolution 71/135, preamble.
[556] UNCITRAL, Note by the Secretariat - Rules of procedure and methods of work (A/CN.9/676), para. 24.
[557] *Supra* note 556 (A/CN.9/676), para. 30.
[558] Ibid.

An example might be the model Bilateral Arbitration Treaty (BAT) proposed by Gary Born in 2015, building on the investor-dispute settlement system. [559] The model BAT provides arbitration as a default dispute resolution mechanism for international commercial disputes arising between enterprises and State, by concluding a BAT, would be agreeing that the default mechanism for resolving international commercial disputes between businesses of each State would be arbitration. The model BAT provides that businesses may opt out of the application of the BAT and arbitration pursuant to it and that parties may refer the dispute to a court or any other form of alternative dispute resolution. This is to preserve the autonomy of the parties to contract out of the default dispute resolution mechanism provided in the BAT. [560] While academically intriguing, such an initiative deserves due consideration by the its intended users, States.[561] Regardless of whether it is perceived desirable or not, it may be worth seeking a mechanism where such initiatives can be brought to the attention of UNCITRAL.

UNCITRAL being an inter-governmental process, there are limits to non-State participation. The views of the non-State actors are for the benefit of member States, who may take such views into account in determining their

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[559] See Gary Born, "Model Bilateral Arbitration Treaty Released for Public Comment", available at http://kluwerarbitrationblog.com/2015/03/13/model-bilateral-arbitration-treaty-released-for-public-comment/ (13 March 2015)

[560] Gary Born, "Draft Commentary on Model Bilateral Arbitration Treaty," available at https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/Explanatory-Note-Draft-Model-Bilateral-Arbitration-Treaty.pdf

[561] The BAT proposal is an unorthodox one and challenges the traditional foundation of arbitration. See Sarthak Malhotra, Bilateral Arbitration Treaty: Doctrinal Concerns and a Comment on the Model Text, Young Arbitration Review (January 2016), p.29 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2724991.

positions on the issues to be decided upon. Consensus is achieved among States and non-State actors do not participate in the decision-taking.[562] This may be the best way to balance the interest of States as constituting members of UNCITRAL and the interest of non-State actors participating in the process. Acknowledging the benefits of participation by wide-ranging non-State actors in norm-making, the question to address is to what extent. It would, in fact, be impracticable to have an open-ended process where all non-State actors that wish to participate can take part. That would require many and substantial changes to present process and raise problems of logistics, representation and organization. Accordingly, there is a need to set the boundaries addressing the questions of which organizations are to be invited, by whom and on what criteria would need to be addressed.

Formal deliberations at UNCITRAL (both the Commission and Working Group) are open to representatives of IGOs and international NGOs invited by the Commission.[563] In practice, it is the secretariat that invites the non-State actors, upon request from that organization or on its own initiative on the basis of its assessment of the relevance and potential contribution of the organization concerned to the relevant session.[564] The Commission is informed of such invitations at its annual session, when objections could be raised.[565] In inviting observers, the secretariat requires the organization to meet certain criteria: (i) that the organization is international in focus and its

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[562] UNCITRAL Rules of Procedure and Methods of Work, para. 7 (*supra* note 285 (A/65/17), Annex III).
[563] *Ibid*., para. 6.
[564] *Ibid*. para. 10.
[565] UNCITRAl, s*upra* note 285 (A/65/17, Annex III) , para. 10.

membership; (ii) that the organization is able to contribute meaningfully to the deliberations in view of its recognized competence or interest and its role in representing a particular sector or industry; and (iii) that the organization is able to report on legal or commercial experience, which is not represented by other organizations already participating in the session.[566]

While these are a reasonable set of criteria to ensure the participation of non-State actors with expertise in a balanced manner in the formal norm-making process (the sessions of Working Groups), a more open-ended approach should be taken during the informal stage. In practice, the secretariat, in preparing preparatory material and draft, seek the assistance of outside experts, conduct consultations with individuals and convene so-called expert group meetings. Such groups have included academics, practitioners and members of various organizations.

However, what may be needed in realizing a truly inclusive forum is a mechanism for engaging in broader public consultations either at the beginning or during the final stages of the norm-making process, preferably both. At present, comments on the final draft are circulated only to States and non-State actors invited to the Commission, which is exactly the same group participating in the formal deliberations.

Public consultations, as conducted by ICSID,[567] EU,[568] the ICC and SIAC in a number of its norm-making activities, would be able to supplement what is lacking in the UNCITRAL norm-making process; engagement with

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[566] UNCITRAL, *supra* note 556 (A/CN.9/676), para. 28.
[567] ICSID, supra note 264.
[568] See supra note 546.

stakeholders who may be impacted by or may apply the norms, most importantly parties to and arbitrators of international arbitration. While one the unsubstantiated criticisms about the norm-making at UNCITRAL in the field of international arbitration has been that the process is captivated by the views of arbitration practitioners,[569] practitioners compromised rather a small portion (approximately 20%) of the State representatives.

Parties to arbitration and arbitrators are the essential actors in international arbitration, as without them, arbitration would not exist.[570] However, their views and perspectives are not often adequately reflected in norm-making. "Social reflexivity" entails that all those to whom a set of rules applies must be allowed to participate in the creation of those rules.[571] While Kaufmann used this notion to explain the criticism about soft law instruments (in addition to lack of democratic legitimacy),[572] it can be said to apply generally to norm-making in the field of international arbitration. With the growth of international arbitration, stakeholders in international arbitration have become extremely diverse (for example, third-party funders and expert witnesses) and public consultations may be a means to reflect their perspectives in norm-making.

The main users of international arbitration are corporations or businesses and they are likely to be most impacted by norm-making.[573] The

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[569] See, for example, S.I Strong, Clash of Cultures: Epistemic communities, Negotiation Theory and International Law Making at the United Nations Commission on International Trade Law (UNCITRAL), 50 Arkon Law Review (2016).
[570] Gaillard, supra note 225494, p. 4.
[571] Kaufmann, *supra* note 172, p. 16.
[572] Berger, supra note 16, p. 64.
[573] Queen Mary University of London, *supra* note 4, p. 3.

irony at UNCITRAL is that those actively participating in norm-making may not necessarily be those who are impacted. For example, there was no organized intervention reflecting the views of investors during the process leading to the Transparency Rules. While it may be that users of international arbitration as a group do not have a single view or a view distinct from those participating in norm-making, efforts should be made to engage them in the norm-making process. This reiterates the need for public consultations.

There may be other way to remedy the situation. One would be to involve user groups directly in the norm-making process. For example, a group of in-house counsels, or a group of investors could be invited to attend Working Group sessions to express their views when discussing relevant norms. In this context, it may be worth noting the existence of ICCA's Users Committee.[574] An alternative would be for States and other organization participating in the formal deliberation to undertake consultations with such groups within their jurisdiction or scope area and present the user perspectives, to the extent they do not contradict the views of the respective State or organization. They may also wish to compose their delegation to include such users. Finally, the secretariat may be requested to conduct consultation with user groups and bring the conclusions to the attention during the formal

[574] The Committee is an effort to engage users of the arbitral process (particularly, but not limited to, corporate counsel) to understand issues of concern, to undertake appropriate responses thereto and to explore collaborative opportunities in the fields of international dispute resolution. See ICCA website (Users Committee) available at http://www.arbitration-icca.org/projects/Corporate_Counsel_Liaison.html.

deliberations. Surveys conducted by the QMUL School of International Arbitration also provide some insight into user perspectives.[575]

In conclusion, providing an inclusive global forum for discussing various norm-making initiatives and moving them forward should continue to be the goal of UNCITRAL. Non-state actor involvement should be facilitated to reflect varied interests, including most importantly those of the users of international arbitration. Providing a neutral forum to foster norm-making among the largest possible number of actors would seem vital and a precondition for global norm-making.

4. Efficiency in norm-making

Chapter IV set out some key characteristics of the contemporary norm-making, which aim at safeguarding the "effectiveness of the norm", in other words its eventual acceptance in international arbitration practice. Against that background, the previous two sections outlined some implication for UNCITRAL in providing an inclusive global forum for norm-making. Whereas those considerations address the ideal scenario, this section touches upon a rather practical aspect, the need to ensure the effectiveness or efficiency of the norm-making process itself.

Norm-making takes long and comes at a cost. Revisions to the ICC Arbitration Rules was comparatively quick taking less than a year. ICSID and IBA respectively took two years to revise its Arbitration Rules and the

[575] The surveys conducted by QMUL are available at http://www.arbitration.qmul.ac.uk/research/index.html.

Guidelines on Conflicts of Interest. The IBA Guidelines on Party Representation took 23 members of the task force five years to prepare. The UNCITRAL experience was not so different. It took UNCITRAL almost six years of deliberations involving more than a thousand representatives to revise essentially two articles in the Model Arbitration Law. The revision of the Arbitration Rules took four years with the making of the Transparency Rules taking six working group sessions over a period of three years.

Norm-making entails a substantive amount of human and financial resources. The representatives of governments and other organization have to dedicate their time to prepare and participate in the norm-making process. Their travel to attend Working Group and Commission sessions in New York and Vienna incur considerable costs. Considerable time and effort put in by chairpersons and rapporteurs and by delegations in conducting consultations prior, during and after the session also need to be taken into account. The operation of the secretariat of UNCITRAL, which supports norm-making in all areas of commercial law, require an annual budget of approximately 3.25 million USD.[576] In addition, the meetings in Vienna and New York require conference rooms, technical equipment and conference services, which are covered by the regular budget of the United Nations. While multilingualism is often highlighted as an essential characteristic of UNCITRAL and must be

[576] The figure indicates the annual budget for the UNCITRAL Secretariat, which supports norm-making in other fields of international law and conducts other activities in the progressive harmonization, modernization and unification of the law of international trade (Subprogramme 5). See United Nations, Proposed programme budget for biennium 2016-2017- Section 8 Legal Affairs (A/70/6 (Sect.8)), pp. 15-16, 33-36.

preserved for the purposes of retaining its inclusive character,[577] translation of the preparatory documents into all six UN official languages requires submission of those documents at least ten weeks in advance. In-session deliberations are interpreted into five other UN official languages requiring at least 12 UN interpreters working throughout the week. In short, norm-making at UNCITRAL is definitely not an inexpensive process and requires quite substantive investment of effort and resources.

The justifications for the lengthy and pricey norm-making has been provided (see chapter IV, section 2). It is because the making process and the actors involved determine the legitimacy of the norm. An instrument formulated by few local practitioners in a conference room over coffee may be useful but cannot be articulated as having the persuasive nature of a global norm. That is why, for a norm to be effective, its making must incorporate diverse perspectives, go through the dynamic cycle and preferably be adopted through consensus. However, whereas norm-making through a transnational legal process may guarantee the eventual effectiveness of the norm, it does not necessarily translate into the norm-making itself being efficient.

An inclusive global forum with numerous actors might easily and unnecessarily complicate the process and at worst, frustrate the consensus required for norm-making. Therefore, a very pragmatic question arises: to what extent should the efficiency of the norm-making process be sacrificed to warrant the effectiveness of the resulting norm? The paradox is quite straight-

[577] Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17 (Part I)), para. 240.

forward. Efficiency of norm-making is likely to be undermined by the pursuit for the effectiveness of the norm.

If the objective of norm-making is to address practical needs through the formulation of a norm, it must also be timely. This notion takes us back to questions of desirability and feasibility (see chapter III, section 3). Before embarking on norm-making, there has to be a conviction that there is a need for, and that it would be possible to formulate, a norm. An additional belief might be needed: that norm-making is worth the effort of all involved, that the process would be effective and the resulting norm would be ready in a timely fashion.

An inclusive process with broad representation and participation enhances its democratic nature but has its downsides. It slows down the process, makes obtaining consensus difficult and could easily politicize issues even of a technical nature.[578] Moreover, such norm-making at UNCITRAL involves a very difficult task of engaging with States and other organizations that might not agree with the desirability for the norm-making and/or have no intention of accepting the norms when they are formulated.[579] This poses a significant concern about the process itself. In any case, reaching a compromise and consensus is painstaking. They take longer in UNCITRAL as

[578] See Henry G. Schermers and Niels Blokker, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY (5th ed.) Martinus Nijhoff Publisers (2011), pp. 307-308. In listing three reasons why international organizations delegate power to non-plenary bodies, Schermers and Blokkker notes: "Decision-making in a large plenary organ is slow and cumbersome. Meetings of more than 12 people rarely work efficiently. Assembling a large number of qualified representatives for a conference is a costly affair, not only financially, but also in irreplaceable personnel."

[579] Ibid. Schermers and Blokkker further that some states may be greatly interested in a particular norm that are of lesser or no importance to others and suggests that it might be advisable to grant the interested members a larger share in their preparation.

there is little room for delegations to make concessions like in other fora. Compromises in norm-making generally denote the acceptance of a rule lower than is desirable. Should consensus be reached at all cost?

The ultimate question asked is how to overcome this paradox or challenge of norm-making. How can norm-making preserve the effectiveness of the resulting norm and at the same time ensure its procedural efficiency? There is no definitive answer considering the divergence in norms, actors and approaches. Rather a spectrum of options exists for addressing this tension.

First, it is necessary to confine norm-making to technical and less-politicized areas. For example, it would be advisable for norm-making by UNCITRAL to be limited to "procedural" aspects of international arbitration. If UNCITRAL were to undertake work in the field of investment arbitration, addressing substantive standards along with procedural aspects would be opening the Pandora 's box. Lesson should be learned from the failure of OECDs negotiations on a Multilateral Agreement on Investment (MAI).[580] It would also be important to clarify the parameters of the norm-making from the very beginning, which in the context of UNCITRAL would mean a clear and precise mandate from the Commission to the Working Group on the issues to be untangled. For example, if the mandate on transparency standards in treaty-based investor-State arbitration were given broadly to include commercial arbitration, UNCITRAL might still be negotiating the draft transparency rules.

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[580] Information about the MAI negotiations is available at http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm.

This again highlights the importance of addressing the questions of desirability and feasibility prior to embarking on norm-making, as those considerations structure the entire norm-making. It would also be vital to ensure that the "desirability" is shared broadly among member States for the reasons mentioned above.

Having said this, even the most technical aspects of norm-making could easily be politicized when there is a considerable divide on views. Even with a seemingly clear and precise mandate, norm-making may easily delve into grey areas. There will be circumstances where consensus simply does not seem plausible. Actors involved may continue to persist on their views resulting in a stalemate. There is a need to prepare for such deadlock situations in norm-making.

In 2015, the Commission agreed that the Working Group that had been tasked with preparing a legal standard on online dispute resolution since 2010 would be given a time limit of one year (no more than two Working Group sessions) to finish its work, after which the work of the Working Group would come to an end, whether or not a result had been achieved.[581] In the end, the Working Group was able to produce a document to the extent consensus was achievable and the Commission adopted the Technical Notes on Online Dispute Resolution in 2016.[582] While not recommendable in all situations, imposing time-constraints may be a way of warranting the efficiency of the

[581] Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 352.
[582] The text of the UNCITRAL Technical Notes on Online Dispute Resolution is available at http://www.uncitral.org/uncitral/en/uncitral_texts/online_dispute_resolution.html.

process. As illustrated above, the Commission should continue to monitor the progress being made by the Working Group, provide guidance on the borderline issues and make decisions, if and when necessary.

Second, it is necessary to carefully consider the various legislative techniques and to select the one most appropriate for norm-making according to the objective of the norm-making as well as the level of consensus that can be achieved. UNCITRAL has taken a flexible and functional approach with respect to legislative techniques and its work in the field of international arbitration shows a full spectrum including a convention, a model law, contractual texts, recommendations and explanatory texts (see chapter II, section 2). While this may be simply considered a question of choosing the appropriate form, it is not necessarily so as there are different means to provide flexibility within the instrument (for example, the options in article 7 of the Model Arbitration Law and the reservations provides for in the Transparency Convention), which may be helpful in obtaining consensus during the norm-making as well as in their acceptance.

Third relates to the composition of the representative of States as well as non-State actors that participate in the norm-making process at UNCITRAL. The size and composition of delegations have varied with representatives generally comprised of government officials (including officials from the permanent mission), arbitration practitioners and academics.[583] Like in any other international organization, States and invited organizations determine how they will be represented at UNCITRAL.

[583] UNCITRAL, A Guide to UNCITRAL (2013), p. 8.

However, in so doing, they may wish to nominate and facilitate the participation of representatives with relevant knowledge and expertise on the issues being discussed. This would further assist in making the norm-making more efficient.

Lastly, it is time to consider non-traditional means for formal deliberations using modern technologies, while preserving the working methods that UNCITRAL has based on for its norm-making. Just as technological developments triggered the amendments to the Model Arbitration Law, innovative measures need to be considered to maximize the efficiency of norm-making at UNCITRAL. One example would be the use of the inter-sessional period between the spring and fall sessions, which sometimes span for more than six months. Tools using information technologies to facilitate informal consultations during this period, particularly at the drafting stage, may be useful and supplement the two weeks allocated for discussions at the Working Group. Public consultations mentioned in section 3 may also be done online.

In summary, the benefits of an inclusive process involving all relevant actors on the one hand and the efficiency of the process on the other has to be constantly balanced. In this context, it may be important to continuously highlight the collaborative nature of the norm-making process and the aim of formulating the most widely acceptable norm. The willingness of actors to yield to consensus in the spirit of cooperation and compromise must also be shared. Skilled process management by chairpersons recognizing divergent perspectives yet facilitating consensus may be found to be crucial. All of the

measures combined would ensure the prominence of UNCITRAL not only as a maker of effective norms but also as an efficient norm-maker.

5. Coordination of existing norms and of norm-making

A central part of the mandate of UNCITRAL is to coordinate the work of organizations active in the field of international trade law, both within and outside the United Nations system, to encourage cooperation between them, to avoid duplication of effort and to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law. The increasing number of norms as well as norm-making initiatives in the field of international arbitration makes this function seemingly more important. This section examines the possible role of UNCITRAL with regard to two aspects: the coordination of existing norms and the coordination of nom-making activities.

Rather than addressing the issue in the abstract, it may be necessary to examine an area where there has been considerable overlap in norm-making: conduct of arbitrators. Almost all of the norms referred to in this study including ICSID Arbitration Rules, SIAC IA Rules, IBA Guidelines on Conflicts, CETA and ASIL-ICCA Report on Issue Conflicts included provisions or dealt with the conduct of arbitrators.

Similar to other procedural aspects of international arbitration, there exists no transnational, overarching standard or code of conduct that applies generally to arbitrators. Nor is there a shared understanding of what conduct or ethics mean. However, the general principles of impartiality and

independence of an arbitrator[584] are found in national legislation, in arbitration rules, in treaty provisions dealing with investment arbitration and more recently in norms formulated by arbitral institutions and professional organizations. An arbitrator who is a member of a bar association is also likely to be subject to regulations on conduct or ethics of that association.

The obligation of impartiality and independence is usually accompanied by a disclosure requirement, the usual consequence of non-compliance being a challenge. For example, national arbitration laws have provisions similar to articles 12 and 13 of the Model Arbitration Law providing grounds for challenge and the challenge procedure. Article 12(1) requires a potential arbitrator to disclose any circumstances that are likely to give rise to justifiable doubts as to his or her impartiality or independence.[585] Article 12(2) makes it clear that arbitrators may be only challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if they do not possess qualifications agreed to by the parties.[586]

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[584] Impartiality means the absence of bias or predisposition towards parties. Lack of impartiality would arise, for instance, if an arbitrator appears to have pre-judged some matters in favour of one of the parties. Independence usually relates to the business, financial, or personal relationship of an arbitrator with a party or parties, and lack of independence usually derives from problematic relations between an arbitrator and a party or its counsel. UNCITRAL, Note by the Secretariat – Settlement of commercial disputes: Possible future work on ethics in international arbitration (A/CN.9/916) para. 19.

[585] Article 12(1) of the Model Law on Arbitration provides: "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him."

[586] Article 12(2) of the Model Law on Arbitration provides: "An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or

The standards of impartiality and independence have also been incorporated in treaties. For example, article 14(1) of the ICSID Convention requires arbitrators to be persons, among others, who may be relied upon to exercise "independent" judgment.[587] CETA contains as Annex 29-B a Code of Conduct for Arbitrators and Mediators. Paragraph 2 of the Code requires every candidate and arbitrator to avoid impropriety and the appearance of impropriety, to be independent and impartial, to avoid direct and indirect conflicts of interests and to observe high standards of conduct, so that the integrity and impartiality of the dispute settlement mechanism is preserved. [588] The Code contains more detailed paragraphs on independence and impartiality of arbitrators stating, inter alia, that an arbitrator shall avoid creating an appearance of bias (para. 11), shall not be influenced by self-interest (para.12), shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of her or his duties (para. 13) and must avoid entering into any relationship or acquiring any financial interest that is likely to affect her or his impartiality or that might reasonably create an appearance of

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independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."

[587] Article 57 of the ICSID Convention further provides a mechanism by which a party may seek disqualification of an arbitrator by showing a manifest lack of the qualities required by article 14(1). ICSID Arbitration Rule 6(2) requires an arbitrator to sign a declaration with an attachment stating past and present professional and other relationships with the parties, as well as any other circumstance that might cause its reliability for independent judgment to be questioned by a party.

[588] The Code provides disclosure obligations for arbitrator candidates (paras. 3-6) as well as the obliges arbitrators to perform his duties thoroughly and expeditiously … and with fairness and diligence (paras. 7-10).

impropriety or bias (para. 15). [589] The report of the ASIL-ICCA Task Force on Issue Conflicts in Investor-State Arbitration highlighted some of the challenges in investment arbitration.

Arbitration rules also contain provisions on impartiality and independence. Articles 11 to 13 of the UNCITRAL Arbitration Rules deal with disclosures by and challenges of arbitrators using similar wording of the Model Arbitration Law. Article 11(1) of the ICC Arbitration Rules requires an arbitrator to be and remain impartial and independent of the parties involved in the arbitration. Article 11(2) further requires a prospective arbitrator to disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. Furthermore, arbitral institutions have formulated stand-alone texts on code of conduct or ethics by arbitrators.[590] Some of these codes are general moral guidelines, while others cover specific situations that occur during arbitration.

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[589] Similar provisions are found in the EU-Singapore Free Trade Agreement (Ch. 9, Annex 9-F), and the EU-Vietnam Free Trade Agreement (Ch. 13, Annex II).

[590] See for example, CIETAC Code of Conduct for Arbitrators (6 May 1994) available at http://www.cietac.org/index.php?m=Page&a=index&id=113&l=en; SIAC Code of Ethics for an Arbitrator available at http://siac.org.sg/our-rules/code-of-ethics-for-an-arbitrator; HKIAC Code of Ethical Conduct, available at http://www.hkiac.org/arbitration/arbitrators/code-of-ethical-conduct. The HKIAC Code begins with the following caveat: "In some instances, the ethics set down in HKIAC's Code of Ethical Conduct herein may be repeated in legislation governing the arbitration, case law or the rules which parties have adopted. In many instances, arbitrators will also be bound by other codes of practice or conduct imposed upon them by virtue of membership of primary professional organisations."

Professional organizations have also prepared code of ethics for arbitrators, the IBA Guideline on Conflicts being just one example.[591] The ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes (amended in 2004) also imposes presumptive duties of independence and impartiality on co-arbitrators.[592]

National courts have also developed jurisprudence regarding arbitrator's obligations of impartiality and/or independence. Case law shows that there have been attempts by parties to resist enforcement of foreign arbitral awards on the basis that the arbitrators lacked independence and impartiality. These defences usually presented on the basis of article V(2)(b) of the New York Convention have rarely been successful. Courts have underlined that the matter raised was not covered by public policy, and that the party should have raised the matter during the arbitral proceedings.

This illustrates that almost all category of norms outlined in chapter II, section 2 have some reference to the impartiality and independence requirement of an arbitrator. Nonetheless, it is unclear which norms would apply under which circumstances. For example, an arbitral tribunal could be bound by more than one norm depending on the nationalities of arbitrators, on their affiliation with bar associations as well as on the place of arbitration. Norms considered applicable at the location where the enforcement of the

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[591] See also CIArb Code of Professional and Ethical Conduct for Members (October 2009) available at http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidelines-protocols-and-rules/code-of-professional-and-ethical-conduct-october-2009.pdf?sfvrsn=4

[592] For a historical background of the Code, see Howard M. Holtzmann, The First Code of Ethics For Arbitrators in Commercial Disputes, THE BUSINESS LAWYER, Vol. 33, No. 1 (1977).

award is sought may also become relevant. This is a typical situation where multiple layers of norms may be applicable at the same time without any clear indication whether one or which shall prevail.

The expansion of international arbitration has resulted in diversification of parties involved in the arbitration process. As such, their perspectives on conduct of arbitrators may differ significantly and what one expects may sometimes be at odds with the expectations of others from another jurisdiction. The complexity of disputes involving multiple parties and complicated transactions leads to subtler questions. In practice, the assessment of compliance with such standards may be carried out quite differently depending on the texts deemed applicable, and depending also on whether assessment is made by the arbitrators themselves, the parties, the arbitral institutions or national courts. This amplifies the uncertainty, which may be due to the discrepancy among the applicable norms.

Under these circumstances, coordination could take a very wide spectrum. One extreme could be to seek convergence by establishing a global standard of conduct or ethics of arbitrators. The other extreme would be recognize the differences, take a case-by-case approach and leave it to the parties, the arbitrators, the arbitral institution or the national courts to provide clarity in applying the norms.

In this context, it should be noted that, in 2015, Algeria had proposed as future work of UNCITRAL a code of ethics for arbitrators in investment

arbitration, [593] suggesting that work could relate to the conduct of arbitrators, their relationship with those involved in the arbitration process, and the values that they were expected to share and convey.[594]

Before jumping to conclusions on the need for norm-making, whether it is desirable and feasible should be answered. In so doing, whether there is a need to complicate the already complex legal framework with another norm should be considered. The norm may result in further fragmentation, a problem the norm-making hoped to address. Whether there is overlap with any existing norm or one that is being prepared would also need to be taken into account. For example, considering that the IBA Guidelines on Conflicts have been in place for some time and that arbitral institutions have begun to regulate its arbitrators by setting their own standards, whether it is desirable to set a norm applicable across institutions and in addition to the IBA Guidelines should be answered. Feasibility of the norm-making also has to be addressed, which relates to two main questions: whether it would be possible to achieve consensus on a uniform text and how the formulated norm would operate within and linked with the existing norms.

If it is perceived that it would not be desirable or not feasible to formulate a norm on the topic, a divergence-accommodating approach might

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[593] UNCITRAL, Proposal by the Government of Algeria: Possible future work in the area of international arbitration between States and investors — code of ethics for arbitrators (A/CN.9/855).

[594] After deliberation and upon request from the Commission (Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 151), The UNCITRAL Secretariat conducted preliminary research on the topic including the feasibility of work in the area. See UNCITRAL, Note by the Secretariat - Settlement of commercial disputes: Possible future work on ethics in international arbitration (A/CN.9/880) & (A/CN.9/916).

be deemed more appropriate. Such an approach could acknowledge the current problems, address the inter-relationship of multiple norms and provide guidance on which ethical standards would be applicable.[595] Such efforts could follow the approach taken in the UNCITRAL Notes on Organizing Arbitral Proceedings.

Another possibility to be considered is the endorsement by UNCITRAL of an existing text, for example the IBA Guidelines on Conflicts of Interest. UNCITRAL has endorsed a number of international legal texts in the past (for example, the Hague Principles on Choice of Law in International Commercial Contracts (2015),[596] INCOTERMS 2010[597] and the Unidroit Principles of International Commercial Contracts[598]). Endorsement of existing norms may be of benefit to both norm-making bodies. It would provide an opportunity for the IBA Guidelines to be considered by States within the UNCITRAL forum and if endorsed, its acceptance would be increased.[599] From the UNCITRAL perspective, it would avoid the need to engage in full-fledged norm-making, the desirability of which may be questioned from its beginning.[600] In other words, there may be no need to reinvent the wheel.

The General Assembly, when establishing UNCITRAL, laid down the basis for collaboration and coordination of UNCITRAL with various

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[595] Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 184.
[596] *Ibid*., paras. 238-240.
[597] *Ibid*., Sixty-seventh session, Supplement No. 17 (A/67/17), paras. 141-144
[598] *Ibid*., paras. 137-140.
[599] It can similarly be said that the IBA Guidelines has gained recognition by its integration into CETA.
[600] A full list of texts prepared by other organization endorsed by UNCITRAL can be found at http://www.uncitral.org/uncitral/en/other_organizations_texts.htm.

organizations active in the field of international trade law, particularly when engaging in formulating activities.[601] As illustrated in chapter III, norm-making in the field of international arbitration resembles a looping cycle constantly reflecting practice and addressing the needs of it users. The landscape, however, is more complex as there are many wheels spinning with different actors behind the wheels. These actors sometimes compete with each other to make their wheels more attractive. In certain instances, they learn from each other. And in other instances, they join together to turn a wheel.

Transnational norm-making is a case of distributed agency not only in terms of actors but also in terms of activities.[602] Distributed agency is particularly likely to be found in the transnational sphere, where the production of non-binding norms by legal practitioners provide important input into the overall norm-making cycle.[603] The dynamic norm-making cycle of international arbitration based on practical needs makes the notion of distributed agency more evident and illustrates the need for coordination among actors involved in norm-making and among the norm-making initiatives.

This may require the expression: the division of norm-making. An actor may identify issues and reach a conclusion that it would be desirable to

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[601] General Assembly resolution 2205 (XXI) section II, paras. 8 (a, c and f-h), 11 and 12. See also the report of the Sixth Committee A/6594, paras. 22-23.
[602] Sigrid Quack, Legal Professionals and Transnational Law-Making: A Case of Distributed Agency, Organization Vol. 14, No. 5 (2007), p. 652.
[603] Terence Halliday and Bruce Carruthers, The Recursivity of Law: Global Norm-making and National Law-making in the Globalization of Corporate Insolvency Regimes, AMERICAN JOURNAL OF SOCIOLOGY Vol. 112 Issue 4, p. 1135-1202.

formulate a norm. Another actor may provide the forum for norm-making. Yet another may be involved in receiving inputs about the proposed norm. A fourth actor may be tasked with the promotion and implementation of the norm once it is formulated.

It may also entail joint projects with other organizations at certain stages of the norm-making. The ASIL-ICCA Task Force Report on Issue Conflicts is one example, the ICCA-QMUL Joint Task Force on Third-Party Funding in International Arbitration being another example.[604]

As prominent as UNCITRAL may be in global norm-making, the Commission and the Secretariat does not have the capacity to undertake work in the entire norm-making cycle. It also has a number of agendas for its future work. Thus, it is not out of authority that UNCITRAL puts itself in the coordination position, but rather out of necessity. It would be important for UNCITRAL to maintain close links with other norm-makers to facilitate exchange of ideas and of information leading to norm-making. Such coordination may be achieved in a number of ways, for example, through formal channels among governing bodies or more practically through activities conducted by the secretariats of the organizations.

There have been many examples of such coordination. But the most recent one is a study on whether the Transparency Convention could provide a

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[604] Created in 2014, the joint Task Force aims at systematically studying and making recommendations regarding the procedures, ethics, and related policy issues relating to third-party funding in international arbitration. The Task Force is comprised of representatives drawn from among diverse stakeholders, including arbitration practitioners, funders, government representatives and academics. Information is available at http://www.arbitration-icca.org/projects/Third_Party_Funding.html

useful model for possible reforms in the field of investor-State arbitration, which the Secretariat conducted in conjunction with the Center for International Dispute Settlement (CIDS).[605] The Secretariat is also working closely with ICCA on identifying issues relating to a code of conduct for arbitrators. In preparation of the UNCITRAL Secretariat Guide to the New York Convention,[606] the Secretariat cooperated closely with two experts, Emmanuel Gaillard and George Bermann and in establishing the respective website (www.newyorkconvention1958.org) with Sherman & Sterling and Columbia Law School. Expert group meetings also are conducted in cooperation with government ministries, arbitral and academic institutions and professional organizations in preparation for norm-making

Whereas coordination among the three organization active in the area of private international law (UNCITRAL, Unidroit and The Hague Conference) has solidified over the years with regular annual meetings, such a formal coordination mechanism is lacking in the field of international arbitration, where there are many more actors and norm-making. Often, there is not a shared interest. Competition among different arbitral institution particularly makes coordination difficult.

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[605] CIDS is a joint research centre of the Graduate Institute of International and Development Studies and the University of Geneva Law School See for example, the CIDS research paper on whether the Mauritius Convention can serve as a model for further reforms available at http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf.

[606] The Commission agreed to include a disclaimer in the Guide as follows: "The Guide is a product of the work of the Secretariat based on expert input, and was not substantively discussed by the United Nations Commission on International Trade Law (UNCITRAL). Accordingly, the Guide does not purport to reflect the views or opinions of UNCITRAL member States and does not constitute an official interpretation of the New York Convention." See *supra* note 329 (A/69/17), para. 116.

Coordination should not be carried out in an opportunistic manner and should not be limited to information exchanges and joint meetings. More formal arrangements should be adopted. Considering the increasing importance of coordination with other norm-making organizations, it is worth devoting perhaps half-day a year either at the Working Group or the Commission to reflect on developments in norm-making.

While coordination is often emphasized, it does not mean that UNCITRAL should be the overarching coordinator with others being the subject of coordination. Such a misperception could easily harm the relationship and the foundation should be to build a cooperative relationship with the organizations involved in law-making.

6. Realization of transnational legal process: the case of UNCITRAL

UNCITRAL was established under article 13(1)(a) of the UN Charter, which refers to the UN General Assembly initiating studies and making recommendations for encouraging the progressive development of international law and its "codification." Taking into account the particularities of international trade law, the General Assembly resolution establishing UNCITRAL, however, mentioned that UNCITRAL should further its "progressive harmonization and unification".[607] Over the years, this mandate

[607] General Assembly Resolution 2205(XXI), para. 8

has been interpreted to encompass the "modernization" of international trade law.

The methods envisaged by the General Assembly in 1966 to further the progressive harmonization, unification and modernization included among others: "(a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them; (b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws; (c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaborations, where appropriate, with the organizations operating in this field; (d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of international trade law …" Through such methods, UNCITRAL, has made great strides in creating a favourable environment for resolving economic disputes and more generally, UNCITRAL's efforts to harmonize and modernize international trade law have helped States to enhance the business environment, thereby contributing to sustainable development and growth.[608] Some fifty years have passed but the methods envisaged in 1966 remain highly relevant, particularly with respect to norm-making in the field

[608] Kimoon Ban, Secretary-General's address to International Council for Commercial Arbitration Congress (9 May 2016) available at https://www.un.org/sg/en/content/sg/statement/2016-05-09/secretary-generals-address-international-council-commercial.

of international arbitration. As such, the role expected of UNCITRAL now is nothing new; it is what was expected of UNCITRAL upon its establishment.

This study focused on international arbitration, an area of international trade law, where most harmonization has been achieved across jurisdictions and norm-making has been most active since the establishment of UNCITRAL. It is also an area where norm-making has become institutionally crowded with a wide range of actors involved. And it is in that context that the sections in this chapter have illustrated how UNCITRAL could strategically position itself in the norm-making landscape by providing a multilateral and inclusive forum for norm-making and at the same time ensuring the efficiency of norm-making, possibly through coordination and cooperation with other actors in the field of international arbitration. This applies to all international organizations involved in norm-making.

As indicated in the above-mentioned General Assembly resolution, it is as important to promote wider participation and adherence of States to the New York Convention and the wider acceptance of the Model Arbitration Law. Whereas there exists a myriad of norms applicable to the procedural aspects of international arbitration, the New York Convention and the Model Arbitration Law continue to function as its backbone, without which the contemporary norm-making cannot take place. As guardians of both norms, UNCITRAL has a role to play in ensuring their uniform interpretation and effective implementation. While a certain degree of harmonization may have been achieved, efforts should continue to monitor developments to address any possible fragmentation and to prepare for any revisions or updates that

might be necessary with regard to these texts. This would guarantee that the New York Convention and the Model Arbitration Law retain their status as truly global norms on international arbitration and provide stability and legal predictability for overall procedural framework of international arbitration.

Whether and how UNCITRAL will be involved "in preparing new norms and in promoting the codification and wider acceptance of international arbitration practices" as referred to by the General Assembly, are political decisions to be made by the Commission and its member States. Yet, it is worth recalling that the uniqueness of UNCITRAL in the field of international arbitration lies in the fact that norm-making is its principle mandate. To the contrary, norm-making is ancillary or incidental for other international organizations, as norms they produce are part of the arbitration-related services they provide. The fact that UNCITRAL does not function as an arbitral institution and administer arbitration has its advantages. It is able to provide a neutral forum for discussing norms which may be applicable generally to international arbitration, regardless of jurisdiction, of institution and of the type of arbitration. This is an aspect which deserves continued recognition. Nonetheless, considering that norm-making in this field is deeply rooted in practical needs, UNCITRAL has a disadvantage that it is comparatively distanced from international arbitration practice. This reiterates the need for participation of non-State actors in the norm-making at UNCITRAL and the need for UNCITRAL to closely monitor norm-making by other organizations.

As highlighted throughout this study, norm-making in this field requires more than the meeting of minds of government representatives during the plenary sessions of UNCITRAL. In order for its Commission and Working Group to properly function as a global body, a number of support activities need to be undertaken. Gathering information about the need for norm-making, surveying existing norms and approaches as well as monitoring developments in arbitration case law are some functions that may not be at the core of norm-making but key in improving the effectiveness of the resulting norm as well as the process leading to it. While the Secretariat is often called on to perform such tasks, it is rather small consisting of more or less fifteen professional staff members. Moreover, the mandate of the Secretariat covers the entire array of international trade law with very limited resources for activities other than servicing of the Commission and the Working Group sessions. Furthermore, there are numerous structural and institutional challenges which make it impractical to consider expanding the Secretariat, increasing its budget or prioritizing its work to the field of international arbitration.[609] Under such circumstances, the Secretariat should be given sufficient flexibility and discretion in carrying out its tasks to support the Commission and the Working Groups within its existing resources. This is another reason for extensive coordination and cooperation with other norm-

[609] The International Trade Law Division of the UN Office of Legal Affairs functions as the substantive secretariat of UNCITRAL and its overall structure as well as its budget is considered within the overall regular budget of the UN Secretariat, which has been under greater scrutiny by the Member State and generally resulting in budget cuts over the last six years.

making organization throughout the entire norm-making cycle, which would be particularly useful during the preparatory and the implementation stages.

The seemingly obvious conclusion of the study is that UNCITRAL should continue to engage in its transnational legal process to formulate norms applicable to the procedural aspects of international arbitration. In an evolving norm-making environment as outlined in this study, UNCITRAL would have to make strategic choices on how it can maintain its reputation as a global or transnational norm-making body. Considering that the success of its texts in the field of international arbitration was the result of a transnational legal process, norm-making should continue to resemble such features yet in an effective manner.

The conclusion of the chapter is that norm-making in the field of international arbitration by international organization should continue to resemble a transnational legal process, with the collective norm-making efforts and the resulting norms contributing to a transnational legal order. In that context, international organizations involved in norm-making should aim at realizing a transnational legal process within their forum, giving particular attention to the distinctive features of norms in the field of international arbitration.

Chapter VI Conclusion

The increasing complexity of contemporary international relations and the evolving international environment have resulted in an expansion of law-making and the field of international arbitration is no exception. As noted, the procedural framework of international arbitration is comprised of a vast amount of different types of norms that have been formulated by a wide range of actors through diverse processes. While much effort has been made to understand the formulation and application of individual norms, there has been very little research on their making in a comprehensive manner. Thus, the study aimed at articulating an explication of norm-making which could apply generally.

For this purpose, the study borrowed the notion of transnational legal process as a theoretical framework to analyse the contemporary norm-making and as a tool to explain the practice of norm-making. Transnational legal process was the lens through which this study examined how State and non-State actors interacted in a variety of fora to make norms, which were eventually accepted for use in international arbitration. While the study has benefited greatly from the theory of transnational legal process, it has also enriched it through an empirical survey of norm-making in international arbitration. The empirical survey provided a concrete illumination of transnational legal process in action and showed how a notion, which finds its origin in the realm of public international law, could also be utilized in other areas of law with some adjustments.

Those advocating or utilizing transnational legal process have generally focused on the end of the spectrum, the internalization of formulated transnational laws. They acknowledge the existence or emergence of such laws and focus on the questions of why and how States comply with, or implement, them. Therefore, their emphasis is on ex-post law-making based on the recognition of the normativity of such laws. However, with respect to norms applicable to the procedural aspects of international arbitration, there is an additional element to be considered. Their normativity is not derived automatically from the codification and further requires their acceptance by parties to arbitration or more broadly speaking, their use in international arbitration practice. Another distinction is that such acceptance is not necessarily by States but in most instances, non-State parties to arbitration, particularly with regard to international commercial arbitration. This acceptance-based characteristic originates from the principle of party autonomy that underlies international arbitration, the parties' right to determine both the procedural elements of arbitration.

As stated in chapter I, this study stems from the question of how norms in the field of international arbitration should be made; however, in retrospect, it is not simply a question of how to make norms but a question of how to ensure the effectiveness of norms that are formulated. Therefore, attention was given to ex-ante law-making, the process leading to the formulation of such norms. Taking into account the principle of parties' procedural autonomy and the resulting acceptance-based feature of such norms, the ultimate question that the study addressed was how to make norms

so that they would eventually be widely accepted in international arbitration practice.

To address that question, the study undertook an empirical survey of the making of key norms in international arbitration since 2006. While the actors involved and the process leading to those norms differed to a certain degree, contemporary norm-making has generally aimed at addressing the practical needs of international arbitration as presented by arbitration practitioners and users. The norms were prepared and finalized by international inter-governmental and non-governmental organizations after undergoing a preparatory stage where the desirability and feasibility of norm-making were considered, followed by substantive deliberations and consultations. The individual norm-making also closely resembled a transnational legal process, where public and private actors interacted in the forum of those international organizations to consider and adopt the norms.

Another distinctive aspect of norm-making in international arbitration was the significant role of non-State actors. Not only were they the preponderant users of norms, but also the prevailing makers of norms. Almost universal adoption by States of the New York Convention as well as the harmonization of national laws achieved through the Model Arbitration Law have resulted in the shift of significance towards non-State actors. Almost all recent procedural norms were formulated by international organizations, some with the involvement of States and some without. International organizations provided a forum for norm-making and were also actively involved in norm-

making in other fora. That is why the study paid particular attention to the increasing role of international organizations in norm-making.

Therefore, the ultimate question addressed in the study was how international organizations can make effective norms. The answer lied in the tool used for the purposes of the study: realization of transnational legal process, yet further taking into account the peculiarities of the norms in international arbitration. Norm-making must engage those that will eventually accept them. If the procedural norm is intended to be used by States, States need to be involved. Similarly, the perspectives of arbitration users, the intended users of the norms as well as relevant stakeholders in international arbitration need to be reflected. Norms formulated in a multilateral and inclusive forum are more likely to be accepted in international arbitration practice. In addition, norms adopted by consensus among those involved in their making will be considered legitimate and can be expected to be accepted more widely. In short, international organizations must aim at realizing a transnational legal process in their norm-making to ensure that the end-result, the norm is eventually widely used in international arbitration.

With respect to norm-making in international arbitration, the study had made an analogy to the formation of customary international law. With the increased use of norms in arbitration practice, their normativeness enhances. Therefore, norm-making should not end with codification. Rather extensive promotional efforts must constitute an essential part of norm-making by international organizations aimed at ensuring that the norms are internalized by the intended users in international arbitration practice.

Realization of a transnational legal process in a multilateral and inclusive forum, adoption of norms by consensus and further promotion of norms are all ideal elements for making of effective norms. However, they also pose a number of challenges, including the need for extensive human and financial resources. Therefore, the study suggested some practical ways to ensure the efficiency of the norm-making itself, which include the coordination among the number of norm-making initiatives by international organizations.

This study aimed at providing a transnational legal process perspective on norm-making in international arbitration. Transnational legal process has provided the overarching theoretical framework for understanding norm-making in the field of international arbitration as well as the rationale for norm-making to be conducted in such manner. Just as a number of books and articles address the future of international arbitration as a dispute resolution method, it is as important to ask how norm-making needs to evolve to continue to provide a sound procedural framework for international arbitration. As mentioned the answer can also be found in transnational legal process.

In closing, reference is made to a quote by Koh illustrating transnational legal process as the combination of the vertical and horizontal flow of laws.

“Perhaps the best operational definition of transnational law, using computer-age imagery, is: (1) law that is ‘downloaded’ from international to domestic law: for example, an international law concept that is domesticated

or internalized into municipal law, …; (2) law that is 'uploaded, then downloaded': for example, a rule that originates in a domestic legal system, …, which then becomes part of international law, …, and from there becomes internalized into nearly every legal system in the world; and (3) law that is borrowed or 'horizontally transplanted' from one national system to another..."[610]

The metaphor might have been more than appropriate to describe transnational legal process in a public international law context. It might have been suitable considering the information technology ten years ago. However, it might not be so accurate for illustrating the procedural legal framework for international arbitration and the relevant norm-making. Norm-making in international arbitration has flown in multiple directions. It has been concurrent and iterative involving a wide range of non-State actors. There has been a much more horizontal interaction among the norms, which do not necessarily fit into national or international legal systems. Moreover, technology has also evolved dramatically over the last ten years. The conclusion is that transnational legal process has to be further developed and adapted to the field of international arbitration.

The procedural framework for international arbitration and norms constituting it can be better described as an open-source development model, where software is developed using publicly available open source codes. This model suggests a collaborative effort, where software programmers build upon the source code and share the changes within the community. Norms are

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[610] Koh, *supra* note 32, pp. 745-746.

like source codes available for use in international arbitration. Few are downloaded and uploaded but in general, they are shared in arbitration practices and for the purposes of peer production of other norms. When more programmers rely on a certain open source, others may also opt to utilize that open source for developing their software. This is how the study perceives norm-making in international arbitration through the lens of transnational legal process. As open-source software, norms will compete and interact with each other. As open-source software developers, international organizations will continue to make efforts to ensure that the norms they formulate are accepted and used in practice.

Acronyms

ASA	Swiss Arbitration Association
AAA	American Arbitration Association
AAA-ICDR	American Arbitration Association, International Centre for Dispute Resolution
AALCO	Asian African Legal Consultative Organization
ABA	American Bar Association
ABCNY	Association of the Bar of the City of New York
ACICA	Australian Centre for International Commercial Arbitration
ALI	American Law Institute
APAA	Association for the Promotion of Arbitration in Africa
APRAG	Asia Pacific Regional Arbitration Group
ASIL	American Society of International Law
AUIA	Arab Union of International Arbitration
CAS	Court of Arbitration for Sport
CCA	College of Commercial Arbitrators
CETA	Comprehensive Economic and Trade Agreement
CIArb	Chartered Institute of Arbitrators
CIEL	Center for International Environmental Law
CIETAC	China International Economic and Trade Arbitration Commission
CILS	Center for International Legal Studies

CRCICA	Cairo Regional Centre for International Commercial Arbitration
DIAC	Dubai International Arbitration Centre
DIS	German Institution for Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit)
DSB	Dispute Settlement Body
ECICA	European Convention on International Commercial Arbitration
ECOSOC	United Nations Economic and Social Council
EU	European Union
FDI	Foreign Direct Investment
FICA	Forum of International Conciliation and Arbitration
FTA	Free Trade Agreement
HKIAC	Hong Kong International Arbitration Centre
IAI	International Arbitration Institute
IBA	International Bar Association
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes

IISD	International Institute for Sustainable Development
ILA	International Law Association
ILC	International Law Commission
JCAA	Japan Commercial Arbitration Association
KCAB	Korean Commercial Arbitration Board
KLRCA	Kuala Lumpur Regional Centre for Arbitration
LCIA	London Court of International Arbitration
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
P.R.I.M.E. Finace	Panel of Recognized International Market Experts in Finance
PCA	Permanent Court of Arbitration
QMUL	Queen Mary University of London
RCICAL	Regional Centre for International Commercial Arbitration
SCC	The Arbitration Institute of the Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
TTIP	Transatlantic Trade and Investment Partnership
UIA	International Association of Lawyers
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law

UNCTAD	United Nations Conference on Trade and Development
Unidroit	International Institute for the Unification of Private Law
VIAC	International Arbitration Centre of the Austrian Federal Economic Chamber
WIPO AMC	World Intellectual Property Organisation Arbitration and Mediation Centre
WTO	World Trade Organization

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국 문 초 록

초국적 법률 프로세스 관점에서 바라본

국제중재 절차규범의 형성

이 재 성

서울대학교 대학원

법학과 국제거래법전공

국제중재는 다양한 주체들이 마련한 여러 형태의 규범의 상호작용 속에 그 절차가 진행된다. 본 연구는 국제중재에 있어 그 절차를 규율하는 규범(이하 '국제중재 절차규범')이 어떻게 마련되어야 하는가에 대한 질문에서 시작되었으며, 국제중재 실무에 널리 활용될 수 있는 절차규범을 국제기구 및 기관 등(이하 '국제기구')이 효율적으로 만들 수 있는 방안을 제시하는 것을 목적으로 한다.

개별 절차규범 형성에 관해서는 다수 연구가 있었으나, 국제중재 절차규범을 모두 아우르는 연구는 찾아보기 어렵다. 다양한 국제분쟁의 해결에 활용되는 이러한 규범들은 국제법/국내법, 공법/사법의 어느

영역에도 딱 들어맞지 않기 때문에, 이들을 포괄적으로 분석할 수 있는 틀이 필요하다. 따라서, 본 연구는 초국적 법률프로세스(transnational legal process)의 개념을 차용하여, 2006 년 이후 마련된 중요 절차규범들의 형성과정을 실증적으로 분석함으로써, 향후 관련 규범을 마련하는 데에 있어 참고할 수 있는 요소들을 도출했다. 초국적 법률프로세스는 국가, 국제기구, 다국적기업, 비정부기구, 개인 등 공적/사적 주체들이 다양한 공공 및 민간 포럼에서 상호작용하면서 초국적 규범을 형성, 해석, 집행하고, 궁극적으로는 이를 내면화하는 일련의 과정 및 이론을 지칭한다.

국제중재절차의 근간을 이루는 원칙은 당사자자치(party autonomy)다. 당사자들이 중재에 합의하듯이, 중재절차 역시 당사자들의 필요 및 의사에 맞춰 유연하게 진행될 수 있다는 것이 국제중재의 큰 장점이다. 따라서, 다소 차이가 있지만, 절차규범이 국제중재에 적용되기 위해서는 분쟁 당사자의 적극적 선택, 수락 또는 수용 (이하 '수용')이 요구된다. 이러한 측면에서 국제중재 절차규범은 일반적인 의미의 법과 다르다고 할 수 있으며, 이러한 특성은 규범형성(norm-making)에 있어 고려할 중요한 요소다.

규범형성이 나아갈 길을 모색하기 위해서는 그간 규범이 어떻게 만들어져 왔는지를 분석할 필요가 있다. 이러한 차원에서 동 연구는 최근 10 여년간 마련된 의미 있는 규범들을 선별하고, 이들의 형성 주체 및 과정을 분석했다. 이들 규범들은 국제중재 실무를 반영하고, 중재절차의 효율성을 제고함과 동시에 중재절차와 관련된 불확실성을 해소하는 등 효과적인 분쟁해결절차로서 국제중재의 역할을 도모하고자 한다는 공통점을 지닌다. 또한 규범의 필요성에 대한 공감대가 형성된 이후, 국제기구에서 협의를 통해 채택되어 널리 활용되고 있다는 점도 유사하다.

초국적 법률프로세스의 관점에서 드러난 국제중재 절차규범 형성의 특징 중 하나는 비국가 주체들의 두드러진 역할이다. 국제중재의 근간을 이루는 뉴욕협약의 성안, 각국의 중재법 제정/개정, 나아가 1986 년 중재모델법의 채택까지는 국가의 역할이 매우 중요했으나, 최근에는 비국가 주체인 국제기구, 중재기관, 전문가협회 등의 역할이 두드러진다. 본 연구에서 선별한 규범들 모두 국제기구에서 마련되었으며, 모든 규범형성과정에 있어 비국가 주체들의 적극적인 참여가 돋보인다. 절차규범을 궁극적으로 활용하는 당사자 및 관련

기관들이 규범형성에 참여하고 있다는 측면에서 이는 바람직한 현상이자 동 연구에 함의하는 바가 크다고 할 수 있다.

절차규범의 경우 국제중재에서 활용될 때 결국 규범성을 갖게 된다. 즉, 규범형성에 있어서 그 내용만큼 중요하게 고려해야 하는 것이 중재실무에 있어 해당 규범이 활용성이다. 이러한 측면에서 본다면 국제중재 절차규범 형성과정이 초국적 법률프로세스의 양상을 나타내는 것은 당연하다. 해당 국제기구가 규범을 마련할 수 있는 권한이 있다 하더라도, 규범형성에 참여한 주체 또는 규범형성 절차가 적절치 못하다면 규범의 정당성 자체에 대한 의문이 제기될 수 밖에 없다. 또한 관련 규범을 활용할 이해당사자들의 입장을 충분히 반영하지 못한다면, 국제중재 실무에서 외면을 받을 밖에 없을 것이다. 즉, 국제중재 절차규범 형성이 초국적 법률프로세스와 유사한 모습을 보이는 것은 이를 통해 규범의 정당성 나아가 규범성을 확보하기 위함이라 설명할 수 있다.

변화하는 국제환경 속에서도 국제중재 절차규범의 형성에 있어 국제기구의 역할은 지속될 것이다. 국제기구들이 국제중재에 널리 활용될 수 있는 효과적인 규범을 마련하기 위해서는 동 연구를 통해 파악된 국제중재 절차규범 및 그 형성과정의 특성을 반영한 초국적

법률프로세스를 구현해야 할 것이다. 이는 결국 국가 및 비국가 주체들이 참여할 수 있는 장을 마련하여 중재 실무를 반영한 규범의 필요성 및 내용을 논의하고 관련 규범을 만들어 가는 과정이 될 것이다. 본 연구는 이 과정에 있어 국제중재 관련 법적/제도적 장치를 구비하고 있지는 못하는 국가들, 그리고 국제중재를 실제 많이 활용하고 있는 기업들의 입장 모두가 충분히 반영될 때 진정 의미있는 규범이 될 수 있다고 본다. 이러한 국제기구의 노력은 국제중재 절차체계를 다지는 광의의 초국적 법률프로세스의 일환이 될 것이다.

이러한 과정을 통해 마련된 절차규범의 경우 국제중재에 널리 활용될 가능성이 높으며, 그만큼 강한 규범력을 갖게 될 것이다. 그러나 현실적으로 국제기구뿐 아니라 절차규범 형성과정에 참여하는 다양한 주체들의 시간과 비용을 고려하지 않을 수 없다. 따라서, 본 연구는 규범형성과정의 효율성을 확보하기 위한 방안들을 검토하고, 기존 규범들간의 유기적인 조율 그리고 규범형성 국제기구들간의 역할 분담 등을 강조한다.

초국적 법률프로세스의 관점에서 국제중재 절차규범의 형성을 살펴본 본 연구는 국제중재 절차규범 형성과정에 전반에 대한 이해를

제고함으로써, 관련 규범의 형성에 있어 주된 역할을 하고 있는 국제기구들이 나아갈 방향을 제시한 것에 의의를 두며 마무리한다.

주제어: **국제중재, 규범형성, 초국적 법률프로세스, 국제기구, 비국가 주체, 절차규범**

학번: **2001-30731**

Annex – Outline of Norms Surveyed in the Study

The following provides an outline of key aspects of norms considered in the empirical survey. These are included as an annex for ease of reference and for improving the readability of the relevant chapters.

A. Amendments to the UNCITRAL Model Arbitration Law (2006)

The 2006 Amendments to the Model Arbitration Law relate mainly to the form of the arbitration agreement and to interim measures. In amending article 7, the Commission adopted two options, both options confirming the validity and effect of a commitment by the parties to submit an existing or a future dispute to arbitration.[611] Option I follows the structure of the 1985 version of the Model Arbitration Law.[612] It requires that an arbitration

[611] UNCITRAL expressed no preference in favour of either option, both of which were offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Arbitration Law is enacted, including the general contract law of the enacting State. Both options intend to preserve the enforceability of arbitration agreements under the New York Convention. See UNCITRAL, Explanatory Note, *supra* note 48, para. 19.

[612] Option I of article 7 (Definition and form of arbitration agreement) reads:
(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
(2) The arbitration agreement shall be in writing.
(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

agreement be in writing, but no longer requires the signature of the parties or an exchange of communication between the parties (article 7(2)). Option I further provides that the writing requirement be met through the use of electronic communications (article 7(4)). In addition, an arbitration agreement is recognized as being in writing when its content is recorded in some form (articles 7(3)) or when its existence is alleged by one party and not denied by the other in an exchange of statements of claim and defence (article 7(5)). This also applies to a situation where a contract makes a reference to a document that contains an arbitration clause, provided that the reference is such as to make that clause part of the contract (article 7(6)). Option II takes a simpler approach by defining arbitration agreement in a manner that omits any form requirement.[613]

The revision of article 17 on interim measures was considered necessary in light of the increased use of such measures.[614] The new articles adopted in 2006 dealing with interim measures and preliminary orders are contained in chapter IV A of the Model Arbitration Law. Section 1 of the chapter provides a generic definition of interim measures (article 17(2)) and sets out the conditions for granting such measures (article 17A). Section 2

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(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

[613] Option II of article 7 (Definition of arbitration agreement) reads:
"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

[614] Article 17 (Power of arbitral tribunal to order interim measures) of the 1985 version reads: Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

deals with the application for, and conditions for granting of, preliminary orders.[615] Section 3 set outs rules on modification, suspension, termination, provision of security, disclosure and costs and damages applicable to both preliminary orders and interim measures. Following the recognition and enforcement regime for arbitral awards, section 4 establishes a similar regime for interim measures. Section 5 makes it clear that the existence of an arbitration agreement does not infringe on the powers of a competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with such a request.

In addition to the revision of articles 7 and 17, article 2A was added in 2006 to facilitate interpretation by reference to internationally accepted principles and to promote a uniform understanding of the Model Arbitration Law.[616] Article 35(2) was also amended so that the presentation of the original or duly certified copy of an arbitration agreement would no longer be required for obtaining recognition or enforcement of arbitral awards.[617]

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[615] Preliminary orders provide a means for preserving the *status quo* until the arbitral tribunal issues an interim measure adopting or modifying the preliminary order. The term "preliminary order" was used to indicate its limited nature: an order and not an award with a maximum duration of 20 days and not subject to court enforcement. Article 17 B of the Model Arbitration Law provides that unless agreed otherwise by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested. Article 17 C provides safeguards for the party against whom the preliminary order is directed.

[616] Upon considering whether a provision along the lines of article 7 of the CISG should be included (see *supra* note 185, paras. 174 – 175), the Commission adopted article 2A (International origin and general principles) which reads:

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

[617] The Model Arbitration Law defers to national procedural laws and practices for the recognition and enforcement of arbitral awards. Article 35(2) of the Model Arbitration Law

B. Recommendation regarding the Interpretation of Articles II(2) and VII(1) of the New York Convention (2006)

The Recommendation was adopted by UNCITRAL considering the wide use of electronic commerce and taking into account domestic legislation as well as case law, which were more favourable than the New York Convention with respect to form requirements governing arbitration agreements, arbitral proceedings and enforcement of arbitral awards.[618] In adopting the Recommendation, UNCITRAL noted that a purpose of the New York Convention was to enable the enforcement of foreign arbitral awards to the greatest extent and that in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards.[619]

The Recommendation encourages that article II(2) of the New York Convention be applied recognizing that the circumstances described therein are not exhaustive.[620] It further encourages that the application of article VII(1) of the New York Convention to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.[621] This suggests to States the

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merely sets forth certain conditions and the footnote to that article states that conditions set forth are intended to be maximum standards and that it would, thus, not be contrary to the harmonization to be achieved by the Model Arbitration Law if a State retained even less onerous conditions.

[618] See *supra* note 188, preamble.

[619] *Ibid.*

[620] *Ibid.*, operative paragraph 1. For the text of article II(2), see *supra* note 201.

[621] *Ibid.*, operative paragraph 2. For the text of article VII(2), see *supra* note 357.

adoption of article 7 of the 2006 Amendments, which establishes a more favourable regime for the recognition and enforcement of arbitral awards than that provided in the New York Convention.

C. Amendments to the ICSID Arbitration Rules (2006)

The ICSID Arbitration Rules and the Additional Facility Arbitration Rules were amended in 2006 to provide for preliminary procedures concerning provisional measures, expedited procedures for dismissal of unmeritorious claims, access of non-disputing parties to proceedings, publication of awards and additional disclosure requirements for arbitrators.[622] Amendments were also made to the ICSID Administrative and Financial Regulation.[623]

Disclosure requirement – Each arbitrator appointed in an ICSID proceeding is required to sign a declaration before or at the first session of a tribunal.[624] The 2006 amendments introduced wording that the statement attached to the declaration would include any other circumstances that might cause the party to question the arbitrator's reliability for independent judgment. That obligation is a continuing one, as the arbitrator must promptly

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[622] See generally Antonietti, *supra* note 194.

[623] The Secretary-General of ICSID sets standard daily fees for members of conciliation commissions, arbitral tribunals and annulment committees. However, the parties and the respective commission, tribunal or ad hoc committee may agree on a rate of remuneration different than the standard fee in accordance with article 60(2) of the ICSID Convention. The 2006 amendment to the Administrative and Financial Regulation 14 requires requests for higher non-standard fees to be made through the ICSID Secretary-General.

[624] ICSID Arbitration Rule 6(2) and Additional Facility Arbitration Rules article 13(2). A statement is to be attached to the declaration with the arbitrator's past and present professional, business and other relationships (if any) with the parties.

notify the ICSID Secretary-General of any such relationship or circumstance that may subsequently arise during the proceeding.

Open hearings – ICSID Arbitration Rule 32(2) had stated that the tribunal shall decide, with the consent of the parties, which other persons may attend the hearings.[625] Considering the benefits of giving access to third parties, it was suggested that a tribunal may allow persons other than those directly involved in the proceeding to attend or observe all or part of a hearing after consultation with the ICSID Secretary-General and with the parties as far as possible.[626] However, the ICSID Arbitration Rule 32(2) was revised only slightly with regard to access to the criteria for open hearings.[627]

Amicus curiae submissions – The ICSID Arbitration Rules did not contain any provision allowing written submissions other than those from the parties to the proceedings.[628] It was suggested that ICSID tribunals should be

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[625] See *Aguas del Tunari v. Bolivia,* ICSID Case No. ARB/02/03, Decision on Respondent's Objections to Jurisdiction (21 October 2005), para. 17 available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C210/DC629_En.pdf and *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic,* ICSID Case No. ARB/03/19, Order of the Tribunal (19 May 2005), para. 6, available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C19/DC516_En.pdf

[626] ICSID Secretariat, *supra* note 259, p.10.

[627] ICSID Arbitration Rule 32(2) and Additional Facility Arbitration Rules article 39(2) read: Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

[628] The question was left to tribunals as article 44 of the ICSID Convention gave residual authority to the tribunal over questions of procedures not directly addressed under the Convention or the Arbitration Rules or not provided for by the parties. In 2005, an arbitral tribunal affirmed its power to accept and consider written submissions from interested third parties. See *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic,* ICSID Case No. ARB/03/19, Order of the Tribunal (19 May 2005), available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C19/DC516_En.pdf. Article

able to accept and consider written submissions from a non-disputing party after consulting both parties to the extent possible.[629] While some expressed a strong preference that the consent of both parties should be a pre-condition, the 2006 ICSID Arbitration Rule 37(2) on submission of non-disputing parties leaves the decision to the tribunal requiring only consultation with the parties.[630] It permits a tribunal to find a balance between the public interest and the interest of the parties and of the proceeding.[631] ICSID Arbitration Rule 37(2) does not contain an exhaustive list of conditions to be considered and the tribunal may attach additional conditions to the filing of the submission.[632]

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44 of the ICSID Convention reads: Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

[629] ICSID Secretariat, *supra* note 259, pg. 11.

[630] The 2006 ISCID Arbitration Rules 37(2) reads: After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

[631] See also article 4 of the UNCITRAL Transparency Rules.

[632] For example, to disclose whether or not the non-disputing party has any affiliation with any of the disputing parties or to disclose the identification of the government, person or organization that has provided any financial or other assistance in preparing the submission.

Since the amendment in 2006, the ICSID Arbitration Rule 37 was invoked more than 45 times with amicus curiae submissions.[633]

Provisional measures – To obtain the relief of provisional measures from an ICSID arbitral tribunal, even where such measures were urgently needed, the parties had to await the review and registration of the request for arbitration and the constitution of the tribunal before filing such a request. The 2006 amendments to ISCID Arbitration Rules 39(1) and (5) introduced a procedure for the expedited filing of requests for provisional measures, and of all the observations of the parties to such a request, prior to the constitution of a tribunal.[634] The ICSID Secretariat's role is to receive the request and any observations of the parties thereto pending the constitution of the tribunal. The Secretary-General sets time limits for the parties to present such observations and the tribunal is ultimately responsible for determining the application. The aim is evidently to reduce delays and to ensure that the tribunal is able to consider the request for provisional measures as soon as it is constituted, especially where the measures were urgently required.[635]

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[633] ICSID, The ICSID Rules Amendment Process, available at https://icsid.worldbank.org/en/Documents/about/ICSID Rules Amendment Process-ENG.pdf.

[634] The 2006 ISCID Arbitration Rules 39(1) and (5) read: (1) At any time [during] after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures. …(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

[635] No corresponding change was made to the Additional Facility Arbitration Rules article 46(4), because it provides for a possible application by the parties to any competent judicial authority for interim or conservatory measures, irrespective of the parties' prior consent in their arbitration agreement.

Preliminary objections – Where the dispute was not manifestly outside the jurisdiction of ICSID, the request for arbitration had to be registered and the parties were invited to proceed to constitute the arbitral tribunal pursuant to article 36(3) of the ICSID Convention.[636] Therefore, the power of the ICSID Secretary-General to screen requests for arbitration did not extend to the frivolous claims or to cases where jurisdiction was merely doubtful. This was a source of recurring complaint from some respondent governments.[637] Prior to the 2006 amendment, objection to jurisdiction were only provided in ICSID Arbitration Rule 41(1). In 2006, ICSID Arbitration Rule 41(5) was added providing an expedited procedure for making preliminary objections to unmeritorious claims.[638] ICSID Arbitration Rule 41(5) entitles a respondent to raise preliminary objections on the merits, with a view to obtaining an early dismissal of the case.[639] If the tribunal finds that the claims lack legal merit, it will render an award to that effect.[640]

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[636] Article 36(3) of the ICSID Convention reads: The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

[637] See Parra, *supra* note 191, p. 65.

[638] The heading of ICSID Arbitration Rule 41 was thus revised from "Objections to Jurisdiction" to "Preliminary Objections". Corresponding changes were made to the Additional Facility Arbitration Rules article 45. The 2006 ICSID Arbitration Rule 41(5) reads: Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

[639] While the 2006 ICSID Arbitration Rule 41(5) is primarily designed to dismiss frivolous claims on the merits, whether it includes expedited objections to jurisdiction is debated. For a general discussion on the scope of preliminary objections, see Aïssatou Diop, Objection under

Publication of an award - Article 48(5) of the ICSID Convention and the 1984 ICSID Arbitration Rule 48(4) precluded ICSID from publishing an award without the consent of the parties.[641] Since the 1984 amendments, ICSID, with authorization from the parties, could publish only excerpts of the legal rules applied by the tribunal. In 2006, the second sentence of ICSID Arbitration Rule 48(4) was revised to facilitate the early release of excerpts of the legal reasoning adopted by the tribunal making their prompt publication mandatory.[642] This amendment was viewed as improving the transparency of the process as well as promoting the overall development of international law in this field.[643]

D. Revision of the UNCITRAL Arbitration Rules (2010)

The 2010 UNCITRAL Arbitration Rules maintains the structure of the 1976 version and contains two more articles. Noteworthy aspects of the 2010 UNCITRAL Arbitration Rules are: (i) revisions to improve the

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Rule 41(5) of the ICSID Arbitration Rules, ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL, Vol. 25, No. 2 (Fall 2010) and Michele Potestà, Preliminary Objections to Dismiss Claims that are Manifestly without Legal Merit under Rule 41(5) of the ICSID Arbitration Rules in Crina Baltag (Ed.), ICSID CONVENTION AFTER 50 YEARS - UNSETTLED ISSUES, Wolters Kluwer, pp. 249-271.

[640] The 2006 ICSID Arbitration Rule 41(6) reads: If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.

[641] Article 48(5) of the ICSID Convention reads: The Centre shall not publish the award without the consent of the parties.

The 1984 ICSID Arbitration Rule 48(4) reads: The Centre shall not publish the award without the consent of the parties. The Centre may, however, include in its publications excerpts of the legal rules applied by the Tribunal.

[642] The 2006 ICSID Arbitration Rule 48(4) reads: The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.

[643] Antonietti, *supra* note 194, p. 442.

procedural balance between the parties by requiring the respondent to submit a response to the notice of arbitration early in the proceedings (article 4) [644]; (ii) revisions to reflect technological developments and their use in arbitration (article 2 on notice and article 28(4) on the possible use of videoconference in hearings); (iii) revisions to reflect developments in arbitration practice and the amendments to the Model Arbitration Law on interim measures (article 26); (iv) introduction of new features to enhance procedural efficiency (article 6 on procedural timetable and article 14 on replacement of arbitrators); (v) revisions seeking more balance between the principle of party autonomy and the discretionary power of the arbitral tribunal (article 25 on tribunal-appointed experts); (vi) revisions to address multi-party proceedings (articles 4(2)(f), 10(1) and 17(5))[645] and (vii) provisions requiring reasonableness of costs and a review mechanism regarding costs (articles 40 to 43).

The following provides a brief summary of the revisions section by section. Section I (Introductory rules, articles 1 to 6) was the subject of several noteworthy changes, including the removal of written form requirement (article 1),[646] the revision of notice requirements (article 2), a new provision requiring the respondent to file a response to the notice of

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[644] Article 4 rectifies the imbalance in the 1976 version, which did not give the respondent an opportunity to set out its position until it had submitted its statement of defence, which was after the constitution of the tribunal and in practice, usually after the procedure and the timetable have been set.

[645] Whereas provisions on joinder were included (articles 4(2)(f) and 17(5)), provisions on consolidation were considered but not included as the situation raised complex issues and could result in unfair solutions. See UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the work of its forty-sixth session (A/CN.9/619), paras. 116-126.

[646] It was decided that the question of the form requirement was a matter dealt under applicable law and was thus deleted from the UNCITRAL Arbitration Rules. See and UNCITRAL, *supra* note 301 (A/CN.9/646), para. 71 and *supra* note 293 (A/CN.9/665), para. 18.

arbitration (article 4) and the role of the designating and appointing authorities. A distinctive feature of the 1976 version was its references to the appointing authority. Because UNCITRAL is not an arbitral institution and does not administer arbitration, there was no arbitral institution to oversee the process or to intervene when necessary under the 1976 version. For that reason, the UNCITRAL Arbitration Rules provided for an appointing authority, a third party chosen by the parties and vested with the authority to act in certain circumstances (for example, articles 6 and 7 on appointment, article 12 on challenges to arbitrators, article 39 on fixing arbitrator's fees and article 41 on fixing the deposit of costs of the 1976 version). When the parties fail to agree upon an appointing authority, the default rule was that the Secretary-General of the PCA, upon request by a party, would designate the appointing authority (article 6(2) of the 1976 version). This mechanism is maintained in the 2010 UNCITRAL Arbitration Rules with a clearer provision on the role of the designating and appointing authorities (article 6). A minor change was the inclusion of the possibility for parties to designate the Secretary-General of the PCA to act as the appointing authority (article 6(1)).

Some notable changes to Section II (Composition of the arbitral tribunal, articles 7 to 16) related to the role of the appointing authority in appointing, resolving challenges of and dealing with the replacement of arbitrators (articles 7 to 10, 13 and 14 respectively), possible involvement of multiple parties in appointment (article 10(1)), disclosure requirement of arbitrators (article 11) and exclusion of liability of arbitrators, appointing authority and any person appointed by the tribunal (article 16).

Section III (Arbitral proceedings, articles 17 to 32) remained largely unchanged. Article 17(1) retains the key principles that the tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that each party is given a reasonable opportunity of presenting its case at appropriate stages of the proceedings. An important addition in 2010 was the duty of the tribunal to enhance procedural efficiency in exercising its discretion. The second sentence of article 17(1) states that the tribunal shall conduct the proceedings so as to avoid unnecessary delays and expense and to provide a fair and efficient process for resolving the parties' dispute.[647] Other notable revisions in Section III pertained to the obligation of the tribunal to establish a timetable (article 17(2)), possibility of a joinder (article 17(5)), obligation of the parties to submit with their respective statements of claim or defence all documents or evidence relied upon (articles 20(4) and 21(2)), interim measures (article 26), parties' involvement with regard to tribunal-appointed experts (article 29) and waiver of right to object (article 32).

Noteworthy changes in Section IV (The award, articles 33 to 43) were disclosure or publication of an award under certain circumstances (article 34(5))[648] and the possibility of the parties agreeing on the application of rules

[647] The sentence was included in lieu of a proposed language to include time limits and as a response to reservations about such inclusion. See UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session (A/CN.9/641), paras. 118-119.

[648] Articles 28(3) and 34(5) of the 2010 UNCITRAL Arbitration Rules deal respectively with confidentiality in hearing and of awards, further elaborating the rules in the 1976 version. However, like the 1976 version, the 2010 UNCITRAL Arbitration Rules do not include a general provision on confidentiality of the proceedings or of the materials before the tribunal. See UNCITRAL, *supra* note 645 (A/CN.9/619), paras. 127-133.

of law (article 35(1)). The rules on costs (articles 40-41) were revised to provide a more transparent procedure for agreeing on the method of calculating the tribunal's fees from the outset and to give the appointing authority a greater role in respect of fees.

The Model Arbitration Clause in the 2010 UNCITRAL Arbitration Rules was slightly modified to state that the parties "should" instead of "may wish to" consider including provisions setting out the appointing authority, the number of arbitrators, the place of arbitration and the language to be used in their arbitration agreement. The 2010 UNCITRAL Arbitration Rules also included a new possible waiver statement for parties wishing to exclude recourse against the arbitral award to the extent permitted by applicable law[649] and a model statement of independence.

E. The IBA Guidelines on Party Representation in International Arbitration

The IBA Guidelines on Party Representation comprise of 27 guidelines.[650] Guidelines 1 to 3 deal with the nature of the text and their application.[651] With respect to representation, party representatives should identify themselves to the other party and the arbitral tribunal and a party should promptly inform the arbitral tribunal of any change.[652] When there exists a conflict-of-interest relationship with the arbitrator, a person should

[649] *Supra* note 285 (A/65/17), paras. 141-151.
[650] See *supra* note 177.
[651] See *supra* notes 177 and 178.
[652] Guideline 4.

not accept representation and in case of a breach, the arbitral tribunal may take measures, including the exclusion of that person, to safeguard the integrity of the proceedings. [653]

With respect to communications with arbitrators, party representatives should generally not engage in *ex parte* communication with an arbitrator or a prospective arbitrator concerning arbitration unless agreed otherwise by the parties.[654] The commentary to Guidelines 7 and 8 notes that the guidelines seek to reflect best international practices and may depart from potentially diverging domestic arbitration practices that are more restrictive or, to the contrary, permit broader *ex parte* communications.

Guidelines 9 to 11 concern the responsibility of a party representative when making submissions and tendering evidence to the arbitral tribunal. A party representative shall not make any knowingly false submission of fact and in the event that he or she learns of a false submission, should promptly correct such submissions. [655] This responsibility also applies to witness or expert evidence and Guideline 11 provides a non-exhaustive list of possible remedial measures by the party representative.

With respect to document production, Guidelines 12 to 17 suggest standards of conduct for party representatives in relation to the process of preserving, collecting and producing documents in international arbitration. Guidelines 18 to 25 deal with interaction with witnesses and experts,

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[653] Guidelines 5 and 6.
[654] Guideline 7. Guideline 8 provides circumstances where it would not be improper to have *ex parte* communications.
[655] Guidelines 9 and 10.

including making contact with a potential witness or expert,[656] assisting in the preparation of witness statements and expert reports[657] and paying reasonable compensation to witnesses and a reasonable fee for experts.[658]

Lastly, Guidelines 26 and 27 list possible remedies that an arbitral tribunal could take to address misconduct by a party representative, which include, for example, admonishment, drawing inferences in assessing evidence or legal arguments, apportionment of the cost of arbitration and any other appropriate measure to preserve fairness and integrity of the proceedings. They also list factors to be taken into account by the arbitral tribunal in addressing issues of misconduct, for example, the need to preserve integrity and fairness, the potential impact of the misconduct and the good faith of the party representative.

F. Revisions to the IBA Guidelines on Conflicts of Interest in International Arbitration (2014)

Initially adopted in 2004, the IBA Guidelines on Conflicts provided a useful tool for arbitrators and other users of international arbitration in considering conflict-of-interest situations as well as impartiality and independence of arbitrators. Similar to the IBA Guidelines on Party Representation, the IBA Guidelines on Conflicts do not override any

[656] Guidelines 18 and 19.
[657] Guidelines 20 to 24.
[658] Guidelines 25.

applicable national law or arbitral rules chosen by the parties and apply to both commercial and investment arbitration. [659]

The Guidelines consist of a part dealing with general standards and another on their practical application. Part I contains seven General Standards with accompanying explanations. General Standard 1 states the principle that every arbitrator shall be impartial and independent of the parties at the time of accepting the appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated. General Standard 2 deals with actions to be taken by a potential or an appointed arbitrator in a conflict-of-interest situation. General Standard 3 deals with disclosure by arbitrators. In 2014, General Standard 3(b) was added to address the increasing use of advance declaration or waiver in relation to potential conflict of interest. While not addressing the validity or effectiveness of such advance declaration or waiver, General Standard 3(b) reiterates the ongoing duty of the arbitrator to disclose under General Standard 3(a). General Standard 4 on possible waiver by the parties remains unchanged.

General Standard 5 dealing with the scope of application of the Guidelines was expanded in 2014 to cover arbitral or administrative secretaries and assistants, reflecting their increasing use in international arbitration. Secretaries and assistants are also bound by the same duty of independence and impartiality as arbitrators and it is the responsibility of the

[659] While the 2004 Guidelines were intended to apply to both commercial and investment arbitration, in the course of the review process, it was found that uncertainty lingered as to their application to investment arbitration. Similarly, despite a comment in the 2004 version that their application extended to non-legal professionals serving as arbitrator, there appeared to remain uncertainty in this regard. See 2014 IBA Guidelines on Conflicts of Interest, p. ii.

arbitral tribunal to ensure that that duty is respected.[660] Reference to non-neutral arbitrators in the 2004 version was removed in the 2014 revision.

General Standard 6 deals with the relationships between an arbitrator and his or her law firm in considering potential conflict of interest, which should be done on a case-by-case basis. The revised General Standard 6(a) begins with a general statement that an arbitrator is, in principle, considered to bear the identity of his or her law firm and combines General Standards 6(a) and (b) of the 2004 version. In the 2004 version, General Standard 6(c) provided that managers, directors or any person having a controlling interest on a legal entity shall be considered to be the equivalent of the legal entity. The 2014 Guidelines extended this list to include any legal or physical person having a direct economic interest in, or a duty to indemnify a party for, the award to be rendered. In other words, third-party funders and insurers may be considered equivalent to the party to the arbitral proceedings.[661]

General Standard 7 addresses the duty of the parties to disclose certain information and of the arbitrator to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. In 2014, General Standard 7(a) was revised to state that a party shall disclose any direct or indirect relationship between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the

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[660] The explanatory note to the General Standard 5 in the 2004 version had reflected this idea.
[661] The terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. See IBA Guidelines on Conflicts of Interest, pp. 14-15.

award to be rendered.[662] General Standard 7(a) also states that a party should disclose information on its own initiative at the earliest opportunity. General Standard 7(b) was added in 2014, providing the duty of a party to disclose the identity of its counsel, as well as any relationship between its counsel and the arbitrator (including membership of the same barristers' chambers). This is to be done at the earliest opportunity and upon any change in its counsel team.

Part II of the IBA Guidelines on Conflicts categorizes possible situations into non-exhaustive application lists.[663] The application lists aim at ensuring consistency in the interpretation and application of the General Standards with a view to avoiding unnecessary challenges and removals.

The Red List consists of a non-waivable list and a waivable list.[664] In these circumstances, an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances. In 2014, situations where the arbitrator was an employee of a party or a third-party funder (items 1.1. and 1.2) and where the arbitrator's firm regularly advised the party (item 1.4) were added in the non-waivable list. Similarly, the situation where the arbitrator regularly advises one of the parties or an affiliate of one of the parties but neither the arbitrator nor his or

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[662] In the 2004 version, General Standard 7(a) stated that a party was required to disclose any direct or indirect relationship between the party (or another company of the same group of companies) and the arbitrator.

[663] IBA Guidelines on Conflicts of Interest, pp. 3 and 17.

[664] The non-waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, acceptance of such a situation cannot cure the conflict. The waivable Red List covers situations that are serious but not as severe. Because of their seriousness, these situations are considered waivable, only if and when the parties, being aware of the conflict of interest situation, express their willingness to have such a person act as arbitrator, in accordance with General Standard 4(c). See IBA Guidelines on Conflicts of Interest, p. 17

her firm derives a significant financial income therefrom (item 2.3.7) was added to the waivable list.

The Orange List consists of situations, which, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. In such situations, the arbitrator has a duty to disclose and the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made. In 2014, situations where enmity exists between an arbitrator and a counsel appearing in arbitration (item 3.3.7) or between an arbitrators and a manager or director of a party or a third-party funder (item 3.4.4) and where the arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel (item 3.3.8) were newly added in the Orange List.

The Green List provides situations where no appearance and no actual conflict of interest exist from an objective viewpoint. Thus, the arbitrator does not have a duty to disclose such situations. In the 2014 version, situations where the arbitrator teaches in the same faculty as, or participated in conferences with, another arbitrator or counsel to one of the parties (items 4.3.3 and 4.3.4) and where an arbitrator has a relationship with one of the parties or its affiliates through a social media network (item 4.3.1) were added in the Green List.

G. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)

The UNCITRAL Transparency Rules comprise a set of procedural rules that provide for the transparency and accessibility to the public of information about treaty-based investor-State arbitration, the proceedings of which have traditionally been conducted behind closed doors. It strikes a balance between the public interest in such arbitration and the interest of the parties in resolving their dispute fairly and efficiently. This aspect is expressly mentioned in article 1(4) of the UNCITRAL Transparency Rules.[665]

Comprised of eight articles, the UNCITRAL Transparency Rules aim at: (i) creating public knowledge of the initiation of an investor-state arbitration;[666] (ii) making documents including the decisions and awards of arbitral tribunals public;[667] (iii) allowing third parties to make submissions to arbitral tribunals where such submissions would be helpful and relevant and would not unduly delay, interfere with, or increase the costs of, the proceedings;[668] (iv) allowing submissions by non-disputing States party to the investment treaty; [669] (v) allowing open or public hearings; [670] and (vi) preserving the existing power of arbitral tribunals to allow closed proceedings and to restrict access to documents, or portions thereof, when necessary to

[665] Article 1(4) of the UNCITRAL Transparency Rules reads: Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account: (a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and (b) The disputing parties' interest in a fair and efficient resolution of their dispute.
[666] Article 2 (Publication of information at the commencement of arbitral proceedings)
[667] Article 3 (Publication of documents)
[668] Article 4 (Submission by a third person)
[669] Article 5 (Submission by a non-disputing Party to the treaty)
[670] Article 6 (Hearings)

protect confidential and sensitive information as well as the integrity of the arbitral process.[671]

The UNCITRAL Transparency Rules came into effect on 1 April 2014 and apply in relation to disputes arising out of treaties[672] concluded after 1 April 2014, when the investor-State arbitration is initiated under the UNCITRAL Arbitration Rules.[673] However, parties to the treaty may agree otherwise.[674] Given the link between the UNCITRAL Arbitration Rules and the application of the UNCITRAL Transparency Rules, article 1(4) was added to the UNCITRAL Arbitration Rules, with effect on 1 April 2014.[675] In short, the UNCITRAL Transparency Rules are incorporated into the UNCITRAL Arbitration Rules through article 1(4).[676]

The UNCITRAL Transparency Rules are also available for use in investor-State arbitrations initiated under arbitration rules other than the UNCITRAL Arbitration Rules, and in *ad hoc* proceedings, when the disputing

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[671] Article 7 (Exceptions to transparency)

[672] For the purposes of the UNCITRAL Transparency Rules, a "treaty" is understood broadly as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against States parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty. See footnote to article 1(1) of the UNCITRAL Transparency Rules.

[673] Article 1(1) of the UNCITRAL Transparency Rules.

[674] See, for example, the Free Trade Agreement between the Republic of Korea and Vietnam, which was signed on 5 May 2015 and entered into force in 20 December 2015. In Chapter 9 on Investment, reference is made to the "UNCITRAL Arbitration Rules as revised in 2010" with a footnote stating that "For greater certainty, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall not be applied in this Chapter."

[675] In all other respects the 2013 UNCITRAL Arbitration Rules remain unchanged from the 2010 UNCITRAL Arbitration Rules.

[676] Article 1(4) of the 2013 UNCITRAL Arbitration Rules reads: For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency"), subject to article 1 of the Rules on Transparency.

parties or the States parties to the investment treaty agree to such application.[677] For example, CETA includes an explicit reference to the UNCITRAL Transparency Rules, making it applicable to all proceedings.[678]

The UNCITRAL Transparency Rules may also apply to arbitration under investment treaties concluded before 1 April 2014,[679] where there is express consent for their application between the disputing parties (the claimant investor and the respondent State)[680] or between the States parties to the investment treaty. The UNCITRAL Transparency Rules foresee the Secretary-General of the United Nations as performing the repository function, through the UNCITRAL Secretariat.[681]

H. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2014)

The Transparency Convention is an instrument by which a State or a regional economic integration organization, which is a party to investment treaties[682] concluded before 1 April 2014, expresses its consent to apply the

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[677] Article 1(9) of the UNCITRAL Transparency Rules reads: These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings.
[678] See supra note 534.
[679] Article 2(1)(b) of the UNCITRAL Transparency Rules.
[680] See for example, Iberdrola, S.A. and Iberdrola Energía, S.A.U. v. Plurinational State of Bolivia (PCA Case No. 2015-05) Terms of appointment (7 August 2015); and BSG Resources Limited v. Guinea (ICSID Case No. ARB/14/22) Procedural order No.2 (17 September 2015).
[681] Article 8 of the UNCITRAL Transparency Rules. The online Transparency Registry is accessible at http://www.uncitral.org/transparency-registry/registry/index.jspx.
[682] The term "investment treaty" means any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade 6 and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to

UNCITRAL Transparency Rules to investor-State arbitration initiated pursuant to a treaty concluded before 1 April 2014.[683] The Transparency Convention supplements existing investment treaties with respect to transparency-related obligations.[684]

Article 2 of the Transparency Convention is the key provision, determining when and how the UNCITRAL Transparency Rules shall apply. In contrast to the UNCITRAL Transparency Rules, whether the arbitration is initiated under the UNCITRAL Arbitration Rules or not does not have any impact on the application of the Transparency Convention. The general rule of application is stipulated in paragraph 1[685] and paragraph 2 refers to the application of the UNCITRAL Transparency Rules when only the respondent State (and not the State of the investor-claimant) is a party to the Transparency Convention.[686] The Convention applies prospectively, that is to

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arbitration against contracting parties to that investment treaty. See article 1(2) of the Transparency Convention.

[683] Article 1(1) of the Transparency Convention reads: This Convention applies to arbitration between an investor and a State or a regional economic integration organization conducted on the basis of an investment treaty concluded before 1 April 2014 ("investor-State arbitration").

[684] Information about the Transparency Convention is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html?lf=100&lng=en.

[685] Article 2(1) (Bilateral or multilateral application) of the Transparency Convention reads: The UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a relevant reservation under Article 3(1)(a) or (b), and the claimant is of a State that is a Party that has not made a relevant reservation under Article 3(1)(a).

[686] Article 2(2) (Unilateral offer of application) of the Transparency Convention reads: Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under Article 3(1), and the claimant agrees to the application of the UNCITRAL Rules on Transparency.

arbitral proceedings commenced after the entry into force of the Convention for the Party concerned.[687]

The Transparency Convention provides States and regional economic integration organizations the flexibility to formulate reservations and takes a negative-list approach, allowing them to exclude specific investment treaties or specific sets of arbitration rules from the application of the Convention, other than the UNCITRAL Arbitration Rules.[688] They may also declare to not provide a unilateral offer of application under article 2(2) of the Convention.[689] By defining specific timing for the formulation and withdrawal of reservations, the Convention provides the necessary level of flexibility, while ensuring that reservations cannot be used to defeat the purpose of the Convention.[690]

I. ICC Arbitration Rules (2017)

The most important amendment to the 2017 ICC Arbitration Rules was the introduction of the expedited procedure and the Expedited Procedure Rules (contained in appendix VI to the 2017 ICC Arbitration Rules). In accordance with article 30(2)(a) of the ICC Arbitration Rules and article 1(2) of the Expedited Procedure Rules, the Expedited Procedure Rules apply if the

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[687] Article 5 of the Transparency Convention.
[688] Article 3(1)(a) and (b) of the Transparency Convention reads: A Party may declare that: (a) It shall not apply this Convention to investor-State arbitration under a specific investment treaty, identified by title and name of the contracting parties to that investment treaty; (b) Article 2(1) and (2) shall not apply to investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules, and in which it is a respondent.
[689] Article 3(1)(c) of the Transparency Convention.
[690] Article 4 of the Transparency Convention.

amount in dispute does not exceed 2 million USD.[691] The Expedited Procedure Rules, however, do not apply: (i) if the arbitration agreement was concluded before 1 March 2017; (ii) if the parties agreed to opt-out of the Expedited Procedure Rules; or (ii) if the ICC Court, upon the request of a party before the constitution of the arbitral tribunal or on its own motion, determines that it is inappropriate in the circumstances.[692]

Under the expedited procedure, the ICC Court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator.[693] The basis for this provision seems to be that a sole arbitrator will likely be able to conduct the proceeding more quickly on both substantive and procedural matters saving cost and time compared to a panel of three or more members. Under the expedited procedure, there is no need for the arbitral tribunal to draw up a document defining its terms of reference.[694] After the constitution of the arbitral tribunal, parties are not allowed to make new

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[691] The Expedited Procedure Rules may also apply in arbitrations involving disputes of higher amounts when parties so agree. See article 30(2)(b) of the 2017 ICC Arbitration Rules.

[692] Article 30(3) of the 2017 ICC Arbitration Rules. Furthermore, article 1(4) of the Expedited Procedure Rules provides: "The Court may, at any time during the arbitral proceedings, on its own motion or upon the request of a party, and after consultation with the arbitral tribunal and the parties, decide that the Expedited Procedure Provisions shall no longer apply to the case. In such case, unless the Court considers that it is appropriate to replace and/or reconstitute the arbitral tribunal, the arbitral tribunal shall remain in place."

[693] Article 2 of the Expedited Procedure Rules. On whether this may be contrary to party autonomy, see Adam Weiss, Diogo Pereira & Erin Klisch, "ICC's International Court of Arbitration Adopts Expedited Procedure Rules" (21 November 2016) available at https://www.paulhastings.com/publications-items/details/?id=d4e6ea69-2334-6428-811c-ff00004cbded. For the different approaches in the institutional rules, see Lucja Nowak and Nata Ghibradze, "The ICC Expedited Procedure Rules – Strengthening the Court's Powers" (13 December 2016) available at http://kluwerarbitrationblog.com/2016/12/13/reserved-for-13-december-the-icc-expedited-procedure-rules-strengthening-the-courts-powers/.

[694] Article 3(1) of the Expedited Procedure Rules. For non-expedited cases, arbitral tribunals are required to draw up a document defining its Terms of References, which is frequently a source of delay (see article 23 of the 2017 ICC Arbitration Rules).

claims unless authorized by the arbitral tribunal.[695] The case management conference shall take place no later than 15 days (with possible extension by the ICC Court) after the date on which the file was transmitted to the tribunal.[696] The arbitral tribunal has the discretion to adopt procedural measures it considers appropriate, for example, not to allow requests for document production or to limit the number, length and scope of written submissions and written witness evidence.[697] The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties with no hearing and no examination of witnesses or experts.[698] Under the expedited procedure, the award must be made within six months from the date of the case management conference,[699] with possible extension granted by the ICC Court.[700] Appendix III (Arbitration costs and

[695] Article 3(2) of the Expedited Procedure Rules. For non-expedited cases, parties are not allowed to make new claims falling outside the limit of the Terms of Reference, after that Terms of Reference have been signed or approved by the Court (see article 23(4) of the 2017 ICC Arbitration Rules).

[696] Article 24 of the 2017 ICC Arbitration Rules and article 3(3) of the Expedited Procedure Rules.

[697] Article 3(4) of the Expedited Procedure Rules.

[698] Article 3(5) of the Expedited Procedure Rules. To address possible issues that might arise when the parties have agreed to hearing in their arbitration agreement (for example, the arbitration agreement being found inoperative under article II(3) of the New York Convention or refusal of recognition and enforcement under article V(1)(b) or V(1)(d) of the New York Convention, article 30(1) of the 2017 ICC Arbitration Rules provides: "By agreeing to arbitration under the Rules, the parties agree that this Article 30 and the Expedited Procedure Rules set forth in Appendix VI (collectively the "Expedited Procedure Provisions") shall take precedence over any contrary terms of the arbitration agreement."

[699] In comparison, for non-expedited cases, the final award must be rendered within six months from the effective date of the terms of reference, which is to be transmitted to the ICC Court upon signature by the tribunal and the parties within 30 days from the transfer of the file to the arbitral tribunal (see article 31 (1) of the 2017 ICC Arbitration Rules).

[700] Article 31(2) of the 2017 ICC Arbitration Rules. According to the ICC Court, extensions will be granted in circumstances which are limited and justified.

fees) to the 2017 ICC Arbitration Rules provides a separate scale of administrative expenses and arbitrator's fess for the expedited procedure.[701]

Another amendment to the ICC Arbitration Rules aimed at streamlining the procedure. The time limit for establishment of the terms of reference under article 23(2) was reduced from two months to 30 days, reducing the initial phases of the proceedings.

Another key amendment related to parties' request to the ICC Court to provide reasons for its decisions. Article 11(4) of the 2012 ICC Arbitration Rules had stated that the decisions of the ICC Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final and that the reasons for such decisions shall not be communicated. Withholding the reasons behind these types of decisions was subject of criticism, given the seriousness of such challenges for the parties and tribunal involved.[702] During the revision, the second part of article 11(4) was deleted, allowing the ICC Court to provide reasons for its decisions made on challenges (article 14) as well as for other decisions such as *prima facie* jurisdictional decisions (article 6(4)) and consolidations (article 10), without having to seek consent of all parties. [703]

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[701] ICC administrative expenses are the same as a non-expedited procedure but the arbitrator's fees are slightly lower.

[702] In comparison, pursuant to articles 10.5 and 10.6 of the LCIA Arbitration Rules, the LCIA Court must give reasons for such decisions unless the parties agree otherwise. See Thomas W. Walsh and Ruth Teitelbaum, The LCIA Court Decisions on Challenges to Arbitrators: An Introduction, ARBITRATION INTERNATIONAL, Vol. 27. Issue 3 (2014) pp. 283-314 available at https://doi.org/10.1093/arbitration/27.3.283.

[703] The service may be utilized where the parties so agree and submit a request for reasons prior to seeking a decision from the ICC Court. The ICC Court's note to parties and arbitrators specifies that any request for the communication of reasons must be made in advance of the relevant decision in respect of which reasons are sought.