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Report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth session (New York, 3-7 February 2014)

Contents

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I. Introduction

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

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session regarding the importance of ensuring transparency in treaty-based investor-State arbitration. The Commission confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with a great practical interest, taking account of the high number of treaties already concluded.[3]

3. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission adopted[4] the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[5] ("Rules on Transparency") and the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013).[6] The decision of the Commission adopting the Rules on Transparency included the recommendation that, "subject to any provision in the relevant investment treaties that may require a higher degree of transparency, the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the date of coming into effect of the Rules on Transparency, to the extent such application is consistent with those investment treaties."[7] At that session, the Commission agreed by consensus to entrust the Working Group with the task of preparing a convention ("transparency convention" or "convention") on the application of the Rules on Transparency to existing treaties, taking into account that the aim of the convention was to give those States that wished to make the Rules on Transparency applicable to their existing treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention.[8]

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.180, paragraphs 5-8.

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[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., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 128.
[5] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), Annex I.
[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), Annex II.
[7] Ibid., para. 116.
[8] Ibid., para. 128.

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its sixtieth session in New York, from 3-7 February 2014. The session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Denmark, Ecuador, El Salvador, France, Germany, Greece, Honduras, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Mauritius, Mexico, Nigeria, Pakistan, Panama, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Zambia.

6. The session was attended by observers from the following States: Angola, Burkina Faso, Chile, Cuba, Czech Republic, Egypt, Finland, Guatemala, Holy See, Libya, Madagascar, Netherlands, Nicaragua, Norway, Palestine, Peru, Poland, Qatar, Romania, Slovakia, Sweden, and Viet Nam.

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*: International Centre for Settlement of Investment Disputes (ICSID) and United Nations Educational, Scientific and Cultural Organization (UNESCO);

(b) *Intergovernmental organizations*: African Union (AU), Cooperation Council for the Arab States of the Gulf (GCC), Organization for Economic Cooperation and Development (OECD) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Association Suisse de l'Arbitrage (ASA), Asociacion Americana de Derecho Internacional Privado (ASADIP), Association of the Bar of the City of New York (ABCNY), Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), China International Economic and Trade Arbitration Commission (CIETAC), Construction Industry Arbitration Council (CIAC), German Institution of Arbitration (DIS), Institute of International Commercial Law (IICL), Inter-American Commercial Arbitration Commission (IACAC), International Bar Association (IBA), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), Kuala Lumpur Regional Centre for Arbitration (KLRCA), Miami International Arbitration Society (MIAS), Milan Club of Arbitrators, New York State Bar Association (NYSBA), P.R.I.M.E. Finance Foundation, Pakistan Business Council (PBC), Queen Mary University of London (QMUL), Swedish Arbitration Association (SAA) and Tehran Regional Arbitration Centre (TRAC).

9. The Working Group elected the following officers:

Chairman: Mr. Salim Moollan (Mauritius)

Rapporteur: Mr. Yeghishe Kirakosyan (Armenia)

10. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.180); (b) note by the Secretariat regarding the preparation of a convention on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.181).

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 convention 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 note prepared by the Secretariat (A/CN.9/WG.II/WP.181). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The Working Group considered agenda items 5 and 6. The deliberations and decisions of the Working Group with respect to those items are reflected in chapters V and VI, respectively.

13. At the closing of its deliberations, the Working Group requested the Secretariat (i) to prepare a draft transparency convention based on the deliberations and decisions of the Working Group, and in that respect, to make the necessary drafting adjustments to ensure consistency of language in the text of the convention; and (ii) to circulate the draft transparency convention to Governments for their comments, with a view to consideration of the convention by the Commission at its forty-seventh session, to be held in New York from 7-25 July 2014.

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

14. The Working Group recalled its discussions at its fifty-ninth session (Vienna, 16-20 September 2013) at which time it completed the first reading of the transparency convention.

A. Consideration of the draft text of the convention

15. The Working Group proceeded to consider the draft text of the convention as set out in paragraph 7 of document A/CN.9/WG.II/WP.181.

1. Preamble

16. As a preliminary matter, the Working Group recalled its decision at its fifty-ninth session that the mandate given by the Commission to the Working Group (see above, para. 3) would not be included in the preamble of the transparency convention, but rather that language contained in paragraph 6 of document A/CN.9/WG.II/WP.181 would be included for consideration by the Commission in the proposal for the General Assembly resolution recommending the transparency convention (see A/CN.9/794, para. 41).

17. In order to emphasize the understanding that Parties to the transparency convention should have the flexibility to adopt the declarations and reservations under the convention, a proposal was made to add the following language to the preamble: "Acknowledging the importance of a flexible approach under the terms of this Convention in light of the complexity of bilateral investment treaties and the interests of State Parties to such treaties, and emphasizing that the Convention constitutes a cornerstone to strengthening the global impact of investor-State dispute mechanism;". That proposal did not receive support.

18. The Working Group recalled that, at its fifty-ninth session, it had found the preamble acceptable in substance, subject to further consideration of the first two paragraphs. It recalled that it had agreed to consider further whether to retain those paragraphs, delete them, or replace them with a single paragraph recalling the mandate of UNCITRAL (A/CN.9/794, para. 35).

19. It was suggested to delete the first two paragraphs of the preamble, on the basis that those paragraphs did not relate to the purpose and content of the convention, and that deleting them would promote clarity of interpretation. Another suggestion was made to retain the language in the second paragraph of the preamble that addressed the importance of the removal of legal obstacles to the flow of international trade and investment. In response, it was said that the language in the first two paragraphs of the preamble, including the language in relation to the removal of obstacles to the flow of international trade, did little to increase the interpretative value of the preamble.

20. After discussion, it was agreed to delete the first two paragraphs of the preamble as contained in paragraph 7 of document A/CN.9/WG.II/WP.181, in their entirety. With that modification, the Working Group approved the preamble in substance.

2. Draft article 1 — Scope of application

21. It was clarified in respect of article 1 that, in light of the agreement of the Working Group at its fifty-ninth session to provide for a general provision on scope and a separate provision on the obligations of the Contracting Parties as currently set out in article 3, the remaining issue for the second reading of the convention in relation to article 1 was whether the word "treaty" or the term "investment treaty"

ought to be used to refer to the investment treaties which are the subject of the convention.

"Investment treaty" or "treaty"

22. In support of the use of the words "investment treaty", it was said that in the context of a convention, it was preferable to use a specific term, rather than the more general word "treaty". In particular, it was said that the word "treaty" was already defined under the Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention"), and that it could lead to confusion if that term was defined differently in the transparency convention. It was further said that the term "investment treaty" provided clear indication as to the type of treaty covered by the Convention.

23. In response, it was said that the term "treaty" was defined in the Rules on Transparency, and that using the same terminology in the Rules and the transparency convention would clarify that both instruments had the same scope of application in respect of the treaties to which they referred.

24. It was confirmed that the term "treaty" as defined in the Rules on Transparency, and "[investment] treaty" as defined in the transparency convention, indeed had the same meaning and that the slight discrepancy in the definitions (as contained in the footnote to article 1 of the Rules, and in article 1(2) of the transparency convention respectively) was a result of the intention to give guidance to users of the Rules, but to have a precise definition in the convention (A/CN.9/794, para.70).

25. A suggestion to move the definition contained in article 1(2) of the transparency convention to a footnote to article 1(1) did not receive support.

26. After discussion, it was agreed to (i) define the term in the transparency convention as "investment treaty", on the basis that the *travaux preparatoires* record that that was a purely terminological choice and that the definition of "investment treaty" in the convention, and the definition of "treaty" in the first footnote to the Rules on Transparency, had exactly the same meaning and scope; and (ii) amend paragraph (1) to read: "This Convention applies to investor-State arbitration conducted on the basis of an investment treaty." (see also below, para. 82).

3. Draft article 2 — Interpretation

27. The Working Group recalled that it had agreed to consider draft article 2 further, and in particular whether to retain or delete that article (A/CN.9/794, paras. 83-88).

28. After discussion, it was agreed to delete article 2, on the basis that that provision was not necessary and that moreover its content differed from Part III of the Vienna Convention, and consequently could lead to complexity in the interpretation of the transparency convention.

4. Draft article 3 — Application of the UNCITRAL Rules on Transparency

General

29. Two proposals were introduced in relation to article 3. The first was that the transparency convention apply on a reciprocal basis as between Contracting Parties to the convention, and specifically that in order for the Rules on Transparency to apply, both the respondent Party and the Party of the claimant would have to be Party to the convention and not have made a relevant reservation. The other was that a reservation by the Party of the claimant would not prevent the Rules on Transparency from being applied by a respondent Party which had not made a relevant reservation. Thus the former proposal provided that reservations should only apply under article 3(1)(a) where Contracting Parties to the convention had made the same reservation in respect of a relevant investment treaty, and the latter provided that a reservation, or lack thereof, formulated by the respondent Party would provide the applicable regime for any dispute.

30. By way of concrete example, those diverging proposals could be framed as a policy question, as follows: when Contracting Party A to the transparency convention had formulated a reservation in relation to a particular investment treaty, but Contracting Party B to the transparency convention had not, whether, when a claimant from Contracting Party A initiated a claim against Contracting Party B, the Rules on Transparency would apply to that dispute.

31. It was agreed that this was an issue of policy which ought to be considered before considering the precise wording of the respective proposals.

32. In addition, the Working Group considered whether, beyond any question of policy, there might be any legal impediments to applying the convention where there was no reciprocity with respect to the relevant reservation.

33. In relation to the policy question, it was said that requiring reciprocity under article 3 would mean that the transparency convention would apply in fewer situations, and consequently could also result in a less broad application of transparency. In response, it was said that that was not necessarily the case. It was recalled that the Working Group had considered at its fifty-ninth session what might happen should an underlying investment treaty contain a higher standard of transparency than the Rules on Transparency, and how that ought to be determined; it was agreed at that session that should a Party to the transparency convention wish to apply a higher standard in an underlying investment treaty, it could formulate a reservation to exclude that treaty from the application of the transparency convention. It was said that without including a requirement of reciprocity in relation to reservations and declarations, in those circumstances, the Rules on Transparency, and not the higher regime provided for in the underlying investment treaty, and agreed bilaterally, might be applied by the respondent Party.

34. In support of a reciprocal approach to reservations and declarations, it was said that when a Contracting Party formulated a reservation to the transparency convention, that reservation should apply not only to that Contracting Party but also to the investors of that Contracting Party, were they to initiate a dispute against a Contracting Party that had not made the same reservation.

35. Another view expressed in support of reciprocity of reservations was that a lack of reciprocity would run counter to Article 21(1) of the Vienna Convention and

as such was not desirable. In response, it was said that providing that a reservation would operate only in respect of the Contracting Party making the reservation but not in respect of a Contracting Party that had not made the same reservation did not run counter to Article 21(1) of the Vienna Convention, and that it would not be a legal bar to the transparency convention defining its own scope as one in which reservations need not be reciprocal.

36. A question was raised as to whether, in relation to investment treaties already in existence and hence to which the transparency convention would apply, higher standards of transparency than those contained in the Rules on Transparency did in fact exist. In response, various examples were cited, including of investment treaties that provided for fewer restrictions or constraints than the Rules on Transparency. However, another view was expressed that, particularly given the robust nature of the Rules on Transparency, the number of such treaties would pale in comparison to the number of investment treaties currently in existence and under which no transparency provisions, or lesser transparency provisions, applied. Furthermore, it was said that the examples given provided for modalities that did not necessarily justify a regime of reciprocity.

37. A question was raised as to whether reciprocity was necessary in relation to the different reservations provided for under article 5, and whether the policy issues discussed in relation to article 5(1)(a) would apply with the same force or at all in relation to article 5(1)(b), (c) and (2). Delegations supporting a reciprocal approach indicated that while the policy reasons would be less compelling under other provisions of article 5, clarity might require a consistent approach.

38. It was agreed to address the matter further at a later stage (see below, paras. 97-128).

Paragraph (2)

39. The Working Group approved the substance of paragraph (2) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 (see below, paras. 121 and 122).

Paragraph (3) — Most-favoured-nation clause

40. The Working Group recalled its consideration at its fifty-ninth session whether a most-favoured-nation clause (“MFN clause”) in an investment treaty could be triggered by a carve-out of certain investment treaties from the transparency convention (A/CN.9/794, para. 118).

41. A view was expressed that paragraph (3), which provided that a claimant could neither avoid nor invoke the provisions of the transparency convention on the basis of an MFN clause, should be deleted, because (i) it was not clear whether, under existing jurisprudence, transparent arbitration would constitute more or less favourable treatment of an investor; (ii) MFN clauses in many investment treaties were framed sufficiently narrowly so as not to apply to the issues covered by the convention in any event; and (iii) including such a provision would not prevent MFN clauses from being invoked when the party attempting to invoke such a clause was from a State or a regional economic integration organization not party to the transparency convention.

42. It was also said in support of deleting paragraph (3) that, despite the clarification in the *travaux preparatoires* that the deliberations of the Working Group should not be interpreted as taking a position on the question of the applicability of MFN clauses to dispute settlement procedures under investment treaties (A/CN.9/794, para. 119), and that the Working Group was not expressing a position on how MFN clauses ought to be interpreted as a matter of international law, including a provision in relation to MFN clauses might give rise to a perception that the Working Group was in fact expressing such a position.

43. A different view was expressed that retaining a provision plainly could not give rise to any broader rule of interpretation, but would be useful in the context of the transparency convention to provide for greater certainty in addressing how an MFN clause should function in relation to investment treaties that were included in its scope. It was further said that from the perspective of an arbitral tribunal, it would be helpful if such a provision were included in the transparency convention in relation to the interpretation of an MFN clause in a particular investment treaty.

44. A proposal was made to replace paragraph (3) with the following language: "This Convention shall not create any obligation under an MFN clause in an investment treaty". That proposal did not receive support.

45. A separate proposal was made to clarify that paragraph (3) could be replaced with language more clearly indicating that the meaning of such provision was to create a procedural bar to claimants attempting to avoid or invoke the Rules on Transparency by way of an MFN clause, rather than a statement in respect of the interpretation of MFN clauses more generally.

46. After discussion, it was agreed that a provision reflecting the principle in paragraph (3) would be retained in the transparency convention, but that the drafting of that provision would need to be further considered (see below, paras. 88-96, 123 and 124).

Location

47. A proposal was made to relocate the provision to a separate article, in order that it would apply equally to article 4. It was said that that issue would be reconsidered further to the discussions of the Working Group on article 4.

5. Draft article 4 — Declaration on future [investment] treaties

48. It was noted that article 4 addressed the question of the application of the transparency convention to investment treaties concluded after 1 April 2014 (A/CN.9/794, paras. 53-58, 116-117).

49. A suggestion was made to delete that article on the basis that the main mandate given by the Commission (see above, para. 3) related to existing investment treaties. In addition, it was said that article 4 raised an issue of legal impossibility insofar as the provisions of an earlier investment treaty could not modify the provisions of an investment treaty concluded later in time, as article 4 purported to do (see A/CN.9/WG.II/WP.181, para. 30). In response, it was said that if two Contracting Parties agreed, after the conclusion of the relevant investment treaty, to apply the Rules on Transparency to that treaty via the transparency convention, the Rules on Transparency would so apply. It was said that while that

would be a narrower application of article 4 than that initially contemplated, it might still be worth retaining the article for that purpose. It was further said that such a mechanism could create a useful tool for those contracting Parties which may change their policy as regards increased transparency in the future.

50. After discussion, there was consensus that article 4 ought to be deleted and delegations that had requested to consult further on that matter were invited to revert to the Working Group at a later stage of its deliberations (see below, paras. 83-86).

6. Draft article 5 — Reservations

Paragraph (1)

51. The Working Group agreed to consider paragraph (1) alongside a consideration of article 3(1) at a later stage of its deliberations (see below, paras. 97-128).

Paragraph (2)

52. A proposal was made to replace paragraph (2) as follows: "2. In the event of amendment to the UNCITRAL Rules on Transparency, a Contracting Party may, within six months of the adoption of such amendment, make a reservation that such revised version of those Rules shall not apply under this Convention. 2(bis). In any arbitration in which the UNCITRAL Rules on Transparency apply pursuant to articles 3(1) or 4, the tribunal shall apply the most recent version of the Rules on Transparency as to which (a) in arbitrations falling under article 3(1)(a) or article 4(a), neither the respondent Contracting Party nor the Contracting Party of the claimant has made a reservation pursuant to article 5(2); and (b) in arbitrations falling under article 3(1)(b) or article 4(b), the respondent Contracting Party has not made a reservation pursuant to article 5(2) and as to which the claimant consents."

53. In support of that proposal, it was said that it clarified the version of the Rules of Transparency that ought to apply in the event there were successive revisions to the Rules on Transparency; namely, under that proposal, it was clear that the most recent version of the Rules to which both Contracting Parties had not formulated a reservation would apply, or in relation to a unilateral offer, the most recent version of the Rules agreed to by the respondent and to which the claimant had agreed.

54. After discussion, it was agreed to consider further the policy issue of whether to include a requirement for reciprocity under article 5(2). Further, it was agreed that in any event the structural nature of the proposal set out in paragraph 52 above should be retained as a useful basis for further drafting insofar as it clearly set out the effects of a reservation as to an amendment to the Rules on Transparency (see below, paras. 97-128).

Paragraph (3)

55. The Working Group approved the substance of paragraph (3) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 (see also below, paras. 114 and 128).

7. Draft article 6 — Declarations and reservations

Paragraph (1)

56. The Working Group approved the substance of paragraph (1) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

Paragraph (2)

57. The Working Group approved the substance of paragraph (2) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

Paragraph (3)

58. The Working Group approved the substance of paragraph (3) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

Paragraph (4)

59. A suggestion was made to insert the following language at the beginning of paragraph (4): "Except for reservations under article 5(2), which shall take effect immediately upon receipt by the depositary, a declaration, reservation, or modification of a declaration or reservation of which the depositary receives …". It was said that reservations under article 5(2) ought to take effect immediately, so that an amendment to the Rules that a Contracting Party did not wish to implement would never apply to that Contracting Party.

60. A view was expressed that the application of reservations ought to be immediate. That view was not supported.

61. After discussion, it was agreed to adopt the proposal as set out in paragraph 59 above, but to remove the words "or modification of a declaration or reservation" contained therein, as repetitive with article 6(6). It was further agreed to add the words "for that Contracting Party" after the phrase "entry into force of the Convention". Consequently, the revised text of article 6(4) as agreed read as follows: "Except for reservations under article 5(2), which shall take effect immediately upon receipt by the depositary, a declaration or reservation of which the depositary receives formal notification after the entry into force of the convention for that Contracting Party takes effect on the first day of the month following the expiration of twelve months after the date of its receipt by the depositary."

Paragraph (5)

62. The Working Group approved the substance of paragraph (5) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

Paragraph (6)

63. A proposal was made to replace paragraph (6) as follows: "Notwithstanding paragraph 3, if, after this Convention has entered into force for a Contracting Party, that Party (a) makes a declaration under article 4; (b) withdraws or modifies a reservation made under article 5(1)(a) or (b) so as to apply article 3(1)(a) or (b) to arbitration under an additional investment treaty or under additional arbitral rules or

procedures; (c) withdraws a reservation made under article 5 (1)(c) or (2); or (d) withdraws or modifies a declaration made under article 9 so as to apply articles 3 or 4 to an additional territorial unit, or to arbitration under an additional investment treaty or additional arbitral rules or procedures; such declaration, withdrawal, or modification is to take effect on the first day of the month following the expiration of three months after the date of receipt of the notification by the depositary. Any other modification or withdrawal is to take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the depositary."

64. It was said in support of that proposal that it served to make mechanical the principle set out in article 6(6), as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 — namely, that there ought to be a shorter period of time for a withdrawal or modification that provided for greater transparency to take effect, and simultaneously a 12-month period for modifications or withdrawals that reduced transparency to take effect, as an anti-abuse measure.

65. In response, it was said that that proposal raised a practical concern as to whether the depositary function would be able to process such a variegated provision, even one that did not provide for a qualitative judgement to be made per se. The question was raised whether that proposal could adequately address a situation in which a withdrawal or modification both expanded the scope of transparency (e.g., by removing an investment treaty from a reservation under article 5(1)(a)), and contracted it (e.g., by at the same time formulating a reservation in respect of that treaty under article 5(1)(b)). It was said in response that that situation would not arise as the wording of article 5(1)(b) could not be applied on a treaty-by-treaty basis.

66. A view was expressed that in light of the practical difficulties raised by the text of the proposal set out in paragraph 63 above, and the possible burden it would impose on the depositary, a much simpler and more desirable option might be to have a single time period applicable to both types of modifications and withdrawals. It was said in support of that suggestion that simplicity and workability was advantageous, in particular given the direct implications of the convention on relevant arbitrations.

67. After discussion, a revised proposal was made as follows: "6. If, after this Convention has entered into force for a Contracting Party, that Party (a) withdraws or modifies a reservation made under article 5(1) so as to apply article 3(1) to arbitration under an additional investment treaty or to arbitration under additional arbitral rules or procedures; or (b) withdraws a reservation made under article 5(2); such withdrawal or modification is to take effect on the first day of the month following the expiration of three months after the date of receipt of the notification by the depositary. Any other reservation, modification, or withdrawal is to take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the depositary."

68. It was said that that proposal provided for greater simplicity, while retaining the principle of differentiated timing in relation to different types of withdrawals and modifications.

69. After discussion, the Working Group adopted the proposal set out in paragraph 67 above, subject to any drafting adjustments that might be required for

the purposes of ensuring consistency with other provisions in the convention (see below, paras. 134(a) and 136).

8. Draft article 7 — Depositary

70. The Working Group approved the substance of article 7, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

9. Draft article 8 — Signature, ratification, acceptance, approval, accession

71. The Working Group approved the substance of article 8, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 (for discussion on article 8(1), see below para. 137).

10. Draft article 9 — Effect in territorial units

72. A proposal was made to delete article 9 on the basis that such a provision only related to exceptional circumstances and moreover addressed matters beyond the scope of the transparency convention. It was said that States had developed their own practices with regard to the territorial application of treaties, and that such practice was more appropriately determined by national practice and public international law principles.

73. After discussion, the Working Group agreed to delete article 9.

11. Draft article 10 — Participation by regional economic integration organizations

74. The Working Group approved the substance of article 10, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181, subject to further consideration of whether article 10(1) should be deleted. The Working Group agreed to consider that drafting matter at a later stage of its deliberations (see below, paras. 129-133).

12. Draft article 11 — Entry into force

75. The Working Group approved the substance of article 11, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

13. Draft article 12 — Time of application

76. It was proposed to include in article 12 a reference to the withdrawal or modification of a declaration or reservation, on the basis that withdrawals or modifications should not affect arbitrations already commenced at the time of that withdrawal or modification. That proposal received support, and consequently it was agreed to amend article 12 such that it would read as follows: “This Convention and any declaration, reservation, or any modification to or withdrawal of a declaration or reservation, apply only to arbitrations that have been commenced after the date when the Convention, declaration, reservation, or any modification to or withdrawal of a declaration or reservation, enters into force or takes effect in respect of each relevant Contracting Party.”

77. It was noted that the words “each relevant Contracting Party” at the end of that provision were intended to make it clear that the article referred to the time when the convention would enter into force in respect of the Contracting Party in

question, and not when the convention would enter into force generally (A/CN.9/784, para. 18).

14. Draft article 13 — Revision and amendment

78. A suggestion was made that the procedure in article 13 for revising or amending the convention should be further considered in order to ensure a comprehensive procedure for adopting amendments to the convention. The Working Group agreed to discuss that matter further (see below paras. 139-147).

15. Draft article 14 — Denunciation of this Convention

79. A suggestion was made that, for consistency with the wording used elsewhere in the text of the convention, paragraph (1) should provide that a denunciation "shall take effect" (instead of "takes effect"), and paragraph (2) should provide that the Convention "shall continue to apply" (instead of "will continue to apply"). It was also proposed to change the term "one year" to "twelve months" to maintain consistency with other provisions in the transparency convention.

80. The Working Group took note of the drafting suggestions and mandated the Secretariat to modify the drafting as necessary. In all other respects the Working Group approved the substance of article 14, as contained in paragraph 7 of document A/CN.9/WG.II/WP.181.

B. Consideration of remaining open issues

81. The Working Group proceeded to address the remaining outstanding matters in its second reading of the transparency convention.

1. Article 1(2)

82. Further to its discussions on article 1 (see above, paras. 21-26), the Working Group agreed to retain the text of article 1(2) as contained in paragraph 7 of document A/CN.9/WG.II/WP.181 without amendment.

2. Article 4

83. Following its discussion on article 4 (see above, paras. 48-50), the Working Group considered that article further, and in particular, whether it ought to be deleted.

84. A proposal was made to retain article 4 but to replace it with the following language: "A Contracting Party may declare that the UNCITRAL Transparency Rules shall apply to any non-UNCITRAL arbitration proceedings commenced under an investment treaty concluded after 1 April 2014, to the same extent to which the UNCITRAL Transparency Rules are applicable under the UNCITRAL Arbitration Rules." It was said that that language would permit an application of the Rules on Transparency to arbitrations arising under future investment treaties that referred to arbitration rules other than the UNCITRAL Arbitration Rules. That proposal did not receive support.

85. It was furthermore said that the transparency convention was intended to address treaties existing prior to 1 April 2014, and that States or regional economic integration organizations concluding treaties after that date would be free to agree to apply the Rules on Transparency in conjunction with other arbitral rules or in ad hoc proceedings.

86. After discussion, it was agreed to delete article 4 in its entirety.

Effect of a renegotiation of existing treaties

87. Another question was raised in relation to whether, if Contracting Parties to the transparency convention also parties to an underlying existing investment treaty decided to reopen negotiations in relation to that existing investment treaty, in contravention of provisions of the transparency convention, that would amount to an amendment thereto, or have different consequences, in light of the later in time rule. Delegations were invited to reflect further on that question and to raise the issue again if it was felt that that question raised any concern which ought to be dealt with by appropriate wording in the convention.

3. Article 3, paragraph (3)

88. The Working Group recalled its decision to retain a provision regarding MFN clauses, subject to further consideration of the drafting (see above, para. 46).

89. The Working Group considered the following drafting proposal in that respect: "A claimant may not seek to alter the applicability or non-applicability of the Rules on Transparency under this Convention by invoking a most-favoured-nation clause."

90. Various drafting comments were made in relation to that proposal. It was suggested to simplify the provision as follows: "A claimant cannot invoke a most-favoured-nation clause to alter the application or non-application of the Rules on Transparency under this Convention."

91. In response to the concern that the provision would, under the proposals set out above, be addressed to claimants, not themselves party to the transparency convention, it was said that investment treaties themselves bestowed legal rights and obligations on nationals of Contracting Parties. A specific proposal to address that concern by adding the following opening words to the revised draft proposal contained in paragraph 89 above: "Each Contracting Party agrees that", received support.

92. It was said in relation to the proposal set out in paragraph 89 above, that the inclusion of the words "may not seek to alter" in fact served two important purposes in relation to how MFN clauses apply to procedural issues generally, and ought to be retained. First, it was said that those words ensured that the text avoided taking a position on the substance on possible application of the scope of MFN clauses in general; and second, if the words "cannot alter" were included instead, then it would suggest that the opposite would be true save for that provision.

93. Another suggestion was made to provide for a wider application of the provision in order to capture not only MFN clauses, but also other treaty provisions that disputing parties might use to alter the application of the Rules on Transparency, as well as the possibility that now or in the future, respondents could also invoke MFN clauses. That proposal read as follows: "The parties to the dispute

shall not seek to alter the application or non-application of the Rules on Transparency under the Convention by invoking the provision of the investment treaty". That proposal did not receive support.

94. After discussion, a modified proposal in relation to paragraph (3) was introduced as follows: "Each Contracting Party to this Convention agrees that a claimant may not invoke a most-favoured-nation provision to seek to alter the application or non-application of the Rules on Transparency under this Convention."

95. Views were expressed that that proposal did not reflect the possibility that investment treaty arbitration might develop such that respondents would also be able to invoke MFN clauses.

96. After discussion, it was agreed to adopt the modified proposal set out in paragraph 94 above, subject to a mandate to the Secretariat to adjust the drafting as necessary (see also below, paras. 123 and 124).

4. Articles 3 and 5

Reciprocity in relation to article 5(1)(a)

97. The Working Group considered further the matter of reciprocity of reservations as set out above in paragraphs 29 to 38. After discussion, and recalling the reasons set out in its discussions and recorded above at paragraphs 34 to 36, the Working Group agreed to adopt a requirement of reciprocity in relation to the reservations falling under article 5(1)(a).

98. It was said that in relation to article 5(1)(b), (c) and (2), taking into account the different policy considerations, there should be reciprocal application of such reservations. However, it was said that some of the underlying policy concerns in relation to article 5(1)(a), particularly in relation to investment treaties that articulated a higher degree of transparency (see above para. 33), did not apply in relation to the remainder of article 5. Another view was expressed that because those provisions did not raise the same policy concerns as the provisions of article 5(1)(a), they ought to be treated differently.

99. The Working Group proceeded to consider a concrete drafting proposal to implement the agreement for reciprocity under article 5(1)(a), and a possible reciprocal approach in the remainder of article 5, as follows. The proposal included article 3(1) in light of the linkage between those two articles: "Article 3. "1. Each Contracting Party to this Convention agrees that the UNCITRAL Rules on Transparency, as they may be revised from time to time, shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules conducted pursuant to an investment treaty concluded before 1 April 2014, in which the respondent is a Contracting Party that has not made a relevant reservation under article 5(1), and either (a) the claimant is of a Contracting Party that also has not made a relevant reservation under article 5(1), or (b) the claimant agrees to the application of the UNCITRAL Rules on Transparency." Article 5. "1. A Contracting Party may declare that: (a) a specific investment treaty, identified by title, name of Parties to that investment treaty, and date that investment treaty was concluded, shall not be subject to this Convention; (b) article 3(1)(a) and/or (b) shall not apply to arbitrations conducted using certain sets of arbitration rules or procedures other than the UNCITRAL Arbitration Rules; (c) article 3(1)(b) will not apply."

100. It was suggested as a matter of drafting to relocate the phrase, in article 3(1), "conducted pursuant to an investment treaty", after the words "any investor-State arbitration". That proposal received support.

101. Another drafting proposal was made to remove the phrase "Each Contracting Party to this Convention agrees" from the beginning of article 3(1), to reduce repetition in that article. A separate proposal was made to move that phrase so that it would constitute a chapeau for the entire article.

102. A concern was raised that the phrase "relevant reservation" in paragraph (1) could lead to confusion or be misinterpreted, in light of the different types of reservations enumerated in article 5 and the applicability of those reservations to the obligations in article 3. By way of further explanation, it was said that by addressing reservations that applied to situations under article 3(1)(a) (reciprocal obligations) as well as under article 3(1)(b) (unilateral offers), article 5(1)(b) could lead to very complex determinations by an arbitral tribunal as to whether a reservation applied.

103. In response, a view was expressed that the phrase "relevant reservation" was clear, and that while it would require interpretation by the arbitral tribunal in respect of each dispute, a tribunal could be relied upon to determine whether a reservation applied in a particular case because it related to a particular treaty under which the arbitration was being conducted, a particular set of arbitration rules or a particular version of the Rules on Transparency. In support of that approach, it was said that retaining a simple draft was desirable.

104. Two proposals were made to address the concern set out in paragraph 102 above. The first proposal was to remove reference to reservations in article 3, but to ensure that article 5 clearly expressed the operative effect of a reservation.

105. The second proposal would: (i) replace the phrase in the last line of the chapeau of article 3(1), after the words "relevant reservation", with the phrase "under articles 5(1)(a) or (b), and either"; (ii) in article 3(1)(a), replace "5(1)" with "5(1)(a) or (b)"; and (iii) insert at the beginning of article 3(1)(b) the text "The respondent Contracting Party has not made a reservation under article 5(1)(c) and".

Reciprocity in relation to article 5(1)(b) and (2)

106. Following consideration of the second proposal set out in paragraph 105 above, the Working Group considered further the issue of whether article 5(1)(b), (c) and (2) ought to require reciprocity or whether the reservation of the respondent Contracting Party ought to be determinative in those instances.

107. In relation to article 5(1)(b), it was reiterated that there was no clear policy reason why reciprocity of reservations ought to exist as between Contracting Parties which had reserved from the application of the transparency convention certain sets of arbitration rules other than the UNCITRAL Arbitration Rules. It was also said that requiring reciprocity in that respect would add significantly to the complexity of determining whether the Rules on Transparency would apply in a specific instance.

108. A different view was expressed that a lack of reciprocity would contravene the provisions of the Vienna Convention (see above, para. 35), and that the transparency convention should not create a precedent in that respect. It was said that it was an established principle of public international law and treaty relations that a

reservation that was formulated should apply to modify obligations in a convention to the same extent for another Party in its relations with the reserving Party. It was also said that grouping reservations into different categories — reciprocity in relation to article 5(1)(a) and non-reciprocity in relation to article 5(1)(b) and (c) — might create an imbalanced regime that could deter States from joining the convention.

109. In response, it was said that the Vienna Convention did not provide any impediment to drafting a convention that expressed distinct legal outcomes. It was furthermore said by way of example, that it was standard to include non-reciprocal obligations in investment treaties.

110. In relation to article 5(1)(c), it was agreed that as that provision provided for the reservation from the option to make a unilateral offer to arbitrate on transparent terms, the only relevant reservation would in any event be that of the respondent Contracting Party.

Modified draft proposal for articles 3 and 5 ("modified draft proposal")

111. A suggestion was made to seek a compromise by defining the scope of application of the convention by reference to the reservations in article 5, in order to set out clearly when the Rules on Transparency would apply under the transparency convention.

112. Consequently a modified draft proposal was introduced in relation to articles 3 and 5, in their entirety.

113. Article 3 of the modified draft proposal read as follows: "1. The UNCITRAL Rules on Transparency, as they may be revised from time to time, shall apply to any investor-State arbitration conducted pursuant to an investment treaty concluded before 1 April 2014, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Contracting Party that has not made a relevant reservation under article 5(1)(a) or (b), and either (a) the claimant is of a Contracting Party that also has not made a relevant reservation under article 5(1)(a), or (b) the respondent Contracting Party has not made a reservation under article 5(1)(c) and the claimant agrees to the application of the UNCITRAL Rules on Transparency. 1bis. In any arbitration in which the UNCITRAL Rules on Transparency apply pursuant to article 3(1), the tribunal shall apply the most recent version of the Rules on Transparency as to which the respondent Contracting Party has not made a reservation pursuant to article 5(2). 2. The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to arbitrations arising under investment treaties falling under paragraph 1(a). 3. Each Contracting Party to this Convention agrees that a claimant may not invoke an MFN provision to seek to alter the application or non-application of the Rules on Transparency under this Convention."

114. Article 5 of the modified draft proposal read as follows: "1. A Contracting Party may declare that: (a) a specific investment treaty, identified by title, name of Parties to that investment treaty, and date that investment treaty was concluded, shall not be subject to this Convention; (b) article 3(1) shall not apply to ad hoc arbitrations or arbitrations conducted using certain sets of arbitration rules or procedures other than the UNCITRAL Arbitration Rules in which it is a respondent; (c) article 3(1)(b) will not apply. 2. In the event of amendment to the UNCITRAL

Rules on Transparency, a Contracting Party may, within six months of the adoption of such amendment, make a reservation with respect to that revised version of those Rules. 3. No reservations are permitted to this Convention other than as provided in this article."

115. Support was expressed for that text as set out in paragraphs 113 and 114 above, and after discussion, consensus was recorded that the modified draft proposal was acceptable in relation to articles 3 and 5, subject to any drafting modifications that may be proposed.

116. After discussion, various drafting proposals were made in relation to the modified draft proposal, including the following proposal in relation to article 3(1) ("the second modified proposal"): "1. The UNCITRAL Rules on Transparency, as they may be revised from time to time, shall apply to any investor-State arbitration conducted pursuant to an investment treaty concluded before 1 April 2014, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Contracting Party that has not made a relevant reservation under article 5(1)(a) or (b), and the claimant is of a Contracting Party that has not made a relevant reservation under article 5(1)(a). 2. The UNCITRAL Rules on Transparency, as they may be revised from time to time, shall also apply to any investor-State arbitration conducted pursuant to an investment treaty concluded before 1 April 2014, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Contracting Party that has not made a relevant reservation under article 5(1), (a), (b) or (c), and the claimant agrees to the application of the UNCITRAL Rules on Transparency."

117. It was said by way of further explanation that that second modified proposal separated the mechanism whereby both Contracting Parties had agreed to apply the transparency convention in respect of a particular investment treaty into paragraph (1), and a unilateral offer on the other hand, into a separate paragraph (2).

118. The second modified proposal received support.

119. A suggestion to make explicit the understanding that paragraph (2) required the State of the claimant not to be a party to the transparency convention, or to have formulated a relevant reservation, was not supported. However, it was suggested that by splitting article 3(1) into two paragraphs, the word "or", which had separated the subparagraphs (a) and (b) of article 3(1), and indicated that the second limb of that provision was only applicable if the first was not, no longer existed to clarify the disjunctive situation arising under those subparagraphs. Consequently a proposal was made to include at the beginning of paragraph (2) of that proposal the words "Where they do not apply pursuant to 3(1)", and to delete the word "also" in that paragraph.

120. After discussion, the proposal set out in paragraph 116 above, with the modification in paragraph 119 above, was accepted.

Application of article 1(7) of the Rules on Transparency

121. The Working Group had regard to the content of paragraph (2) as contained above in paragraph 113, which would become paragraph (3) under the second modified proposal. A question was raised as to whether that principle — the disapplication of the final sentence article 1(7) of the Rules on Transparency to

arbitrations under paragraph (1) of the second modified proposal, would also apply to paragraph (2). It was agreed that it would not, because paragraph (2) provided for a unilateral offer by a respondent Contracting Party to arbitrate transparently, and consequently the Rules on Transparency would apply by agreement of the disputing parties as contemplated by article 1(2)(a) of the Rules on Transparency so that article 1(7) of the Rules on Transparency would not come in the way of their application.

122. Consequently, it was agreed to retain the text of paragraph (2) of article 3, as set out above in paragraph 113.

MFN clauses

123. The Working Group had regard to the content of paragraph (3) as contained above in paragraph 113, which would become paragraph (4) under the second modified proposal. A concern was reiterated that framing that provision in terms of the claimant's inability to invoke an MFN clause said nothing about the possibility for a respondent or a third person to invoke an MFN clause (see also above para. 93). The Working Group agreed to retain the provision as contained in paragraph 113, on the basis that the only risk identified by the Working Group concerned the potential use of an MFN clause by claimants. It was reiterated that the Working Group could not, and did not purport to, make any statement or take any position as to the applicability or otherwise of MFN clauses to any given situation, but was merely providing for a procedural bar to prevent a claimant from invoking an MFN provision to seek to alter the application or non-application of the Rules on Transparency under this convention.

124. Consequently, it was agreed to retain the text of the modified draft proposal (as set out above in para. 113).

Article 5

125. The Working Group had regard to the content of article 5 as contained in the modified draft proposal (as set out above in para. 114).

126. Several proposed drafting changes were suggested in relation to that article. First, in relation to article 5(1)(b), it was suggested to adopt the language in paragraph 7 of document A/CN.9/WG.II/WP.181, such that that subparagraph would read as follows: "(b) article 3(1) shall not apply to arbitrations conducted using certain sets of arbitration rules or procedures other than the UNCITRAL Arbitration Rules in which it is a respondent;". It was clarified that the word "certain" in that provision was intended to mean "all or some". It was also noted that, as article 3(1) had been split into two paragraphs, a consequential amendment was required in article 5(1)(b) to refer to both paragraphs (1) and (2) of article 3. Those suggestions were accepted, subject to any minor modifications to be made by the Secretariat for the purposes of drafting clarity.

127. Third, it was proposed to reintroduce the words "in arbitrations in which it is a respondent" to the end of article 5(1)(c). It was said that while that wording might not be strictly necessary, given the logical implication of a reservation in respect of a unilateral offer, such wording would promote clarity of drafting. After discussion, that modification was agreed.

128. Consequently the draft of article 5 as contained in the modified draft proposal was agreed, with the modifications set out in paragraphs 126 and 127 above.

5. Article 10(1)

129. Further to its previous discussions in relation to article 10 (see above, para. 74), the Working Group considered that if the word "State" were to be deleted from paragraph (1), and bearing in mind the drafting suggestion to delete the word "Contracting" where it appeared in the convention before the word "Parties" (see below, para. 135), article 10(1) would read: "Any reference to a 'Party' or 'Parties' in this Convention applies equally to a regional economic integration organization when the context so requires".

130. It was said that as "Parties" are defined as being both States and regional economic integration organizations in article 8(1), article 10(1) had become redundant and ought to be deleted. In addition, it was said that the words "when the context so requires", introduced an element of ambiguity throughout the draft.

131. A concern was raised that if article 10(1) were not to be deleted, the determination of the "context so requiring" in operational provisions of the convention such as in article 3, could lead to complexity. For example, when a State and a regional economic integration organization were both party to an investment treaty, it would not necessarily be clear whether a claimant from a "Party" could be from one or both of those entities under the transparency convention.

132. After discussion, a compromise proposal was suggested on the basis that the discussions appeared to relate to a single existing investment treaty to which a regional economic integration organization was a party — namely, the Energy Charter Treaty — and as such addressed a very limited and narrow set of circumstances. It was said that on that basis, a solution to replace in article 3(1), the words "a claimant is of a Party that has not made a relevant reservation" with the words "a claimant is of a State that is a Party that has not made a relevant reservation", and to delete article 10(1) as redundant, would be a solution.

133. That proposal received support. One delegation noted that although it would accept that proposal, it did so on the basis of achieving compromise and continued to have reservations about the substance of that solution. After discussion, that proposal was agreed, with the caveat that if after further examination it appeared that the text created difficulties in other circumstances outside the Energy Charter Treaty, that solution might need to be reconsidered.

C. Comments in relation to treaty practices

134. The Working Group took note of the following comments made by the Secretariat on the drafting of certain provisions of the transparency convention:

(a) Article 6(6): as a matter of simplification, the withdrawal of reservations under the first sentence of the revised proposal of article 6(6), as contained above in paragraph 67 could take effect immediately, instead of after a three-month period;

(b) Article 8(1): the words "that is a party to an investment treaty", as they appeared in article 8(1) should be deleted, as they were not necessary and would put

a burden of the depository to check whether a State or regional economic integration organization was indeed party to such investment treaty. With that modification, article 8(1) would read as follows: “This Convention is open until [date] for signature by (a) any State, or (b) a regional economic integration organization constituted by sovereign States.”;

(c) The Working Group was further informed of the treaty practice to develop more detailed provisions on revision and amendment of conventions than that contained in article 13;

(d) As a matter of drafting, the Working Group agreed that the Secretariat should use the word “shall” in a consistent manner where appropriate in the text of the convention.

135. As a more general drafting matter, it was suggested to delete the word “Contracting” where it appears in the convention before the word “Parties”; it was further suggested to delete the words “on the first day of the month following the expiration of” where those words appear in articles 6, 11 and 14 of the convention. After discussion, those suggestions were agreed.

1. Article 6(6)

136. After discussion, it was agreed that withdrawal of reservations would take effect immediately following deposit, rather than after a three-month period.

2. Article 8(1)

137. The Working Group agreed to the deletion of the words “that is a party to an investment treaty” where it appeared in subparagraph (a) of article 8(1), and to retain those words where they appeared in subparagraph (b) of that article, for the reason that regional economic integration organizations ought to be party to such investment treaties to in turn become party to the transparency convention. In addition, the Working Group agreed that a provision should be included in the text of the convention providing that regional economic integration organization should declare, at the time of adoption of or accession to the convention that it is a party to an investment treaty.

3. Article 13

138. Following its discussion in relation to article 13 (see above, para. 78), the Working Group considered a proposal to redraft that article as follows: “1. Any Contracting Party may propose an amendment to the present Convention and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Contracting Parties to this Convention with a request that they indicate whether they favour a conference of Contracting Parties for the purpose of considering and voting upon the proposal. In the event that within [four] months from the date of such communication at least one third of the Contracting Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. 2. The conference of Contracting Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Contracting Parties present and voting at the

conference. 3. An adopted amendment shall be submitted by the Secretary-General of the United Nations to all the Contracting Parties for acceptance. 4. An adopted amendment enters into force six months after the date of deposit of the third instrument of acceptance. 5. When an amendment enters into force, it shall be binding on those Contracting Parties which have accepted it, other Contracting Parties still being bound by the provisions of this Convention and any earlier amendment which they have accepted. 5bis. When a State or a regional economic integration organization ratifies, accepts, approves or accedes to an amendment, that has already entered into force, the amendment enters into force in respect of that State or that regional economic integration organization, six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. 6. Any State or regional economic integration organization which becomes a Contracting Party to the Convention after the entry into force of the amendment shall be considered as a Contracting Party to the Convention as amended."

139. It was said that the purpose of that revised text was to provide a clear and detailed procedure in the event of amendment of the convention. It was explained that paragraph (1) was modelled after Article 47(1) of the Convention on the Rights of Persons with Disabilities and Article 44(1) of the International Convention for the Protection of All Persons from Enforced Disappearance. It was further explained that: (i) paragraph (1) aimed at clarifying that a proposal of an amendment is to be filed individually by each Contracting Party; and (ii) the second sentence of paragraph (1) was based on Article 40(2) of the Vienna Convention.

140. In relation to paragraph (2), it was said that it aimed at specifying the number of Contracting Parties necessary for the adoption of the amendment and that the proposed text emphasized consensus in accordance with the UNCITRAL practice. It was noted that paragraph (4) followed article 11(1) of the transparency convention and that paragraph (5) was based on Article 40(4) of the Vienna Convention. It was further noted that paragraph (6) corresponded to article 13(2) of the transparency convention, taking also into account Article 40(5) of the Vienna Convention.

141. After discussion, the Working Group agreed to consider the draft proposal as the basis of replacement for article 13.

142. In relation to the drafting of that proposal, it was agreed to replace: (i) the word "agreement" where it appeared in the second sentence of paragraph (2) of that proposal, by the word "consensus"; (ii) the word "acceptance" where it appeared in the draft proposal by the words "ratification, acceptance or approval"; and (iii) the word "accepted" where it appeared in paragraph (5) by the words "expressed consent to be bound by".

143. In relation to the substance of that proposal, it was suggested to delete the words "other Contracting Parties still being bound by the provisions of this Convention and any earlier amendment which they have accepted" in paragraph (5), on the basis that that matter was dealt with under the Vienna Convention in a more nuanced fashion. That proposal was agreed.

144. A further suggestion was made to delete paragraph (6) of that proposal; that suggestion did not receive support. A separate proposal to provide under paragraph (6) that Parties acceding to the convention after an amendment thereto should be given the option to adopt the convention with or without the amendment, was also not supported.

145. A proposal to revise the title of article 13, to read simply "Amendment", in order better to reflect the substance of the provision, was accepted.

146. After discussion, it was agreed to retain the text of the proposal set out in paragraph 138 above, as modified by paragraphs 142, 143 and 145 above.

V. Organization of future work

147. In relation to future work in the field of dispute settlement to be considered by the Commission at its forty-seventh session, the Working Group reiterated its understanding that it would commence work on the revision of the Notes on Organizing Arbitral Proceedings at its sixty-first session.

VI. Other business

148. In commemoration of the sixtieth session of the Working Group, and having regard to the significance of the work of that Working Group since its inception, Bryan Hymel, the American operatic tenor, sang the aria "*Ah! Lève-toi Soleil*" from the opera "*Roméo et Juliette*" by Charles-François Gounod.