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Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session (New York, 4-8 February 2013)

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] Further, the Commission agreed that the question of possible intervention in the arbitration by a non-disputing State party to the investment treaty should be regarded as falling within the mandate of the Working Group. Whether the legal standard on transparency should deal with such a right of intervention, and if so, the determination of the scope and modalities of such intervention should be left for further consideration by the Working Group.[4]

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the importance of ensuring transparency in treaty-based investor-State arbitration expressed at its forty-first session, in 2008, and at its forty-fourth session, in 2011,[5] and urged the Working Group to pursue its efforts and to complete its work on the rules on transparency for consideration by the Commission preferably at its next session.[6]

4. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.175, paragraphs 5-14.

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its fifty-eighth session in New York, from 4-8 February 2013. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Bahrain, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Czech Republic, El Salvador, France, Germany, Greece, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Mauritius, Mexico,

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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., para. 202.

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

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

Nigeria, Norway, Pakistan, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Angola, Belarus, Belgium, Burkina Faso, Cyprus (Republic of), Ecuador, Finland, Indonesia, Ireland, Kuwait, Netherlands, Oman, Panama, Peru, Poland, Qatar, Romania, Slovakia, Sweden, Switzerland and Tunisia.

7. The session was attended by observers from the following non-member States and Entities: Holy See.

8. The session was attended by observers from the European Union.

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

(a) *United Nations system*: International Centre for Settlement of Investment Disputes (ICSID); Office of Legal Affairs, General Legal Division (OLA/GLD), the World Bank, United Nations Conference on Trade and Development (UNCTAD) and United Nations Educational Scientific and Cultural Organization (UNESCO);

(b) *Intergovernmental organizations*: Corte Centroamericana de Justicia (CCJ) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Association of the Bar of the City of New York (ABCNY), Association Suisse de l'Arbitrage (ASA), Barreau de Paris, Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), ICC International Court of Arbitration (ICC), Institute of International Commercial Law (IICL), International Arbitration Institute (IAI), International Bar Association (IBA), International Cotton Advisory Committee (ICAC), International Council for Commercial Arbitration (ICCA), International Federation of Commercial Arbitration Institutions (IFCAI), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators, Moot Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), New York State Bar Association (NYSBA), P.R.I.M.E. Finance Foundation (P.R.I.M.E.), Queen Mary University of London School of International Arbitration (QMUL), Swedish Arbitration Association (SAA) and Tehran Regional Arbitration Centre (TRAC).

10. The Working Group elected the following officers:

Chairman: Mr. Salim Moollan (Mauritius)

Rapporteur: Mr. David Brightling (Australia)

11. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.175); (b) notes by the Secretariat regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.176 and its addendum; and A/CN.9/WG.II/WP.177).

12. The Working Group adopted the following agenda:

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

III. Deliberations and decisions

13. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.176 and its addendum; A/CN.9/WG.II/WP.177). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The deliberations of the Working Group on other business are reflected in chapter V.

14. At the closing of its deliberations, the Working Group requested the Secretariat (i) to prepare a draft of revised rules on transparency in treaty-based investor-State arbitration 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 rules; (ii) to circulate the draft revised rules on transparency to Governments for their comments, with a view to consideration and adoption of the draft revised rules by the Commission at its forty-sixth session, to be held in Vienna from 8-26 July 2013; and (iii) to prepare a note for the consideration by the Commission containing the draft text of a convention on transparency, draft recommendations and model declarations, regarding the question of application of the rules on transparency to disputes arising under investment treaties concluded before their adoption (see A/CN.9/WG.II/WP.176/Add.1, paras 14-34).

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

A. Consideration of outstanding substantive issues on the draft rules on transparency in treaty-based investor-State arbitration

15. The Working Group recalled the substantive matters left open for its consideration as part of the third reading of the rules on transparency as set out in paragraph 6 of document A/CN.9/WG.II/WP.176 (see also A/CN.9/760, paras. 123-124), and agreed to proceed first with the consideration of those issues.

1. Article 1 — Scope of application

16. The Working Group considered article 1 as contained in paragraph 7 of document A/CN.9/WG.II/WP.176 and, further to its agreement to proceed with outstanding substantive issues, proceeded to address paragraph (1) of article 1.

Paragraph (1) — Applicability of the legal standard on transparency

17. The Working Group recalled the approaches discussed at its fifty-sixth and fifty-seventh sessions in relation to paragraph (1). It was recalled that a solution in relation to the date of the conclusion of the treaty, whereby treaties concluded after the coming into force of the rules on transparency would require contracting Parties expressly to "opt-out" of their application, and for existing treaties, contracting Parties to "opt-in" to their application, had received wide support by way of compromise (see A/CN.9/741, para. 54).

18. It was said that neither option 1 nor option 3 (as contained in paragraph 7 of document A/CN.9/WG.II/WP.176) adequately reflected that compromise.

19. It was furthermore said that, although a proposal made at the fifty-seventh session of the Working Group and reproduced as option 2 (in paragraph 7 of document A/CN.9/WG.II/WP.176) had in some respects encapsulated the compromise referred to under paragraph 17 above, it did not sufficiently accommodate the views of those delegations that recognized that the rules on transparency could apply under existing treaties that referred to the UNCITRAL Arbitration Rules, in particular where the intention of those treaties — manifest by express wording therein — was to incorporate any amendments to the existing UNCITRAL Arbitration Rules as those rules evolved.

First proposal on paragraph (1)

20. Consequently and with a view to reconciling that viewpoint with the existing draft text of option 2, one delegation submitted a new proposal to replace paragraph (1) in its entirety, as follows (the "article 1(1) proposal"):

> "1. The Rules on Transparency shall apply to investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ('treaty') concluded after [date of coming into effect of the Rules on Transparency], unless the Parties to the treaty have agreed otherwise. 2. In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before [date of coming into effect of the Rules on Transparency] that does not expressly provide for application of the UNCITRAL Arbitration Rules 'as amended,' 'as revised,' or 'as in force at the time a claim is submitted,' or use words with similar meaning and effect, these Rules shall apply only when: (a) the disputing parties agree to their application in respect of that arbitration; or, (b) the Parties to the treaty, or, in the case of a multilateral treaty, the home State of the investor and the respondent State, have agreed after [date of coming into effect of the Rules on Transparency] to their application. 3. These Rules shall not affect any authority that arbitral tribunals may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third parties. 4. These Rules are

available for use in investor-State arbitrations initiated under other arbitration rules or in ad hoc proceedings."

21. It was clarified by way of introduction to that proposal that it sought to balance the different views expressed within the Working Group and was premised on two key objective factors. These factors were described as: (i) the timing of the conclusion of a treaty, and specifically, whether a treaty was concluded prior to or after the coming into force of the rules on transparency; and (ii) party autonomy, whereby Parties to treaties could determine whether the rules on transparency would or would not apply to disputes arising under that treaty.

22. It was said by way of summary that the article 1(1) proposal retained the compromise referred to under paragraph 17 above, by requiring a Party to the treaty to "opt-in" to the application of the rules on transparency in relation to its existing treaties, and to "opt-out" in relation to treaties concluded after the coming into force of the rules. It was furthermore clarified that the one category of treaties to which the rules on transparency could apply under the article 1(1) proposal, and which had not previously been caught by the compromise proposal in option 2 of paragraph 7 of document A/CN.9/WG.II/WP.176, were existing treaties that included express wording regarding the evolution of the UNCITRAL Arbitration Rules — for example, where a treaty referred to the UNCITRAL Arbitration Rules "as amended", "as revised", or "as in force at the time a claim is submitted".

23. It was further stated by way of background that new paragraphs (3) and (4) of the proposal were in principle uncontroversial, with paragraph (3) simply ensuring that the new powers granted under the rules on transparency did not affect an arbitral tribunal's decision-making powers under the UNCITRAL Arbitration Rules; and paragraph (4) re-stating the principle contained in the present paragraph (3) of article 1 of the draft rules on transparency (as set out in paragraph 7 of A/CN.9/WG.II/WP.176), namely that the rules on transparency may be used in conjunction with any applicable arbitration rules.

24. The Working Group proceeded to discuss the article 1(1) proposal, both with respect to the policy considerations it raised, and, as a secondary matter, any drafting improvements that might be required to clarify that proposal.

Policy considerations

25. Views were expressed that a reference in a treaty to the UNCITRAL Arbitration Rules "as amended" or similar expression should not be sufficient to make the rules on transparency applicable. In particular, the example was given of a treaty concluded at a time where arbitrations were held in confidence and where transparency standards were not widely contemplated. In response, it was said that where a treaty expressly provided for the application of an updated version of the UNCITRAL Arbitration Rules, Parties to the treaty had contemplated evolution at the time of negotiating it. In such cases, it was said that application of the rules on transparency should be possible where the arbitral tribunal considered that it reflected the agreement of the Parties to that treaty. It was also said that the expectations of confidentiality that one might have in relation to the UNCITRAL Arbitration Rules were peculiar to commercial arbitration and that such expectations would not necessarily extend to investor-State disputes.

26. A large number of delegations accepted that the article 1(1) proposal, which provided for the possibility of application of the rules on transparency where the treaty used express dynamic wording permitting such arguments to be made before an arbitral tribunal, represented a clear, reasonable and legally sound compromise, despite not reflecting their preferred option for article 1(1).

27. Many of those delegations expressed primary support in principle for the compromise as set out in paragraph 17 above, which did not provide for the possibility of application of the rules on transparency pursuant to a dynamic interpretation of a treaty by the arbitral tribunal. Many other delegations supporting the article 1(1) proposal as a reasonable compromise explained that their primary preference would be for the arbitral tribunal to have the ability, currently encapsulated in option 3 (as set out in paragraph 7 of A/CN.9/WG.II/WP.176), to apply the rules on transparency where the treaty was interpreted in accordance with international law to provide for such application. Nonetheless, in the spirit of achieving compromise, and in the interest of progressing the rules on transparency, many delegations expressing primary support for option 2 or option 3, acknowledged that the article 1(1) proposal, as set out in paragraph 20 above, would be acceptable.

Second proposal on paragraph (1)

28. After discussion, a new proposal, slightly modifying the article 1(1) proposal, was suggested (the "second proposal"), in order to achieve greater clarity regarding its scope, and in order to allay the concerns set out in paragraph 25 above. The second proposal would consist of deletion from the chapeau in paragraph (2) of the following: "that does not expressly provide for application of the UNCITRAL Arbitration Rules 'as amended,' 'as revised,' or 'as in force at the time a claim is submitted,' or use words with similar meaning and effect". The chapeau would thus read: "In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before [date of coming into effect of the Rules on Transparency], these Rules shall apply only when:". Furthermore a new paragraph (2)(c) would be added as follows: "the arbitral tribunal determines that language in the treaty providing for the application of the UNCITRAL Arbitration Rules, as amended, as revised, or as in force at the time a claim is submitted, or using words with the same meaning and effect, expresses the agreement of the contracting Parties to apply the Rules on Transparency."

29. It was said that that proposal differed from option 3, because it limited the possibility of applying the rules on transparency based on dynamic treaty interpretation to those treaties that contained express wording ("as amended", "as revised", "as in force at the time a claim is submitted", or words with similar meaning and effect). It was also said that that proposal clarified that an arbitral tribunal would have the discretion to accept submissions that such a dynamic interpretation was appropriate, but that the rules on transparency would not automatically apply where such wording existed. Finally, it was said that that wording made it clear that the role of the arbitral tribunal would be to interpret the treaty.

30. A large majority expressed support for the "second proposal". The Working Group took note of suggestions made on that proposal as reflected under paragraphs 31 to 33 below.

31. As a matter of clarification, there was a shared understanding in the Working Group that (i) where a treaty contained rules on transparency which were drafted so as to prevail over the applicable arbitration rules, then the treaty provisions on transparency would prevail over the UNCITRAL rules on transparency, which in turn would prevail (as provided in draft article 1(3) of the rules on transparency, see paragraph 7 of document A/CN.9/WG.II/WP.176) over any applicable provision in the UNCITRAL Arbitration Rules; and (ii) nothing in article 1 should be construed as establishing rules on treaty interpretation.

Paragraph (2)(c) of the second proposal

32. It was suggested to amend paragraph (2)(c) of the second proposal so as to clarify that the arbitral tribunal should not on its own initiative make a determination on whether language in the treaty permitted application of the rules on transparency without a request of the parties to do so. One delegation disagreed with that suggestion.

Relation of the rules on transparency with the UNCITRAL Arbitration Rules

33. In response to a question regarding whether the UNCITRAL Arbitration Rules would be amended to include a reference to the rules on transparency, the Working Group was reminded of the draft proposal for amending the UNCITRAL Arbitration Rules, as contained in paragraph 15 of document A/CN.9/WG.II/WP.176. It was suggested that any amendment to the UNCITRAL Arbitration Rules be made effective as from the date of coming into effect of the transparency rules, as a number of treaties concluded since 2010 have included a reference to the 2010 UNCITRAL Arbitration Rules, and the Parties to such treaties did not necessarily intend to include rules on transparency.

Paragraph (2) — Application of the rules on transparency by the disputing parties

34. The Working Group considered article 1, paragraph (2), as contained in document A/CN.9/WG.II/WP.176, paragraph 7, which reflected the principle that the disputing parties cannot derogate from the rules on transparency unless permitted to do so by treaty (A/CN.9/741, paras. 60-81; A/CN.9/WG.II/WP.172, para. 19; A/CN.9/WG.II/WP.176, para. 17).

35. Views were expressed that paragraph (2)(b) might need to be slightly modified in order to ensure that the power it conferred on the arbitral tribunal to adapt the rules to achieve the objectives of transparency was clarified, in order to avoid such a power amounting to an additional exception to the rules (such as those set out in article 7), which, it was said, was not the intention of this provision. Rather, paragraph (2)(b) was intended only to provide some flexibility to the arbitral tribunal to adapt the rules should the circumstances of the proceedings so require. The Working Group mandated the Secretariat to amend the language as necessary in line with this objective.

36. In all other respects, the Working Group agreed on the substance of article 1, paragraph (2).

Paragraph (3) — Relationship between the rules on transparency and the applicable arbitration Rules

37. The Working Group agreed on substance of article 1, paragraph (3) as contained in paragraph 7 of A/CN.9/WG.II/WP.176.

Paragraph (4) — Relationship between the rules on transparency and the applicable law

38. The Working Group agreed on substance of article 1, paragraph (4) as contained in paragraph 7 of A/CN.9/WG.II/WP.176.

Paragraph (5) — Discretion of the arbitral tribunal

39. The Working Group recalled that, at its fifty-sixth session, it had agreed on the substance of article 1, paragraph (5) regarding exercise of its discretion by the arbitral tribunal under the rules (A/CN.9/741, para. 85).

Footnote to article 1, paragraph (1)

-"a treaty providing for the protection of investments or investors"

40. The Working Group recalled that the footnote to article 1, aimed at clarifying the understanding that treaties to which the rules on transparency would apply should be understood in a broad sense, was agreed in substance at the fifty-sixth session of the Working Group (A/CN.9/741, para. 102).

2. Article 5 — Submission by a non-disputing Party to the treaty

41. The Working Group considered article 5 as contained in paragraph 38 of document A/CN.9/WG.II/WP.176, which provided for submission by a non-disputing Party to the treaty. In particular, at its fifty-seventh session, the Working Group identified that paragraph (1) of that article required further consideration by the Working Group (A/CN.9/760, para. 124; A/CN.9/WG.II/WP.176, para. 6).

Paragraph (1)

42. The Working Group considered whether the arbitral tribunal should, or should enjoy discretion to, accept submissions by a non-disputing Party to the treaty, and therefore whether the word "shall" or "may" should be used in paragraph (1) (see A/CN.9/WG.II/WP.176, para. 40).

43. Support was expressed for the use of the word "may" for the reason that it would provide the arbitral tribunal with discretion to accept submissions by a non-disputing Party to the treaty, thereby promoting a more flexible approach by, for example, permitting the arbitral tribunal to refuse submissions made at a late stage of the proceedings, when such submissions would disrupt the proceedings.

44. Support was also expressed for the principle that an arbitral tribunal should accept submissions by a non-disputing Party to the treaty, and therefore for the use of the word "shall". It was said that accepting submissions from non-disputing Parties to the treaty would ensure that balanced and comprehensive information would be provided to the arbitral tribunal and that all views would be on record, and

that the arbitral tribunal could in any event accord the weight to that submission as it saw fit. Moreover, it was observed that were a non-disputing Party to the treaty to make a submission, it would be unusual or unlikely for an arbitral tribunal to reject it.

45. In response to an invitation by the Working Group for States to review their treaties to identify if they contained provisions giving the non-disputing Party the right to submit an opinion on treaty interpretation to the arbitral tribunal (A/CN.9/760, para. 63), it was said that treaties were either silent on the matter, or included the word "shall" (the examples of the North American Free Trade Agreement and of the Central American Free Trade Agreement being given in that respect). It was furthermore said that to add a discretionary element would potentially diverge from current practice and dilute future standards in that regard.

46. A view was expressed that the proposed distinction regarding whether the arbitral tribunal should enjoy discretion in accepting submissions by a non-disputing Party to the treaty was not relevant in practice. It was said that a non-disputing Party could make submissions on its own initiative irrespective of the use of the word "may" or "shall", and that the arbitral tribunal would in any case deal with them as it deemed appropriate. In response, it was stated that there could be situations where rejecting a submission would be justified. Therefore, regulating that matter with some flexibility was indeed necessary, in particular to deal with those situations such as late submissions disrupting the arbitral proceedings.

47. It was said that the use of the word "shall" did not preclude this flexibility, when paragraph (1) was read in conjunction with paragraph (4), which provided that the arbitral tribunal should ensure that any submission did not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

48. Two concerns were raised to this approach. First, it was said that the words "shall accept" might appear to prevent the arbitral tribunal from exercising any discretion under paragraph (4) where disruption was caused by, for example, a very late submission. Second, it was said that the second limb of paragraph (4), which addressed the question of prejudice caused to any disputing party by a submission, might not apply in relation to paragraph (1), as any submission on treaty interpretation could be seen as affecting the position of a party to the dispute.

49. In reply to the concerns set out in paragraph 48 above, it was said that (i) wording could be inserted to make clear that paragraph (4) applied, even where the words "shall accept" were used; and (ii) that the threshold in paragraph (4) was not whether prejudice would be caused, but rather a higher standard of whether "unfair" prejudice would result from such a submission.

50. A view was expressed that the ability of the arbitral tribunal to invite the non-disputing Party to make submissions with respect to treaty interpretation may prejudice the rights of the other Party to that treaty.

51. After discussion, the Working Group agreed that the arbitral tribunal should accept submissions by a non-disputing Party to the treaty, provided that any submissions would not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party. The Working Group also agreed that the word "accept" was clearer than "allow" in relation to submissions, and that the text should be amended accordingly. As a result, the Working Group agreed to amend paragraph (1) as follows: "1. The arbitral tribunal shall, subject to paragraph (4),

accept, or, after consultation with the disputing parties, may invite submissions on issues of treaty interpretation from a non-disputing Party to the treaty."

3. Article 6 — Hearings

52. The Working Group considered draft article 6 as contained in paragraph 44 of document A/CN.9/WG.II/WP.176. In particular, at its fifty-seventh session, the Working Group had identified that paragraph (1) of that article required further consideration by the Working Group (A/CN.9/760, para. 124; A/CN.9/WG.II/WP.176, para. 6) and, consequently, the Working Group resumed its discussions on that paragraph.

Paragraph (1)

53. At its fifty-seventh session, the Working Group had expressed significant support for the principle that the default rule would remain that hearings would be public under the transparency rules, subject only to the exceptions in paragraphs (2) and (3) (A/CN.9/760, para. 82). It was clarified that the text of paragraph (1) in relation to which the Working Group had agreed to proceed in that respect at its fifty-seventh session should read: "Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ('hearings') shall be public." The wording as set out in paragraph 44 of document A/CN.9/WG.II/WP.176 did not accurately reflect that agreement.

54. At the fifty-seventh session of the Working Group, some delegations had supported instead the view that a disputing party should have a unilateral right to hearings being closed (A/CN.9/760, para. 79). That proposal did not receive support at the current session of the Working Group. Instead, it was proposed by way of alternative that hearings should be closed with the agreement of both disputing parties.

55. Substantial support was expressed for the text set out in paragraph 53 above. It was said that the exceptions to which the general rule on open hearings were subject, set out in paragraphs (2) and (3) of article 6, not only created a balanced regime and protected interests identified as potentially confidential or damaging to the integrity of the arbitral process, but furthermore that any valid objection to holding open hearings would be captured by those exceptions. It was additionally said that the mandate of the Working Group in developing rules on transparency was to create a standard that provided for a different, higher standard of transparency than the existing UNCITRAL Arbitration Rules, which provided as a default rule that hearings would be held in camera (see article 25(4) of the 1976 UNCITRAL Arbitration Rules and article 28(3) of the 2010 Rules). Views were expressed that creating a discrepancy between the levels of transparency in the publication of documents under article 3, and a derogable provision regarding open hearings in article 6, might lead to the circumvention of transparency by disputing parties. It was said that disputing parties might avoid submitting written documentation subject to a standard on transparency and instead raise those issues in closed hearings. It was furthermore pointed out that article 1, paragraph (2) provided that the disputing parties may not derogate from the rules on transparency, unless permitted to do so by the treaty, and that permitting a derogation from the general rule of open hearings by agreement between the disputing parties, in the rules on transparency, would be incompatible with that article.

56. Support was also expressed for the proposal set out in paragraph 54 above, namely that hearings should be closed where both disputing parties so agreed. It was said that that proposal was a compromise, insofar as it had moved away from the previous suggestion of a unilateral veto right, and that it would facilitate the resolution of disputes by disputing parties. It was said that that proposal struck a good balance in the rules on transparency, in light of the other provisions, including on publication, notices, submissions, awards and transcripts. It was also said that the cost burden would be lower on the disputing parties if hearings were closed. A proposed modification to the joint veto proposal, to grant the arbitral tribunal discretion to override the parties' joint veto in cases involving human rights, did not receive support.

57. Delegations supporting open hearings as the default rule, subject only to the exceptions set out in paragraphs (2) and (3) of article 6, and delegations supporting a joint veto right in respect of open hearings, were invited as a possible compromise to consider whether the text of paragraph (1) as set out in paragraph 44 of document A/CN.9/WG.II/WP.176 might provide adequate comfort in relation to both approaches. That text provided for open hearings as a default rule, subject to the exceptions set out in paragraphs (2) and (3), and in addition with a discretion of the arbitral tribunal to otherwise decide, after consultation with the disputing parties. It was also pointed out that article 1, paragraph (5) would then apply in relation to the discretion of the arbitral tribunal and the factors therein to be taken into account.

4. Article 7 — Exceptions to transparency

58. The Working Group considered draft article 7 as contained in paragraph 1 of document A/CN.9/WG.II/WP.176/Add.1, which addressed exceptions to transparency. In particular, at its fifty-seventh session, the Working Group had identified that paragraph (2)(c) of that article, as well as a draft proposal for two new paragraphs, tentatively numbered 2(d) and (2)bis, required further consideration by the Working Group (A/CN.9/760, para. 123; A/CN.9/WG.II/WP.176, para. 6).

Paragraph (2)(c)

59. The Working Group considered the three options under paragraph (2)(c): (i) option 1, under which the arbitral tribunal was to conduct a conflict of law analysis for all information; (ii) option 2, under which the arbitral tribunal was directed to the law of the respondent for the respondent's information, and a conflict of law analysis for all other information; and (iii) option 3, under which the arbitral tribunal was given guidance for its conflict of law analysis that on issues of respondent information, it should take respondent law particularly into account (A/CN.9/760, para. 104).

60. Support was expressed for option 1, on the basis that it best provided for all the different possibilities that might arise in an arbitration, and that the law of the respondent might not be best suited in every case. In that respect, it was said that the arbitral tribunal was best placed to make a determination in light of all of the circumstances. It was said by those delegations in favour of option 1 that option 3 might be an acceptable compromise insofar as it, while making express that the arbitral tribunal should take into account the applicable law of the respondent and

thus potentially providing comfort to delegations favouring option 2, did not mandate a certain determination.

61. Support was also expressed for option 2. It was said that the information provided by the respondent should be protected against being made available to the public under the applicable law of the respondent. It was said that a respondent would be bound by its own law in any event and that, in that regard, there should be a level of consistency between investment treaty arbitration and domestic laws.

62. Views were expressed that, as recorded at the fifty-seventh session of the Working Group (A/CN.9/760, para. 103), option 2 was open to abuse. It was recalled that the Working Group had expressed unanimous support for the proposal that it was not permissible for a State to adopt in its investment treaties the rules on transparency and then to use its domestic laws to undermine the spirit of those rules. The Working Group unanimously reaffirmed that view.

Paragraph (2)(d)

63. The Working Group considered paragraph (2)(d), which corresponded to a proposal made at the fifty-seventh session of the Working Group (A/CN.9/760, para. 117).

64. No support was expressed for that paragraph, and consequently the Working Group agreed to delete it.

Paragraph (2)bis

65. The Working Group considered the language in tentatively numbered paragraph (2)bis, which corresponded to a proposal made at the fifty-seventh session of the Working Group (A/CN.9/760, paras. 105-109). Some support was expressed for paragraph (2)bis on the basis that it provided a separate category of information than that set out in paragraph (2)(c), and that security interests were sufficiently critical that they must be carved out as self-judging exceptions in the rules on transparency.

66. It was said that the Working Group was mandated to produce rules on transparency and that paragraph (2)bis represented a wide-ranging exception which would allow a State to circumvent the rules on transparency unilaterally. In response, it was said that the language in that paragraph was used in a number of free trade agreements and bilateral investment treaties.

B. Proposals to resolve outstanding substantive issues on the draft rules on transparency in treaty-based investor-State arbitration

1. Proposals

67. With a view to resolving the outstanding substantive and policy issues, a possible compromise proposal was made in relation to, on the one hand the scope of application of the rules, and on the other hand, the level of transparency the rules would establish.

68. It was said that a compromise in that respect might be (i) to draft article 1 on the application of the rules on transparency, such that the rules on transparency

would not apply to existing treaties (except to the extent an instrument for their application such as those set out in paragraphs 14-34 of document A/CN.9/WG.II/WP.176/Add.1 was implemented), and that the rules on transparency would apply to treaties concluded in the future unless Parties to a treaty opted out of their application; and (ii) at the same time, to retain a high level of transparency in the substantive provisions addressing open hearings (article 6, paragraph (1)) and exceptions to transparency (draft article 7, paragraph (2)). In that manner, it was said that the rules on transparency need not compromise on substance or create a lower standard of transparency, because the rules would not apply save for where Parties to a treaty had so elected.

69. In that respect, the following specific proposal was introduced as a comprehensive package to resolve outstanding substantive and policy issues (the "compromise proposal"):

(i) A new draft of article 1(1) on applicability of the rules, as follows: "(1) The Rules on Transparency shall apply to investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ('treaty') concluded after [date of coming into effect of the Rules on Transparency], unless the Parties to the treaty have agreed otherwise. (2) In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before [date of coming into effect of the Rules on Transparency], these Rules shall apply only when: (a) the disputing parties agree to their application in respect of that arbitration; or, (b) the Parties to the treaty, or, in the case of a multilateral treaty, the home State of the investor and the respondent State, have agreed after [date of coming into effect of the Rules on Transparency] to their application under that treaty. (3) These Rules shall not affect any authority that arbitral tribunals may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third parties.";

(ii) Draft article 6(1), as follows: "1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ('hearings') shall be public.";

(iii) The selection of option 3 of draft article 7(2)(c) as set out in document A/CN.9/WG.II/WP.176/Add.1, paragraph 1; and

(iv) A modification to draft article 7(2)bis such that it would read "(2)bis. Nothing in these Rules shall require a disputing party to make available information [to the public] the disclosure of which it considers would be contrary to its essential security interests."

70. Following discussion, it was noted that there was a very strong majority in favour of that compromise. Those delegations that could not accept the compromise proposal were invited (i) to determine, if a record of consensus were to be found in favour of the compromise proposal, whether those delegations would raise a formal objection to that record and, (ii) in parallel, to pursue discussions with other delegations.

71. Consequently, those delegations unable to accept the compromise proposal in paragraph 69 above introduced a new proposal as follows (the "counter-proposal"): (i) article 1 would remain as set out in paragraph 69(i) above; (ii) article 6(1) would remain as set out in the compromise proposal in paragraph 69(ii) above; (iii) option 2 of draft article 7(2)(c), rather than option 3, as set out in the compromise proposal, would be selected; and (iv) in draft article 7(2)bis, the language of the compromise proposal as set out in paragraph 69(iv) above would be adopted, but with an additional carve-out: specifically, an exception for information that would impede law enforcement, albeit without the self-judging standard to which essential security interests was subject in that paragraph.

2. Consideration of the proposals

72. The Working Group considered the compromise proposal, as set out in paragraph 69 above as well as the counter-proposal set out in paragraph 71 above. Some further support was added to the large majority expressing support for the compromise proposal.

73. It was said that in relation to both proposals, delegations had made important concessions and in so doing had moved from their original positions. In particular, it was said that in considering the counter-proposal, the concessions agreed by some delegations in the initial compromise proposal were open to re-negotiation only on a non-comprehensive, article-by-article basis.

74. In view of the large majority supporting the compromise proposal, those delegations that had been unable to accept the compromise proposal were invited to respond to whether, despite that compromise failing to represent their preferred solution, it would nonetheless be a solution that could be accepted. Those delegations requested further consideration of the counter-proposal in order to find common ground with those delegations supporting the compromise proposal.

3. Revised compromise proposal

75. After consultation, the Working Group proposed a revised compromise proposal (the "revised compromise proposal"). The articles the subject of the revised compromise proposal are set out in full as follows:

> "Article 1
>
> "(1) The Rules on Transparency shall apply to investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ('treaty') concluded after [date of coming into effect of the Rules on Transparency], unless the Parties to the treaty have agreed otherwise.
>
> "(2) In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before [date of coming into effect of the Rules on Transparency], these Rules shall apply only when: (a) the disputing parties agree to their application in respect of that arbitration; or, (b) the Parties to the treaty or, in the case of a multilateral treaty, the home State of the investor and the respondent State, have agreed after [date of coming into effect of the Rules on Transparency] to their application.

"(3) These Rules shall not affect any authority that arbitral tribunals may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third parties.

"(4) In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty: (a) The [disputing parties] [the parties to that arbitration (the 'disputing parties')] may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty; (b) The arbitral tribunal shall have the power, beside its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case if such adaptation is necessary to achieve the transparency objectives of these Rules in a practical manner.

"(5) Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.

"(6) Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.

"(7) Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account, (a) the public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings, and (b) the disputing parties' interest in a fair and efficient resolution of their dispute.

"(8) In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

"Footnote to article 1, paragraph (1):

"* For the purpose of the Rules on Transparency, a 'treaty providing for the protection of investments or investors' shall be understood broadly as encompassing any agreement concluded between or among States or regional integration organizations, including free trade agreements, economic integration agreements, trade and investment framework or cooperation agreements, and bilateral and multilateral investment treaties, so long as it contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty."

"Article 6

"(1) Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ('hearings') shall be public.

"(2) Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make

arrangements to hold in private that part of the hearing requiring such protection.

“(3) The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate) but may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render infeasible any original arrangement for public access to a hearing.”

“Article 7

“Confidential or protected information

“(1) Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to in paragraphs 4 and 5, shall not be made available to the public or to non-disputing Parties to the treaty pursuant to articles 2 to 6.

“(2) Confidential or protected information consists of: (a) Confidential business information; (b) Information that is protected against being made available to the public under the treaty; (c) Information that is protected against being made available to the public, in the case of the information of the respondent, under the law of the respondent, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or (d) Information the disclosure of which would impede law enforcement.

“(3) Nothing in these Rules requires a respondent to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.

“(4) The arbitral tribunal, in consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public or to non-disputing Parties to the treaty including by putting in place, as appropriate (a) time limits in which a disputing party, non-disputing Party to the treaty, or third person shall give notice that it seeks protection for such information in a document, (b) procedures for the prompt designation and redaction of the particular confidential or protected information in such documents, and (c) procedures for holding hearings in private to the extent required by article 6, paragraph 2. Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.

“(5) Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

"Integrity of the arbitral process

"(6) Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardise the integrity of the arbitral process as determined pursuant to paragraph 7.

"(7) The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardise the integrity of the arbitral process because (a) it could hamper the collection or production of evidence, or (b) it could lead to the intimidation of witnesses, lawyers acting for disputing parties, or members of the arbitral tribunal, or (c) in comparably exceptional circumstances."

76. All delegations supported the revised compromise proposal save for two delegations, which indicated that they could positively recommend the text to their Governments but required further time to consider that proposal.

77. After discussion, those delegations formally accepted the revised compromise proposal set out in paragraph 75 above, with one delegation expressing concerns regarding article 6(1) of that proposal in relation to open hearings.

78. The Working Group expressed formal and unanimous support for the revised compromise proposal.

Amendment to the UNCITRAL Arbitration Rules

79. The Working Group agreed that, given the solution reached as recorded in paragraph 75 above, the UNCITRAL Arbitration Rules would require an amendment in article 1(4) of those Rules in order to create a link with the rules on transparency along the lines of the language in paragraph 15 of document A/CN.9/WG.II/WP.176, and that this amendment would result in a new 2013 or 2014 version of the Rules.

80. The Working Group agreed that the language in paragraph 15 of document A/CN.9/WG.II/WP.176, with the addition of the words in brackets "[as an appendix]" after the words "include the UNCITRAL Rules on Transparency", would be presented to the Commission in that respect.

C. Establishment of a registry of published information

1. Institution(s) to serve as a registry

81. The Working Group considered article 8 as contained in paragraph 9 of document A/CN.9/WG.II/WP.176/Add.1, which addressed the repository of published information, and which contained two options regarding the possible institutional management of a registry — on the one hand, a single registry to undertake all functions (option 1); and on the other, a system whereby various arbitral institutions would maintain their own registry system (option 2).

82. The Working Group also had before it a note by the Secretariat (A/CN.9/WG.II/WP.177) further to the mandate given by the Working Group to the Secretariat to liaise with arbitral institutions to assess better the cost and other

implications of the establishment of a registry under the draft rules on transparency (A/CN.9/760, paras. 122 and 123).

83. The Working Group noted the strong preference of arbitral institutions for there to be a single institution to undertake the registry function (option 1 of draft article 8), for a number of reasons (A/CN.9/WG.II/WP.177, paras. 6-11). After discussion, the Working Group agreed that option 1, a single registry, was its preferred option, and proceeded to consider which institution should undertake that work.

84. The Working Group expressed the unanimous view that the best institution to serve as a registry under the rules on transparency would be UNCITRAL.

85. The Working Group also took note of the willingness of two other institutions, the International Centre for Settlement of Investment Disputes (ICSID), and the Permanent Court of Arbitration at The Hague (PCA), to undertake the function of a single registry under the rules on transparency should UNCITRAL not be in a position to take up that role.

2. Hard copy documents

86. After discussion, the Working Group agreed, having regard to the issues raised in paragraph 15 of document A/CN.9/WG.II/WP.177, that the registry would only publish electronic documents. Consequently, the Working Group agreed to delete the square bracketed wording in article 8.

3. Guidelines

87. The Working Group agreed that a document setting out guidelines for the functioning of a registry should be drafted, and that it would be within the remit of the institution ultimately serving as registry to create the same.

4. Waiver of liability

88. The Working Group considered whether a waiver of liability clause, in respect of both the arbitral tribunal, through which the documents would be sent to the registry under article 3, and for the registry itself, should be added to the rules. The question of how to address liability claims brought by third parties (e.g., in case of violation of data privacy) was also raised. The Working Group agreed that the registry should enjoy the widest possible immunity. It was agreed that the UNCITRAL Secretariat, the PCA and ICSID would consider, in relation to their respective institutions, whether a waiver of liability clause would need to be included in the rules, taking into account that immunities may attach to those institutions by virtue of their status as international organizations.

D. Consideration of outstanding drafting issues on the draft rules on transparency in treaty-based investor-State arbitration

89. The Working Group agreed to consider outstanding drafting issues relating to the rules on transparency. It was clarified that the guiding principle in considering those suggestions was to ensure the rules on transparency functioned properly but not to alter in any way the substance of provisions already agreed.

1. Article 2 — Publication of information at the commencement of arbitral proceedings

90. In order to clarify that the notice of arbitration had been transmitted to, or received by, the respondent before publication of information pursuant to article 2, the Working Group agreed that the second sentence of article 2 should be amended to read as follows: “Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being made.”

2. Article 3 — Publication of documents

General

91. The Working Group considered how the registry would deal with requests for documents after the arbitral tribunal has discharged its function and its mandate terminated. It was clarified that requests for documents would have to be made before the arbitration terminated, as in any case, documents published by the registry could only be communicated to the registry by the arbitral tribunal. It was suggested that disputing parties should be encouraged to work out an arrangement to deal with requests for documents after the arbitral tribunal had discharged its functions.

Paragraphs (1), (2) and (3)

92. As a matter of drafting, the Working Group agreed to delete the words “which must be requested separately under paragraph 3” in draft article 3, paragraphs (1) and (2). Further, the Working Group agreed to add the word “exhibits and” before the words “any other documents” in the first sentence of paragraph (3).

Paragraph (2)

93. The Working Group further considered whether paragraph (2) might create ambiguity in relation to a request for expert reports or witness statements after the arbitral tribunal had discharged its duties (A/CN.9/WG.II/WP.177, para. 23). It was agreed to add the words “to the arbitral tribunal” at the end of paragraph (2) in order to clarify (as set out in paragraph 91 above) that requests must be made whilst the arbitral tribunal was extant.

Paragraph (5)

94. The Working Group took note of a concern that the phrase “any administrative costs” in paragraph (5) might be ambiguous insofar as it might, erroneously, suggest that a third party may have to pay for the administrative costs relating to publication such as uploading onto the registry website. The Working Group requested that the Secretariat amend the language accordingly.

V. Other business

95. The Working Group recalled that the Secretariat was entrusted by the Commission with the preparation of a guide on the New York Convention, in order to promote a more uniform interpretation and application of the Convention. That project is carried out by the Secretariat in close cooperation with Professors G. Bermann and E. Gaillard. Mr. Gaillard, with his research team, in conjunction with Mr. Bermann and his research team, with the support of the Secretariat have established a website (www.newyorkconvention1958.org) in order to make the information gathered in the preparation of the guide on the New York Convention publicly available. The purpose of the website is to make available details on the judicial interpretation of the Convention by States Parties.

96. The Working Group was informed that the newyorkconvention1958.org website has been upgraded and streamlined to make the latest version a more complete and user-friendly research and information tool for legislators, judges, practitioners, parties and academics. The interface has been improved to facilitate quick or advanced searches, which can be performed by clicking on icons, checkboxes, or suggested search terms. It can handle complex search equations and track the results of multiple-step searches. As part of the latest update to the newyorkconvention1958.org website, users can access a larger and constantly growing database of information. To date, the newyorkconvention1958.org website assembles summaries of 782 cases on the implementation of the New York Convention from 18 jurisdictions, and makes available over 900 original-language decisions and 90 English-language translations.

97. Case law and summaries from other jurisdictions will be added to the website on an ongoing basis. In that respect, delegates were invited to contribute case law from their jurisdiction through the website.

98. The Working Group expressed its appreciation for the establishment of the website and for its update. Special appreciation was expressed to Ms. Yas Banifatemi who coordinated the work under the project.