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Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fifth session (Vienna, 3-7 October 2011)

Contents

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session (New York, 16 June-3 July 2008)[1] that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic.[2]

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session regarding the importance of ensuring transparency in treaty-based investor-State arbitration. The Commission confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with a great practical interest, taking account of the large number of treaties already concluded.[3] Further, the Commission agreed that the question of possible intervention in the arbitration by a non-disputing State Party to the investment treaty should be regarded as falling within the mandate of the Working Group. Whether the legal standard on transparency should deal with such a right of intervention, and if so, the determination of the scope and modalities of such intervention should be left for further consideration by the Working Group.[4]

3. The most recent compilation of historical references regarding the consideration by the Commission of work of the Working Group can be found in document A/CN.9/WG.II/WP.165, paragraphs 5-12.

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its fifty-fifth session in Vienna, from 3 to 7 October 2011. The session was attended by the following States members of the Working Group: Argentina, Australia, Austria, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, El Salvador, France, Germany, Greece, India, Israel, Italy, Japan, Mauritius, Mexico, Nigeria, Norway, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Belarus, Belgium, Croatia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland, Indonesia, Netherlands, New Zealand, Panama, Romania, Slovakia and Switzerland.

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

[2] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 190.

[3] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200.

[4] Ibid., para. 202.

6. The session was also attended by observers from Palestine and the European Union.

7. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: International Centre for Settlement of Investment Disputes (ICSID);

(b) *Intergovernmental organizations*: Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) and the Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Association for the Promotion of Arbitration in Africa (APAA), Barreau de Paris, Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), China International Economic Trade and Arbitration Commission (CIETAC), Comité Français de l'Arbitrage (CFA), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Council of Bars and Law Societies of Europe (CCBE), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Hong Kong International Arbitration Center (HKIAC), Inter-American Bar Association (IABA), International Arbitration Centre of the Austrian Federal Economic Chamber (VIAC), International Arbitration Institute (IAI), International Bar Association (IBA), International Court of Arbitration (ICC), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), Madrid Court of Arbitration, Milan Club of Arbitrators, New York State Bar Association (NYSBA), Pakistan Business Council (PBC), Swiss Arbitration Association (ASA), Tehran Regional Arbitration Centre (TRAC), The Swedish Arbitration Association (SAA), and Union Internationale des Avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Mr. Salim Moollan (Mauritius)

Rapporteur: Mr. Markus Maurer (Germany)

9. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.165); (b) a note by the Secretariat regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.166 and its addendum); (c) a note by the Secretariat reproducing comments by the International Centre for Settlement of Investment Disputes (ICSID) (A/CN.9/WG.II/WP.167).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of a legal standard on transparency in treaty-based investor-State arbitration.

5. Other business.

6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.166 and its addendum; and A/CN.9/WG.II/WP.167). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The Secretariat was requested to prepare a draft of revised rules on transparency, based on the deliberations and decisions of the Working Group.

IV. Preparation of a legal standard on transparency in treaty-based investor-State arbitration

12. The Working Group resumed discussions on the preparation of a legal standard on transparency in treaty-based investor-State arbitration on the basis of documents A/CN.9/WG.II/WP.166 and A/CN.9/WG.II/WP.166/Add.1 and the proposed draft rules on transparency ("rules on transparency") contained therein.

A. Rules on transparency in treaty-based investor-State arbitration

1. General remarks on the structure of the rules on transparency

13. The Working Group recalled its decision that the legal standard on transparency should be drafted in the form of rules, rather than guidelines (A/CN.9/717, paras. 26 and 58). Before commencing its first reading of the rules on transparency, the Working Group heard a presentation on the structure of the draft rules (see also below, para. 38). Article 1 (1) dealt with the scope of application of the rules on transparency, and in particular with the question of how the consent of the States Parties to an investment treaty would be expressed so that the rules on transparency would apply to the settlement of an investor-State dispute under the treaty. Article 1 (2) served the purpose of clarifying that, where the rules on transparency provided for the exercise of discretion by the arbitral tribunal, that discretion should be exercised by the arbitral tribunal taking into account both the legitimate public interest in transparency in the field of treaty-based investor-State arbitration and in the arbitral proceedings as well the arbitrating parties' own legitimate interest in an efficient resolution of their dispute. Articles 2 to 6 dealt with substantive issues on transparency. Article 7 addressed exceptions to transparency, which were limited to the protection of confidential and sensitive information and of the integrity of the arbitral process. Article 8 was meant to determine who would be in charge of making the information available to the public.

2. Preamble — Purposes of the rules on transparency

14. The Working Group recalled that the preamble to the rules on transparency as contained in paragraph 8 of document A/CN.9/WG.II/WP.166 reflected a suggestion

made in the Working Group that the purposes the rules on transparency were intended to serve should be expressed in an introduction to the instrument (A/CN.9/717, para. 112). The preamble addressed the balance that the rules sought to achieve in providing both a meaningful opportunity for public participation and a fair and efficient resolution of the dispute for the parties. Some views expressed against including a preamble in the rules on transparency indicated that a preamble would be quite unusual for such an instrument, and its binding nature would be uncertain. As an alternative, it was suggested that the substance of the preamble be included in the decision of the Commission adopting the rules as well as in the text of the resolution of the General Assembly recommending their use. As another alternative, it was noted that a similar balancing provision as between the objectives of transparency and efficient adjudication was already contained in article 1 (2). It was suggested that that might replace the preamble.

15. As a matter of drafting, it was suggested that the word "fast" appearing before the words "and efficient" in the first sentence of the preamble should be replaced by the word "fair", for the sake of consistency with article 17 (1) of the UNCITRAL Arbitration Rules, as revised in 2010 ("2010 UNCITRAL Arbitration Rules") (see also below, para. 39).

16. The view was expressed that it might be preferable to defer the decision on a possible need for a preamble until after the content of the rules on transparency had been considered.

17. After discussion, the Working Group agreed to further consider that matter at a future session.

3. Article 1 — Scope of application and structure of the rules

(a) Article 1 (1) — Scope of application

Opt-in or opt-out solution

18. The Working Group considered article 1 (1) of the draft rules as contained in paragraph 10 of document A/CN.9/WG.II/WP.166. Article 1 (1) dealt with the scope of application of the rules on transparency and provided for two options, and variants. The Working Group agreed that discussion on article 1 (1) would be useful to identify trends among member States on the scope of application of the rules on transparency. It was generally understood that no decision could be made at that point and that that matter would require further consideration at future sessions of the Working Group.

19. A view was expressed that different aspects with respect to the scope of application of the rules could be identified. It was said that the material scope of application related to the question whether the rules on transparency would apply in the context of arbitration initiated under the UNCITRAL Arbitration Rules only, or also to arbitration conducted under other rules if the parties so chose. The material scope should be distinguished from the temporal scope of application, which raised questions whether the rules on transparency would apply only to arbitration under investment treaties concluded after the date of coming into effect of the rules on transparency or also under treaties concluded before that date.

Opt-out solution, material application

20. One option, referred to as the "opt-out solution", provided that "[T]he Rules on Transparency shall apply to any arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments ("treaty") [which entered into force] after [date of adoption of the Rules on Transparency], unless the treaty provides that the Rules on Transparency do not apply." Under that option, the rules on transparency would apply as an extension of the UNCITRAL Arbitration Rules under investment treaties expressly providing for arbitration under the UNCITRAL Rules, unless States otherwise provided in the investment treaty by opting out of the rules on transparency. The consent to apply the rules on transparency would be manifested when, in investment treaties, parties would include a reference to the UNCITRAL Arbitration Rules, being on notice that the UNCITRAL Arbitration Rules included the rules on transparency. Application of the rules on transparency would then be understood to be the norm, while the parties would retain the ability to expressly exclude their application.

21. It was said that that option could only apply to arbitration initiated under the UNCITRAL Arbitration Rules, and not in the context of arbitration under other international arbitration rules. It was underlined that if the rules on transparency were to be applied only to arbitration under the UNCITRAL Arbitration Rules, that would permit an investor to choose to arbitrate under a different set of arbitration rules that did not include any transparency provisions. A question was raised whether that would be a desirable effect. It was said that the opt-out solution was not incompatible, as a matter of principle, with the application of the rules on transparency to arbitration initiated under other international arbitration rules, as the parties to an investment treaty could also agree to apply them to such other arbitration.

Opt-out solution, temporal application — "[which entered into force]"

22. Those delegations that favoured option 1 expressed different views on whether the words "which entered into force" in brackets under option 1 should be retained.

23. If the words "which entered into force" were retained, the rules on transparency would apply, without a retroactive effect, to investment treaties entered into force after the date of adoption of the rules on transparency. In favour of that option, it was said that States Parties to the investment treaty would know that application of the UNCITRAL Arbitration Rules triggered application of rules on transparency for investment treaties concluded after the date of adoption of the rules on transparency. For investment treaties concluded before that date, solutions such as those described in paragraphs 15 to 23 of document A/CN.9/WG.II/WP.166/Add.1 should be further considered.

24. If the words "which entered into force" were to be deleted, the rules on transparency might then apply to any arbitration initiated under the UNCITRAL Arbitration Rules after the date of adoption of the rules on transparency, even if the treaty had entered into force before that date (provided that the treaty itself did not specify application of an earlier version of the UNCITRAL Arbitration Rules). It was highlighted by those delegations favouring application of the rules on transparency to investment treaties entered into force before the date of adoption of the rules on transparency, that some treaties could be interpreted as allowing for

such an application. For instance, that would be the case for investment treaties referring to the application of the UNCITRAL Arbitration Rules as in force at the time the arbitration commenced. It was pointed out that, under that option, in certain instances, if States Parties to an existing treaty did not want the rules on transparency to apply, they would then have to amend or modify their investment treaty to that effect.

Opt-in solution, material and temporal applications

25. Under the second option, referred to as the "opt-in solution", States would be required expressly to adopt the rules on transparency in order for them to apply. Two variants were proposed for consideration by the Working Group: variant 1 provided that the rules on transparency should apply in respect of arbitration initiated under any set of arbitration rules, and variant 2 limited the application of the rules to arbitration under the UNCITRAL Arbitration Rules. In both cases, consent of States to apply the rules on transparency could be given in respect of arbitration initiated under investment treaties concluded either before or after the date of adoption of the rules on transparency. The rules on transparency would then operate as a stand-alone text.

26. A majority of delegations expressed a preference for option 2 for the reasons that they favoured express adoption by States of the rules on transparency and that that solution would ensure that States had taken the conscious decision to apply those rules.

27. Regarding option 2, variant 1, it was suggested that it might be simpler to limit the application of the rules on transparency to arbitration under the UNCITRAL Arbitration Rules, as it was considered that legal uncertainties and difficulties could arise in the application of the rules on transparency together with other arbitration rules.

28. Arbitration institutions were invited to provide comments on whether application of the rules on transparency to arbitration arising under their own rules could be envisaged. The International Centre for Settlement of Investment Disputes ("ICSID"), the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"), the ICC International Court of Arbitration and the Permanent Court of Arbitration at The Hague, confirmed that, as a matter of principle, application of transparency rules in conjunction with their institutional rules was unlikely to create problems. All the institutions expressed interest in being associated with the work in order to identify how to practically apply rules on transparency to the arbitration cases administered under their arbitration rules. ICSID further informed the Working Group that it had already gained experience in applying a broader standard of transparency in the context of ICSID arbitration under the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR"). The Arbitration Institute of the SCC explained that the SCC rules were equally applied in commercial and investment arbitral proceedings and that, although the SCC rules contained the principle of confidentiality, parties could deviate from that principle if they so agreed.

29. After having heard the comments of the arbitration institutions, a number of delegations considered that option 2, variant 1, could constitute a viable solution,

allowing a broader application of the rules on transparency, which was said to be in line with the mandate given by the Commission to the Working Group.

30. After discussion, the Working Group noted that a majority of delegations expressed preference for option 2, it being understood that the two variants it contained should be further considered at a future session of the Working Group. A few delegations expressed support for option 1, with diverging views on whether article 1 (1) should deal with the question of application of the rules on transparency to existing investment treaties, or whether that should be dealt with through other means. It was suggested that option 1, which was limited to the UNCITRAL Arbitration Rules, could be restricted to future investment treaties and combined with option 2, variant 1, which covered all other situations (i.e. application to existing treaties, and irrespective of the arbitration rules chosen by the parties). The Working Group agreed to further consider the two options and their two variants at a future session of the Working Group. It requested the Secretariat to provide an analysis of issues that might arise in the application of the rules on transparency to arbitration under both the 1976 UNCITRAL Arbitration Rules and their 2010 revised version, and to do so in respect of the various options considered under article 1 as well as regarding the other substantive provisions of the rules on transparency.

Rules on transparency and transparency provisions in the investment treaty

31. The Working Group considered the relationship between the rules on transparency and any transparency provisions in an investment treaty under which the arbitration could arise. In that light, a suggestion was made to include in the rules on transparency wording that the rules would not supersede a provision in the relevant investment treaty that required greater levels of transparency. The Working Group found that policy acceptable and requested the Secretariat to draft a provision pursuant to that suggestion for consideration at a future session.

Application of the rules on transparency by the disputing parties

32. The Working Group then considered whether article 1 should include a provision regarding the application of the rules on transparency by the disputing parties to reflect the discussion at its fifty-fourth session (A/CN.9/717, paras. 47-55). The purpose of such a provision would be to clarify that once the States Parties to the investment treaty agreed that rules on transparency should apply according to article 1 (1), the disputing parties should not be entitled to exclude or vary their application.

33. There was broad support for the suggestion that there should not be a provision allowing the disputing parties to vary the offer for transparent arbitration for the policy reason that it would not be appropriate for the disputing parties to reverse a decision on that matter. In addition, the legal standard on transparency was meant to benefit not only the investor and the host State but also the general public, with the consequence that it was not for the disputing parties to renounce transparency provisions adopted by the States.

34. The Working Group then considered the drafting proposal for such provision as contained in paragraph 21 of document A/CN.9/WG.II/WP.166. It was said that the wording “The Rules on Transparency are designed to confer rights and benefits

on the general public" had either to be elaborated or should be deleted. As an alternative, the phrase could be replaced by wording along the lines of "The Rules on Transparency are adopted in the public interest (…)." Support was expressed for deleting that phrase as its content was too descriptive and unnecessary.

35. It was also suggested to omit the words "in the course of the arbitration" as the provision should make clear that disputing parties were not entitled to opt-out of, or derogate from, the rules on transparency at any time, whether before or during the arbitral proceedings.

36. The prevailing view was in favour of including the proposal referred to in paragraph 21 of document A/CN.9/WG.II/WP.166, taking account of the drafting adjustments, and the Working Group agreed that that matter would be further considered at a future session. A few delegations were of the view that, in line with the principle of party autonomy, the disputing parties should be able to agree to not apply the rules on transparency.

"a treaty providing for the protection of investments"

37. The Working Group agreed that the term "a treaty providing for the protection of investments" used under article 1 (1) should be clarified in order to delineate its scope of application. The notion of a "treaty providing for the protection of investments" under the rules was said to be an important matter, as that notion constituted the gateway for applying the transparency rules. It was agreed that that notion should be understood broadly as including free trade agreements, and bilateral and multilateral investment treaties, as long as they contained provisions on the protection of an investor or investment and the right to resort to investor-State arbitration. In addition, it was noted that many investment treaties provided for dispute settlement between the Contracting States Parties and between the investor and a State. In that light, it was observed that there was a need to clarify that the rules on transparency would only apply to dispute settlement regarding the protection of investments and investors and not to disputes between States under the treaty. The Working Group requested the Secretariat to include wording in the revised version of the rules that would clarify that term.

(b) Article 1 (2) — Structure of the rules on transparency

38. The Working Group considered article 1 (2) of the rules as contained in paragraph 10 of document A/CN.9/WG.II/WP.166. It was noted that article 1 (2) dealt with the structure of the rules on transparency (see also above, para. 13). It clarified that each of the substantive rules set out in articles 2 to 6 was subject to the limited exceptions set out in article 7. It further reflected discussions held in the Working Group to the effect that, while there was a need to balance the legitimate public interest in transparency in the field of treaty-based investor-State arbitration with the arbitrating parties' own legitimate interest in a fast and efficient resolution of their dispute, the exceptions in article 7 should be applied strictly and constituted the only limitations to the transparency rules under articles 2 to 6 (A/CN.9/717, paras. 129-143).

39. The principle contained in article 1 (2) found broad support. Some drafting suggestions were made. To align the wording with article 17 (1) of the 2010 UNCITRAL Arbitration Rules, it was suggested to replace the word "fast"

appearing in the last sentence of article 1 (2) by the word "fair" (see also above, para. 15). Further, it was suggested to delete the first two sentences of the paragraph, as they were viewed as too descriptive and repetitive of the content of article 7 (1), and thus redundant. It was noted that human rights considerations might fall within paragraph (2) (i). In addition, it was suggested, as a matter of drafting, to clarify that that there were two matters for the public interest set out in paragraph (2) (i): treaty-based investor-State arbitration in general and the arbitral proceeding itself.

40. After discussion, the Working Group agreed that paragraph (2) should be redrafted in line with the suggestions contained in paragraph 39 above, for further consideration by the Working Group at a future session.

4. Article 2 — Initiation of arbitral proceedings

41. As part of the discussions on the substantive provisions on transparency contained in articles 2 to 6 of the rules on transparency, the Working Group was reminded of its mandate to prepare a legal standard on transparency that would reflect best practices in the field of transparency in the context of investor-State arbitration. At its fifty-fourth session, the Working Group had agreed to proceed with a discussion on developing the content of the highest standards on transparency, on the basis that the legal standard on transparency be drafted in the form of rules. That was done on the understanding that delegations that had initially proposed that the legal standard on transparency take the form of guidelines had agreed on the preparation of draft rules if those rules would only apply where there was an express reference to them (opt-in solution). It was said that the content of the rules on transparency might need to be reconsidered, and possibly diluted, in the event the Working Group would at a later stage decide that the application of the rules would be based on an opt-out approach (A/CN.9/717, paras. 26 and 58).

42. The Working Group then considered article 2 on information to be made available to the public at the stage of the initiation of arbitral proceedings as contained in paragraph 24 of document A/CN.9/WG.II/WP.166. Article 2 contained different drafting options to reflect the diverging views expressed at the fifty-fourth session (A/CN.9/717, paras. 60-74). Option 1 provided that some information should be made public once the arbitral proceedings were initiated and did not address publication of the notice of arbitration. Under that option, the publication of the notice of arbitration would be dealt with under article 3 of the rules on transparency, after the constitution of the arbitral tribunal. Option 2 dealt with the publication of the notice of arbitration when the proceedings were initiated, before the constitution of the arbitral tribunal, and included two variants.

Publication of general information

43. There was a general understanding in the Working Group that some information should be made publicly available before the constitution of the arbitral tribunal, in order to allow the general public to be informed of the commencement of the proceedings. The Working Group agreed that article 2 should, at a minimum, provide the names of the parties and a broad indication of the field of activity concerned before the constitution of the arbitral tribunal. It was said that that proposal was in line with the current practice of ICSID (see A/CN.9/WG.II/WP.167, paras. 5 to 7), and therefore constituted a procedure many States were already

familiar with. It was agreed to include in article 2 a reference to the investment treaty under which the claim was brought, as it was seen as a factual matter unlikely to create debate. The Working Group agreed that the nationalities of the parties, as well as a brief description of the claim, contained in option 1 of article 2, should not be part of the information communicated to the public at the early stage of the proceedings, as that information could be contentious.

Means of publication

44. On the question of the means of publication, preference was expressed for publication via a repository of published information ("registry"), as the intervention of a neutral institution to handle publication, in particular at that stage of the procedure, was seen as a preferable solution. The Working Group agreed that any party, and not only the respondent, should be entitled to communicate the notice of arbitration to the registry, which could in turn extract therefrom the relevant information listed under paragraph 43 above, for publication.

45. A question was raised whether publication of information at that stage should be made mandatory and, if so, whether there should be any sanction in case of non-compliance by the parties of their obligation to communicate information to the registry. It was said that the question of sanctions was a difficult matter to address in an instrument of the nature of the rules.

46. The Secretariat was requested to propose a new version of option 1 of article 2, based on the discussion reflected above in paragraphs 43 and 44.

Publication of the notice of arbitration (and of the response thereto)

47. The Working Group turned its attention to the question whether, in addition to publishing the general information referred to in paragraph 43 above, the notice of arbitration should also be made publicly available before the constitution of the arbitral tribunal as contemplated under option 2.

48. Those delegations that supported publication of the notice of arbitration before the constitution of the arbitral tribunal considered that early disclosure of the notice of arbitration would permit the general public not only to be informed of the commencement of the proceedings, but also to express their views at an early stage of the proceedings. It was said that prompt publication of the notice of arbitration best served the interest of transparency and that such publication would allow protection of sensitive and confidential information, as proposed under variant 1 of option 2.

49. However, reservations were expressed on the publication of the notice of arbitration before the constitution of the arbitral tribunal. It was suggested that the fact that the information should be "promptly" communicated, as proposed in option 2, would need to be clarified. It was said that not all States were necessarily prepared to deal with publication of the notice of arbitration in a timely manner and that the respondent State would need time to organize its defence and to prepare its response to the notice of arbitration. It was recalled that under the UNCITRAL Arbitration Rules, the arbitral tribunal could be appointed within two to three months from the date of the notice of arbitration. In addition, it was said that during the time following the notice of arbitration and until the response to the notice was filed, there were possibilities for settling the dispute which would be

compromised once the parties' positions as expressed in the notice of arbitration and the response were published.

50. Questions were raised regarding how the publication would be made, and the costs that would be associated therewith, such as the costs of maintaining a secured website and of redacting confidential and sensitive information from the notice of arbitration, and possibly from the response to the notice. It was also said that publication of the notice of arbitration was better dealt with under article 3, regarding publication of documents, as it was said that the arbitral tribunal would be best placed to oversee matters of confidential and sensitive information that might be contained in the notice of arbitration, and that screening of the notice of arbitration would go beyond the role of a registry.

51. In response, those favouring publication of the notice of arbitration before the constitution of the arbitral tribunal said that expenses involved in publishing the notice of arbitration had to be balanced with the values of transparency and accountability, which should prevail. It was suggested that publication of the notice of arbitration would not entail costs for the registry, as the burden of providing a redacted version of the notice was on the parties. It was further said that experience showed that disclosure of the notice of arbitration at the early stage of the proceedings did not constitute an impediment to an amicable settlement of the dispute. To alleviate concerns regarding possible disputes between the parties on the information to be redacted, it was suggested that the arbitral tribunal, once constituted, would have the power to rule on any such dispute, and that matter could be clarified under option 2.

52. Support was expressed for the proposition that if the notice of arbitration was to be published, the response thereto should also be published. With a view to ensuring fairness, it was suggested that details of the dispute contained in the notice should be made public only when the respondent State had an opportunity to present its own position in the response to the notice.

53. After discussion, the majority view was not in favour of the publication of the notice of arbitration before the constitution of the arbitral tribunal, while a minority favoured prompt publication of the notice of arbitration. The Secretariat was requested to propose a revised version of option 2, variant 1, taking account of the discussions.

5. Article 3 — Publication of documents

54. The Working Group recalled its discussion at its fifty-third session, where different views were expressed on whether, and if so, which documents should be published (A/CN.9/712, paras. 40 to 42). At the fifty-fourth session of the Working Group, different approaches had emerged from the consideration of the matter (A/CN.9/717, paras. 87-92). Those approaches were reflected in article 3, as contained in paragraph 32 of document A/CN.9/WG.II/WP.166.

Option 1 — Publication of all documents

55. Under option 1, documents to be published were all documents submitted to, or issued by, the arbitral tribunal, subject to article 7. If certain documents to be published could not be made publicly available, third parties should have a right to access the information. That option did not receive support.

Option 2 — Publication of documents, at the discretion of the arbitral tribunal

56. Under option 2, the arbitral tribunal should decide which documents to publish, unless disputing parties objected to the publication. A few delegations that expressed preference for option 2 were reminded that that option would be even stricter than the 1976 and 2010 UNCITRAL Arbitration Rules by providing the parties with a veto, and therefore would not promote transparency. It was further said that it would be burdensome for the arbitral tribunal to decide which documents to make available to the public, a procedure, it was said, which might impede the efficiency of the arbitral proceedings. That option received little support.

Option 3 — List of documents to be published

57. Under a third option, the provision on publication of documents contained a first paragraph that listed documents that would be made available to the public, either automatically, or as decided by the arbitral tribunal. Paragraph (2) provided the arbitral tribunal with discretion to order publication of any documents provided to or issued by it. Paragraph (3) allowed third parties to request access to any documents provided to, or issued by, the arbitral tribunal, and provided the arbitral tribunal with discretion to grant such access.

58. Strong support was expressed in favour of option 3. The structure of the provision was said to be clear, in that it identified in a first paragraph which documents would be made publicly available; it further included in a second paragraph a possibility for the arbitral tribunal to decide to publish additional documents; finally, the last paragraph covered any other documents that could be requested by third parties, and that would not be included under the first two paragraphs. That proposal was seen as establishing a good balance between the documents to be published and the exercise by the arbitral tribunal of its discretion in managing the process.

Paragraph (1)

59. Diverging views were expressed on the documents to be listed under paragraph (1). Some favoured publication of all documents in the proceedings, so that paragraphs (2) and (3) could be omitted, while others considered that the list should be kept limited, giving effect to the arbitral tribunal's discretion to order publication of additional documents under paragraphs (2) and (3). Those in favour of a comprehensive list of documents to be automatically published proposed that, in addition to the documents already listed under paragraph 1, the following documents be added: the response to the notice of arbitration, the submissions by the experts appointed by the arbitral tribunal, and all decisions of the arbitral tribunal.

60. Views diverged on whether exhibits, which could be voluminous documents, should be part of the list under paragraph (1). It was suggested that in order to allow parties to be aware of the documents that would be produced during the proceedings, a table of contents of exhibits otherwise not produced should be included in the list. It was also said that the notion of "submission" by a party was very vague. As a drafting suggestion, it was proposed to add the word "written" before the words "submissions" and "order" in paragraph (1).

61. Furthermore, it was said that the documents listed referred to legal terms that might be understood differently. To address that concern, it was suggested to align the wording of paragraph (1) with the terminology of the 2010 UNCITRAL Arbitration Rules and to refer to the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence, any expert reports, submissions by amici and non-disputing State parties and further written statements.

62. Strong support was expressed in favour of automatic publication of listed documents without the arbitral tribunal exercising any discretion under paragraph (1).

Paragraphs (2) and (3)

63. As paragraphs (2) and (3) permitted the arbitral tribunal to exercise its discretion in ordering publication of additional documents, it was proposed to add the words "in the exercise of its discretion" under paragraph (2), in order to use terminology consistent with that of article 1 (2).

64. Wide support was expressed for the retention of the words in square brackets in both paragraphs that provided for a consultation of the parties by the arbitral tribunal.

Revised draft of option 3

65. After discussion, the prevailing view was in favour of option 3, which would constitute a basis for continuation of discussion on the matter of publication of documents at a future session. The Working Group requested the Secretariat to provide a revised draft of option 3, as follows. The chapeau of paragraph (1) would read along the lines of: "1. Subject to the express exceptions set out in article 7, the following documents shall be made available to the public:". The list of documents would then include a number of categories, such as (i) notice of arbitration and response thereto, (ii) memorials, (iii) witness statements and expert reports, (iv) exhibits, (v) submissions by third parties and non-disputing State Parties, and (v) decisions and orders of the arbitral tribunal. It was pointed out that further consideration should be given to the documents to be made available to the public under paragraph (1), as well as on the issue of timing for the publication. The Secretariat was requested to prepare a list of documents to be included in those categories, using precise terminology, including taking account of the terms used in the UNCITRAL Arbitration Rules. Paragraphs (2) and (3) would be drafted along the lines of: "2. Subject to the express exceptions set out in article 7, the arbitral tribunal may, in the exercise of its discretion and in consultation with the disputing parties, order publication of any documents provided to, or issued by, the tribunal. 3. Subject to the express exceptions set out in article 7, third parties may request access to any documents provided to, or issued by, the arbitral tribunal, and the tribunal shall decide whether to grant such access after consultation with the disputing parties."

Form and means of publication

66. The Working Group then considered two options on the form and means of publication, as contained in paragraph 32 of document A/CN.9/WG.II/WP.166. Preference was expressed for option 1, which provided that the documents to be

published were to be communicated by the arbitral tribunal to the repository. The Working Group agreed to consider the question of timing of the publication in the context of its discussion on article 7.

6. Article 4 — Publication of arbitral awards

67. The Working Group considered article 4, as contained in paragraph 41 of document A/CN.9/WG.II/WP.166. Broad support was expressed for paragraph (1), which provided that awards would be made publicly available, subject to article 7. Paragraph (2) contained two options that dealt with the question of form and means of publication. In light of the decision taken on the form and means of publication under article 3 (see above, para. 66), the Working Group agreed that option 1 was the preferred option.

7. Article 5 — Submission by third party and non-disputing Party

(a) Article 5 (1) to (5) — Submission by third party

68. The Working Group considered article 5 as contained in document A/CN.9/WG.II/WP.166, paragraph 43. It was clarified that discussions on article 5, paragraphs 1 to 5, would focus on submission by third party and not on submission by a non-disputing State Party to the treaty. That matter would be dealt with separately (see below, paras. 78-98).

Option 1

69. Option 1 was based on a provision used in certain investment treaties, which expressed the principle that submission by third party should be permitted, without detailing modalities. A view was expressed in favour of option 1 on the grounds that such a provision reflected an evolution in practice, and that arbitral tribunals would usually know how to deal with submission by third party, without the need for specific guidance. However, a concern was expressed that many States might not be familiar with submission by third party in the context of arbitral proceedings, and it was widely felt that more guidance should be provided in the rules on that matter.

Option 2

70. The Working Group agreed to proceed on the basis of option 2, which was seen as addressing the concern that guidance should be provided with respect to submission by third party. Option 2 reflected the proposal to draft a provision along the lines of Rule 37 (2) of the ICSID Arbitration Rules, as complemented by elements dealt with under paragraph B.2 of the NAFTA Free Trade Commission's "Statement of the Free Trade Commission on non-disputing party participation of 7 October 2004" (A/CN.9/717, para. 121). Option 2 contained a detailed procedure on information to be provided regarding the third party that wishes to make a submission (paragraph (2)); matters to be considered by the arbitral tribunal (paragraphs (3) and (5)); and the submission itself (paragraph (4)).

"Amicus curiae" — "third party"

71. A question was raised whether the term "amicus curiae" should be used. It was said that that notion was well known in certain legal systems, where it was used in the context of court procedure. Amicus curiae participation in arbitral proceedings

was said to be a more recent evolution. In order to provide rules that would be understood in the same manner in all legal systems, it was recommended to avoid any reference to the term "amicus curiae" and to use instead words such as "third party submission", "third party participation", or other terms with similar import. That proposal received support.

72. A further question was raised whether the term "third party" was an appropriate term to use, taking into account the different interpretation that could be given to it in different contexts and in different jurisdictions. The attention of the Working Group was drawn to article 17 (5) of the 2010 UNCITRAL Arbitration Rules, that referred to "third persons". The Working Group took note of the suggestion that the terms "non-disputing parties" or "third persons" instead of "third parties" should be considered for use in the provision and requested the Secretariat to provide appropriate language in that respect.

73. The appropriateness of the term "submission" was questioned, as that term was also used in connection with submissions made by disputing parties to the arbitral tribunal. As an alternative, it was suggested to use the term "communication".

74. After discussion, the Working Group agreed that the term "amicus curiae" should not be used in the title and the content of the provision and the Secretariat was requested to provide an appropriate wording in that respect.

Paragraphs (2) and (4) — Page limit

75. It was observed that paragraph (2) set a page limit for the application to the arbitral tribunal by a third party and paragraph (4) for the actual submission. It was said that setting a specific page limit might not be appropriate for each case and that it would be best left to the arbitral tribunal's discretion. In that light, it was suggested to replace the words in paragraph (2) ", within the limit of [5 typed pages]" by the words "in a concise manner, within the limits as may be set by the arbitral tribunal" and to delete the words "[20 typed pages, including any appendices]", in paragraph 4. That proposal found broad support.

Paragraph (3) — "among other things"

76. It was observed that paragraph (3) did not contain the words "among other things" before listing the criteria for accepting a submission, as contained in ICSID Rule 37 (2), on which option 2 was based. The Working Group agreed that those words should be inserted in a revised version of paragraph (3), for the reason that it permitted the arbitral tribunal to exercise its discretion as to the criteria it considered to be relevant.

Paragraph (5)

77. A view was expressed that paragraph (5) dealt with two matters that might need to be differentiated. In relation to the first part of the paragraph, providing that the arbitral tribunal should "ensure that the submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party", it was said that that might be a difficult task for the arbitral tribunal to undertake. It was suggested to differentiate the procedural from the substantive impact that a submission might have. From the procedural angle, the arbitral tribunal should ensure that the

submission by third party would not burden the arbitral proceedings, and that, for instance, time limits would be complied with. It was suggested to consider addressing that matter in a revised version of paragraph (5). In relation to the second part of paragraph (5) dealing with the fact that both parties should be given an opportunity to present their observations on the submissions by the third party, it was generally felt that that provision was an important one, to be retained.

(b) Article 5 (6) — Submission by a non-disputing Party to the treaty

78. At the fifty-third session of the Working Group, it was observed that a State Party to the investment treaty that was not a party to the dispute could also wish, be invited, or have a treaty right to make submissions. It was noted that such State(s) often had important information to provide, such as information on the *travaux préparatoires*, thus preventing one-sided treaty interpretation (A/CN.9/712, para. 49). The Working Group agreed to bring that matter to the attention of the Commission and ask its guidance on whether it should be made part of the scope of its current work (A/CN.9/712, para. 103, A/CN.9/717, para. 124). Following the decision of the Commission at its forty-fourth session (see above, para. 2), the Working Group undertook consideration of the matter, on the basis of the draft contained in paragraph 43 of document A/CN.9/WG.II/WP.166.

79. Article 5 (6) was meant to limit non-disputing State intervention to issues of law and matters of interpretation. That limited scope of intervention was meant to address concerns raised that an intervention by a non-disputing State, of which the investor was a national, could resemble aspects of diplomatic protection.

Separate provision on non-disputing State Party to the treaty

80. It was said that several investment treaties allowed for the participation of a non-disputing State, such as the North American Free Trade Agreement (NAFTA), which included an article 1128 entitled “Participation by a Party”. Instances of similar provisions found in other treaties included the Central American Free Trade Agreement (CAFTA), and in the Canadian Model BIT (2004).

81. Doubts were expressed on the need for such a provision in the rules, because it was said that non-disputing State(s) Party(ies) to a treaty enjoyed the right to comment on the treaty, or arbitral tribunals might request submissions, a situation that was said to arise in practice. For instance, a State Party to a treaty might issue statements on treaty interpretation, or unilateral declarations on its understanding of a treaty provision.

82. A different view was expressed that a provision on submission by a non-disputing State Party to the treaty was not needed for the reason that a State should enjoy the same rights as third parties in that respect, and therefore, it was suggested to include a reference to non-disputing State Party to a treaty under article 5 (1), and to delete paragraph 6.

83. However, wide support was expressed for a separate provision devoted to the matter of submission by a non-disputing State Party to the treaty for the reasons that it would contribute to clarifying the legal regime applicable to that category of submissions and would mark the difference between submission by third party and by non-disputing State Party to the treaty. It was explained that a non-disputing State Party’s participation might pose the risk of resurgence of diplomatic

protection, a risk not posed by participation of third parties. Therefore, support was expressed for excluding from the scope of paragraph (1) of article 5 non-disputing States Parties, and retaining paragraph (6).

84. It was suggested that some provisions of article 5, such as paragraphs (3) and (5) might also apply in the context of paragraph 6. Therefore, it was suggested that a separate article be developed for consideration at a future session.

Scope: treaty interpretation, matters of law and fact

85. Paragraph (6) restricted intervention by a non-disputing State Party to the treaty to issues of law and of treaty interpretation and excluded submission on the factual aspects of the dispute.

86. Regarding treaty interpretation, it was widely felt that the non-disputing State Party to the treaty might bring a perspective on the interpretation of the treaty, including access to the *travaux préparatoires* which might not be otherwise available to the tribunal, thus avoiding one-sided interpretations limited to the respondent State's contentions.

87. Views were expressed that if the investor's home State were allowed to file a submission beyond matters of treaty interpretation, and to address matters of law, there would be a risk that the submission by the non-disputing State Party to the treaty might come very close to diplomatic protection. Therefore, it was suggested to delete from paragraph (6) the words "law and of" before the words "treaty interpretation".

88. Contrary views were expressed that a State should not be prevented from making a factual submission or a submission on matters of law, and it was suggested that paragraph 6 should be drafted so that a non-disputing State Party to the treaty might make such a submission to the arbitral tribunal, without limiting the scope of such submission. As an example, it was said that the arbitral tribunal might need information on the nationality or corporate status of the investor, or the policy of the investor's home State, and the non-disputing State Party to the treaty, as home State of the investor, might be best placed to provide such information that belonged to the realm of domestic law or factual matters. It was said that the 1976 and 2010 UNCITRAL Arbitration Rules were silent on submission by non-disputing State Party, thereby not limiting such intervention. In addition, the experience in the context of NAFTA showed that intervention by non-disputing State Party to the treaty did not bring the risk of resurgence of diplomatic protection.

89. A question was raised whether the term "issue of law" in paragraph (6) was meant to refer to public international law or domestic law. It was further said that it might be in many instances difficult to distinguish an issue of law from a factual issue. For instance, records of treaty negotiations might fall in either category.

Right to make submission

90. Views diverged on whether the rules ought to create a right for the non-disputing State Party to make a submission, by providing that the arbitral tribunal "shall" instead of "may" accept a submission from a non-disputing State Party. It was said that the non-disputing State Party should have the right to make submission, and if it did so, the arbitral tribunal should accept it. However, it was

pointed out that ICSID Rule 37 (2), which provided that "the Tribunal may allow a person or entity …" indicated that the arbitral tribunal enjoyed discretion to refuse a submission by non-disputing State Party, and views were expressed that a similar approach should be adopted in paragraph (6).

91. It was suggested that a non-disputing State Party to the treaty should not be under an obligation to make a submission, and in instances where the arbitral tribunal would invite such a State to make a submission, the arbitral tribunal should not draw any inference from non-participation by the State. It was agreed that paragraph (6) should be amended to reflect that the arbitral tribunal might accept or might invite submissions, but could not compel a State to make such submission.

92. A further suggestion was made that a non-disputing State Party should not be entitled to make a submission on its own motion, and should be entitled to do so only if so requested by the arbitral tribunal. That suggestion received little support.

Operation of the provision in multilateral context

93. A suggestion was made that the provision should limit non-disputing State Party's submission to cases where the State was the home State of the investor, in particular if the non-disputing State Party could make submission on factual matters. That was proposed as an important distinction to bear in mind in the context of multilateral investment treaties.

Negotiating State

94. A suggestion was also made that a State that had participated in the treaty negotiation, but was not Party to the treaty, might have useful information to provide to the arbitral tribunal on treaty interpretation, and therefore it was suggested to consider whether the provision should also deal with that matter. There was no support for that suggestion.

"Non-disputing Party to the treaty"

95. It was further said that a party to an investment treaty was not necessarily a State, and therefore, paragraph (6) should refer to "non-disputing Party to the treaty", instead of "non-disputing State Party to the treaty". That suggestion received broad support.

Drafting proposal

96. With the objective to address the various views and concerns expressed on paragraph (6), a proposal was made to draft a provision on submission by a non-disputing Party to the treaty as follows: "(1) The arbitral tribunal shall accept or, after consulting with the parties, may invite submissions on issues of treaty interpretation from a non-disputing Party to the treaty. (2) The arbitral tribunal, after consulting with the parties, may accept or may invite submissions on questions of law [or fact] from a non-disputing Party to the treaty. In exercising its discretion whether to accept or invite such submissions, the arbitral tribunal shall take into consideration the factors referred to in article 5, paragraph 3. (3) The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2. (4) The arbitral tribunal shall ensure that any submission does not disrupt the proceeding or unduly burden

or unfairly prejudice either party. The arbitral tribunal shall also ensure that both parties are given an opportunity to present their observations on any submission by a non-disputing Party to the treaty."

97. After discussion, the Working Group took note of the broad agreement for (i) dealing with submissions by non-disputing Parties to the treaty in a provision distinct from the provision on third party's submission; (ii) providing that the arbitral tribunal should consult the parties where the tribunal would exercise its discretion, and (iii) allowing parties to present their observations on the submission. The Working Group further agreed that the proposal under paragraph 96 would form the basis for its consideration of that matter at its next session. It took note of the various matters that would need to be considered in relation thereto.

98. In paragraph (1), it was questioned whether the arbitral tribunal should enjoy discretion to accept submission by a non-disputing Party, and therefore whether the word "shall" before the word "accept" should be replaced by the word "may". In paragraph (2), the notion of "questions of law" was said to require further consideration, in particular taking account of the discussion on the difficulty to distinguish in certain instances questions of law and of fact. In addition, the question of whether issues of law and fact should be part of the scope of an intervention by a non-disputing Party was also considered an open question for further consideration. Some opposed its inclusion, while others considered that the reference to "questions of law [or fact]" should be replaced by a reference to "matters within the scope of the dispute", in order to align the right of non-disputing Parties with those of third parties. It was further suggested that the provision could be restructured in case the non-disputing Party would be subject to the same regime as third parties. As a matter of drafting, it was suggested that the reference to paragraph (3) in paragraph (2) of the proposal should be carefully considered in order to ensure that the criteria for assessing the submission would not be limited to the two criteria mentioned in paragraph (3), but would also include discretion of the arbitral tribunal to take account of other possible criteria. Paragraph (3) was seen as too detailed, and unnecessary. The question of operation of the provision in the context of multiparty treaties was also listed as a matter for further consideration. Lastly, it was said that paragraph (4) should mirror any revision that would be made to article 5, paragraph (5).

8. Article 6 — Hearings and publication of transcripts of hearings

99. The Working Group considered article 6, as contained in paragraph 52 of document A/CN.9/WG.II/WP.166. It recalled that information contained in documents A/CN.9/WG.II/WP.163 and A/CN.9/WG.II/WP.167 could provide useful insight on some practical questions regarding public hearings.

Paragraph (1) — Hearings

100. Support was expressed in favour of option 1 without the words "[, unless a disputing party objects thereto]", as that option was seen to best further the interests of transparency. A few delegations favoured option 1 with the party's veto right contained in square brackets. Some delegations preferred option 2, as they viewed the discretion of the tribunal as vital, in particular in view of practical difficulties and costs of public hearings. As a compromise, it was proposed to combine options 1 and 2, so that hearings should, in principle, be public, but the decision to

hold public hearings should be in the hands of the tribunal after consultation with the parties. That proposal found support, as it was viewed to provide an appropriate balance, including by those that had expressed preference for option 1 with a veto right of the parties.

101. It was questioned whether the availability of transcripts instead of public hearings would not equally satisfy the public interest of transparency. In response, it was said that participation of the public via public hearings was a meaningful opportunity, in particular with regard to certain groups that could not easily make use of transcripts.

102. After discussion, the Working Group agreed to consider at a future session option 1 without the words "[, unless a disputing party objects thereto]" and the compromise proposal referred to above in paragraph 100. With respect to terminology, the Working Group further agreed to use the term "public" hearings.

Paragraph 2 — Mandatory exceptions to public hearings

103. General support was expressed for paragraph (2). As a matter of drafting, it was suggested that the words "a hearing is to be [public] [held openly] and" were redundant and could be deleted, in particular if option 1 under paragraph (1) would be retained.

Paragraph 3 — Logistical arrangements and discretionary exception to public hearings

104. It was noted that paragraph (3) contained two elements, the arbitral tribunal's power to make logistical arrangements to provide public access to the hearings and its discretion to close the hearings for logistical reasons. Some views were expressed that paragraph (3) was redundant and should be deleted, as the arbitral tribunal would generally have that power and discretion. In response, it was said that the provision was needed to provide guidance to parties that were not familiar with public hearings and also to arbitral tribunals. Some views were expressed that paragraph (3) might be too broad as it permitted closing the entire hearing for logistical reasons which, in certain instances, might give rise to abuse. In reply, it was said that the words "where this is or becomes necessary for logistical reasons" might take sufficient account of that concern. In addition, it was proposed to provide in paragraph (3) that the arbitral tribunal should consult the parties before deciding whether to close the hearings.

105. A concern was raised on how to deal with an oral submission that would suddenly touch on confidential information during a public hearing. In response, it was said that there had been no difficulties encountered so far with that question, including with live broadcasting of hearings. A delegation expressed the view that, based on the information contained in the documents by the Secretariat, all the examples of such live broadcasting raised took place pursuant to the agreement of the disputing parties and in the context of institutional arbitration. That was disputed by other delegations.

Costs

106. A question was raised regarding the costs of public hearings. In that light, it was said that it would be useful to receive information on that matter. After

discussion, the Working Group agreed to invite arbitral institutions to provide the Secretariat with information on their experience with costs associated with public hearings and, more generally, with costs associated with publication of documents, arbitral awards and submissions by third parties. The Working Group agreed that the matter of allocation of costs should also be further considered.

Paragraphs (4) and (5) — Transcripts of hearings

107. The Working Group proceeded with the consideration of paragraphs (4) and (5), which provided that the decision on availability of transcripts should depend upon the solution adopted in respect of public access to hearings, with the exception of hearings held closed for logistical reasons. It was clarified that the purpose of those paragraphs was not to make transcripts mandatory for all hearings, but to make them available insofar as they had been issued.

108. It was said that, in instances where hearings were closed for reasons covered under article 7, it would nevertheless be possible to redact certain information from the transcripts and publish them. Therefore, the logic of providing a parallel regime for hearings and transcripts was questioned. It was suggested that transcripts could be treated in the same fashion as documents in the list contained in paragraph (1) of option 3 of article 3.

109. After discussion, the Working Group agreed that the provision should simply provide that transcripts should be made available to the public subject only to the exceptions referred to in article 7. Also, the Working Group agreed to further consider whether there would be a need for a specific paragraph on transcripts under article 6 or whether transcripts of hearings should be added to the list of documents to be published under paragraph (1) of option 3 of article 3. In addition, it was agreed that the question of procedure for redacting confidential information from transcripts would be considered in the context of discussion on article 7.

9. Article 7 — Exceptions to transparency

110. The Working Group considered article 7 as contained in paragraph 1 of document A/CN.9/WG.II/WP.166/Add.1. Article 7 contained four parts, dealing with the determination of exceptions to transparency in paragraph (1), the definition of confidential and sensitive information in paragraph (2), the procedure for identifying and protecting confidential and sensitive information in paragraphs (3) and (4), and a procedure for protecting the integrity of the arbitral process in paragraph (5). It was suggested that the overall structure of the article would be further considered after its content had been discussed.

Paragraph (1) — Exceptions to transparency

111. Paragraph (1) limited the exceptions to transparency to the protection of confidential and sensitive information and the protection of the integrity of the arbitral process. The Working Group agreed that those two categories should constitute exceptions to transparency provisions in articles 2 to 6 of the rules.

112. As matters of drafting regarding subparagraph (a), it was suggested that the opening words of subparagraph (a), which read “A party shall not be under any obligation to publish any confidential and sensitive information,” were unclear, as they dealt with the notion of party’s obligation, whereas under the rules,

communication of information would be mainly channelled through the arbitral tribunal. If that approach were to be kept, it was suggested that, in subparagraph (a), the words "nor entitled" be added after the word "obligation". Also, it was suggested that as the procedure for identifying confidential and sensitive information under paragraph (4) involved the arbitral tribunal, there should be a reference in subparagraph (a) to paragraph (4) in order to clarify that it might not be for the parties alone to decide what constituted protected information.

113. As a matter of drafting regarding subparagraph (b), it was proposed to replace the words "shall be entitled to" by the word "may". It was further suggested, in keeping with the approach adopted in the rules, to provide that the arbitral tribunal should consult the parties where it decided, on its own motion, to restrain the publication of information for the reasons mentioned in subparagraph (b). However, to take account of the exceptional circumstances in which the arbitral tribunal might have to restrain publication, it was suggested that the consultation would take place "if practicable". In support of that proposal, it was explained that, in urgent situations, the arbitral tribunal would not necessarily have the ability to consult the parties. Furthermore, it was suggested to provide that the arbitral tribunal should, at a later stage, consult the parties on its proposed way forward. That suggestion was supported.

114. It was further suggested to define a limited list of instances where publication could jeopardize the integrity of the arbitral process, and to that end, to delete the word "including" in subparagraph (b). Then a separate sentence should be drafted to provide that publication would be considered as jeopardizing the arbitral process in the instances listed in subparagraph (b), or in "comparable exceptional circumstances". That suggestion received support, as it provided adequate guidance to the arbitral tribunal by clarifying that restrictions to publication could only occur in circumstances that met the threshold of exceptional circumstances.

115. However, it was pointed out that there could be other instances not comparable to the examples given under subparagraph (b) where the arbitral tribunal should take measures to limit publication, and the reference to "comparable exceptional circumstances" might be too restrictive. It was recalled that article 17 (1) of the 2010 UNCITRAL Arbitration Rules provided the arbitral tribunal with discretion to conduct the arbitration in such manner as it considered appropriate. A question was raised whether that discretion ought to be limited by the rules on transparency. To address that concern, it was proposed to use the word "comparably" instead of "comparable" before the words "exceptional circumstances". That proposal received support. It was further suggested that subparagraph (b) be simplified to only express the principle, and that the modalities be left to be entirely covered under paragraph (5).

Proposal on paragraphs (1) and (5)

116. To address the concerns expressed on the drafting of paragraph (1), it was suggested that paragraph (1) be reformulated along the following lines: "1) Information shall not be made available to the public pursuant to articles 2 to 6 where: a) The information is confidential and sensitive as defined in paragraph 2 and as identified pursuant to paragraphs 3 and 4; or b) The information, if made available to the public, would jeopardise the integrity of the arbitral process as determined pursuant to paragraph 5." Paragraph (5) would then be redrafted as

follows: "5) The arbitral tribunal may, upon the application of a party or, after consultation with the parties where practicable, upon its own initiative, determine that making information available to the public would jeopardise the integrity of the arbitral process (a) because it could hamper the collection or production of evidence or (b) because it could lead to the intimidation of witnesses, lawyers acting for the parties, or members of the arbitral tribunal, or (c) in comparably exceptional circumstances." That proposal received broad support. The Working Group requested the Secretariat to propose a revised version of paragraphs (1) and (5), taking account of the proposal and including a provision that would address cases where consultation of the parties by the arbitral tribunal was initially not possible for practical reasons (see above, para. 113).

Paragraph (2) — Definition of confidential and sensitive information

117. Paragraph (2) dealt with the definition of confidential and sensitive information. It was questioned whether the terms "confidential and sensitive information" should be replaced by the terms "confidential or sensitive information" or "protected information". The Working Group agreed to consider questions of terminology after its deliberation on the definition of such information.

118. Regarding subparagraph (a), it was questioned whether the phrase "confidential business information" was sufficiently broad. A concern was expressed that that phrase could be understood as not covering, for instance, industrial or financial information, or personal data. It was suggested that a list of situations where information would need to be protected could be elaborated that would include business, political, institutional sensitive information, personal data and legal impediments under a law. That list could be preceded by a general formulation which would define confidential and sensitive information in abstract terms, along the lines, for instance, of article 19 (2) of the Norwegian Model Bilateral Investment Treaty. It was suggested that subparagraph (a) should be deleted because the protection of "confidential business information" would fall under subparagraph (b) as being protected by applicable law. In response, it was said that some jurisdictions did not have laws protecting that information.

119. Regarding subparagraph (b), the reference to "applicable law" was said to be too vague, and it was suggested to better define which law would need to be taken into account.

120. Subparagraph (c) as contained in paragraph 1 of document A/CN.9/WG.II/WP.166/Add.1 was seen as redundant and unclear. A suggestion was made to amend subparagraph (c) by adding the words "other than" before the words "for any of the aforementioned reasons" or, as an alternative, to delete those words. With that amendment, it was said that subparagraph (c) would then create discretion for the arbitral tribunal to protect information that would not fall within the categories covered under subparagraphs (a) and (b). That would cover, for instance, personal data, or any other category not contemplated under paragraph (2).

121. However, it was felt by some delegations that leaving too broad discretion to the arbitral tribunal might not be desirable, and the provision should seek to delineate which information should be protected. It was said that the discretion of the arbitral tribunal should be limited by reference to applicable laws and rules. It was further explained that that approach would not eliminate discretion of the

arbitral tribunal, but would define a basis for it. The discretion of the arbitral tribunal should comprise assessing for instance how to apply the domestic laws of the parties in order to equalize the protection of confidential information which might differ between the home State of the investor and the State party to the dispute.

Proposal on paragraph (2)

122. In order to address the aforementioned concerns, the following proposal to revise paragraph (2) was made: "2. Confidential and sensitive information consists of: "(a) Confidential business information; (b) Information which is protected against being made available to the public under the treaty; (c) Information which is protected against being made available to the public under the law of a disputing party or any other law or rules determined to be applicable to the disclosure of such information by the arbitral tribunal."

123. It was explained that the proposal sought to achieve a balance between the need to provide a basis for the determination of protected information and the necessary flexibility to ensure fairness in the treatment of the parties. That proposal received support for the reason that it provided adequate guidance to the arbitral tribunal.

124. However, it was pointed out by those in favour of granting wider discretion to the arbitral tribunal that the proposed draft was too restrictive. In that light, it was suggested to add after subparagraph (c) the following subparagraph: "; or (d) Information which, if made available to the public, would breach essential interests of any individual or entity".

125. It was suggested that confidential business information should be more extensively defined under subparagraph (a), but there was no support for providing a list of possible categories of protected information.

126. Subparagraph (b) was found acceptable. It was questioned whether application of mandatory laws and rules referred to under subparagraph (c) of the proposal should be left to the discretion of the arbitral tribunal, as it might not be for the tribunal to decide on those issues. A suggestion was made that subparagraph (c) be merged with subparagraph (b).

127. It was said that subparagraph (c) intended to grant to the arbitral tribunal discretion to determine whether the law of a disputing party or any other law or rules were applicable to the disclosure of confidential information. Concerns were expressed regarding the ability of the arbitral tribunal to determine whether the law of a disputing party applied to the disclosure of information. It was stated that the arbitral tribunal should be under an obligation to apply the laws of a disputing party in that regard. It was further explained that States that had developed legislation on protected information might find themselves in a difficult situation in case an order of the arbitral tribunal in respect of information to be disclosed was inconsistent with their legislation. Similarly, a State could be obliged under legislation to disclose information, and an arbitral tribunal could not be granted the power to prevent such disclosure. It was suggested that that matter ought to be clarified under paragraph 2.

128. After discussion, it was suggested that the proposal under paragraph 122 above would constitute a basis for further consideration, and the Secretariat was requested to provide a revised version of paragraph (2) taking account of the discussion.

Paragraphs (3) and (4)

129. The Working Group considered paragraphs (3) and (4) and agreed that those paragraphs should be revised to provide: (1) that they applied to all documents, including reports of tribunal appointed experts, submissions by third parties, and not only to documents submitted by the disputing parties; in doing so, the revised version of those paragraphs should deal with redaction of protected information in arbitral awards in a manner consistent with article 4, and also address confidentiality for submissions by third parties; (2) some flexibility in terms of timing, as it was not practicable to require from a party that, at the time it submitted the information to the arbitral tribunal, it also submitted a redacted version; (3) that the arbitral tribunal should be entitled to oversee the process of redaction of confidential information, regardless of whether there was an objection by a party to such designation in order to avoid that parties through implied or express agreement on confidentiality, defeated the whole purpose of the transparency rules; and (4) that, if the tribunal determined that certain information did not constitute confidential and sensitive information, the party that submitted the information might withdraw all or part of it, and not rely on it, when that party felt that confidential and sensitive information would not be sufficiently protected.

Paragraph (5)

130. It was suggested that paragraph (5) should include a provision that would permit disclosure of information when the threat that led to prohibit such publication dissipated. It was further suggested to consider whether a more general rule could be proposed, whereby any designation of information as confidential and sensitive could be revisited on the motion of a party in light of a change in circumstances. Concerns were expressed that that approach would create uncertainties, and add additional burden to the process. The Working Group agreed to further consider that question at a future session.

10. Article 8 — Repository of published information (“registry”)

131. The Working Group recalled that, at its fifty-fourth session, it had agreed that a neutral registry would be crucial to provide the necessary level of neutrality in the administration of the rules on transparency. With respect to the principle of a registry, three proposals were considered. The first one was the establishment of a single registry as contained in paragraph 8 of document A/CN.9/WG.II/WP.166/Add.1. The second proposal was in favour of a list of arbitral institutions that could fulfil the function of a registry and would read along the lines of: “1. In case the arbitral procedure is administered by one of the following institutions, that institution shall be in charge of making information available to the public pursuant to the Rules on Transparency.” That proposal would then contain a list of arbitral institutions that have agreed to participate. A second paragraph would read as follows: “2. In case the arbitral procedure is not administered by one of the institutions listed in paragraph 1, the respondent shall

designate one of them, which shall be in charge of making information available to the public pursuant to the Rules on Transparency."

132. A third proposal made was that the establishment of a registry in the context of the rules on transparency should follow by analogy the procedure for the designation of an appointing authority as contained in the 2010 UNCITRAL Arbitration Rules, i.e. disputing parties would agree on the choice of a registry and in case they could not agree, an institution would designate the registry.

133. After discussion, the Working Group requested the Secretariat to prepare, for consideration at a future session, a revised draft of article 8 with options to reflect the proposals mentioned in paragraphs 131 and 132 above. The Working Group also requested the Secretariat to provide information on the cost of a registry and to do so in close cooperation with the arbitral institutions that had expressed an interest in the matter, which included ICSID, the PCA, and the Arbitration Institute of the SCC.

B. Applicability to the settlement of disputes arising under existing treaties

134. The Working Group recalled that, at its fifty-fourth session, views had been expressed in favour of pursuing further the options to prepare an instrument that, once adopted by States, could make the rules on transparency applicable to existing investment treaties. The Working Group then considered various instruments to make the rules on transparency applicable to existing investment treaties, as contained in document A/CN.9/WG.II/WP.166/Add.1, paragraphs 10-23. The instruments included (i) a recommendation urging States to make the rules applicable in the context of treaty-based investor-State dispute settlement, (ii) a convention, whereby States could express consent to apply the rules on transparency to arbitration under their existing investment treaties, and (iii) joint interpretative declarations pursuant to article 31 (3) (a) Vienna Convention on the Law of Treaties (the "Vienna Convention") or amendment or modification pursuant to articles 39-41 Vienna Convention.

135. All proposed instruments were found to be interesting and it was noted that they were not mutually exclusive, but could complement one another. In particular, it was said that a convention on the applicability of the rules on transparency as contained in document A/CN.9/WG.II/WP.166/Add.1, paragraph 19 was feasible and interesting, as that instrument was said to best fulfil the mandate of the Working Group to further transparency in treaty-based investor-State arbitration. The Working Group recalled its understanding that such a convention would make the rules on transparency applicable only to investment treaties between such States Parties that were also parties to the convention. As a matter of drafting, it was suggested that the opening words of article 3 of the draft convention be amended to read "Each Contracting State agrees that the UNCITRAL Rules on Transparency shall apply" for the reason that the language needed to be more specific. A question was raised whether the convention should also include the text of the rules on transparency. Regarding the recommendations contained in paragraphs 13 and 14 of document A/CN.9/WG.II/WP.166/Add.1, it was agreed to further consider them, in

particular in light of the decision that would be made regarding the scope of application of the rules on transparency (see above, paras. 18-30).