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**United Nations Commission
on International Trade Law**
Working Group II (Arbitration and Conciliation)
Fifty-eighth session
New York, 4-8 February 2013

Annotated provisional agenda

I. Provisional 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. Organization of future work.
6. Other business.
7. Adoption of the report.

II. Composition of the Working Group

1. The Working Group is composed of all States members of the Commission, which are the following: Algeria (2016), Argentina (2016), Armenia (2013), Australia (2016), Austria (2016), Bahrain (2013), Benin (2013), Bolivia (Plurinational State of) (2013), Botswana (2016), Brazil (2016), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2016), Croatia (2016), Czech Republic (2013), Egypt (2013), El Salvador (2013), Fiji (2016), France (2013), Gabon (2016), Georgia (2015), Germany (2013), Greece (2013), Honduras (2013), India (2016), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2013), Jordan (2016), Kenya (2016), Latvia (2013), Malaysia (2013), Malta (2013), Mauritius (2016), Mexico (2013), Morocco (2013), Namibia (2013), Nigeria (2016), Norway (2013), Pakistan (2016), Paraguay (2016), Philippines (2016), Republic of Korea (2013), Russian Federation (2013),



Senegal (2013), Singapore (2013), South Africa (2013), Spain (2016), Sri Lanka (2013), Thailand (2016), Turkey (2016), Uganda (2016), Ukraine (2014), United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2016) and Venezuela (Bolivarian Republic of) (2016).

2. States not members of the Commission and international governmental organizations may attend the session as observers and participate in the deliberations. In addition, invited international non-governmental organizations may attend the session as observers and represent the views of their organizations on matters where the organization concerned has expertise or international experience so as to facilitate the deliberations at the session.

III. Annotations to agenda items

Item 1. Opening of the session

3. The fifty-eighth session of the Working Group will be held at the United Nations Headquarters, New York, from 4 to 8 February 2013. Meeting hours will be from 10.00 a.m. to 1.00 p.m. and from 3.00 to 6.00 p.m., except on Monday, 4 February 2013, when the session will be opened at 10.30 a.m.

Item 2. Election of officers

4. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

Item 4. Preparation of a legal standard on transparency in treaty-based investor-State arbitration

(a) Previous deliberations

5. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission mandated Working Group II (Arbitration and Conciliation) to undertake work on the question of a revision of the UNCITRAL Arbitration Rules.¹

6. At its fortieth session (Vienna, 25 June-12 July 2007), the Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.² The Commission noted that broad support had been expressed in the Working Group for a generic approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations. The Commission noted, however, that the extent to which the revised UNCITRAL Arbitration Rules should take account of investor-State dispute settlement or

¹ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, para. 187.

² *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17)*, para. 174.

administered arbitration remained to be considered by the Working Group at a future session.³

7. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted that the Working Group had decided to proceed with its work on the revision of the UNCITRAL Arbitration Rules in their generic form and to seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take (A/CN.9/646, para. 69). After discussion, the Commission agreed that it would not be desirable to include at that time specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves and that any work on investor-State disputes which the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution. The Commission was of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency as a desirable objective in investor-State arbitration, should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group (*ibid.*, para. 69) in the field of treaty-based arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based arbitration and that broad discretion should be left to the Working Group in that respect. With a view to facilitating consideration of the issues of transparency in treaty-based arbitration by the Working Group at a future session, the Commission requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in investor-State arbitration. It was emphasized that, when composing delegations to the Working Group sessions that would be devoted to that project, member States and observers should seek to achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration.⁴

8. At its forty-third session (New York, 21 June-9 July 2010), the Commission adopted the UNCITRAL Arbitration Rules (as revised in 2010).⁵

9. At that session, with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session that the topic of transparency in treaty-based investor-State

³ *Ibid.*, para. 175.

⁴ *Ibid.*, *Sixty-third Session, Supplement No. 17* (A/63/17), paras. 313-314.

⁵ *Ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 187.

arbitration should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II (Arbitration and Conciliation) with the task of preparing a legal standard on that topic. The Commission was informed that, pursuant to the request received from the Commission at the forty-first session, the Secretariat had circulated a questionnaire to States with regard to their practice on transparency in investor-State arbitration and that replies thereto would be made available to the Working Group.⁶ Those replies are reproduced in document A/CN.9/WG.II/WP.159 and its addenda.

10. At its fifty-third (Vienna, 4-8 October 2010) and fifty-fourth (New York, 7-11 February 2011) sessions, the Working Group considered the preparation of a legal standard on transparency in treaty-based investor-State arbitration on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.159 and its addenda; A/CN.9/WG.II/WP.160 and its addendum; A/CN.9/WG.II/WP.162 and its addendum; A/CN.9/WG.II/WP.163; and A/CN.9/WG.II/WP.164).

11. 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 noted that the Working Group had considered matters of content, form and applicability to both future and existing investment treaties of the legal standard on transparency. It was 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 great practical interest, taking account of the high number of such treaties already concluded. 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.⁷

12. At its fifty-fifth session (Vienna, 3-7 October 2011), the Working Group completed its first reading of the draft legal standard on transparency in treaty-based investor-State arbitration on the basis of notes prepared by the Secretariat (A/CN.9/WG.II/WP.166 and its addendum; and A/CN.9/WG.II/WP.167). At its fifty-sixth session (New York, 6-10 February 2012), the Working Group commenced its second reading of the draft legal standard on transparency in treaty-based investor-State arbitration, and considered in depth the question of the scope of application of the legal standard, on the basis of notes prepared by the Secretariat (A/CN.9/WG.II/WP.169 and its addendum as well as A/CN.9/WG.II/WP.170 and its addendum).

13. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the importance of ensuring transparency in treaty-based investor-State arbitration expressed at its forty-first session, in 2008, and at its forty-fourth session, in 2011, and urged the Working Group to pursue its efforts and

⁶ Ibid., para. 190.

⁷ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 200-202.

to complete its work on the rules on transparency for consideration by the Commission preferably at its next session.⁸

14. At its fifty-seventh session, the Working Group completed its second reading of the draft legal standard on transparency in treaty-based investor-State arbitration on the basis of notes prepared by the Secretariat (A/CN.9/WG.II/WP.169 and its addendum; A/CN.9/WG.II/WP.170 and its addendum, A/CN.9/WG.II/WP.172, A/CN.9/WG.II/WP.173 and A/CN.9/WG.II/WP.174).

15. At its fifty-eighth session, the Working Group is expected to complete its third reading of the draft legal standard on transparency in treaty-based investor-State arbitration, and to consider preparation of instruments, such as a recommendation or a convention, on the application of the legal standard on transparency to investment treaties concluded before the date of adoption of the legal standard, on the basis of a note prepared by the Secretariat (A/CN.9/WG.II/WP.176 and its addenda).

(b) Documentation

16. The Working Group will have before it notes by the Secretariat regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.176 and its addenda). A limited number of the following background documents will be made available at the session:

- UNCITRAL Arbitration Rules (1976);
- UNCITRAL Arbitration Rules (as revised in 2010);
- UNCITRAL Notes on Organizing Arbitral Proceedings;
- UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006);
- Reports of the United Nations Commission on International Trade Law on the work of its thirty-ninth session (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17)); fortieth session (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17 (part I))); forty-first session (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17)); forty-second session (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17)); forty-third session (*Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17)); forty-fourth session (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17)) and forty-fifth session (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17));
- Report of Working Group II (Arbitration and Conciliation) on the work of its forty-eighth (A/CN.9/646); fifty-third (A/CN.9/712); fifty-fourth (A/CN.9/717); fifty-fifth (A/CN.9/736); fifty-sixth (A/CN.9/741) and fifty-seventh (A/CN.9/760) sessions;
- Settlement of commercial disputes, transparency in treaty-based investor-State arbitration, notes by the Secretariat: A/CN.9/WG.II/WP.159 and its addenda; A/CN.9/WG.II/WP.160 and its addendum; A/CN.9/WG.II/WP.162

⁸ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 65-69.

and its addendum; A/CN.9/WG.II/WP.163; A/CN.9/WG.II/WP.164; A/CN.9/WG.II/WP.166 and its addendum; A/CN.9/WG.II/WP.167; A/CN.9/WG.II/WP.169 and its addendum; A/CN.9/WG.II/WP.170 and its addendum; A/CN.9/WG.II/WP.172; A/CN.9/WG.II/WP.173; and A/CN.9/WG.II/WP.174.

17. UNCITRAL documents are posted on the UNCITRAL website (www.uncitral.org) upon their issuance in all the official languages of the United Nations. Delegates may wish to check the availability of the documents by accessing the Working Group's page in the "Working Groups" section of the UNCITRAL website.

Item 5. Organization of future work

18. At its fifty-eighth session, the Working Group may wish to consider organization of its work in respect of the matters which were mentioned by the Commission at its thirty-ninth,⁹ forty-fourth¹⁰ and forty-fifth¹¹ sessions as matters for future work of the Working Group.

19. In its deliberations on future work, the Working Group may wish to note that, at its forty-fourth session, the Commission agreed that the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings needed to be updated pursuant to the adoption of the UNCITRAL Arbitration Rules, as revised in 2010.¹² At its forty-fifth session, it was suggested that the Working Group should receive a mandate to that end. After discussion, the Commission confirmed that the Secretariat should undertake the revision of the Notes as its next task in the field of dispute settlement, as previously decided by the Commission. The Commission agreed to decide at a future session whether the draft revised Notes should be first examined by the Working Group before being considered by the Commission.¹³

Item 6. Other business

(a) Technical assistance

20. At its forty-fourth session, the Commission stressed the importance of technical cooperation and assistance by the UNCITRAL Secretariat, as legislative technical assistance, in particular to developing countries, was no less important than the formulation of uniform rules itself.¹⁴ It had been noted that, while UNCITRAL had prepared a number of legislative standards, their rate of adoption varied significantly, and therefore the promotion of the adoption and use of those standards seemed to call for specific attention.¹⁵

21. At that session, the Commission also noted that the continuing ability to respond to requests from States and regional organizations for technical cooperation and assistance activities was dependent upon the availability of funds to meet

⁹ Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 182-187.

¹⁰ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 203-207.

¹¹ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 70.

¹² Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 205.

¹³ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 70.

¹⁴ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 253.

¹⁵ Ibid., para. 254.

associated costs. The Commission further noted that, despite efforts by the Secretariat to solicit new donations, funds available in the UNCITRAL Trust Fund for Symposia were very limited.¹⁶ It was suggested that UNCITRAL delegates and experts might be in a position to further contribute to the mandate of UNCITRAL, for example, by assisting in identifying decision makers on trade law reform.¹⁷ Against that background, the Working Group might wish to devote some time to discussing possible ways to further the implementation of UNCITRAL texts in the field of arbitration.

Item 7. Adoption of the report

22. The Working Group may wish to adopt, at the close of its session, a report for submission to the forty-sixth session of the Commission, scheduled to be held in Vienna, from 8 to 26 July 2013. The main conclusions reached by the Working Group at its ninth meeting (on Friday morning) will be summarily read out for the record at the tenth meeting and subsequently incorporated into the report.

IV. Scheduling of meetings

23. The fifty-eighth session of the Working Group will last for five working days. There will be ten half-day meetings available for consideration of the agenda items. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session,¹⁸ the Working Group is expected to hold substantive deliberations during the first nine half-day meetings (that is, from Monday to Friday morning), with a draft report on the entire period being prepared by the Secretariat for adoption at the tenth and last meeting of the Working Group (on Friday afternoon).

24. The Working Group may wish to note that its fifty-ninth session is tentatively scheduled to be held in Vienna, from 16-20 September 2013.

¹⁶ Ibid., para. 258.

¹⁷ Ibid., para. 257.

¹⁸ Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 381.