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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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* This document is submitted later than the required ten weeks prior to the start of the meeting because of the need to complete consultations.

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B. Content of draft rules on transparency in treaty-based investor-State arbitration (*continued*)

Article 9. Repository of published information

1. Draft article 9 — Repository of published information

Option 1

> "----- *shall be in charge of making available to the public information pursuant to the Rules on Transparency*." [Other services to be determined, such as storage of documents]."

Option 2

> "*1. If the arbitral proceedings are administered by an arbitral institution, that institution shall be in charge of making information available to the public pursuant to the Rules on Transparency*. [Other services to be determined, such as storage of documents].
>
> "*2. If the arbitral proceedings are not administered by an arbitral institution, the respondent shall designate an arbitral institution among the list of institutions in annex, which shall fulfil the functions referred to in paragraph 1*."

Remarks

2. At its fifty-fourth session, the Working Group discussed the issue whether establishing a neutral repository ("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 (PCA) and the International Centre for Settlement of Investment Disputes (ICSID) had expressed their readiness to provide such registry services (A/CN.9/717, para. 148).

Options 1 and 2

3. At the fifty-fifth session of the Working Group, various proposals were made (A/CN.9/736, paras. 131-133). One was the establishment of a single registry as contained in option 1. Another proposal was in favour of a list of arbitral institutions that could fulfil the function of a registry as reflected under option 2 (A/CN.9/736, para. 131). Under option 2, it is proposed to annex to the rules on transparency a list of arbitral institutions that could fulfil the function of a registry. The Working Group may wish to consider whether and how the annex could be updated from time to time by UNCITRAL. It is proposed that the choice of the institution be made by the respondent.

4. The Working Group may wish to note that reference is made to the publication of "information" under article 9 of the draft rules on transparency, in order to

capture the submission of information under article 2, publication of documents under article 3 and publication of awards under article 4. The rules on transparency do not foresee the publication of recordings of public hearings, but neither prohibit it.

Matters to be considered for the establishment of a repository of published information ("registry")

- *Interested arbitral institutions*

5. It may be recalled that the PCA as well as ICSID have expressed their interest to act as a single registry, should that function not be fulfilled by the United Nations Secretariat. The PCA, ICSID, as well as the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and the Cairo Regional Centre for International Commercial Arbitration (CRCICA) have expressed their interest to act as one of several participating organizations acting as registry (see above, paragraph 1, article 9, option 2).

- *Questions for consideration where various arbitral institutions would act as registry providers*

6. The Working Group may wish to consider the following questions if it decides that a range of arbitral institutions could provide the services of a registry, as proposed under article 9, option 2, of the rules on transparency:

- Whether, in view of establishing a common framework and having a coherent system in place, guidance should be provided by UNCITRAL to arbitral institutions with regard to issues surrounding the establishment and functioning of registries, the determination of common features, such as security and access control issues, design of the system, format of information posted; and

- Whether, in view of enhancing public access to the information that may be found on the website of different organizations, it would be advisable to have a centralized collection of links to the different cases, which could be located at the website of UNCITRAL, maintained by the UNCITRAL Secretariat.

7. Further details on the various possibilities for establishing a registry where different institutions are involved, as suggested by arbitral institutions, can be found in document A/CN.9/WG.II/WP.170 and its addendum.

- *Costs*

8. At its fifty-fifth session, the Working Group invited interested arbitral institutions to provide information on the costs of establishing and maintaining a repository of information to be published in accordance with the rules on transparency (A/CN.9/736, para. 133). In pursuance to that decision, the Secretariat circulated a questionnaire to arbitral institutions that had expressed an interest in being associated to the current activities of the Working Group or that had been listed by UNCTAD as institutions administering treaty-based investor-State

disputes.[1] The questionnaire and the replies received from arbitral institutions are reproduced in document A/CN.9/WG.II/WP.170 and its addendum.

9. If the United Nations Secretariat were to act as a unique registry provider, the estimated cost of establishing the online system would be 27,000 euros. The estimated cost of system maintenance, technical support and data hosting would be 7,000 euros per year.

10. The Working Group may wish to consider that management of the registry would, depending on the volume of cases, possibly require the full-time assignment of one staff member. At this point, it is not yet possible to determine whether that staff member could be assigned through reallocation of responsibilities or whether an additional staff member would be required.

11. Possible methods of covering the costs associated with the registry system could be determined once the parameters of the registry have been finalized by the Working Group. The Working Group, however, might wish to consider seeking guidance from the Commission at its forty-fifth session as to whether, in the case that the Secretariat were to act as registry under the rules on transparency, a cost recovery mechanism should be developed

12. If other institution(s) were to act as registry providers, the Secretariat could maintain links to the various cases on the UNCITRAL website at no additional cost.

C. Interplay between the rules on transparency and arbitration rules

1. Rules on transparency and UNCITRAL Arbitration Rules

13. At its fifty-fifth session, the Working Group requested the Secretariat to provide an analysis of issues that might arise in the application of the rules on transparency to arbitration under both the 1976 UNCITRAL Arbitration Rules (referred to in this section as the "1976 Arbitration Rules") and their 2010 revised version (referred to in this section as the "2010 Arbitration Rules") (both versions are being referred to in this section as the "UNCITRAL Arbitration Rules") (A/CN.9/736, para. 30).

14. This section discusses the interplay of the UNCITRAL Arbitration Rules and the rules on transparency, when the two sets of rules apply in the context of treaty-based investor-State arbitration only (see article 1, paragraph (5), in A/CN.9/WG.II/WP.169, paras. 8 and 22).

15. The interplay between the rules on transparency and the UNCITRAL Arbitration Rules is threefold:

- The provisions of the rules on transparency regarding publication of arbitral awards and hearings would modify the corresponding provisions of the UNCITRAL Arbitration Rules;

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[1] See *Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note No. 1 (2010), International Investment Agreements, p. 2; available on 28 November 2011 at www.unctad.org/en/docs/webdiaeia20103_en.pdf; see also document A/CN.9/WG.II/WP.160, para. 29.

- Other provisions of the rules on transparency would supplement the UNCITRAL Arbitration Rules; some of those rules supplementing the UNCITRAL Arbitration Rules, in particular those on submissions by third persons and non-disputing Parties to the treaty, are inspired from certain arbitral practices in treaty-based investor-State arbitrations;
- Articles 8 and 9 of the rules on transparency would not affect the UNCITRAL Arbitration Rules because they relate solely to the implementation of the rules on transparency.

a. Modifications to provisions of the UNCITRAL Arbitration Rules

Publication of arbitral awards — article 4 of the rules on transparency, modifying article 32, paragraph (5), of the 1976 Rules and article 34, paragraph (5), of the 2010 Arbitration Rules

16. Article 4 of the rules on transparency provides that all arbitral awards shall be published, subject to the exceptions defined in those rules. Article 4 would reverse the principle whereby awards may be made public with the consent of the parties, contained in article 32, paragraph (5), of the 1976 Arbitration Rules and article 34, paragraph (5), of the 2010 Arbitration Rules.

Hearings — article 7 of the rules on transparency, modifying article 25, paragraph (4) of the 1976 Arbitration Rules and article 28, paragraph (3), of the 2010 Arbitration Rules

17. Article 7 of the rules on transparency provides that "hearings shall be public, unless otherwise decided by the arbitral tribunal, after consultation with the disputing parties" (subject to the exceptions defined in the rules on transparency). Article 7 would reverse the provisions of article 25, paragraph (4), of the 1976 Arbitration Rules and article 28, paragraph (3), of the 2010 Arbitration Rules that provide for hearings to "be held in camera, unless the parties agree otherwise".

b. Supplement to the UNCITRAL Arbitration Rules

18. Articles 1, 2, 3, 5 and 6 of the rules on transparency would supplement the UNCITRAL Arbitration Rules.

Scope of application — article 1 of the rules on transparency

Article 1, paragraph (1), of the rules on transparency and article 1, paragraph (2), of the 2010 Arbitration Rules: temporal and material applications

19. Both options under article 1, paragraph (1), referred to as the "opt-out" and "opt-in" solutions, provide for the application of the rules on transparency to the settlement of disputes arising under treaties concluded after the date of coming into effect of the rules on transparency. For the settlement of those disputes, the offer to arbitrate contained in the investment treaty would be made after 15 August 2010 (which is the date of coming into effect of the 2010 Arbitration Rules) and, in accordance with article 1, paragraph (2), of the 2010 Arbitration Rules, the 2010 Arbitration Rules would apply, in conjunction with the rules on transparency.

20. Parties to a treaty may decide that the rules on transparency should also apply to treaties concluded before the date of coming into effect of the rules on transparency (as well as before the date of coming into effect of the 2010 Arbitration Rules).

21. Under the opt-out solution, the rules on transparency would apply to the settlement of disputes arising under existing treaties if the treaties provide for the application of the UNCITRAL Arbitration Rules, as in effect at the date of commencement of the arbitration. In that case, the rules on transparency would be applied in conjunction with the 2010 Arbitration Rules.

22. Under the opt-in solution, Parties to a treaty may agree to apply the rules on transparency to their already concluded investment treaties. Depending on the consent expressed by the Parties, the rules on transparency may then apply in conjunction with the 2010 Arbitration Rules, the 1976 Arbitration Rules (or, depending on the variant retained under the opt-in solution, to arbitration irrespective of the arbitration rules applicable to the settlement of the dispute).

23. Under the various possible instruments available to Parties to investment treaties to declare the rules on transparency applicable to investment treaties concluded before the date of coming into effect of the rules on transparency (see A/CN.9/WG.II/WP.166/Add.1, paras. 10 to 23), the Parties may agree to declare the rules on transparency applicable either in conjunction with the 2010 Arbitration Rules, or the 1976 Arbitration Rules (or more generally to arbitration regardless of the arbitration rules applicable to the settlement of the dispute).

Article 1, paragraph (3), of the rules on transparency, supplementing article 15, paragraph (1), of the 1976 Arbitration Rules and article 17, paragraph (1), of the 2010 Arbitration Rules

24. Article 1, paragraph (3), of the rules on transparency provides standards for the exercise of discretion by the arbitral tribunal in a manner that is consistent with the principles underlying article 15, paragraph (1), of the 1976 Arbitration Rules and article 17, paragraph (1), of the 2010 Arbitration Rules.

Initiation of arbitration proceedings — article 2 of the rules on transparency, supplementing article 3 of the 1976 Arbitration Rules and 2010 Arbitration Rules, and article 4 of the 2010 Arbitration Rules

25. Article 2 of the rules on transparency would supplement article 3 of the UNCITRAL Arbitration Rules, as it establishes an obligation for the disputing parties to provide information to the registry once the notice of arbitration has been received. It would also supplement article 4 of the 2010 Arbitration Rules if a reference to the response to the notice of arbitration is included in article 2.

Publication of documents — article 3 of the rules on transparency, supplementing section III of the UNCITRAL Arbitration Rules

26. Article 3 of the rules on transparency provides that the arbitral tribunal shall communicate documents to the registry for publication. Such obligation is not dealt with under the UNCITRAL Arbitration Rules. Article 3 would supplement section III of the UNCITRAL Arbitration Rules on arbitral proceedings.

Submission by third persons — article 5 of the rules on transparency; Submission by non-disputing Party to the treaty — article 6 of the rules on transparency, supplementing section III of the UNCITRAL Arbitration Rules

27. The UNCITRAL Arbitration Rules are silent on submissions by third persons. Submissions by third persons have been accepted by arbitral tribunals in cases under the UNCITRAL Arbitration Rules, in general based on the discretion left in the UNCITRAL Arbitration Rules to the arbitral tribunal to "conduct the arbitration in such manner as it considers appropriate".[2] Arbitral tribunals also considered that article 25, paragraph (4), of the 1976 Arbitration Rules (corresponding to article 28, paragraph (3), of the 2010 Arbitration Rules), did not prevent the arbitral tribunal to receive written submissions.[3]

28. Articles 5 and 6 of the rules on transparency would therefore supplement section III of the UNCITRAL Arbitration Rules by codifying how, in treaty-based investor-State arbitration, the arbitral tribunal should handle submissions by third persons and non-disputing Parties to the treaty.

c. No effect on the UNCITRAL Arbitration Rules

Exceptions to transparency — article 8 of the rules on transparency

29. Article 8 deals with exceptions to the rules on transparency. It defines information that is considered as confidential or sensitive, and should be excluded from publication. There is no provision on confidential or sensitive information in the UNCITRAL Arbitration Rules. Article 8 also addresses the matter of protection of the integrity of the arbitral process, in the limited context of the impact of transparency on the arbitral process.

30. Article 8 would not affect the UNCITRAL Arbitration Rules, because it relates solely to the implementation of the rules on transparency.

Repository of published information — article 9 of the rules on transparency, and appointing authorities

31. Article 9 of the rules on transparency provides for the establishment of a repository of published information, which may consist of one institution or many institutions providing the service of a registry. The repository will, from the date the

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[2] See for instance, *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to intervene as "amici curiae", 15 January 2001; see also, *United Parcel Service of America inc. v. Government of Canada*, "Decision of the tribunal on petitions for intervention and participation as amici curiae", 17 October 2001, available at: http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthorityAmicus.pdf; *Glamis Gold, Ltd. v. The United States of America*, "Decision on application and submission by Quechan Indian Nation", 16 September 2005, available at: www.naftaclaims.com/Disputes/USA/Glamis/Glamis-Amicus-Decision--16-09-05.pdf. See also the comments of the United States of America in document A/CN.9/159/Add.3 on Transparency in treaty-based investor-State arbitration.

[3] See for instance, *United Parcel Service of America inc. v. Government of Canada*, "Decision of the tribunal on petitions for intervention and participation as amici curiae", 17 October 2001, paras. 65-68, available at: http://naftaclaims.com/Disputes/Canada/UPS/UPSDecisionReParticipationAmiciCuriae.pdf.

arbitral tribunal is constituted, mainly communicate with the arbitral tribunal for the publication of documents.

32. Option 2 of article 9 provides a list of arbitral institutions that may be chosen by the parties to act as registry. It may be noted that the UNCITRAL Arbitration Rules provide for the designation of an appointing authority, which may assist the parties in certain instances. It is likely that if the parties choose as appointing authority an institution also listed under article 9 (option 2), the same institution will act as both an appointing authority and a repository of published information for the case. However, option 2 of article 9 does not provide that if an appointing authority has been designated, that appointing authority will act as the registry for the reasons that an appointing authority may also be a physical person, and may be chosen by the parties at a late stage of the proceedings.

33. Article 9 is to be considered in conjunction with the articles of the rules on transparency only, as its purpose is to deal with the means of publication. It would not affect the UNCITRAL Arbitration Rules.

Allocation of costs

34. The Working Group may wish to note that article 40, paragraph (1), of the 1976 Arbitration Rules, as well as article 42, paragraph (1), of the 2010 Arbitration Rules, provide that "the costs of arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case." The allocation of costs resulting from the application of the rules on transparency would be covered by those provisions of the UNCITRAL Arbitration Rules.

2. Arbitration rules of international arbitral institutions

35. Comments received from arbitral institutions on the interplay of the rules on transparency with their institutional rules will be published by the Secretariat as it receives them.

III. Draft convention on transparency in treaty-based investor-State arbitration

36. At its fifty-fifth session, the Working Group considered the text of a draft convention on transparency in treaty-based investor-State arbitration as contained in document A/CN.9/WP.166/Add.1, paragraph 19. The Working Group considered that a convention on the applicability of the rules was feasible and interesting, as that instrument was said to best fulfil the mandate of the Working Group to further transparency in treaty-based investor-State arbitration. The Working Group recalled its understanding that such a convention would make the rules on transparency applicable only to investment treaties between such States (or regional economic integration organizations) Parties that would also be parties to the convention on transparency (A/CN.9/736, para. 135).

37. The text of a draft convention on transparency in treaty-based investor-State arbitration could 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 or investors between Contracting Parties to this Convention.*

"*2. The term "treaty providing for the protection of investments or investors" means any investment agreement between Contracting Parties, including a bilateral or multilateral investment agreement or free trade agreement, so long as it contains provisions on the protection of investments and a right for investors to resort to arbitration against Parties to the treaty.*

"*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 Party 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 or investors between Contracting Parties to this Convention. Nothing in this agreement prevents Contracting Parties from applying standards that provide a higher degree of transparency than the Rules on Transparency*."

Remarks

38. The Working Group may wish to consider the wording of the draft convention as set out above, in paragraph 37. The drafting takes account of the suggestion made at the fifty-fifth session of the Working Group that the opening words of article 3 of the draft convention be amended to read "Each Contracting Party agrees that the UNCITRAL Rules on Transparency shall apply […]" for the reason that the language needed to be more specific (A/CN.9/736, para. 135). The definition of the term "treaty providing for the protection of investments or investors" has been modified to more closely follow the proposed definition of that term in article 1 of the rules on transparency (A/CN.9/WG.II/WP.169, paras. 8 and 23 to 24).

39. The option of a convention in the form of a general statement of applicability as proposed in this note does not incorporate the contents of the rules on transparency currently developed by the Working Group, but reflects the agreement of the Contracting Parties to apply these rules to arbitrations under their investment treaties existing at the date of entry into force of the convention. The Working Group may wish to consider further the question raised at its fifty-fifth session whether the convention should also include the text of the rules on transparency (A/CN.9/736, para. 135).

40. The draft convention 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 it is considered that the option of a convention should be pursued.

41. The Working Group may wish to note that the wording of the draft convention has been chosen to be as generic as possible, to make the draft convention applicable to as many investment treaties as possible.