United Nations A/CN.9/760

General Assembly

Distr.: General
12 October 2012

Original: English

United Nations Commission on International Trade Law
Forty-sixth session
Vienna, 8-26 July 2013

Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-seventh session (Vienna, 1-5 October 2012)

Contents

V.12-56520 (E) 011112 021112

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 high 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. 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,[5] and urged the Working Group to pursue its efforts and to complete its work on the rules on transparency for consideration by the Commission preferably at its next session.[6]

4. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.171, paragraphs 5-14.

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its fifty-seventh session in Vienna, from 1-5 October 2012. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Bolivia (Plurinational State of), Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Czech Republic, Egypt, El Salvador, France, Germany, India, Iran (Islamic Republic of), Italy, Japan,

---

[1] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), 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.

[5] Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314; ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200.

[6] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 69.

Malaysia, Mauritius, Mexico, Norway, Pakistan, Paraguay, Philippines, Republic of Korea, Russian Federation, Singapore, South Africa, Spain, Thailand, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Belarus, Belgium, Cuba, Cyprus, Dominican Republic, Ecuador, Finland, Guatemala, Indonesia, Liberia, Netherlands, Panama, Poland, Portugal, Romania, Slovakia, Sweden and Switzerland.

7. The session was also attended by observers from the European Union.

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

(a) *United Nations system*: United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: Corte Centroamericana de Justicia (CCJ), League of Arab States, Organization for Economic Cooperation and Development (OECD) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: American Arbitration Association (AAA), American Bar Association (ABA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Association for the Promotion of Arbitration in Africa (APAA), Association Suisse de l'Arbitrage (ASA), Barreau de Paris, Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), Center for International Legal Studies (CILS), China International Economic and Trade Arbitration Commission (CIETAC), Comité Français de l'Arbitrage (CFA), Construction Industry Arbitration Council (CIAC), European Law Institute (ELI), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), Korean Commercial Arbitration Board (KCAB), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Moot Alumni Association (MAA), New York State Bar Association (NYSBA), Pakistan Business Council (PBC), Queen Mary University of London School of International Arbitration (QMUL), Vale Columbia Center on Sustainable International Investment (VCC) and Vienna International Arbitral Centre (VIAC).

9. The Working Group elected the following officers:

Chairman: Mr. Salim Moollan (Mauritius)

Rapporteur: Mr. Muhammad Mustaqeem De Gama (South Africa)

10. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.171); (b) 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.172 and its addendum; and A/CN.9/WG.II/WP.169 and its addendum); (c) a note by the secretariat reproducing comments of arbitral institutions on the interplay between the draft rules on transparency and their institutional rules (A/CN.9/WG.II/WP.173); and (d) a note by the secretariat containing a proposal by the Governments of Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States of America regarding the determination

of the scope of application of the draft rules on transparency (A/CN.9/WG.II/WP.174).

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

III. Deliberations and decisions

12. 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.169 and its addendum; A/CN.9/WG.II/WP.172 and its addendum; A/CN.9/WG.II/WP.173; and A/CN.9/WG.II/WP.174). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The secretariat was requested to prepare (i) a revised draft of the rules on transparency, based on the deliberations and decisions of the Working Group, as well as (ii) wording for a convention on transparency in treaty-based investor-State arbitration and for a unilateral declaration (see below, para. 141).

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

A. Draft rules on transparency in treaty-based investor-State arbitration

1. Article 3 — Publication of [documents][information]

13. The Working Group considered article 3, as contained in paragraph 29 of document A/CN.9/WG.II/WP.169, which reflected a proposal made at its fifty-fifth session that the provision on publication of documents or information should provide: (i) a list of documents made available to the public; (ii) discretionary power of the arbitral tribunal to order publication of additional documents or information; (iii) a right for third persons to request access to additional documents or information; and (iv) the publication of documents or information (see A/CN.9/736, paras. 54-66; A/CN.9/741, para. 111).

Paragraph (1)

List of exhibits and exhibits

14. It was noted that paragraph (1) included, in the list of information to be "automatically" disclosed (that is, subject only to the exceptions set out in article 8), two square-bracketed categories of documents: (i) a table listing all exhibits to the documents required to be disclosed under paragraph (1), and (ii) the exhibits themselves.

15. Some delegations expressed the concern that the "automatic" production of the exhibits themselves under article 3(1) would be unduly cumbersome, bearing in mind the potentially voluminous nature of exhibits and additionally that redactions may be required. It was agreed that exhibits would be deleted from article 3(1), but would be subject to disclosure on a discretionary basis under other provisions of article 3. The view was expressed that the publication of a table of exhibits would be less onerous; and furthermore, that the disclosure of the submissions under article 3(1) would be sufficient to ensure that the existence of exhibits was made known to the public, and therefore subject to request under the provisions of article 3. Another view was expressed that the creation and disclosure of a table of exhibits would itself be burdensome, particularly for parties from developing countries or countries with fewer resources.

16. A suggestion was made to the effect that, in circumstances where a table of exhibits had been prepared in the course of proceedings, there would be little burden on parties to make such a document available pursuant to article 3(1). After discussion, the Working Group agreed that, where a table of exhibits already existed, there would be an obligation to produce it pursuant to article 3(1), but if a list of exhibits had not been produced in the course of proceedings, there would not be a requirement to create one for the purposes of disclosure under article 3. The secretariat was requested to undertake drafting to reflect that agreement.

Expert reports and witness statements

17. The Working Group considered whether expert reports and witness statements should be included in the list of documents in article 3(1). Views were expressed that these documents formed a critical part of the factual background of a case and should be publicly available in order to promote fully the goal of enhancing transparency in investor-State disputes.

18. Some delegations stated that removing expert reports and witness statements from paragraph (1) would not obstruct the goal of transparency, because both a disputing party or any other person could still request their publication under other provisions of article 3. It was also said that reasonably detailed information could be offered to the public in relation to the subject of the dispute, but the public should not be put on the same footing as the parties.

19. Another view was expressed that the other provisions of article 3 under which such documents would be requested (paragraphs (2) and (3)) did not provide for "automatic" production upon request, but rather, required the exercise of discretion and consultation in relation to their publication. A further comment was made that adding a discretionary element to the determination of whether witness statements or expert reports should be disclosed would impose a significant burden on the

arbitral tribunal and consequently — because of the consequential delay in proceedings as well as the need for relevant submissions by the parties — on the parties as well.

20. It was proposed that expert reports and witness statements be taken out of the ambit of article 3(1), and a separate category created under the provision dealing with publication. Specifically, it was proposed that these documents should be subject neither to "automatic" disclosure under paragraph (1), nor to a decision by the arbitral tribunal under paragraphs (2) or (3). Rather, the proposal was made that expert reports and witness statements should be made available "automatically" — that is, with no discretion or decision-making on the part of the arbitral tribunal — upon request by any person, subject to the exceptions set out in article 8. Under that proposal, it was clarified that, as with the Working Group's consensus set out in paragraphs 15-16 above in relation to exhibits to pleadings or submissions, expert reports and witness statements disclosed on this basis would be disclosed without exhibits, which would need to be requested separately.

21. After discussion, consensus was reached in relation to the proposal set out in paragraph 20 above. The delegations that did not favour this solution requested that it be recorded that they objected to the "automatic" publication of witness statements and expert reports upon request, and in particular, queried how this would reduce the burden on an arbitral tribunal.

22. The secretariat was mandated to draft a new article 3(2), reflecting the agreement set out in paragraph 20 above, for consideration during the third reading of the draft rules.

Transcripts

23. The Working Group also considered whether transcripts should be included in the list of documents in article 3(1). The Working Group recalled its previous discussion, and agreement, recorded in paragraphs 107 to 109 of document A/CN.9/736, to include transcripts in article 3(1), on the basis, inter alia, that confidential information in transcripts could be redacted and that therefore transcripts should be treated in the same fashion as the other documents listed in paragraph (1).

24. The Working Group affirmed this conclusion, and agreed that transcripts should be contained within the list of documents in article 3(1). The secretariat was mandated to make minor drafting modifications if appropriate to clarify that the article did not impose a requirement that transcripts be produced where none had been made in the course of proceedings.

Paragraphs (2) and (3)

25. It was noted that paragraphs (2) and (3) (as set out in A/CN.9/WG.II/WP.169) created a distinction in relation to the person making the request (disputing parties and other persons), rather than in relation to the type of document itself. A suggestion was made that expert reports and witness statements should only be made accessible to the person making the request, in order, inter alia, to protect the intellectual property of experts and provide protection to witnesses. That suggestion was opposed, on the bases that (i) there was no practical mechanism for limiting the broader publication of a document or information once it had been disclosed to a

third party; and (ii) any provision limiting access to a restricted audience would be inconsistent with the notion of transparency and might in any event be discriminatory.

26. It was stated that where a person had requested a document or information under article 3, and the tribunal had in the exercise of its discretion granted access to that document or information, it was difficult to anticipate a basis on which the tribunal would subsequently refuse access to another person requesting the same material. It was said that in order to facilitate a coherent standard on transparency, disclosure of or access to documents or information must not be limited to specific groups of persons. It was recalled that article 8 would limit the provision of information on the basis of confidentiality concerns.

27. A distinction was then made in relation to publication versus access. It was said that the original reason for the division between paragraphs (2) and (3) was not because the Working Group considered that access should be limited to a selective group of persons, but because the Working Group considered that there were some categories of documents or information which would not lend themselves to publication, such that a right of access, rather than publication per se, would be more appropriate.

28. A proposal was made to consolidate paragraphs (2) and (3) into a single paragraph, in order to establish one uniform provision for an application to the tribunal in respect of "other documents" not falling within paragraph (1) or the newly proposed paragraph (2) (dealing with expert reports and witness statements, as set out in paragraph 21 above). Such a proposal would function on the bases that: (i) it would remain subject to article 8; and (ii) the arbitral tribunal, on its own initiative or upon request from a disputing party or a person who is not a disputing party, would have the discretion to decide whether and how to make available to the public any other documents not falling within paragraphs (1) or (2).

29. Views were expressed that a tribunal should not have the initiative to publish documents and that third persons should not have a right of request, in the interest of the manageability of proceedings. A suggestion was also made to the effect that rules on requests made after the final award had been rendered, also be included in the rules on transparency.

30. The Working Group reached consensus on the proposal set out in paragraph 28 above, and mandated the secretariat to draft language reflecting that agreement and taking into account the considerations raised in paragraph 28.

Paragraph (4)

31. In relation to paragraph (4), it was noted that consequential amendments would be required from the amalgamation of paragraphs (2) and (3). The question was raised how "other documents", as used in paragraph 28 above, would be made available to the public. The Working Group otherwise expressed agreement on the substance of paragraph (4).

Paragraphs (1) to (4) — Relationship with article 8

32. Concerns were expressed that paragraphs (1) to (4) of article 3 (as set out in A/CN.9/WG.II/WP.169, and including the amendments set out in paragraphs 14 to

31 above) only referred to the exceptions in article 8, rather than to article 8 as a whole, which left scope for doubt as to how the mechanics of the linkage between article 3 and article 8 would work in practice. In response to these concerns, the Working Group agreed to modify article 3, paragraphs (1) to (4), and article 8, paragraph (3).

33. Specifically, in relation to paragraphs (1) to (3) of article 3 (as set out in A/CN.9/WG.II/WP.169, and including the amendments set out in paragraphs 14 to 31 above), it was agreed to delete the words "to the exceptions set out in" in the respective first lines, so that these paragraphs would now commence, "Subject to article 8 (…)".

34. On the basis of the concerns set out in paragraph 32 above, the Working Group also considered a revised draft of article 3(4) (corresponding to article 3(4) as set out in A/CN.9/WG.II/WP.169) as follows: "4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 9 as soon as possible in accordance with the arrangements referred to in article 8(3). The documents made available [to the public] [to the person requesting access to them] pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 9 as they become available and, if applicable, in a redacted form in accordance with article 8. The repository shall make the documents available in a timely manner, in the form and in the language in which it receives them."

35. The Working Group agreed that the draft text contained in paragraph 34 above was acceptable and should be retained.

2. Article 4 — Publication of arbitral awards

36. The Working Group considered article 4, as contained in paragraph 33 of document A/CN.9/WG.II/WP.169, which concerned the publication of arbitral awards. The Working Group recalled that, at its fifty-fifth session, it had expressed broad support for article 4 (A/CN.9/736, para. 67).

37. A suggestion was made that arbitral awards, the "automatic" disclosure of which was currently provided for in article 4, be included instead in the list of documents in article 3(1), given that the same "automatic" procedure of disclosure applied to the documents in that article, including orders and decisions of the arbitral tribunal. In response, a suggestion was made to grant the arbitral tribunal discretion, upon request from a party, to order the delay of publication of an arbitral award where other proceedings were pending in which that party was involved and which dealt with similar factual or legal issues, in order to avoid prejudicing the outcome of those other proceedings. That suggestion did not receive support, as being in potential conflict with an important policy objective of the work of this Working Group, and it was stated that such a provision would unduly delay publication of numerous awards, given the similarity of factual and legal issues raised in various proceedings.

38. Following discussion, it was agreed to amend article 3(1) by replacing the words "and orders and decisions" in the last line with the words "and orders, decisions and awards". It was clarified that article 3(4) would satisfy the communication requirement currently set out in article 4(2). As a result, it was agreed that article 4 was no longer necessary and should be deleted.

3. Article 5 — Submission by a third person

39. The Working Group considered article 5, as contained in paragraph 35 of document A/CN.9/WG.II/WP.169, which provided for submission by a third person.

Paragraph (1)

40. A question was raised as to whether the word "may" in paragraph (1) was intended as a reference to the balancing procedure under article 1(5). If that was the intention, it was suggested that this be made clear by adding the words "in the exercise of its discretion" between the words "may" and "allow" in the first line of paragraph (1). It was said that these words were used in other parts of the rules when it was being made clear that the tribunal was to have regard to the balancing exercise referred to in draft article 1(5) of the rules. In response, it was said that article 5 was somewhat different because draft articles 5(3) and 5(5) contained specific guidance on the way in which the tribunal should approach the exercise of its discretion under article 5. This understanding was shared by the Working Group.

41. A proposal was made that submissions by third parties should be subject to the mandatory requirement of consultation with the disputing parties. That proposal did not receive support.

42. Following discussion, the Working Group decided to retain the substance of article 5(1), as contained in paragraph 35 of document A/CN.9/WG.II/WP.169.

Paragraph (2)

43. In light of concerns raised in relation, inter alia, to the meaning and scope of the term "financial and other assistance" and to the fact that disclosure was limited to assistance in the preparation of the submission and not more generally, the Working Group agreed to consider a proposal to modify article 5(2). That proposal was submitted jointly by a number of delegations (the "draft proposal"), and read as follows: "(2) A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any such page limits as may be set by the arbitral tribunal: (a) describe the third person, including, where relevant, its membership and legal status (e.g. trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the third person); (b) disclose whether or not the third person has any affiliation, direct or indirect, with any disputing party; (c) provide information on any government, person or organization that has provided any financial or other assistance in preparing the submission or has provided more than 25 per cent of the third person's income in the two-year period preceding the request; (d) describe the nature of the interest that the third person has in the arbitration; and (e) identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission."

Subparagraphs (a), (d) and (e) of the draft proposal

44. Subparagraphs (a), (d) and (e) as contained in paragraph 35 of document A/CN.9/WG.II/WP.169 were agreed in substance, with no objections to the minor consequential changes thereto contained in the draft proposal.

Subparagraph (b) of the draft proposal

45. The Working Group considered subparagraph (b) of the draft proposal. Some delegations expressed the view that, in addition to addressing whether a relationship existed between the third party and a disputing party, subparagraph (b) should also require the nature of that relationship to be specified.

46. That suggestion received broad support, and consequently it was agreed to amend the draft of subparagraph (b) of the draft proposal, to read: "(b) disclose any connection, direct or indirect, which the third person has with any disputing party;"

Subparagraph (c) of the draft proposal

47. In relation to subparagraph (c), the Working Group considered whether a percentage threshold would sufficiently capture the type and extent of assistance the rules intended to address.

48. It was said that a percentage would not adequately reflect whether the assistance had in fact been substantial, particularly in the case of a large third-party recipient entity, to which a high absolute figure of financial assistance might not amount to a high percentage of total revenue. Furthermore, it was said that expressing assistance as a percentage of income might preclude reporting in circumstances where assistance, even of a significant nature, had been given "in kind", or where the assistance fell just below the threshold. Other views were expressed that the percentage would, as a proportion of overall turnover, provide a relevant indication of whether the influence had been significant, and that moreover third parties might benefit from guidance in order to better understand the requirements of a rule which broadly amounted to a self-reporting obligation.

49. Further to that discussion, a compromise proposal was put forward, which sought to promote more effectively the objective of the provision, characterized by some as a requirement for third parties to disclose substantial financial assistance provided by any government, person or other organization. That proposal replaced the words "provided more than 25 per cent of the third person's income in the two-year period preceding the request" with "provided substantial assistance over the previous two years''. In addition, it was proposed that third parties be given guidance as to what might constitute substantial assistance, by including immediately thereafter the words "such as, for instance, funding 20 per cent of the third party's overall operations annually". The use of the words "overall operations" in lieu of "income" was said to address circumstances where the provision of assistance to the third party was broader than income per se. A proposal to use the figure of 20 per cent rather than the originally proposed 25 per cent received no objection.

50. Some delegations reiterated concerns relating to the use of a percentage, even when expressed as guidance, on the basis that it might be seen as a threshold amount under which disclosure was not required. In response, it was said that the 20 per cent figure was provided by way of illustrative example, and whether assistance was substantial would always depend on the particular facts; a suggestion was made on this basis to modify the proposal set out in paragraph 43 above to replace the words "more than" with "approximately", or "around", before the figure of 20 per cent, to indicate that it was not a definitive threshold. After discussion, that proposal was agreed, and the secretariat was given the mandate to use suitable

language in that respect. The secretariat was also given the mandate to consider moving the word "annually" within the subparagraph, should that clarify the draft, it being made clear that the intention was that the figure of 20 per cent related to operations in one year, not two years.

51. The agreed form of subparagraph (c) would therefore read, subject to any minor wording modifications to be made by the secretariat: "(c) provide information on any government, person or organization that has provided to the third party (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the request, such as, for instance, funding [approximately][around] 20 per cent of its overall operations annually."

Paragraph (3)

52. It was suggested to remove the words "factual or" from part (b) of paragraph 3, on the grounds that submissions of third parties should relate only to the determination of legal issues in the proceedings, and not to factual matters. In response, it was said that third parties frequently provide important factual information which satisfies the requirement expressed in paragraph (3) to bring "a perspective, particular knowledge or insight that is different from that of the disputing parties" and that to exclude such a role would do a disservice to the tribunal, which retains under article 5 the discretion to determine what is of assistance to it.

53. Following discussion, the Working Group decided to retain the substance of article 5(3), as contained in paragraph 35 of document A/CN.9/WG.II/WP.169.

Paragraph (4)

54. The Working Group considered article 5(4). It was proposed that a "catch-all" subparagraph be added, to the effect that a submission filed by a third party must comply, in addition to the criteria set out in paragraph (4), subparagraphs (a)-(d), with any other condition set by the arbitral tribunal.

55. Views were expressed that such a discretionary authority was inherent to the arbitral tribunal, and that addressing a tribunal's right to impose conditions on submissions might unnecessarily create a need for such authority to be made explicit elsewhere in the rules, for the avoidance of doubt. After discussion, it was agreed that article 5(4) should be retained in its current form, as contained in paragraph 35 of A/CN.9/WG.II/WP.169.

Paragraph (5)

56. After consideration, the Working Group decided to retain the substance of article 5(5), as contained in paragraph 35 of document A/CN.9/WG.II/WP.169.

Paragraph (6)

57. A proposal to modify slightly paragraph (6) by removing the word "also" from the draft text was agreed. The Working Group further mandated the secretariat to make consequential changes for the sake of consistency to other relevant paragraphs of the rules, including article 6(5).

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

58. The Working Group considered article 6, as contained in paragraph 37 of document A/CN.9/WG.II/WP.169.

Paragraph (1)

59. Opinion was divided on whether the tribunal was required ("shall accept") or should have a discretion ("may accept") to accept submissions on issues of treaty interpretation from a non-disputing Party to the treaty.

60. Views were offered in support of the "shall accept" option, namely: that since the non-disputing Party had concluded the treaty, the interpretation thereof might affect its rights thereunder in future proceedings; that the Party's interventions could be helpful to the tribunal's understanding of the treaty; and that arbitral experience showed that a non-disputing Party to a treaty rarely intervened simply to protect its investor's interests. It was stated that some treaties provided that the non-disputing party was entitled to submit its opinion on treaty interpretation to the tribunal.

61. In support of the "may accept" option, it was said that the provisions of article 6 appeared unrelated to transparency and would have the effect of facilitating diplomatic protection of an investor by a State; that discretion should be given to the tribunal, in order to be consistent with that set out in article 6(2); and that requiring acceptance of such submissions in all cases could lead to the politicization of the proceedings.

62. Opinion was also divided on the question of whether the tribunal should have the discretion to invite, on its own initiative, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.

63. Article 6(1) was left open for further deliberation. The Working Group invited States to review their treaties to identify if they contained provisions giving the non-disputing Party the right to submit its opinion on treaty interpretation to the tribunal.

Paragraph (2)

Questions of law; questions of fact; or matters within the scope of dispute

64. The square-bracketed language within article 6(2) was considered, specifically in regard to whether that paragraph should address submissions by a non-disputing Party to the treaty concerning "questions of law"; "questions of law or fact"; or alternatively, "matters within the scope of the dispute". It was clarified that to the extent article 6(2) was intended to address issues of law, these should be in addition to those addressed in relation to treaty interpretation in paragraph (1).

65. Some delegations expressed the view that that provision should be limited to matters of law. In response, views were expressed that it was difficult to differentiate between matters of law and fact in practice. It was said that the language "matters within the scope of the dispute" would address both legal and factual matters, and that the arbitral tribunal's discretion would serve as a filter to determine which submissions would be useful to it.

66. Views were expressed that article 6(2) should be deleted, as there was uncertainty over what "questions of law and / or fact," and "matters within the

scope of the dispute" meant, and also a danger of opening the door to diplomatic protection.

67. After discussion, the Working Group agreed to replace the square-bracketed language with the words "matters within the scope of the dispute", which was consistent with the language used in article 5(1), and to add the word "further" (thus reading "further matters within the scope of the dispute"), which was seen usefully to connote a difference between the scope of paragraph (2), and the preceding paragraph (1) in relation to issues of treaty interpretation.

Invitation to non-disputing Parties to a treaty

68. A separate issue was raised in relation to whether the tribunal should be permitted on its own initiative to invite non-disputing Parties to a treaty to make further submissions on matters within the scope of the dispute, which invitation was currently provided for in the draft of paragraph (2) as contained in paragraph 37 of document A/CN.9/WG.II/WP.169.

69. It was suggested that under article 6(2), the ability of the tribunal to invite submissions should be removed, on two primary bases: (i) that such invitation could risk a politicization of disputes and might introduce aspects of diplomatic protection; and (ii) that moreover such invitation would put the non-disputing Party to a treaty in a more privileged position than any third person to the dispute, which was said not to be justified in relation to issues outside the scope of treaty interpretation. A distinction was made with paragraph (1), under which it was said that a non-disputing Party to a treaty was potentially directly affected by issues of treaty interpretation and thus the arbitral tribunal should, under that paragraph, maintain the power to invite submissions from non-disputing Parties.

70. After discussion, the Working Group agreed to eliminate the faculty, currently expressed in paragraph (2), of the arbitral tribunal to invite submissions from non-disputing Parties to a treaty. The secretariat was mandated to draft new language reflecting that agreement. It was clarified that the decision to eliminate the wording dealing with that point was not meant to have an impact on any power the tribunal might otherwise have under the arbitration rules or otherwise.

Other points

71. The Working Group also agreed that the word "accept", which was used both in articles 6(1) and 6(2), could be changed to "allow", in order to achieve clarity and furthermore to maintain consistency with the wording in article 5(3).

Paragraph (3)

72. Article 6(3) was considered by the Working Group and was adopted without amendment in the form set out in paragraph 37 of document A/CN.9/WG.II/WP.169.

Paragraph (4)

73. Article 6(4) was considered by the Working Group and adopted without amendment in the form set out in paragraph 37 of document A/CN.9/WG.II/WP.169.

Paragraph (5)

74. Consistent with the proposal agreed in relation to article 5, set out in paragraph 57 above, the Working Group agreed to delete the word "also" from the text of this paragraph. It furthermore agreed on a suggestion to insert the word "reasonable" before the word opportunity, and instructed the secretariat to ensure that consistent consequential changes were made elsewhere in the draft where the term "opportunity" was used, where applicable.

75. It was agreed that the secretariat would provide a new draft of article 6(5), reflecting these agreements.

5. Article 7 — Hearings

76. The Working Group considered article 7 as contained in paragraph 41 of document A/CN.9/WG.II/WP.169.

77. In connection with article 7(1) the following question arose: should the permitted grounds for holding hearings or portions of hearings in private rather than in public extend beyond those set out in paragraphs 7(2) or 7(3)? In that regard, the Working Group also considered whether public hearings should be the rule, rather than the exception.

78. The following views were expressed in support of limiting the tribunal's discretion to the matters set out in paragraphs (2) and (3): that any further discretion risked being ambiguous and open-ended, leaving the tribunal open to pressure from the parties and thus jeopardizing the principle of transparency; that paragraph (2) made provision for the exceptions to transparency set out in article 8 and, other than article 7(3), there were no grounds for granting the tribunal any wider discretion; that United Nations instruments should reflect the values of human rights and freedom of expression, and consequently that any exceptions to transparency should be narrowly drawn so as not to create an open-ended discretion that would violate those principles. After discussion, it was agreed that there should not be an open-ended discretion; and the discussions centred on whether public hearings should be the rule, rather than the exception.

79. Some support was expressed for the proposition that a disputing party to the arbitration could unilaterally veto a public hearing should it so wish. In support, it was stated that adequate protection of national security and confidential information, as well problems associated with politicization of disputes, required a veto power to be available. It was further stated that open hearings might become logistically unworkable and that paragraphs (2) and (3) did nothing to allay this concern, and also that issues of the possible cost implications of a public hearing should be taken into account.

80. Some delegations expressed a preference for relying on article 28(3) of the UNCITRAL Arbitration Rules as the default rule, pursuant to which commercial arbitrations were held in private unless the parties otherwise agreed. It was stated that it would be difficult to see how this would advance the Working Group's mandate to promote transparency.

81. One suggestion was to revisit the issues raised by article 7(1) after the Working Group had considered article 8, which was intended to deal with exceptions to transparency.

82. After discussion, there was very significant support for the principle that the default would remain that hearings would be public under the rules, subject only to the exceptions in paragraphs (2) and (3), with some delegations supporting the view that a party should have a unilateral right to hearings being closed. A question arose as to whether the very significant support expressed for the principle above amounted to consensus. In order to progress the second reading, it was ultimately agreed to leave article 7(1) open for further deliberation.

Paragraph (2)

83. Following discussion, the Working Group agreed that the square brackets around "confidential or sensitive" be removed, and, subject to discussion on article 8, as set out in paragraph 90 below, that the words "or sensitive" be deleted. The Working Group otherwise agreed that article 7(2), as contained in paragraph 41 of document A/CN.9/WG.II/WP.169, be retained in its current form.

Paragraph (3)

84. There was broad agreement to delete the words "right of" from line 2 of paragraph (3) as the logistical arrangements concerned access rather than the right to access.

85. A further suggestion was made to insert the word "unexpected" before "logistical reasons" at the end of the paragraph, to preclude the possibility of an arrangement in advance to hold hearings in private solely on logistical grounds which could or should have been foreseen. The suggestion was not supported.

86. A question was raised in relation to the definition of "hearings", in order to ensure that paragraph (3) was sufficiently clear in respect of the types of hearings to which public access, and the tribunal's facilitation thereof, was intended to apply. It was said that as a matter of principle, hearings should always be open where they were substantive (including jurisdictional hearings and hearings in which evidence by witnesses or experts, or oral arguments, were presented), but not where mere matters of procedure were to be addressed.

87. It was stated that the term "hearing" might properly have to be used only in the sense of not including mere procedural discussions. It was stated that article 17(3) of the UNCITRAL Arbitration Rules and article 24(1) of the UNCITRAL Model Law on International Commercial Arbitration, respectively, contained language that could be included in the draft rules in order to link the meaning of hearings therein with the meaning in the draft rules.

88. The Working Group agreed that article 7(3), as contained in paragraph 41 of document A/CN.9/WG.II/WP.169, be retained, with the modification in paragraph 84 above, and the addition of language to reflect the point in paragraph 87 above.

6. Article 8 — Exceptions to transparency

First subheading

89. The Working Group considered article 8 as contained in paragraph 45 of document A/CN.9/WG.II/WP.169.

90. Various views were advanced as to which of the square-bracketed words modifying "information" were most appropriate to be retained in the first subheading. Following discussion, it was agreed that the first subheading of article 8 would be "Confidential or protected information", as best reflecting the contents of the provision. It was further agreed that the secretariat should make the necessary consequential changes elsewhere in the text of the draft rules to be consistent with this wording.

Paragraphs (1) to (9)

91. A view was expressed that the drafting approach in article 3 was too detailed and risked over-regulating the powers of an arbitral tribunal, while at the same time failing to enumerate every circumstance that may arise.

92. Accordingly a more flexible and simplified drafting approach was suggested, in order to permit an arbitral tribunal to adjust its procedures to individual situations. On this basis, a revised draft of article 8 was put before the Working Group (the "draft proposal").

93. The Working Group considered whether the draft proposal should form the basis of its further consideration of article 8, paragraphs (1) to (9). A suggestion was made that the Working Group revert instead to the draft of article 8 as set out in A/CN.9/WG.II/WP.169. This proposal did not receive support. Consequently the draft proposal formed the basis of the Working Group's subsequent consideration of article 8, paragraphs (1) to (9) (with the exception of paragraph (2)(c), which was considered separately, in the form set out in A/CN.9/WG.II/WP.169).

94. The draft proposal read as follows:

"Draft article 8 — Exceptions to transparency

Confidential or protected information

1. Confidential or protected information, as defined in paragraph 2 below and as identified pursuant to the arrangements referred to in paragraphs 3 and 4 below, shall not be made available to the public or to non-disputing Parties pursuant to articles 2 to 7.

2. Confidential or protected information consists of:

(a) Confidential business information;

(b) Information that is protected against being made available to the public under the treaty;

(c) Information that is protected against being made available to the public under any law or rules determined to be applicable to the disclosure of such information by the arbitral tribunal.

3. The arbitral tribunal shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, in consultation with the parties, procedures for designating and redacting confidential or protected information or holding hearings in private pursuant to Article 7, paragraph 2. Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the parties.

4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, the disputing party, non-disputing Party or third person that submitted the document shall be permitted either (i) to resubmit the document in a form that complies with the tribunal's determination or (ii) to withdraw all or part of the document from the record of the arbitral proceedings instead."

Paragraph (1) of the draft proposal

95. It was suggested that the cross-references in paragraph (1) should be updated and the secretariat was mandated to undertake this task, in addition to any other cross-referencing or consequential numbering changes.

96. In all other respects, it was agreed that paragraph (1) as contained in the draft proposal was acceptable and should be retained in the form therein.

Paragraph (2) of the draft proposal

97. Following discussion, it was agreed that the chapeau in paragraph (2) was to retain its current form, subject to the consequential changes required to accord with the amended title of article 8, as set out in paragraph 91 above.

Paragraphs (2)(a) and (2)(b) of the draft proposal

98. It was agreed to add the word "or" after subparagraph (b) in order to clarify that the categories listed in paragraph (2) were alternatives.

99. A question was raised as to the meaning of the term "confidential business information" in paragraph (2)(a), and a suggestion made that a definition of the term in the rules, or an illustrative list setting out examples, was required. There was also a suggestion to add the word "sensitive" between "confidential" and "business". Following discussion, the Working Group agreed to retain article 8(2)(a) as drafted.

100. It was further agreed that subparagraph (b) as contained in the draft proposal was acceptable and should be retained in the form therein.

Paragraph (2)(c) of document A/CN.9/WG.II/WP.169

101. The Working Group considered article 8(2)(c), as contained in paragraph 45 of A/CN.9/WG.II/WP.169.

102. A proposal was made to delete any reference to the law of the disputing party, which was said to infringe upon the discretion of the arbitral tribunal to determine the applicable law. In response, concerns were expressed that such a proposal did not provide sufficient guidance, in particular to a respondent, as to whether decisions of the arbitral tribunal might put it in breach of its own law. After discussion, a compromise was proposed, which would make mandatory the application of the law of the respondent to the disclosure of information by that respondent, and to make all other information subject to a conflict of law determination by the tribunal. In that regard, the Working Group considered a proposal made jointly by a number of delegations concerning article 8(2)(c) (the "draft proposal"): "Information which is protected against being made available to the public, in the case of the information of the respondent, under the law of the

respondent, and in the case of other information, under any law or rules determined to be applicable to the disclosure of such information by the arbitral tribunal.".

103. The Working Group did not reach agreement in relation to the draft proposal. A view was expressed that the law of the party providing information should mandatorily apply to that information. That view did not receive support. Views were expressed that the draft proposal would give comfort to developing countries which had concerns regarding, inter alia, whether national security interests would be sufficiently protected. Other views were expressed that the provision was open to abuse and would dilute the objective of the rules; and specifically, that providing for mandatory application by a State of its national law in relation to information provided by it would permit a State to circumvent the object of the rules by introducing legislation precluding the disclosure of all information in investor-State disputes. In response, unanimous support was expressed for the proposition that it was not permissible for a State to adopt UNCITRAL rules on transparency and then use its domestic law to undermine the spirit (or the letter) of such rules.

104. After further discussion, it was said that three views had been expressed, in the form of distinct proposals: (i) a proposal under which the tribunal be given discretion to conduct a conflict of law analysis for all information (set out in paragraph 102 above); (ii) the "draft proposal" set out in paragraph 102 above under which the tribunal was directed to the law of the respondent for the respondent's information, and a conflict of law analysis for all other information; and (iii) a proposal under which the tribunal be given guidance for its conflict of law analysis that on issues of respondent information, it should take respondent law particularly into account. The secretariat was asked to include these three options in its subsequent drafts for further consideration by the Working Group.

Paragraph (2)(bis)

105. The following new language, proposed as an article 8(2)(bis), was placed before the Working Group: "Nothing in these rules shall require a party to make available information [to the public] the disclosure of which it considers would impede law enforcement or would be contrary to the public interest or its essential security interests."

106. It was said that that provision was not intended as a further exception under article 8, but was a matter which a State could determine for itself. Several delegations indicated support for the proposed text. Several delegations voiced opposition to the proposed text on the grounds that it would negate the very goal of transparency on which the rules were predicated, and would run counter to the direction given to the Working Group by the Commission. It was said that expressions such as "would impede law enforcement" and "would be contrary to the public interest" were overly broad and that practically any meaning could be ascribed to them in order to justify withholding information. In this regard, it was stated that the mandate of the Working Group was premised on transparency itself being in the public interest.

107. It was further stated that protection of such information should and often does appear in national laws, as well as in treaties entered into by the State, and that there was no justification for the rules to offer in effect an extra layer of protection. Several delegations objected to the notion that the State itself would decide what

information to withhold, which was regarded as being within the purview of the tribunal.

108. It was suggested that, since the information in question would be subject to a State's domestic law, the matter should be dealt with under article 8(2)(c).

109. In response it was stated that treaties concluded before the date of adoption of the rules on transparency ("existing treaties") do not always contain provisions protecting such information and that it was important to have balance in the rules on transparency. It was also stated that, including for the reason that deliberations on article 8(2)(c) had not yet been concluded, it was not clear that the law of a disputing State party would afford the necessary protection.

Paragraph (3)

110. The Working Group considered a second draft proposal on article 8(3), further to its agreement that the mechanics of the linkage between article 3 and article 8 should be more clearly set out (see paragraph 32 above), and that the question of the promptness of making documents available be addressed (the "second draft proposal" on article 8). The second draft proposal read as follows: "3.The arbitral tribunal, in consultation with the parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate (i) time limits in which a party, non-disputing Party, or third person shall give notice that a document contains confidential or protected information, (ii) procedures for the prompt designation and redaction of the particular confidential or protected information in such documents, and (iii) procedures for holding hearings in private to the extent provided by Article 7, paragraph 2. Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the parties."

111. Broad support was expressed for the second draft proposal, with several minor modifications agreed as follows. It was agreed that:

(a) In (i), the words "a document contains confidential or protected information" should be replaced by the words "it seeks protection for such information in a document";

(b) In the last sentence, the word "decision" should be substituted for the word "determination", and the secretariat should ensure the appropriate word was used consistently throughout the draft rules;

(c) The secretariat should ensure that the terms "parties" and "disputing parties" were used correctly and consistently throughout the draft;

(d) The words "or to non-disputing parties" should be inserted after "to the public" to ensure consistency with paragraph (1); and

(e) The word "provided" in the penultimate sentence ("provided by Article 7'') should be replace by the word "required".

112. The Working Group agreed to retain the second draft proposal as set out in paragraph 110 above with the modifications set out in paragraph 111 above.

Paragraph (4)

113. Concerns were expressed in relation to the paragraph (4) of the draft proposal in paragraph 94 above, and specifically that this draft proposal overlooked the circumstance whereby a party compelled to produce a document by the arbitral tribunal could subsequently withdraw that document on grounds of confidentiality. It was agreed that paragraph (4) was only intended to apply in circumstances where a party had voluntarily submitted a document.

114. The following wording was proposed in order to clarify that intention: "4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings."

115. That language was broadly agreed, subject to two separate concerns. First, it was said that wording would permit a party introducing a document into the record to withdraw a self-determined confidential part of the document (for legitimate or abusive reasons), and that this might distort the meaning of the document as a whole. In response it was stated that while that wording did not directly address the point, the arbitral tribunal could address such conduct within the context of the proceedings, for example, by drawing adverse inferences, or, in the case of exhibits, exercising its discretion not to publish the document. Second, it was said that where both parties agreed on a document's confidentiality, the parties, rather than the tribunal, should have the ultimate discretion to determine whether to withhold that document from the public. That suggestion did not receive support within the context of paragraph (4), and it was stated that such an approach would undermine the tribunal's guardianship of the rules.

116. After discussion, it was agreed to retain paragraph (4) in the form set out in paragraph 114 above.

117. With respect to the second point in paragraph 115 above, a proposal was then made to include a new subparagraph (d) in article 8(2) as follows: "information that both disputing parties agree not be made available to the public unless it constitutes a breach of the public interest". Some support was expressed for the proposal, while other delegations expressed strong disagreement with the suggestion, and it was agreed to further consider this proposal during the third reading of the rules.

Paragraphs (10) and (11) – Integrity of the arbitral process

Paragraph (10)

118. Following discussion, it was agreed that this paragraph would retain its current form, as contained in paragraph 45 of document A/CN.9/WG.II/WP.169, subject to consequential numbering changes required as a result of the amendments to article 8 set out above.

Paragraph (11)

119. It was agreed that this paragraph would retain its current form, as contained in paragraph 45 of document A/CN.9/WG.II/WP.169, subject to consequential numbering changes required as a result of the amendments to article 8 set out above.

7. Article 9 — Repository of published information

120. The Working Group considered article 9, as contained in paragraph 1 of document A/CN.9/WG.II/WP.169/Add.1. Views were expressed in favour of option 2, on the basis that it would result in a single administrative body in a given arbitral procedure for the application of the rules on transparency as well as for the application of the arbitral procedure. The Working Group did not reach consensus on which of the two options set out therein would be preferable, which decision was left for consideration at a future session.

121. It was nonetheless agreed in principle that if the Working Group ultimately proceeded with option 1, then UNCITRAL would be the preferred repository institution, if it had the capacity to so act. It was also agreed that if multiple institutions were to be designated as repositories under option 2, then a central website should be established, preferably by UNCITRAL, to serve as a hub of information linking to such institutions' repository function.

122. Moreover, a mandate was given to UNCITRAL to liaise with other arbitral institutions to assess better the cost and other implications of acting as a repository, and to report back to the Working Group at its next session.

8. General remarks on the second reading of the draft rules on transparency

123. At the beginning of the fourth day of the session, the remaining issues outstanding for the Working Group's consideration on its second reading of the draft rules on transparency were summarized as follows: (i) a new draft proposal for articles 3(4) and 8(3), which were said to be interrelated; (ii) a new draft proposal for article 8(2)(c); (iii) a draft proposal for a new paragraph, presumptively entitled article 8(2)(bis); (iv) article 8(4); (v) article 9; and (vi) two discrete points regarding (a) whether there ought to be a time window under which applications by third persons (both for documents, and as the author of documents) under articles 3 and 5 should be time-limited and (b) how the costs of transparency provisions should be borne.

124. This would leave for the third reading the consideration of outstanding issues in article 1 (scope of application); article 6 (1), in particular whether the word "may" or "shall" should be used; and article 7(1), regarding the question of open hearings.

Submissions by third parties and requests for access to documents by third parties

125. As set out in paragraph 123 above, the Working Group agreed to consider the number and timing of third-party submissions under articles 3 and 5. A proposal to create a specific rule to set time frames under which parties could access documents under article 3 and make submissions under article 5 was not supported. Nor did a proposal to limit the number of submissions from third parties receive support.

Instead, it was agreed that the management of proceedings should remain at the discretion of the arbitral tribunal.

Costs

126. In response to a number of general queries in relation to how costs of transparency procedures should be borne, the Working Group considered the issue of costs in separate discussions.

127. It was said that there were at least four categories of costs associated with transparency measures: (i) the cost of making documents available on the registry website; (ii) the cost relating to open hearings; (iii) costs relating to third-person participation (i.e. legal expenses in responding to submissions); and (iv) the costs of arbitrators.

128. Moreover, the view was expressed that such costs were a necessary part of implementing transparency proceedings in furtherance of the mandate given by the Commission to the Working Group.

129. A suggestion was made that the rules provided for the possibility of the tribunal ordering costs against third persons making frivolous submissions to an arbitral proceedings. It was said that a third person could submit itself to the jurisdiction of a tribunal when it was accepted as a "third person" (as defined under article 5). In response, it was said that an arbitral tribunal and parties would be unlikely to respond to a frivolous submission (thereby avoiding costs) but that moreover, the possibility of a cost order against a non-profit third party would likely have a chilling effect on their participation in the arbitral process, thereby undermining the public interest of transparency.

130. A further suggestion was made that the costs associated with providing third persons access to exhibits should be addressed in the rules as that it was thought to be fair that the requesting party bear such costs, and not the disputing parties. After discussion it was clarified that costs in this sense were restricted to the provision of the documents to the party (i.e. photocopying, shipping etc.) and not to the process of preparing the documents (i.e. redacting documents) for release. It was noted that costs of these processes were legitimate concerns but there may be tension with the overall objectives of transparency as costs should not act as a deterrence to the public's participation in proceedings. It was questioned whether it would be fair to impose costs on the first person requesting access to documents, when those documents would then also be available to the general public. After discussion, it was agreed that third parties requesting access to documents would only be required to meet the administrative costs of such access (such as photocopying, shipping etc.) and the secretariat was given a mandate to draft language reflecting that agreement for consideration by the Working Group.

9. Article 1 — Scope of application

131. The Working Group considered article 1, in relation to the scope of application of the transparency rules, for the purpose of advancing the discussions of the Working Group on article 1 prior to its next session. Two new proposed drafts were put before the Working Group, with the express objective of encapsulating the approach set out in paragraph 54 of document A/CN.9/741.

132. It was agreed to amalgamate those two proposals by including square-bracketed text on wording that diverged, so that these two proposals could be considered as one proposal, at a future session. The amalgamated proposal read as follows: "Article 1 — Scope of application of the transparency rules 1. These Rules shall apply to investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty") concluded after [date of coming into effect of the Rules on Transparency], unless the Parties to the treaty have agreed otherwise. 2. In respect of (i) investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before [date of coming into effect of the Rules on Transparency] and of (ii) investor-State arbitrations initiated under other arbitration rules or ad hoc, these Rules shall [only] apply [if][provided that]: a) the disputing parties agree to their application in respect of that arbitration; or, b) the Parties to the treaty, or in the case of a multilateral treaty, the home State of the Investor and the Respondent, have agreed [in an instrument adopted][to the application of these Rules] after [date of coming into effect of the Rules on Transparency][in an instrument adopted]."

133. That proposal also contained a proposed new article 1(4) of the UNCITRAL Arbitration Rules 2010, in order to articulate the link between the existing UNCITRAL Arbitration Rules and the draft transparency rules, without formally making the transparency rules part of, or an annex to, the UNCITRAL Arbitration Rules, thus making the transparency rules accessible to arbitrations conducted under rules other than the UNCITRAL Arbitration Rules. The proposed new article 1(4) of the UNCITRAL Arbitration Rules 2010 read as follows: "4. For investor-State arbitrations initiated pursuant to a treaty providing for the protection of investments or investors, these Rules of Arbitration include the UNCITRAL Rules on Transparency [as amended from time to time] subject to the provision of Article 1 of the UNCITRAL Rules on Transparency."

134. It was agreed that the proposal set out in paragraphs 132 and 133 above would be tabled for consideration by the Working Group at its next session. The proposal also included, for reference, a flow-chart illustrating the manner in which the proposal would affect UNCITRAL-related arbitration (but not other institutional arbitration).

135. Views were expressed that delegations should not be forced to accept transparency rules either via a dynamic interpretation or otherwise, but that consent should always be clearly given. Other views were expressed that where dynamic interpretation of treaties was recognized and even accepted as standard practice, States should not be deprived of that interpretation, especially as it might have the effect of facilitating the objectives of transparency.

136. In this respect it was agreed that any solution offered under article 1 should not undermine any discretion which tribunals otherwise have under the UNCITRAL Arbitration Rules 2010.

137. The Working Group invited States to review their treaties in order to identify if they contained specific references to UNCITRAL Arbitration Rules, such as "UNCITRAL Arbitration Rules as then in force", or "UNCITRAL Arbitration Rules as may be amended from time to time".

138. It was stated that those in favour of the language on scope of application set out in paragraphs 132 and 133 above also recognized the importance of ensuring the application of the transparency rules to existing treaties, and therefore urged the Working Group, at the same time as examining the language set out in paragraphs 132 and 133 above, to move without delay to an examination of potential mechanisms permitting application to existing treaties.

139. It was also emphasized that the rules themselves must provide clear and robust standards on transparency and that article 1 would be the mechanism by which parties could agree whether or not to apply the rules on transparency.

140. With regard to existing treaties, it was noted that several delegations had submitted a proposal (contained in document A/CN.9/WG.II/WP.174) that no rule or presumption be established in the transparency rules regarding the application of those rules under existing treaties, but rather that such application be left to be determined in accordance with internationally accepted rules of treaty interpretation. It was said, in support of that approach, that applying the rules to existing treaties only where the parties expressly "opted-in" to the rules by a subsequent agreement (as proposed in paragraph 132 above) would thwart the reasonable expectations of those countries who intended to benefit from dynamic clauses in their treaties, and that it would send a negative message regarding the virtues of transparency. By contrast, the presumptive application of the transparency rules under the "opt-out" approach for future treaties would send a powerful pro-transparency message and would promote widespread use of the transparency rules.

141. It was furthermore agreed to give the secretariat the mandate to prepare wording for (i) a convention on transparency in treaty-based investor-State arbitration, to include a draft clause permitting a reservation thereto, and (ii) for a unilateral declaration, both of which to be considered at the fifty-eighth session of the Working Group.