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**United Nations Commission  
on International Trade Law**  
**Working Group II (Arbitration and Conciliation)**  
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## **Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration**

**Addendum**

**Note by the Secretariat**

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## **B. Draft rules on transparency in treaty-based investor-State arbitration (*continued*)**

### **Article 7. Exceptions to transparency**

#### 1. Draft article 7 – Exceptions to transparency

##### Exceptions to transparency

*“1. The rules set out in articles 2 to 6 are subject to the following express exceptions:*

*“(a) A party shall not be under any obligation to publish any confidential and sensitive information, as defined in article 7, paragraph 2, and the tribunal shall make arrangements to protect such information from publication; and*

*“(b) The arbitral tribunal shall be entitled to restrain the publication of information where such publication would jeopardise the integrity of the arbitral process, including where such publication could hamper the collection or production of evidence or lead to the intimidation of witnesses, lawyers acting for the parties, or members of the arbitral tribunal.*

##### Definition of confidential and sensitive information

*“2. Confidential and sensitive information consists of:*

*“(a) confidential business information;*

*“(b) information which is protected against disclosure under the treaty or the applicable law; and*

*“(c) information that may be designated as confidential and sensitive by the arbitral tribunal in any order on confidentiality for any of the aforementioned reasons.*

##### Procedure for identifying and protecting confidential and sensitive information

*“3. A disputing party that provides information shall clearly designate whether it contends that the information is of a confidential and sensitive nature at the time it submits the information to the arbitral tribunal and shall, at the time it submits a document containing such information, submit a redacted version of the document that does not contain the information.*

*“4. Where the opposing party disputes that any or all of such information is confidential and sensitive, it shall so indicate within 30 days of receipt of the redacted document from the other party, identifying with precision the portions of the document that it contends ought not to be redacted. The arbitral tribunal shall then rule on any such objection to the designation or redaction of confidential and sensitive information.*

##### Procedure for protecting the integrity of the arbitral process

*“5. The arbitral tribunal may, at its own initiative or upon the application of a disputing party, take appropriate measures to restrain the publication of information where such publication would jeopardise the integrity of the arbitral process, including where such publication could hamper the collection*

*or production of evidence or lead to the intimidation of witnesses, lawyers acting for the parties, or members of the tribunal.”*

## **Remarks**

### ***Paragraph (1) - Exceptions to transparency***

2. Paragraph (1) limits the exceptions to transparency to the protection of confidential and sensitive information and the protection of the integrity of the arbitral process (A/CN.9/717, paras. 129-143).

### ***Paragraph (2) - Confidential and sensitive information***

3. The Working Group may wish to consider the definition of “confidential and sensitive information” contained in paragraph (2). That proposal is based on corresponding provisions usually found in investment treaties as well as on the definition of confidential and sensitive information provided by arbitral tribunals in confidentiality orders in NAFTA cases under the UNCITRAL Arbitration Rules.<sup>1</sup> The “information supplied by third parties that those third parties are entitled to regard as confidential” is often mentioned as part of the definition of sensitive and confidential information in such provisions. The Working Group may wish to consider whether that category should be added to the definition under paragraph (2).

4. It may also be noted that under some treaties “confidential and sensitive information” has been defined in general terms as “any sensitive factual information that is not available in the public domain” (A/CN.9/712, para. 67). Such a definition can be found in article 10.22.4 of the Australia-Chile Free Trade Agreement (“FTA”).<sup>2</sup> Under that FTA, there are additional exceptions for (i) information which would impede law enforcement, and (ii) information otherwise protected from disclosure by the law of a Party (signatory to that FTA).

### ***Paragraphs (3) and (4) - Procedure for identifying and protecting confidential and sensitive information***

5. Paragraphs (3) and (4) reflect a proposal made at the fifty-fourth session of the Working Group that the parties should agree on the determination of confidential

<sup>1</sup> *UPS v. Canada*, Procedural Directions and Order of the Tribunal, 4 April 2003, pp. 3-9, available at [www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Confidentiality\\_Order-en.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Confidentiality_Order-en.pdf); *Chemtura v. Canada*, Confidentiality Order, 21 January 2008, available at [www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Confidentialityorder.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Confidentialityorder.pdf); *Merril & Ring Forestry v. Canada*, Confidentiality Order, 21 January 2008, available at [www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ConfidentialityOrderTribunal21Jan08.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ConfidentialityOrderTribunal21Jan08.pdf); *V. G. Gallo v. Canada*, Confidentiality Order, 4 June 2008, available at [www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ConfidentialityOrder2008-06-04.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ConfidentialityOrder2008-06-04.pdf); *Claytons/Bilcon of Delaware v. Canada*, Procedural Order No. 2 (Confidentiality Order), 4 May 2009, available at [www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ProceduralOrderNo2-May42009.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ProceduralOrderNo2-May42009.pdf); *Mobil Investments v. Canada*, Minutes of the First Session of the Arbitral Tribunal with the Parties, Annex 3 (Confidentiality Order), 6 May 2009, pp. 38-44, available at [www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Mobil-Minutes-FirstSession2009-07-29.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Mobil-Minutes-FirstSession2009-07-29.pdf).

<sup>2</sup> Australia – Chile Free Trade Agreement of 2008, available at [www.dfat.gov.au/fta/aclfta/FTA\\_Text.html](http://www.dfat.gov.au/fta/aclfta/FTA_Text.html).

and sensitive information and that only in case an agreement could not be found, the arbitral tribunal would make that decision (A/CN.9/717, para. 134).

***Paragraph (5) - Procedure for protecting the integrity of the arbitral process***

6. The Working Group recalled that, at its fifty-third session, it had been generally recognized that the question of protection of the integrity of the arbitral process should be taken into account as part of the discussion on limitations to transparency (A/CN.9/712, para. 72). At its fifty-fourth session, it was felt in the Working Group that the term “integrity of the arbitral process” would need to be defined, as it could otherwise become an overly broad category, and exceptions to transparency should be concisely defined (A/CN.9/717, para. 137). After discussion, the Working Group agreed that the questions for further consideration on that matter would include (A/CN.9/717, para. 143): (i) whether a provision on protection of the integrity of the arbitral process should be in the form of a general formulation or should contain specific instances that were meant to be specifically addressed; (ii) the interplay between the protection of the integrity of the arbitral process and the provisions in the UNCITRAL Arbitration Rules already dealing with that issue; and (iii) how to determine the threshold for a limitation to transparency based on the ground of the need to protect integrity of the arbitral process.

7. The power of the arbitral tribunal to protect the integrity of the arbitral process is expressed in generic terms in arbitration rules,<sup>3</sup> and has been used to deal with specific issues by arbitral tribunals. A number of cases illustrate how that inherent power has been used by arbitral tribunals: they have in certain instances issued provisional measures in order to protect the integrity of the arbitral proceedings,<sup>4</sup> “in particular the access to and integrity of the evidence.”<sup>5</sup>

**Article 8. Repository of published information (“registry”)**

8. Draft article 8 – Repository of published information

*“----- shall be in charge of making available to the public information [and other services] pursuant to the Rules on transparency.”*

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<sup>3</sup> For instance, article 15 (1) of the 1976 UNCITRAL Arbitration Rules and article 17 (1) of the 2010 UNCITRAL Arbitration Rules; article 15 of the ICC Rules; article 19 of the SCC Arbitration Rules (Arbitration Institute of the Stockholm Chamber of Commerce). The Working Group may wish to note other texts that also reflect that principle, such as the Code of Ethics for Arbitrators in Commercial Disputes of the American Arbitration Association.

<sup>4</sup> For instance, *Biwater Gauff v. Tanzania*, Procedural Order No. 3 (ICSID 29 September 2006), at para. 163. *Libananco Holdings Co. Ltd. v. Turkey*, No. ARB/06/S, Decision on jurisdiction (ICSID 23 June 2008), at 78.

<sup>5</sup> *Quiborax S.A. v. Plurinational State of Bolivia*, No. ARB/06/2, Decision on Provisional Measures (ICSID 26 February 2010), at para. 141. The tribunal concluded that “[C]laimants have shown the existence of a threat to the procedural integrity of the ICSID proceedings, in particular with respect to their right to access to evidence through potential witnesses,” (No. ARB/06/2, Decision on Provisional Measures (ICSID 26 February 2010), at para. 141); *Methanex Corp. v. United States*, Final Award (ICSID 3 August 2005), at PI. II, ch. I, para. 54.

## Remarks

9. At its fifty-fourth session, the Working Group discussed the issue whether establishing a neutral registry should be seen as a necessary step in the promotion of transparency in treaty-based investor-State arbitration (A/CN.9/717, paras. 148-151). The prevailing view was that the existence of a registry would be crucial to provide the necessary level of neutrality in the administration of a legal standard on transparency. General support was expressed for the idea that, should such a neutral registry be established, the United Nations Secretariat would be ideally placed to host it. It was also recalled that, should the United Nations not be in a position to take up that function, the Permanent Court of Arbitration at The Hague and ICSID had expressed their readiness to provide such registry services (A/CN.9/717, para. 148). Also, it was generally felt that it might be premature to attempt designing the detailed features of such a registry until decisions had been made by the Working Group as to the precise functions it would fulfil (A/CN.9/717, para. 150).

## III. Applicability of the legal standard on transparency to the settlement of disputes arising under existing investment treaties

### A. General remarks

10. At the fifty-fourth session of the Working Group, views were expressed in favour of pursuing further the option to prepare an instrument that, once adopted by States, could make the legal standard on transparency applicable to existing treaties. That question was said to have an important practical impact as there were more than 2,500 investment treaties in force to date (A/CN.9/712, para. 85 and A/CN.9/717, paras. 33-35).<sup>6</sup> In that context, the Working Group discussed the options of making the legal standard on transparency applicable to existing treaties by either a recommendation urging States to make the legal standard applicable in the context of treaty-based investor-State dispute settlement, or a convention, whereby States could express consent to apply the legal standard on transparency to arbitration under their existing investment treaties (see below, section B). Such convention, however, would make the legal standard applicable only to investment treaties between such States parties that were also parties to the convention (A/CN.9/717, para. 42). Also, it was said that the options of making the legal standard on transparency applicable to existing treaties by joint interpretative declarations pursuant to article 31 (3) (a) Vienna Convention on the Law of Treaties (the “Vienna Convention”), by amendment or modification pursuant to articles 39-41 Vienna Convention (see below, section C) were interesting and practically possible options, which should be further explored (A/CN.9/717, para. 45).

<sup>6</sup> For an online compilation of all investment treaties, see the database of the United Nations Conference on Trade and Development (UNCTAD), available on 20 July 2011 at [www.unctadxi.org/templates/Startpage\\_\\_\\_\\_718.aspx](http://www.unctadxi.org/templates/Startpage____718.aspx).

11. The Secretariat was requested to further explore the options of making the legal standard on transparency applicable to existing treaties and to prepare possible wording to facilitate continuation of the discussion regarding the various options considered at the fifty-fourth session of the Working Group (A/CN.9/717, para. 46).

## **B. Possible UNCITRAL instruments**

### **1. Recommendation on the application of a legal standard on transparency**

12. The Working Group may wish to consider a recommendation urging States to apply the legal standard on transparency to existing and future treaties as a means to further the application of a legal standard on transparency to investment treaties. The purpose of the recommendation would be to highlight the importance of transparency in the context of treaty-based investor-State arbitration. The recommendation leaves it to States to decide on the means of implementing the legal standard on transparency in the context of both existing and future treaties. It aims at encouraging States and investors to apply the legal standard to their arbitration, to the extent this is consistent with the existing investment treaty.

13. The Working Group may wish to consider the following wording for a possible recommendation regarding the application of the legal standard on transparency to treaty-based investor-State arbitration initiated under the UNCITRAL Arbitration Rules.

*“The United Nations Commission on International Trade Law,*

*“Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,*

*“Also recalling the General Assembly resolutions 31/98 of 15 December 1976 and 65/22 of 10 January 2011 recommending the use of the UNCITRAL Arbitration Rules,*

*“Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the wide use of arbitration for the settlement of investor-State disputes,*

*“Also recognizing the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,*

*“Further recognizing that some States have adopted high transparency standards in certain treaties providing for the protection of investments (“investment treaty”),*

*“Bearing in mind that the UNCITRAL Arbitration Rules are widely used for the settlement of treaty-based investor-State disputes,*

*“Noting that the preparation of the Rules on Transparency was the subject of due deliberation in UNCITRAL and that it benefitted from extensive*

*consultations with Governments and interested intergovernmental and international non-governmental organizations,*

*“Believing that the Rules on Transparency would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international [investment] disputes,*

*“Believing further that, in connection with the modernization of the UNCITRAL Arbitration Rules as revised in 2010, adoption of the Rules on Transparency is particularly timely,*

*“Noting the great number of investment treaties already in force, and the practical importance of promoting the application of the Rules on Transparency to arbitration under those already concluded investment treaties,*

*“1. Recommends that, subject to any provision in the relevant investment treaty that may require a higher degree of transparency, the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated under the UNCITRAL Arbitration Rules, pursuant to an investment treaty concluded before the date of adoption of the Rules on Transparency, to the extent such application is consistent with those treaties;*

*“2. Also recommends that the Rules on Transparency be used or referred to by Governments, inter alia, in formulating necessary amendments or modifications to such treaties.”*

14. Should the Working Group decide that the legal standard on transparency would apply irrespective of the applicable set of arbitration rules, a possible recommendation might read as follows.

*“The United Nations Commission on International Trade Law,*

*“Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,*

*“Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the wide use of arbitration for the settlement of investor-State disputes,*

*“Also recognizing the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,*

*“Further recognizing that some States have adopted high transparency standards in certain treaties providing for the protection of investments (“investment treaty”),*

*“Noting that the preparation of the Rules on Transparency was the subject of due deliberation in UNCITRAL and that it benefitted from extensive consultations with Governments and interested intergovernmental and international non-governmental organizations,*

*“Believing that the Rules on Transparency would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international [investment] disputes,*

*“Noting the great number of investment treaties already in force, and the practical importance of promoting the application of the Rules on Transparency to arbitration under those already concluded investment treaties,*

*“1. Recommends that, subject to any provision in the relevant investment treaty that may require a higher degree of transparency, the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to an investment treaty concluded before the date of adoption of the Rules on Transparency, to the extent such application is consistent with those treaties;*

*“2. Also recommends that the Rules on Transparency be used or referred to by Governments, inter alia, in formulating necessary amendments or modifications to such treaties.”*

## **2. Possible draft convention on transparency in treaty-based investor-State arbitration**

15. With a view to promoting application of a legal standard on transparency to investment treaties, a suggestion was made at the fifty-third and fifty fourth sessions of the Working Group that an international convention on transparency in treaty-based investor-State arbitration could be prepared whereby States would express consent or agree to apply a legal standard on transparency (A/CN.9/712, para. 93, A/CN.9/717, paras. 42-46).

16. The option of a convention in the form of a general statement of applicability as proposed in this note would not incorporate the contents of the legal standard on transparency currently developed by the Working Group, but reflect the agreement of the Contracting States to apply the legal standard to arbitrations under their investment treaties existing at the date of entry into force of the convention or concluded thereafter. Should the Working Group decide to pursue the option of drafting a convention, further questions would require consideration, including the relation between the convention and the legal standard on transparency.

17. The proposed wording of the draft convention below does not include provisions which would be typically found in a convention, including the preamble and final provisions, such as the depositary, signature, ratification, acceptance, approval, accession, reservations, entry into force, revision and amendments, and denunciation. Those provisions could be drafted at a later stage if the Working Group considers that the option of a convention should be pursued.

18. The Working Group may wish to note that the proposed wording of the draft convention below has been chosen to be as generic as possible, to make the draft convention applicable to as many investment treaties as possible. As mentioned in a remark under article 1, paragraph (1) on the scope of the rules on transparency, the wording of draft convention clarifies that the term “a treaty providing for the protection of investments” should be understood in a broad sense, including free trade agreements, bilateral and multilateral investment treaties, so long as they



contain provisions on the protection of an investor and its right to resort to investor-State arbitration (A/CN.9/WG.II/WP.166, para. 22).

19. Should the Working Group decide that a convention should be prepared, possible provisions might read as follows.

*“Article 1. Scope of application*

*“1. This Convention shall apply to investor-State arbitration [under the UNCITRAL Arbitration Rules] conducted on the basis of a treaty providing for the protection of investments between Contracting States to this Convention.*

*“2. The term “treaty providing for the protection of investments” means any investment agreement between Contracting States, including a bilateral or multilateral investment agreement or free trade agreement, so long as it contains provisions on investment protection and a right to resort to investor-State arbitration.*

*“Article 2. Interpretation*

*“In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*

*“Article 3. Use of the UNCITRAL Rules on Transparency*

*“Each Contracting State agrees to apply the UNCITRAL Rules on Transparency to investor-State arbitration [under the UNCITRAL Arbitration Rules] conducted on the basis of a treaty for the protection of investments between Contracting States to this Convention. Nothing in this agreement prevents Contracting States from applying standards that provide a higher degree of transparency than the Rules on Transparency.”*

### **C. Possible actions by States**

20. At its fifty-third and fifty-fourth sessions, the Working Group considered the possible actions that could be undertaken by States to ensure applicability of a legal standard on transparency to existing multilateral or bilateral investment treaties (A/CN.9/712, paras. 85-86, A/CN.9/717, paras. 42-46). At the fifty-fourth session of the Working Group, joint interpretative declaration by States Parties pursuant to article 31 (3) (a) Vienna Convention as well as amendment or modification to treaties according to article 39 ff. Vienna Convention were mentioned as possible instruments to ensure application of the transparency standard to existing investment treaties (A/CN.9/717, paras. 42-45).

21. As requested by the Working Group, models of such instruments are proposed below. The drafting options have been attempted to be as simple as possible to only provide an illustration of such instruments. They have also been drafted in a very generic form, so that they could be applied with the necessary adaptations to a diversity of investment agreements.

22. Possible draft models of joint interpretative declarations pursuant to article 31 (3) (a) Vienna Convention could read as follows.

*[Model 1]*

*“Understanding of Government of [ ] and Government of [ ] on the interpretation and application of certain provisions of the [ ] [name of the investment treaty]*

*“The provision[s] of articles [ ] of the [ ] [name of the investment treaty] permitting an investor from a Contracting State to initiate an arbitration against another Contracting State [under the UNCITRAL Arbitration Rules] in the context of the [ ] [name of investment treaty] shall be understood as including the application of the UNCITRAL Rules on Transparency. The Governments of the Contracting States [listing the names] have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant treaty provisions.”*

*[Model 2]*

*“The [Governments of the Contracting States to the [name of the investment treaty] share the understanding that the term ‘UNCITRAL Arbitration Rules’ as used in [specific articles] of the [name of the treaty] includes the UNCITRAL Rules on Transparency.”*

23. Possible draft models of amendment or modification pursuant to article 39 ff. Vienna Convention on the Law of Treaties could read as follows.

*[Model 1]*

*“Agreement on an Amendment to the [ ] [name of the investment treaty] between the Government of [ ] and the Government of [ ]*

*“The Government of [ ] and the Government of [ ] agreed to make the following amendments to the [ ] [name of the investment treaty]*

*“Article [ ] [number to be inserted] of the Agreement is amended as follows:*

*“( ) The UNCITRAL Rules on Transparency shall apply to arbitrations initiated [under the UNCITRAL Arbitration Rules] on the basis of the [name of the investment treaty].”*

*[Model 2]*

*“Protocol Amending the [name of the investment treaty] between the Government of [ ] and the Government of [ ], signed on [date]*

*“The Government of [ ] and the Government of [ ],*

*“Considering:*

*“That a [ ] [name of the investment treaty] between the two Governments was signed on [ ] [date],*

*“That, during the period of validity of the Agreement, there has arisen the need to introduce certain amendments to achieve transparency in investor-State disputes arising under the Agreement,*

*“Agree:*

*“To conclude the following Protocol amending the [name of the investment treaty] between the Government of [ ] and the Government of [ ], signed on [date].*

*“Article \_\_\_ [number to be inserted]*

*“Article \_\_\_ [number to be inserted] of the Agreement is amended as follows*

*“( ) The UNCITRAL Rules on Transparency shall apply to arbitrations initiated [under the UNCITRAL Arbitration Rules] on the basis of the [name of the investment treaty].”*

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