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Settlement of commercial disputes: Preparation of a legal standard on transparency in treaty-based investor-State arbitration

Note by the Secretariat

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IV. Possible content of a legal standard on transparency

1. At its fifty-third session, the Working Group generally agreed that the substantive issues to be considered in respect of the possible content of a legal standard on transparency would be as follows: publicity regarding the initiation of arbitral proceedings; documents to be published (such as pleadings, procedural orders, supporting evidence); submissions by third parties ("amicus curiae") in proceedings; public hearings; publication of arbitral awards; possible exceptions to the transparency rules; and repository of published information ("registry") (A/CN.9/712, para. 31). The Working Group may wish to note that document A/CN.9/WG.II/WP.163 contains information on the practical aspects of transparency that usefully complement matters dealt with in the sections below.

A. Issues for consideration

1. Publicity regarding the initiation of arbitral proceedings

(i) Timing of the publication and documents to be published

2. At the fifty-third session of the Working Group, different views were expressed on whether the existence of arbitral proceedings should be made public once the arbitral proceedings commenced, or when the arbitral tribunal was constituted (A/CN.9/712, para. 34). Different views were expressed regarding the information to be made public at that early stage of the proceedings, in particular, whether it should be limited to the existence of a dispute, or also include publication of the notice of arbitration (A/CN.9/712, para. 33). It was suggested that providing only preliminary information regarding the parties involved, their nationality, and the economic sector concerned might be sufficient (A/CN.9/712, para. 33).

3. Rules of arbitral institutions often referred to in investment treaties regarding the settlement of disputes between the host State and an investor do not provide for the publication of the notice of arbitration. For instance, Regulation 22 of the ICSID Administrative and Financial Regulations provides that "[t]he Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding". Rules of other arbitration institutions either do not deal with that matter, or provide for the confidentiality of the procedure (see A/CN.9/WG.II/WP.160, paras. 38 to 47 on the content of rules of arbitration institutions in that respect). Investment treaties sometimes provide for the publication of the notice of arbitration (and even of the intent to arbitrate), but the timing for such publication is not necessarily defined. It may be done at a stage where the seriousness of the claim has already been assessed. Examples of such provisions can be found in document A/CN.9/WG.II/WP.160, paras. 18 and 20.

4. In case the Working Group would favour the option of publication of the notice of arbitration once received by a party, it may wish to consider how to deal with the issue of protecting confidential and sensitive information that may be contained in the notice of arbitration at that early stage of the proceedings where no arbitral tribunal would yet be constituted (see below, paras. 41 and 42). Similarly,

the question of frivolous claims, and the way to limit publication thereof would deserve consideration.

(ii) Person(s) responsible for publication and consequences in case of failure to publish

5. As to the person(s) responsible for taking the initiative of publication regarding the initiation of the arbitral proceedings, it is conceivable that the host State, the investor or a repository should be responsible for the publication. The publication of information could be undertaken jointly by the parties, based on their consent to do so (A/CN.9/712, para. 35).

6. The determination of the person responsible for making information public would depend on whether a repository for publishing information is established under the legal standard on transparency. If this were to be the case, the repository would be the channel through which information would be published, and the manner in which information should be conveyed to the repository should also be defined. In case no repository is established, publication could be envisaged to be made by the parties, either jointly or separately (see below, paras. 41 and 42).

7. Questions identified by the Working Group at its fifty-third session as to whether publication of information at that stage should be made mandatory, and if so, whether there should be any sanction in case of non-compliance also deserves further consideration (A/CN.9/712, para. 36).

2. Documents to be published

(i) List of documents

8. At the fifty-third session of the Working Group, different views were expressed on whether, and if so, which documents should be published (A/CN.9/712, para. 40). The view was expressed that all documents submitted to, and issued by, the arbitral tribunal should be made available to the public (A/CN.9/712, para. 41). A contrary view was that not all documents would need to be published, in particular in view of the necessity to find the right balance between the requirements of public interest and the legitimate need to ensure manageability and efficiency of the arbitral procedure (A/CN.9/712, para. 42).

9. Provisions on public access to procedural documents in investment treaties dealing with that matter most often include either a general statement on publicity of all documents or a list of documents that should be made publicly available. In that latter case, the following documents have been listed: request for arbitration, notice of arbitration, submissions to the tribunal by a disputing party and any written submissions by the non-disputing party(ies) and amicus curiae, minutes or transcripts of hearings of the tribunal, where available; and orders, awards, and decisions of the tribunal.

(ii) Person(s) responsible for the publication

10. At the fifty-third session of the Working Group, different views were expressed on whether the parties or the arbitral tribunal should be the ones to decide on publication of documents. A further question was whether the consent of the parties would be required for publication (A/CN.9/712, para. 43). Some views were

expressed that the arbitral tribunal should decide the issue of publication of documents on a case-by-case basis (A/CN.9/712, para. 44).

11. Under investment treaties, the responsibility for making that information available to the public lies in certain instances with the arbitral tribunal, in others with the parties.[1] Where parties are authorized to make information public, certain investment treaties provide that either party may make all information public, whereas others limit the right of a party to publicize only its own statements or submissions. In general, treaties do not provide details on the manner in which the information is to be conveyed to the public.

12. Concerning the timing for publication, certain investment treaties provide that the information shall be made available "immediately" or "in a timely manner", whereas others are silent on that question.

(iii) Practical aspects of publication

13. Questions regarding the practical aspects of the publication of documents, such as the language of publication (A/CN.9/712, para. 45) and allocation between the parties of the costs of publication were raised at the fifty-third session of the Working Group and would deserve further consideration.

(iv) Examples

14. At the fifty-third session of the Working Group, an order in the case *Chemtura Corporation v. Government of Canada*[2] was given as an example of a document containing provisions on publication (A/CN.9/712, para. 41). It reads as follows:

> "*Part II — Conduct of Proceedings and Public Disclosure of Documents […] 11. Subject to the provisions of paragraph 13, either disputing party may disclose to the public the following materials, provided that the disputing party provides the other disputing party with 20 days notice of its intent to disclose such material publicly: all pleadings and submissions, together with their appendices and attached exhibits, correspondence to and from the Tribunal, transcripts and any awards, including procedural orders, rulings, preliminary and final awards. 12. A disputing party has twenty days from the date of notice by the other disputing party of its intent to publicly disclose material referred to in paragraph 11, to object to disclosure on the basis that it contains confidential information. Such material may not be publicly disclosed unless both disputing parties have confirmed that they do not object to such release or have agreed on the redaction of the material containing confidential information. 13. Except as permitted by this Order, neither disputing party shall publicly disclose material designated as confidential by the other disputing party […].*"

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[1] Article 38, paras. (3) to (8), of Canada's Model Foreign Investment Promotion and Protection Agreement 2004 (FIPA). See also, for instance, the Agreement between the United Mexican States and the Government of the Republic of Iceland on the Promotion and Reciprocal Protection of Investments, signed 24 June 2005, which states the following: "Article 17 — Awards and Enforcement (…) (4). The final award will only be published with the written consent of both parties to the dispute."; available on 30 November 2010 at www.unctad.org/sections/dite/iia/docs/bits/Mexico_Iceland.PDF.

[2] *Chemtura Corporation v. Government of Canada, Confidentiality Order*, January 21, 2008.

15. Examples of provisions on publication of documents can be found in document A/CN.9/WG.II/WP.160, paras. 13 to 22.

3. Publication of arbitral awards

16. At the fifty-third session of the Working Group, many delegations expressed support for the establishment of a general provision under which awards rendered by arbitral tribunals in treaty-based investor-State arbitration should be published (A/CN.9/712, para. 62). That matter can be considered in light of examples given above in paragraphs 14 and 15 ("publication of documents").

17. In case the Working Group would consider that awards should be treated differently from the other documents, and be made public, unless all parties to the arbitration agreed otherwise, it would still be possible to provide for the publication of excerpts of the award containing the relevant legal reasoning (A/CN.9/712, para. 63).[3] A provision reflecting that suggestion could read as follows: "*Awards shall be published unless all parties agree otherwise. In case the parties do not agree to the publication of an award, the arbitral tribunal shall promptly make publicly available excerpts of the legal reasoning of the tribunal.*"

4. Submissions by third parties (amicus curiae) in arbitral proceedings

18. Many delegations expressed strong support for allowing submissions by third parties, also known as amicus curiae submissions. It was said that amicus curiae submissions could be useful for the arbitral tribunal in resolving the dispute and promoted legitimacy of the arbitral process (A/CN.9/712, para. 46).

(i) Restricting criteria for amicus curiae submissions

19. It was widely felt that there should be certain restricting criteria in place for amicus curiae submissions, including the subject matter of the submission, expertise of the amicus curiae, relevance for the proceedings, appropriate page limits, and the time when such submissions would be allowed (A/CN.9/712, para. 47).

(ii) Intervention by non-disputing State(s)

20. The Working Group may consider whether it wishes to further consider the question of participation of non-disputing States that are parties to the investment treaty, but not to the arbitration, pending decision by the Commission on whether that matter should be part of the scope of the current work (see A/CN.9/WG.II/WP.162, para. 3). At the fifty-third session of the Working Group, it was observed that another State party to the investment treaty at issue that was not a party to the dispute could also wish, or be invited, to make submissions. It was noted that such State often had important information to provide, such as information on *travaux préparatoires*, thus preventing one-sided treaty interpretation (A/CN.9/712, para. 49).

21. The Working Group may wish to consider whether specific provisions should be crafted to determine the possible scope of intervention of a non-disputing State in the procedure. For instance, the scope of intervention of a non-disputing State could

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[3] See Rule 48 (4) of the ICSID Arbitration Rules.

be limited to questions of interpretation of the investment treaty, or to submissions on points of law. Other questions that the Working Group may wish to consider include whether the arbitral tribunal may ex officio invite the non-disputing State to make submissions, and how to ensure that submission by a non-disputing State would not disrupt the proceeding or unfairly prejudice either party.

(iii) Decisions on amicus submissions

22. The Working Group left open the question whether the arbitral tribunal would have full discretion to decide on amicus curiae submissions or whether it would have to consult the parties, in accordance with the consensual nature of arbitral proceedings (A/CN.9/712, para. 48).

(iv) Levels of access to documents

23. In the general framework of allowing amicus curiae submissions, the importance of access to documents was emphasized, as the quality of any amicus curiae submissions would depend on the permitted level of access to documents (A/CN.9/712, para. 51). With respect to the role of amicus curiae, a question that would deserve further consideration is whether there should be different levels of access to documents provided for the general public on the one hand and amicus curiae on the other hand.

(v) Costs and case management concerns

24. In its consideration of that matter, the Working Group may wish to keep in mind the cost that may be incurred by the parties as a result of amicus curiae submissions and the necessity to find a right balance between transparency concerns and manageability of the case.

(vi) Examples

25. With the exception of the ICSID Arbitration Rules, rules of arbitral institutions usually do not contain express provisions on the participation of a non-disputing party, the possibility of which would remain a matter between the parties to the arbitration and in the discretion of the arbitral tribunal (see A/CN.9/WG.II/WP.160, paras. 29 to 47). Rule 37 (2) of the ICSID Arbitration Rules regulates non-disputing party submissions as follows:

> "*After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'non-disputing party') to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either*

party, and that both parties are given an opportunity to present their observations on the non-disputing party submission."

26. The Working Group may wish to note that Chapter Eleven of the North American Free Trade Agreement (NAFTA) and the interpretative documents produced by the Free Trade Commission contain details on the issue of third-party participation. The "Statement of the Free Trade Commission on non-disputing party participation" of 7 October 2004 reads as follows:

"*[…]B. Procedures*

1. Any non-disputing party that is a person of a Party, or that has a significant presence in the territory of a Party, that wishes to file a written submission with the Tribunal (the 'applicant') will apply for leave from the Tribunal to file such a submission. The applicant will attach the submission to the application.

2. The application for leave to file a non-disputing party submission will: (a) be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant; (b) be no longer than 5 typed pages; (c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, 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 applicant); (d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party; (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission; (f) specify the nature of the interest that the applicant has in the arbitration; (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission; (h) explain, by reference to the factors specified in paragraph 6, why the Tribunal should accept the submission; and (i) be made in a language of the arbitration.

3. The submission filed by a non-disputing party will: (a) be dated and signed by the person filing the submission; (b) be concise, and in no case longer than 20 typed pages, including any appendices; (c) set out a precise statement supporting the applicant's position on the issues; and (d) only address matters within the scope of the dispute.

4. The application for leave to file a non-disputing party submission and the submission will be served on all disputing parties and the Tribunal.

5. The Tribunal will set an appropriate date by which the disputing parties may comment on the application for leave to file a non-disputing party submission.

6. In determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address matters within the scope of the dispute; (c) the non-disputing party has a

significant interest in the arbitration; and (d) there is a public interest in the subject-matter of the arbitration.

7. The Tribunal will ensure that: (a) any non-disputing party submission avoids disrupting the proceedings; and (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

8. The Tribunal will render a decision on whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal will set an appropriate date by which the disputing parties may respond in writing to the non-disputing party submission. By that date, non-disputing NAFTA Parties may, pursuant to Article 1128, address any issues of interpretation of the Agreement presented in the non-disputing party submission.

9. The granting of leave to file a non-disputing party submission does not require the Tribunal to address that submission at any point in the arbitration. The granting of leave to file a non-disputing party submission does not entitle the non-disputing party that filed the submission to make further submissions in the arbitration. […]"

27. The Norwegian draft model agreement for investment contains specific provisions with respect to third-parties' intervention. Article 18, paragraph 3 provides as follows: "The Tribunal shall have the authority to accept and consider written amicus curiae submissions from a person or entity that is not a disputing Party, provided that the Tribunal has determined that they are directly relevant to the factual and legal issues under consideration. The Tribunal shall ensure an opportunity for the parties to the dispute, and the other Party, to submit comments on the written amicus curiae observations." In addition, article 18, paragraph 4 states that "[...] the Tribunal shall reflect submissions from the other Party and from amicus curiae in its report."

5. Hearings

(i) Public hearings

28. At its fifty-third session, the Working Group considered whether hearings should be open to the public (A/CN.9/712, para. 52). Both support and reservations were expressed regarding public hearings. It was suggested that a provision on open hearings in any legal standard to be prepared on transparency should provide that hearings should be held in public, unless the parties agreed otherwise (A/CN.9/712, paras. 53-55). In contrast, reservations of a general nature were expressed regarding public hearings, a concept that was viewed to be contrary to the very nature of arbitration, which was said to be confidential and not to allow for third parties' access to hearings. It was said that treaty-based investor-State arbitration would often raise issues of a political nature and open hearings were likely to put additional pressure on the participating State, thus creating the risk that the involvement of the general public would not facilitate but adversely affect the settlement of the dispute (A/CN.9/712, para. 57).

29. Dispute resolution provisions in investment treaties favouring transparency provide that hearings shall be open to the public, subject to the protection of confidential information. Public hearings may be organized through webcast, or

other means that would not necessarily require the physical presence of the public in the hearing room. Logistical arrangements are usually left to the arbitral tribunal to be determined in consultation with the disputing parties. Examples of such provisions can be found in document A/CN.9/WG.II/WP.160, paras. 23 to 28.

30. Rule 32 (2) of the ICSID Arbitration Rules deals with attendance by third party of hearings as follows: "*Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.*"

(ii) Transcripts of hearings

31. At the fifty-third session of the Working Group, there was general agreement that the decision to be made regarding transcripts of hearings should depend upon the solution adopted in respect of public access to hearings (A/CN.9/712, para. 58). The Working Group was informed that, for arbitrations under the rules of ICSID, the decision to hold open hearings was left to the arbitral tribunal, unless either party objected. In contrast, to make transcripts publicly available, the consent of the parties was needed. It was further said that the publication of transcripts was a question usually left to the respondent State at least for cases under NAFTA and that ICSID so far had not published any transcripts on its website (A/CN.9/712, para. 59).

6. Possible limitations to transparency rules

(i) Principles

32. At its fifty-third session, the Working Group considered the possible limitations to transparency. Various categories of possible exceptions or limitations were mentioned: protection of confidential and sensitive information, protection of the integrity of the arbitral process, and ensuring manageability of the arbitral proceedings (A/CN.9/712, paras. 67 to 72).

- protection of confidential and sensitive information

33. At the fifty-third session of the Working Group, the need to protect confidential and sensitive information was largely admitted, as was the need to protect proceedings from any outside pressures on the parties or on the arbitral tribunals (see below, paras. 36-40). Taking into account that both transparency and confidentiality can be considered as legitimate interests, the Working Group may wish to consider whether a right balance should be found to protect both interests. General comments were made to the effect that exceptions to transparency to protect confidential and sensitive information should not be so wide as to weaken the main rules on transparency; they should provide clarity and guidance, in order to avoid disputes between the parties on that matter (A/CN.9/712, para. 70).

- *protection of the integrity of the arbitral process*

34. At the fifty-third session of the Working Group, it was generally recognized that the question of protection of the integrity of the arbitral process was important to take into account as part of the discussions on transparency. In addition, protection of the integrity of the arbitral proceedings may be seen as a means to contribute to the de-politicization of investment disputes.

- *manageability of the arbitral proceedings*

35. At the fifty-third session of the Working Group, the general question of case management was said to be an important one to be further considered (A/CN.9/712, para. 72). Rules on transparency should not create delays, increase costs or unduly burden the arbitral proceedings and a right balance should be found between the public interest and the manageability of the arbitral proceedings.

(ii) Definition of confidential and sensitive information

36. Dispute resolution clauses in investment treaties that deal with public access to procedural documents and awards usually provide that documents submitted to, or issued by, the arbitral tribunal shall be publicly available, unless the disputing parties agree otherwise, subject to the deletion of confidential and sensitive information. Confidential and sensitive information is usually described as information that is not generally known or accessible to the public and, if disclosed, would cause or threaten to cause prejudice to an essential interest of any individual or entity, or to the interest of a party or would be contrary to personal privacy (see A/CN.9/WG.II/WP. 160, paras. 13 to 22). At the fifty-third session of the Working Group, the view was expressed that any provision on that matter should be drafted in a generic manner, thus circumventing the need to envisage all possible circumstances, but rather leaving a large degree of discretion to the arbitral tribunal (A/CN.9/712, para.69).

37. A model which was said to provide useful guidance in investor-State arbitration was the IBA Rules on the Taking of Evidence in International Arbitration (2010) which contained provisions on confidentiality in paragraphs (3) and (4) of article 9 on admissibility and assessment of evidence (A/CN.9/712, para. 68). Those provisions read as follows: "*3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account: (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice; (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations; (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen; (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules. 4. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.*"

(iii) Person(s) determining confidential and sensitive information

38. The determination of confidential and sensitive information could be handled by the arbitral tribunal or the parties (A/CN.9/712, para. 69). Provisions in investment treaties seem to indicate that usually the parties are responsible for identifying confidential and sensitive information, and in case a decision needs to be made in that respect, the arbitral tribunal has the authority to do so.

(iv) Sanction

39. The question of the conditions of enforcement of limitations or exceptions to transparency rules and whether a sanction should be provided in case a party would breach confidentiality obligations would deserve further consideration. One possible sanction mentioned at the fifty-third session of the Working Group was related to costs (A/CN.9/712, para. 71). Article 9 (7) of the IBA Rules on the Taking of Evidence in International Arbitration (2010) was given as an example of a provision containing such sanction. It provided that: "*If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence*".

(v) Example of procedure

40. US Model BIT, article 29(4) provides as follows:

"*Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:*

(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and

(d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with

the designation under (ii) of the disputing party that first submitted the information."

7. Repository of published information ("registry")

41. At the fifty-third session of the Working Group, suggestions were made that information could be made publicly available by the parties, either the host State or the investor, or by a neutral registry (A/CN.9/712, paras. 37, 73-75). The purpose of the current work on transparency is to ensure that information on treaty-based investor-State arbitration cases are made known to the interested public. One flexible approach to do so could be to leave publication of information to the host State. In case an arbitral institution would be involved in the administration of the case, it could also be in charge of the publication.

42. In case the Working Group would decide that a neutral registry should be established, it may then wish to determine its role, and whether it would be involved in any determination regarding for instance limitations to transparency. Under that option, there would be a number of issues to clarify, such as what constitutes a treaty-based investor-State arbitration for the purpose of the applicability of the provisions on publication of documents by a neutral registry, the exact role of a neutral registry and whether it should be established within the United Nations Office of Legal Affairs, or in an existing arbitral institution; the Permanent Court of Arbitration at The Hague and ICSID have mentioned their readiness to provide that service.

B. Proposals

43. The Working Group may wish to note that if the legal standard on transparency to be adopted takes the form of guidelines (see A/CN.9/WG.II/WP.162, para. 15), the content may include more detailed explanations; there could also be variants proposed to the parties and arbitral tribunals. If the legal standard takes the form of model clauses or stand-alone rules on transparency (see A/CN.9/WG.II/WP.162, paras. 13-14 and 16-21), binding on the parties once they apply, the rules should be clear as to the rights and obligations they provide.

1. Scope of application

44. A first part on the scope of application of the legal standard on transparency might be needed. The Working Group may wish to consider how to determine the criteria for application of the legal standard on transparency, whether it should be limited arbitration under investment treaties, or also apply to disputes under contract between States and investors, whether the term "investment treaty" would require clarification. The Working Group may wish to note the potential difficulties and lack of flexibility that any such definition of scope would entail. The Working Group may also wish to consider whether that section should also include a provision on the interplay between the legal standard on transparency and the applicable arbitration rules (see A/CN.9/WG.II/WP.162, paras. 46 and 47).

2. Initiation of the arbitral proceedings[4]

45. Proposal: "*Information regarding the name of the parties, their nationalities and the economic sector involved shall be made publicly available once [the notice of arbitration has been received by the respondent] [the arbitral tribunal has been constituted]*."

3. Publication of documents[5]

46. Option 1, Variant 1: "*All documents submitted to, or issued by, the arbitral tribunal shall be made publicly available [unless all parties agree otherwise,] subject to section 6 below.*" Variant 2: "*The following documents shall be made publicly available: the notice of arbitration; pleadings, submissions to the tribunal by a disputing party and any written submissions by the non-disputing party and amicus curiae; minutes or transcripts of hearings of the tribunal, where available; and orders, awards, and decisions of the tribunal [unless the disputing parties otherwise agree,] subject to section 6 below*."

47. Option 2: "*The arbitral tribunal shall decide, in consultation with the parties, which documents to make publicly available*."

48. Proposal regarding the practical issue of language for the publication of documents: "*Documents shall be published in the language or languages in which they have been made available to the arbitral tribunal*."

4. Submissions by third parties (amicus curiae) in arbitral proceedings

49. The Working Group may wish to consider the level of details it wishes to include on that matter in a legal standard on transparency, based on the examples given under paragraphs 25 to 27 above.

5. Hearings and transcripts thereof

50. Proposal: "*In the event of oral hearings, the Tribunal shall conduct hearings open to the public [unless either party objects] and shall determine, in consultation with the parties, the appropriate logistical arrangements. Transcripts of the hearings shall be made publicly available subject to section 6 below*."

6. Possible limitations to transparency rules

51. A specific section dealing with limitations to both publication of documents and public hearings could be provided for in a legal standard on transparency. Those limitations could be dealt with in a generic or detailed manner and the Working Group may wish to determine which model would be more appropriate (see above, paras. 14, and 32-40).

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[4] The proposal reflects the option where preliminary information only (and not the notice of arbitration) is disclosed at an early stage of the proceedings, either before or after the constitution of the arbitral tribunal. The option of publication of the notice of arbitration is dealt with under the section on publication of documents (see paras. 46-48).

[5] The following proposals seek to reflect the various suggestions made by the Working Group in relation to the publication of documents (see paras. 8-16). They include the question of publication of the notice of arbitration and arbitral award.

7. Repository of published information

52. Proposal: *[The information] [The documents] referred to in sections 2 and 3 shall be made available by [to be determined] through [to be determined]*.