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**United Nations Commission
on International Trade Law
Working Group II (Arbitration and Conciliation)
Fifty-fifth session
Vienna, 3-7 October 2011**

Annotated provisional agenda

I. Provisional agenda

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2. Election of officers.
3. Adoption of the agenda.
4. Preparation of a legal standard on transparency in treaty-based investor-State arbitration.
5. Organization of future work.
6. Other business.
7. Adoption of the report.

II. Composition of the Working Group

1. The Working Group is composed of all States members of the Commission, which are the following:¹ Algeria (2016), Argentina (2016), Armenia (2013), Australia (2016), Austria (2016), Bahrain (2013), Benin (2013), Bolivia (Plurinational State of) (2013), Botswana (2016), Brazil (2016), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2016), Czech Republic (2013), Egypt (2013), El Salvador (2013), Fiji (2016), France (2013), Gabon (2016), Georgia (2015), Germany (2013),

¹ The following six State members elected by the General Assembly on 3 November 2009 agreed to alternate their membership among themselves until 2016 as follows: Belarus (2010-2011, 2013-2016), Czech Republic (2010-2013, 2015-2016), Poland (2010-2012, 2014-2016), Ukraine (2010-2014), Georgia (2011-2015) and Croatia (2012-2016).



Greece (2013), Honduras (2013), India (2016), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2013), Jordan (2016), Kenya (2016), Latvia (2013), Malaysia (2013), Malta (2013), Mauritius (2016), Mexico (2013), Morocco (2013), Namibia (2013), Nigeria (2016), Norway (2013), Pakistan (2016), Paraguay (2016), Philippines (2016), Poland (2012), Republic of Korea (2013), Russian Federation (2013), Senegal (2013), Singapore (2013), South Africa (2013), Spain (2016), Sri Lanka (2013), Thailand (2016), Turkey (2016), Uganda (2016), Ukraine (2014), United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2016) and Venezuela (Bolivarian Republic of) (2016).

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

III. Annotations to agenda items

Item 1. Opening of the session

3. The fifty-fifth session of the Working Group will be held at the Vienna International Centre, from 3 to 7 October 2011. Meeting hours will be from 9.30 a.m. to 12.30 p.m. and from 2 to 5 p.m., except on Monday, 3 October 2011, when the session will be opened at 10 a.m.

Item 2. Election of officers

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

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

(a) Previous deliberations

5. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission mandated Working Group II (Arbitration and Conciliation) to undertake work on the question of a revision of the UNCITRAL Arbitration Rules.²

6. At its fortieth session (Vienna, 25 June-12 July 2007), the Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.³ The Commission noted that broad support had been expressed in the

² *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, para. 187.

³ *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17)*, para. 174.

Working Group for a generic approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations. The Commission noted, however, that the extent to which the revised UNCITRAL Arbitration Rules should take account of investor-State dispute settlement or administered arbitration remained to be considered by the Working Group at a future session.⁴

7. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted that the Working Group had decided to proceed with its work on the revision of the UNCITRAL Arbitration Rules in their generic form and to seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take (A/CN.9/646, para. 69). After discussion, the Commission agreed that it would not be desirable to include at that time specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves and that any work on investor-State disputes which the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution. The Commission was of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency as a desirable objective in investor-State arbitration, should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group (*ibid.*, para. 69) in the field of treaty-based arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based arbitration and that broad discretion should be left to the Working Group in that respect. With a view to facilitating consideration of the issues of transparency in treaty-based arbitration by the Working Group at a future session, the Commission requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in investor-State arbitration. It was emphasized that, when composing delegations to the Working Group sessions that would be devoted to that project, member States and observers should seek to achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration.⁵

⁴ *Ibid.*, para. 175.

⁵ *Ibid.*, *Sixty-third Session, Supplement No. 17 (A/63/17)*, paras. 313-314.

8. At its forty-third session (New York, 21 June-9 July 2010), the Commission adopted the UNCITRAL Arbitration Rules (as revised in 2010).⁶

9. At that session, with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II (Arbitration and Conciliation) with the task of preparing a legal standard on that topic. The Commission was informed that, pursuant to the request received from the Commission at the forty-first session, the Secretariat had circulated a questionnaire to States with regard to their practice on transparency in investor-State arbitration and that replies thereto would be made available to the Working Group.⁷ Those replies are reproduced in document A/CN.9/WG.II/WP.159 and its addenda.

10. Support was expressed for the view that the Working Group could also consider undertaking work in respect of those issues that arose more generally in treaty-based investor-State arbitration and that would deserve additional work. The prevailing view, in line with the decision previously made by the Commission, was that it was too early to make a decision on the precise form and scope of a future instrument on treaty-based arbitration and that the mandate of the Working Group should be limited to the preparation of rules of uniform law on transparency in treaty-based investor-State arbitration. However, it was agreed that, while operating within that mandate, the Working Group might identify any other topic with respect to treaty-based investor-State arbitration that might also require future work by the Commission. It was agreed that any such topic might be brought to the attention of the Commission at its next session, in 2011.⁸

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

12. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session regarding the importance of ensuring transparency in treaty-based investor-State arbitration. The Commission noted that the Working Group had considered matters of content, form and applicability to both future and existing investment treaties of the legal standard on transparency. It was confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with a great practical interest, taking account of the high number of treaties already concluded. Further, the Commission agreed that the question of possible intervention in the arbitration by a non-disputing State party to the investment treaty should be regarded as falling within the mandate of the Working Group. It was said that whether there should be

⁶ *Ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 187.

⁷ *Ibid.*, para. 190.

⁸ *Ibid.*, para. 191.

such a right of intervention dealt with in the legal standard on transparency, and if so, the determination of the scope and modalities of such intervention should be left for further consideration by the Working Group.⁹

13. At its fifty-fifth session, the Working Group is expected to continue its work on the preparation of a legal standard on transparency in treaty-based investor-State arbitration on the basis of notes prepared by the Secretariat (A/CN.9/WG.II/WP.166 and its addendum; and, if applicable, A/CN.9/WG.II/WP.167).

(b) Documentation

14. The Working Group will have before it notes by the Secretariat regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.166 and its addendum; and, if applicable, A/CN.9/WG.II/WP.167).

15. A limited number of the following background documents will be made available at the session:

- UNCITRAL Arbitration Rules (1976);
- UNCITRAL Arbitration Rules (as revised in 2010);
- UNCITRAL Notes on Organizing Arbitral Proceedings;
- UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006);
- Reports of the United Nations Commission on International Trade Law on the work of its thirty-ninth session (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*); fortieth session (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17 (part I))*); forty-first session (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17)*); forty-second session (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*); forty-third session (*Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*); and forty-fourth session (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*);
- Report of Working Group II (Arbitration and Conciliation) on the work of its forty-eighth session (A/CN.9/646);
- Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (A/CN.9/712);
- Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (A/CN.9/717);

⁹ Report of the Commission on the work of its forty-fourth session (in preparation).

- Settlement of commercial disputes: transparency in treaty-based investor-State arbitration, notes by the Secretariat (A/CN.9/WG.II/WP.159 and its addenda; A/CN.9/WG.II/WP.160 and its addendum; A/CN.9/WG.II/WP.162 and its addendum; A/CN.9/WG.II/WP.163; and A/CN.9/WG.II/WP.164).

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

Item 5. Organization of future work

17. At its fifty-fifth session, the Working Group might wish to consider organization of its work in respect of the matters which were mentioned by the Commission at its thirty-ninth session as matters for future work of the Working Group.¹⁰ At that session, the topic of arbitrability was said to be an important question, which should also be given priority. It was said that it would be for the Working Group to consider whether arbitrable matters could be defined in a generic manner, possibly with an illustrative list of such matters, or whether the legislative provision to be prepared in respect of arbitrability should identify the topics that were not arbitrable. It was suggested that studying the question of arbitrability in the context of immovable property, unfair competition and insolvency could provide useful guidance for States. It was cautioned however that the topic of arbitrability was a matter raising questions of public policy, which was notoriously difficult to define in a uniform manner, and that providing a predefined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.¹¹ Another topic was the issue of arbitration in the field of insolvency. Yet another suggestion was made to address the impact of anti-suit injunctions on international arbitration. A further suggestion was made to consider clarifying the notions used in article I, paragraph (1), of the New York Convention of "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" or "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought", which were said to have raised uncertainty in some State courts. The Commission also heard with interest a statement made on behalf of the International Cotton Advisory Committee suggesting that work could be undertaken by the Commission to promote contract discipline, effectiveness of arbitration agreements and enforcement of awards in that industry.¹²

18. At its forty-fourth session, the Commission noted that the issue of arbitrability should be maintained by the Working Group on its agenda, as decided by the Commission at its thirty-ninth session.¹³ Further, the Commission heard a suggestion that the issue of confidentiality might need to be further examined.

¹⁰ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 182-187.

¹¹ *Ibid.*, para. 185.

¹² *Ibid.*, para. 186.

¹³ *Ibid.*, para. 187.

It was said that where confidentiality was specifically protected under legislation, there was no single approach to the scope of the obligation of confidentiality in terms of the information that was to be treated as confidential, the persons to whom the obligation attached, or permissible exceptions to prohibitions on disclosure and communication. The Commission agreed that the options for dealing with confidentiality in commercial arbitration should be considered as a matter for future work of the Working Group. Further, it was suggested that conciliation/mediation with respect to the settlement of treaty-based investor-State disputes should also be considered as a topic for future work.¹⁴

Item 7. Adoption of the report

19. The Working Group may wish to adopt, at the close of its session, a report for submission to the forty-fifth session of the Commission, scheduled to be held either in New York, from 18 June to 6 July 2012, or in Vienna, from 9 to 27 July 2012. The place of the session will be confirmed in due time. The main conclusions reached by the Working Group at its ninth meeting (on Friday morning) will be summarily read out for the record at the tenth meeting and subsequently incorporated into the report.

IV. Scheduling of meetings

20. The fifty-fifth session of the Working Group will last for five working days. There will be ten half-day meetings available for consideration of the agenda items. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session,¹⁵ the Working Group is expected to hold substantive deliberations during the first nine half-day meetings (that is, from Monday to Friday morning), with a draft report on the entire period being prepared by the Secretariat for adoption at the tenth and last meeting of the Working Group (on Friday afternoon).

21. The Working Group may wish to note that its fifty-sixth session is scheduled to be held either in New York, from 6 to 10 February 2012, or in Vienna, from 30 January to 3 February 2012. The place of the session will be confirmed in due time.

¹⁴ Report of the Commission on the work of its forty-fourth session (in preparation).

¹⁵ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr.3)*, para. 381.