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Settlement of commercial disputes

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

Comments of arbitral institutions on the interplay between the draft rules on transparency and their institutional rules

Note by the Secretariat

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1	2
II. Comments received from arbitral institutions.		2
A. The Permanent Court of Arbitration ("PCA")		2
B. International Centre for Settlement of Investment Disputes ("ICSID").		2
C. London Court of International Arbitration ("LCIA").		3
D. Cairo Regional Centre for International Commercial Arbitration ("CRCICA")		6
E. Arbitration Institute of the Stockholm Chamber of Commerce ("SCC").		8



I. Introduction

1. Arbitral institutions that had expressed an interest in being associated with the current work of the Working Group regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration have provided comments on issues that could arise in connection with the application of the UNCITRAL rules on transparency currently under preparation by the Working Group to arbitration cases administered under their arbitration rules (A/CN.9/736, under para. 28). Comments received from arbitral institutions are reproduced below (see also A/CN.9/WG.II/WP.169/Add.1, para. 35).

II. Comments received from arbitral institutions

A. The Permanent Court of Arbitration (“PCA”)

Reply by the Deputy Secretary-General

Date: 11 January 2012

Currently parties may choose among the following sets of the Permanent Court of Arbitration (“PCA”) Arbitration Rules: 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; Permanent Court of Arbitration Optional Rules for Arbitration between International Organizations and Private Parties; Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment; and Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Outer Space Activities.

Our prima facie review indicates that the above sets of PCA Rules, which are based on either the 1976 or the 2010 UNCITRAL Arbitration Rules, can operate in tandem with the rules on transparency as currently drafted.¹ The PCA reserves the right to amend or supplement its response, subject to future modifications of the draft transparency rules.

B. International Centre for Settlement of Investment Disputes (“ICSID”)

Reply by the Secretary-General

Date: 18 January 2012

1. The International Centre for Settlement of Investment Disputes (ICSID) herein provides comments on the possible interplay between the ICSID Arbitration Rules

¹ Previously, parties to arbitration under PCA Rules have agreed to very broad disclosure requirements. For example, in the *Abyei* arbitration (PCA Case No. 2008-5), which was conducted under the PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, the Parties agreed to make public the oral and written pleadings as well as the final award.

and the draft rules on transparency as currently stated in documents A/CN.9/WG.II/WP.169 and A/CN.9/WG.II/WP.169/Add.1.

2. ICSID administers arbitration proceedings governed by the UNCITRAL Arbitration Rules on an ad hoc basis, such as in the context of NAFTA and various BITs. The comments made by the UNCITRAL Secretariat in document A/CN.9/WG.II/WP.169/Add.1 at paragraphs 13 to 34 would apply to UNCITRAL cases administered by ICSID. As a result, any transparency provisions adopted by the Commission could be applied in UNCITRAL cases administered by ICSID.

3. Under the ICSID Convention, the Centre provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The ICSID Administrative Council also adopted Additional Facility Rules (AF Rules) authorizing the ICSID Secretariat to administer proceedings that fall outside the scope of the ICSID Convention, such as when one of the parties is not a Contracting State or a national of a Contracting State (e.g., Canada or Mexico) or when the proceedings are between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not arise directly out of an investment, provided that the underlying transaction is not an ordinary commercial transaction.

4. The interplay between the draft UNCITRAL rules on transparency and the ICSID Convention and the Centre's Arbitration Rules would assume that the UNCITRAL rules could apply in an ICSID arbitration proceeding. On the basis of the discussion of the Working Group so far, and the discussions that have yet to take place regarding the scope of application of the rules, the Centre is not in a position to offer further comment at this stage.

C. London Court of International Arbitration ("LCIA")

Reply by the Director General
Date: 20 January 2012

Introduction

The LCIA has been requested to comment on the interplay between LCIA rules, practice and procedure, and the proposed UNCITRAL rules on transparency in treaty-based investor-State arbitration, were the two to be applied together.

The comments below relate only to practical matters arising from the LCIA's role as administrator, or designated "repository"/registry, and do not extend to the roles, rights and responsibilities of the parties and of the tribunal.

References to "the LCIA" may relate to the LCIA secretariat and/or to the LCIA Court. However, the LCIA Court is the final authority for the application of rules, practice and procedure adopted by the LCIA for the administration of arbitrations, whether applied by the secretariat on behalf of the Court, or by the Court itself, in the person of its President, Vice-Presidents, or Divisions.

UNCITRAL rules on transparency

Draft Article 1. Scope of application

Paragraph 1: As currently drafted, Option 2, Variant 1 [of paragraph 1 of article 1 as contained in document A/CN.9/WG.II/WP.169, paragraph 8], is the only version by which the rules on transparency may come to be applied in arbitration proceedings under rules other than the UNCITRAL arbitration rules.

Paragraph 2: The mandatory nature of the rules on transparency is noted.

Paragraphs 3-5: The precedence taken by the rules on transparency over the applicable arbitration rules, in the event of conflict, is noted. The LCIA joins with ICSID, PCA, SCC and ICC in confirming that, as a matter of principle, the application of the rules on transparency in conjunction with the LCIA arbitration rules is unlikely to cause problems.

The LCIA's position may, however, change as the draft rules on transparency evolve.

Draft Article 2. Publication of information at the commencement of arbitral proceedings

By Article 30.1 of the LCIA arbitration rules, unless they expressly agree in writing to the contrary, the parties undertake, as a general principle, to keep confidential all materials in the proceedings, created and produced for the purpose of the arbitration. The adoption by the parties, in writing, of the rules on transparency would constitute their agreement that such materials need not be kept confidential.

Were the LCIA required to act as a registry for the purposes of the rules on transparency, it would set up a dedicated website, with dedicated server; operated and maintained separately from its own website, to ensure greater efficiency and ease of operation and access; and to safeguard the confidentiality of other arbitrations pending before the LCIA, to which the confidentiality provisions of Article 30 of the LCIA arbitration rules did apply.

Draft Article 3. Publication of documents

See comments relating to Article 2, above.

The exceptions to publication covered by Article 8 are noted, as is the responsibility of the tribunal, under Article 3.4 to ensure that documents that are not to be made publicly available are withheld from the registry, or are suitably redacted.

In the event that an arbitral institution were not only acting as registry, but also administering under its own rules in conjunction with the rules on transparency, the institution itself would presumably receive documents that were not to be made publicly available. In which case, the institution would expect to be advised by the tribunal of which of these documents were to be excluded from the public record or redacted.

Draft Article 4. Publication of arbitral awards

As above, the adoption of the rules on transparency would constitute an agreement in writing that the award should not be kept confidential, for the purposes of Article 30.1 of the LCIA arbitration rules.

Also as above, were the institution administering the arbitration under its own rules, and not merely acting as registry, it would be privy to non-redacted awards, although only redacted versions (if applicable) would be made publicly available.

I note the use, in Articles 2, 3 and 4, of the words, “*promptly*”, and “*in a timely manner*” relating to the registry’s duty to make materials available to the public. It would be helpful if there were guidance as to how these words should be interpreted.

Draft Article 5. Submission by a third person

That there is no provision in the LCIA rules for the intervention of amici curiae does not prohibit the express agreement of the parties that such intervention should be permitted in accordance with the procedures set out in this article.

Draft Article 6. Submission by a non-disputing Party to the treaty

I note that the Working Group has yet to settle whether the tribunal should have the discretion to accept or to decline submissions by non-disputing parties to the treaty. Similarly, that there is to be further discussion as to whether a non-disputing party should be entitled to make submissions not only on matters of treaty interpretation, but also on questions of law or fact, or on matters within the scope of the dispute. It would seem, however, that these matters affect the parties and the tribunal, but not the administering institution or registry.

It is noted, however, that documents submitted pursuant to Articles 5 and 6 of the rules on transparency are to be made available to the public in accordance with Article 3.

Draft Article 7. Hearings

Article 19.4 of the LCIA arbitration rules provides that all meetings and hearings shall be in private unless the parties agree otherwise in writing, or the arbitral tribunal directs otherwise. The adoption of the rules on transparency would constitute an agreement in writing that hearings need not be held in private.

On a minor housekeeping matter, with reference to Article 7.3, the LCIA secretariat would be at the disposal of the tribunal for the purposes of making the logistical arrangements referred to in that article, were the arbitration being conducted under the LCIA arbitration rules.

Draft Article 8. Exceptions to transparency

The question of what information is not to be made available to the public or to non-disputing parties, is for the tribunal and the parties. It is, however, essential that the mechanisms, designed to ensure that the administrator and/or registry does not make such materials public, are effective, having in mind the registry’s obligation to publish “*promptly*” or “*in a timely manner*”.

D. Cairo Regional Centre for International Commercial Arbitration (“CRCICA”)

Reply by the Director
Date: 20 January 2012

I. General Remarks

Since its establishment CRCICA adopted, with minor modifications, the Arbitration Rules of UNCITRAL of 1976 (“UNCITRAL Rules”). CRCICA has amended its Arbitration Rules in 1998, 2000, 2002 and 2007 to ensure that they continue to meet the needs of their users, reflecting best practice in the field of international institutional arbitration.

The present CRCICA Arbitration Rules were enforced as of March 2011 (“Rules”). They are based upon the new UNCITRAL Arbitration Rules, as revised in 2010, with minor modifications emanating mainly from the Centre’s role as an arbitral institution and an appointing authority.

The Rules are equally applicable to commercial and investment arbitration proceedings.

Article 40 of the Rules provides for confidentiality as a general principle, however, the parties could deviate from such rule should they so agree.

II. Treaty and UNCITRAL Rules vis-à-vis the Rules

In this section, we shall provide our comments regarding the interplay between the Treaty and UNCITRAL Rules which are contained in the UNCITRAL document A/CN.9/WG.II/WP.169/Add.1, paragraphs 13 to 34, which are also applicable for the Rules. We will keep the same sequence as contained in the said document for ease of reference.

a. Modifying

Publication of arbitral awards

A/CN.9/WG.II/WP.169/Add.1: Paragraph 16.

Relevant article from the CRCICA Arbitration Rules: Article 40, paragraphs 1 and 3.

Same implication on the Rules as to the UNCITRAL Rules? Yes.

Comments: Confidentiality is regulated by Article 40 of which the parties may opt out.

Hearings

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraph 17.

Relevant article from the CRCICA Arbitration Rules: Article 28, paragraph 3.

Same implication on the Rules as to the UNCITRAL Rules? Yes.

Comments: Same paragraph is found in the Rules.

b. Supplementing

Scope of application — article 1 of the rules on transparency

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraphs 19-23.

Relevant article from the CRCICA Arbitration Rules: Article 1, paragraph 2.

Comments: Article 1, paragraph 2, of the Rules stipulates that the applicable version of the rules shall be the rules in effect on the date of commencement of the arbitration proceedings, unless agreed otherwise.

Therefore, the Rules will be applicable to disputes commencing after March 2011 even if the investment treaty was signed before the said date. However, this is relevant only in the event that the final draft of the Treaty includes the variant stipulating for its applicability with rules different than the UNCITRAL Rules.

Article 1, paragraph (3), of the rules on transparency

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraph 24.

Relevant article from the CRCICA Arbitration Rules: Article 17, paragraph 1.

Same implication on the Rules as to the UNCITRAL Rules? Yes.

Comments: Same paragraph is contained in the Rules and therefore the same effect applicable on the UNCITRAL Rules exists.

Initiation of arbitration proceedings — article 2 of the rules on transparency

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraph 25.

Relevant article from the CRCICA Arbitration Rules: Article 4

Comments: Article 4 provides that all documents are to be submitted to CRCICA which will cover the event where CRCICA shall be acting as a Registry and/or will provide CRCICA with copies to forward to the relevant Registry should it be bound to do so.

Publication of documents — article 3 of the rules on transparency

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraph 26.

Comment: As the arbitral institute administering the case, all documents are to be communicated via CRCICA.

Submission by third persons — article 5 of the rules on transparency:

Submission by non-disputing Party to the treaty — article 6 of the rules on transparency

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraphs 27-28.

Same implication on the Rules as to the UNCITRAL Rules? Yes.

Comments: CRCICA is also silent as to submissions by non-disputing parties. Therefore the same effect applicable on the UNCITRAL Rules exists.

c. No effect

Exceptions to transparency — article 8 of the rules on transparency

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraphs 29-30.

Relevant article from the CRCICA Arbitration Rules: Article 40.

Same implication on the Rules as to the UNCITRAL Rules? No.

Comments: Again, Article 40 regulating confidentiality stipulates that the whole process is confidential unless the parties agree otherwise. Therefore, Article 8 of the Treaty shall have a “modifying” effect on the Rules unlike the case with the UNCITRAL Rules.

Repository of published information — article 9 of the rules on transparency, and appointing authorities

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraphs 31-33.

Comments: These functions are already exercised by CRCICA as an arbitral institution, with the exception of publishing documents. Should the Registry be a

different unit other than CRCICA, the articles providing for CRCICA's role as an appointing authority would therefore be modified.

Allocation of costs

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraph 34.

Relevant article from the CRCICA Arbitration Rules: Article 46.

Same implication on the Rules as to the UNCITRAL Rules? Yes.

Comments: Although the Rules differ from the UNCITRAL Rules when it comes to regulating the arbitration costs, both rules make the unsuccessful party liable for the costs in principle. Section V of the Rules regulates the costs of the arbitration.

III. Treaty and the Rules, possibilities that do not exist with the UNCITRAL Rules

As stated above, the Rules contain an article regulating confidentiality which does not exist in the UNCITRAL Rules. The parties to the arbitration may however agree to deviate from such rule. Accordingly, the Treaty shall have a modifying effect on the Rules in connection thereto.

Since, unlike the UNCITRAL Rules, the CRCICA Rules are applicable to institutional arbitrations, the role of CRCICA is reflected therein. Depending on the functions of the Registry, the role played by CRCICA may be of use to it should the Treaty stipulate for regulations regarding the interplay between the role of the institution administering the proceedings and the Registry.

E. Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”)

Reply by the Secretary-General

Date: 23 January 2012

We have reviewed the report of the Working Group on Arbitration on the work of its fifty-fifth session, A/CN.9/736, the draft rules on transparency, A/CN.9/WG.II/WP.169, the comments on the interplay between the UNCITRAL Arbitration Rules and the draft rules on transparency, A/CN.9/WG.II/WP.169/Add.1, paragraphs 13 to 34, and the question in your letter of 14 December 2011.

The below represents a preliminary assessment of the possible interplay between the SCC Rules and the draft rules on transparency.

In summary, the SCC does not foresee that the draft rules on transparency would create any problems for treaty-based investor-State arbitrations under the SCC Rules where the draft rules on transparency would be applied.

For the sake of clarity, the SCC would like to underline that none of the below should be interpreted as the SCC advocating a specific standard on transparency. The objective has been to outline how the SCC Rules would work in conjunction with the draft rules on transparency. The SCC recognizes that the rules on transparency have not yet been finalized, and this reply is thus presented with the caveat that a different analysis may be necessary as a result of the final version of the text.

This document outlines the possible interplay between the SCC Rules and the draft rules on transparency in the context of treaty-based investor-State arbitration. The

SCC Rules apply equally in commercial and treaty-based investor-State arbitral proceedings.

These comments first provide some general remarks on the interplay between the SCC Rules and the draft rules on transparency. The comments then follow the format of the Secretariat's note on the interplay between the draft rules of transparency and the UNCITRAL Arbitration Rules, A/CN.9/WG.II/WP.169/Add.1, paragraphs 13 to 34, to provide specific comments on how provisions of the draft rules would modify, supplement or have no effect on the SCC Rules.

THE SCC RULES AND THE DRAFT RULES ON TRANSPARENCY

The rules on transparency may be applied as a result of the different options as described in Article 1 — Scope of Application. Arbitrations that take place under both the SCC Rules and the draft rules on transparency may only occur under Option 2, Variant 1 of Article 1(1) of the draft rules on transparency, for the obvious reason that Option 1 and Option 2, Variant 2 refer to arbitrations conducted under the UNCITRAL Arbitration Rules. For the rules on transparency to be applied to arbitrations conducted under the SCC Rules, the agreement to arbitrate the treaty-based investor-State dispute must (i) refer to the SCC Rules, and (ii) incorporate the rules on transparency.

The SCC Rules consist of many provisions that may be modified by party agreement. Article 19(1) of the SCC Rules provides that “[s]ubject to these Rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate”. Application of the draft rules on transparency therefore does not likely present any conflict with the SCC Rules where the rules on transparency, under Option 2, Variant 1 of Article 1(1), would form part of the parties’ arbitration agreement.

In the report of the Working Group on Arbitration on the work of its fifty-fifth session, A/CN.9/736, the Secretariat noted that the Working Group agreed to amend the language of the draft rules on transparency to use terminology that is consistent with the 2010 UNCITRAL Arbitration Rules (see, e.g., paras. 15, 39, 61). In some instances, the terminology in the draft rules on transparency differs from the terminology used in the SCC Rules. For example, Article 2 of the draft rules on transparency refers to the “notice of arbitration”, while Article 2 of the SCC Rules refers to this document as the “Request for Arbitration”. As a general comment regarding differing terminology, the SCC does not anticipate that differing terminology in the draft rules on transparency and the SCC Rules will affect the interplay between the two rules.

While differing terminology will likely not affect the interplay between the two rules, the SCC would like to highlight that the SCC Rules and the draft rules on transparency appear to differ in regards to when the arbitration is deemed to “commence”. Under Article 4 of the SCC Rules, the arbitration is commenced on the date that the SCC receives the Request for Arbitration. Article 2 of the draft rules on transparency, entitled “Publication of information at the commencement of arbitral proceedings” does not reference an institution’s role under either Option 1 or Option 2 as relevant in determining the date of “commencement of arbitral proceedings”. Rather, the SCC understands that Article 2 of the draft rules on transparency considers that the arbitration commences “[o]nce the notice of

arbitration has been received by the respondent”, similar to Article 3(2) of the 2010 UNCITRAL Arbitration Rules. While the effect of this difference is not known at this time, the SCC would like to highlight the difference.

As a final general comment, the SCC notes that several provisions of the draft rules on transparency require the arbitral tribunal to exercise its discretion in implementing the rules (see, e.g., Article 5 on allowing submission by third parties and Article 8(7) on exceptions to transparency). Should the arbitral tribunal be unable to reach unanimous decision on these discretionary issues, Article 35 of the SCC Rules will apply to resolve the issue. Article 35 of the SCC Rules states that where an arbitral tribunal consists of more than one arbitrator, decisions shall be made by majority vote or by the chairperson, failing a majority. The arbitral tribunal may also decide that the chairperson alone has the authority to make procedural rulings.

Following the format of the Secretariat’s note on the interplay between the rules on transparency and the UNCITRAL Arbitration Rules, A/CN.9/WG.II/WP.169/Add.1, paragraphs 13 to 34, the SCC’s comments on the specific interplay between provisions of the SCC Rules and the draft rules on transparency are threefold: provisions of the draft rules on transparency that would modify the SCC Rules (a); provisions of the draft rules on transparency that would supplement the SCC Rules (b); and provisions of the draft rules on transparency that would have no effect on the SCC Rules (c).

a. Modifications to provisions of the SCC Rules

Articles 3, 4, 7 and 9 (Option 2, para. 1) of the draft rules on transparency would constitute party agreements that modify the default provisions of the SCC Rules.

Publication of documents — Article 3 of the draft rules on transparency, modifying Article 46 of the SCC Rules

Article 3 of the draft rules on transparency requires the arbitral tribunal to communicate documents to the repository for publication. Article 46 of the SCC Rules requires the arbitral tribunal to maintain the confidentiality of the arbitration. The confidentiality provision in the SCC Rules is subject to party agreement to the contrary, and the adoption of the draft rules on transparency would constitute party agreement to modify the provisions in the SCC Rules.

Publication of arbitral awards — Article 4 of the draft rules on transparency, modifying Article 46 of the SCC Rules

Article 4 of the draft rules on transparency requires the arbitral tribunal to communicate the arbitral award to the repository. Article 46 of the SCC Rules requires the arbitral tribunal to maintain the confidentiality of the award. The confidentiality provision in the SCC Rules is subject to party agreement, and the adoption of the draft rules on transparency would constitute a party agreement that modifies the provisions in the SCC Rules.

Hearings — Article 7 of the draft rules on transparency, modifying Article 27(3) of the SCC Rules

Article 7(1) of the draft rules on transparency requires hearings to be public, unless otherwise decided by the arbitral tribunal, after consultation with the disputing parties. Article 27(3) of the SCC Rules states that hearings will be held in private, unless otherwise agreed by the parties. The adoption of the draft rules on transparency would constitute a party agreement to modify the default provisions in the SCC Rules, requiring hearings to be public.

Repository of published information — Article 9 (Option 2, para. 1) of the draft rules on transparency, modifying Article 46 of the SCC Rules

Article 9 (Option 2, para. 1) of the draft rules on transparency requires that the arbitral institution administering the arbitral proceedings be responsible for making information publicly available pursuant to the rules. Article 46 of the SCC Rules requires the SCC to maintain the confidentiality of the arbitration and the award, and is expressly subject to party agreement to the contrary. The adoption of the draft rules on transparency would constitute a party agreement to modify the default provisions in the SCC Rules, requiring the SCC to publish certain information throughout the arbitration.

This explanation is presented with the caveat that the SCC would be hesitant to disclose information in situations where one party objects to the applicability of the rules on transparency prior to the constitution of the arbitral tribunal.

b. Supplement to the SCC Rules

Articles 1-8 of the draft rules on transparency would supplement provisions of the SCC Rules.

Scope of application — Article 1

Article 1(1) (Option 2, Variant 1), (2), (4), (5) of the draft rules on transparency, supplementing the SCC Rules generally under Article 19(1) of the SCC Rules

Under Article 19(1) of the SCC Rules, the arbitration shall be conducted in accordance with the agreement of the parties. Article 1(1) (Option 2, Variant 1) of the draft rules on transparency states the rules will be applied when expressly provided for in the relevant treaty, and the draft rules on transparency would be part of the agreement between the parties that instructs the arbitral tribunal how the arbitration shall be conducted. The draft rules on transparency therefore would supplement the SCC Rules.

Article 1(3) of the draft rules on transparency, supplementing Article 19 of the SCC Rules

Article 1(3) of the draft rules on transparency requires the arbitral tribunal to balance the public interest in transparency in treaty-based investor-State arbitration and in the particular arbitration with the parties' interest in a fair and efficient resolution of their dispute. Article 19 of the SCC Rules requires the arbitral tribunal to exercise its discretion as "appropriate", while ensuring the arbitration is impartial, practical and expeditious. By requiring the arbitral tribunal to take the

public interest in transparency into account when exercising its discretion, the draft rules on transparency would supplement the SCC Rules.

Publication of information at the commencement of arbitral proceedings — Article 2 of the draft rules on transparency, supplementing Article 2 and Article 5 of the SCC Rules

Article 2 of the draft rules on transparency places an obligation on the disputing parties to provide information to the repository once the notice of arbitration has been received. This obligation supplements the obligations on the disputing parties in commencing the arbitral proceedings under Article 2 and Article 5 of the SCC Rules.

Publication of documents — Article 3 of the draft rules on transparency, supplementing Articles 18-34 (“The proceedings before the Arbitral Tribunal”) of the SCC Rules

Article 3 of the draft rules on transparency requires the arbitral tribunal to communicate documents to the repository for publication. Such an obligation is not included in Articles 18-34 (“The proceedings before the Arbitral Tribunal”) of the SCC Rules. Article 3 of the draft rules on transparency would therefore supplement this provision of the SCC Rules.

Publication of arbitral awards — Article 4 of the draft rules on transparency, supplementing Article 36(4) of the SCC Rules

Article 4 of the draft rules on transparency requires the arbitral tribunal to communicate the arbitral award to the repository. Article 36(4) of the SCC Rules obliges the arbitral tribunal to communicate the award to the parties and the SCC. In the event of the SCC acting as both the administering institution and the repository (as under Article 9 (Option 2, para. 1) of the draft rules on transparency), Article 4 of the draft rules on transparency would have no effect on the communication requirements in the SCC Rules, as the SCC would already be in possession of the award. In all other cases, however, Article 4 of the draft rules on transparency would supplement the communication requirements in Article 36(4) of the SCC Rules by requiring the arbitral tribunal to communicate the award to an additional body.

Submission by a third party — Article 5 of the draft rules on transparency, supplementing Article 24 and Article 26 of the SCC Rules

Article 5 of the draft rules on transparency allows the arbitral tribunal to accept submissions from third parties, after consultation with the disputing parties. The SCC Rules are silent on submissions by third parties. The SCC Rules in Article 24 on Written submissions and Article 26 on Evidence refer to the claimant, respondent and, collectively as, the parties, but do not expressly contemplate submissions by third parties.

To date, there are no known arbitrations, treaty-based investor-State or other, under the SCC Rules in which third parties either successfully made or attempted to make submissions to the arbitral tribunal.

The SCC Rules do not present a bar to submissions by third parties. Under Article 19(1) of the SCC Rules, the arbitral tribunal has broad discretion to “conduct

the arbitration in such manner as it considers appropriate”. Article 5 of the draft rules on transparency would supplement the SCC Rules.

Submission by a non-disputing Party to the treaty — Article 6 of the draft rules on transparency, supplementing Article 24 and Article 26 of the SCC Rules

Article 6 of the draft rules on transparency either requires or allows the arbitral tribunal to invite submissions on treaty interpretation and questions of law or fact from a non-disputing party to the treaty, after consultation with the disputing parties. The SCC Rules are also silent on submissions by a non-disputing party to the treaty, and there are no known treaty-based investor-State arbitrations to this date under the SCC’s administration in which a non-disputing party to the treaty either made successfully or attempted to make a submission to the arbitral tribunal.

Article 19(1) of the SCC Rules grants the arbitral tribunal broad discretion to “conduct the arbitration in such manner as it considers appropriate”. Article 6 of the draft rules on transparency would supplement the SCC Rules.

Exceptions to transparency — Article 8 of the draft rules on transparency

Article 8 of the draft rules on transparency provides exceptions to transparency requirements and contains definitions for confidential, sensitive and protected information and protective measures for the integrity of the arbitral process. The SCC Rules contain no similar provisions. Article 8 of the draft rules on transparency, which apply only to the implementation of these rules, would therefore supplement the SCC Rules.

c. No effect on the SCC Rules

The SCC does not anticipate that the draft rules on transparency will affect the general framework for deciding costs, as defined in Article 43 and Appendix III of the SCC Rules.

Additional comments on costs

The SCC anticipates that costs incurred as a result of repository services will be assumed by the parties, but recognizes that principal issues relating to the treatment of costs remain yet to be addressed. The SCC is therefore not able to foresee at this point the exact implication, if any, of these costs on the application of the SCC Rules.

Article 43(5) of the SCC Rules provides that the arbitral tribunal shall apportion the costs of the arbitration between the parties, having regard to the outcome of the case and other relevant circumstances. Under Article 43(1) of the SCC Rules, these costs include the fees of the arbitral tribunal, the administrative fee of the SCC and the expenses of the arbitral tribunal and the SCC. “Expenses”, as explained in Appendix III, Article 4 of the SCC Rules, include “any reasonable expenses incurred by the arbitrator(s) and the SCC”.

The SCC appreciates the opportunity offered by UNCITRAL to contribute to its mission and looks forward to continue the discussion with the Working Group.