International arbitration is unique as a dispute resolution process insofar as it relies on the consent of parties to submit disputes not to a national framework, but to an adjudicative process the parameters of which are themselves the subject of negotiation. That such a process works cross-border, cross-culturally and in relation to complex and simple disputes alike is in part a function of the global framework established by the instruments developed by the United Nations and the UN Commission on International Trade Law (UNCITRAL or the Commission), including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules.

There are parallels to be drawn between international arbitration as a process and the development of UNCITRAL texts in the field of international arbitration: in relation to the latter, there is putative consent that multilateral rule-making in the UNCITRAL forum confers legitimacy upon a text (cf., in the former, consent to arbitration as a system), and there is specific negotiation of the text itself (cf., in the former, the negotiation of the arbitral procedure in each arbitration). However whereas in an arbitration, the final boundaries are set by the arbitral tribunal based on the parties’ agreement, in the negotiation of a multilateral text, the stakeholders themselves must arrive at a consensus.

That consensus is achieved at the end of a multilateral process whereby UNCITRAL member and observer States, as well as international organizations (IOs, which include inter-governmental and non-governmental organizations), together debate, negotiate and consult to achieve a universally accepted standard. This feat of political and legal diplomacy comprises not only an

* The views expressed are those of the authors and do not necessarily reflect those of the United Nations.
outcome, but indeed a process that contributes to the legitimacy of the result-
ing texts.

The recently concluded UNCITRAL Rules on Transparency in Treaty-based
Investor-State Arbitration (the Rules on Transparency, or the Rules) mark
a watershed moment in such multilateral rule-making, because harmoniza-
tion of practice in this respect was seen to benefit not only the main actors
of the arbitral process, but also the public interest at large. Thus, the role of
IO observers to UNCITRAL, and the willingness of States to accommodate the
public interest, were both critical components to the successful completion of
the Rules.

This chapter sets out to provide (a) a background on the rule-making process
at UNCITRAL; (b) the role of both governmental and non-governmental IOs,
as well as States, in the genesis and development of the Rules on Transparency;
and (c) the content of the Rules on Transparency in light of compromises
achieved during the consensus-making process.

1 Background on the Rule-making Process at UNCITRAL

1.1 The Establishment of UNCITRAL and Its Implications for Rule-
making in the Field of International Trade Law

UNCITRAL came into being pursuant to a mandate from the General Assembly
of the United Nations in 1966 in order to pursue the goal of the progressive har-
monization and unification of international trade law. A report commissioned
by the General Assembly the previous year calling 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 Schmitthof
Study, or the Study), had noted an “increasing awareness” that a modern
legislative framework provided a necessary foundation for sound economic
and social progress, and a “legal lag” in the realization. The Study went on to

1 Resolution 2205 (XXI) of 17 December 1966.
2 GA Resolution 2102 (XX), adopted on 20 December 1965.
3 The Report of the Secretary General pre-dating the establishment of UNCITRAL regarding
the “progressive development of the law of international trade”, defines the expression “the
law of international trade” as “the body of rules governing commercial relationships of a
private law nature involving different countries”; it further provides that “international com-
nercial 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.”
Document A/6396, ¶¶ 10 and 12.
4 Schmitthoff Study, ¶¶ 216–24.