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

Note by the Secretariat

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. It was confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with a great practical interest, taking account of the high number of such treaties already concluded.[3]

3. At its forty-fifth session (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,[4] 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.[5]

4. At its fifty-third (Vienna, 4-8 October 2010) and fifty-fourth (New York, 7-11 February 2011) sessions, the Working Group considered the matters of form, applicability and content of a legal standard on transparency in treaty-based investor-State arbitration.[6] At its fifty-fifth session (Vienna, 3-7 October 2011), the Working Group completed a first reading of the draft rules on transparency in treaty-based investor-State arbitration (as contained in document A/CN.9/WG.II/WP.166 and its addendum).[7] At its fifty-sixth (New York, 6-10 February 2012) and fifty-seventh (Vienna, 1-5 October 2012) sessions, the Working Group undertook a second reading of the draft rules on transparency (as contained in document A/CN.9/WG.II/WP.169 and its addendum).[8]

5. In accordance with the decisions of the Working Group at its fifty-seventh session (A/CN.9/760, para. 12), part II of this note contains a revised draft of the rules on transparency (articles 1 to 6 are dealt with in this note and

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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., *Sixty-third Session, Supplement No. 17 and corrigendum* (A/63/17 and Corr.1), para. 314; ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200.

[5] Ibid., *Sixty-seventh Session, Supplement No. 17*(A/67/17), paras. 65-69.

[6] Reports of the Working Group on the work of its fifty-third (A/CN.9/712) and fifty-fourth (A/CN.9/717) sessions.

[7] Report of the Working Group on the work of its fifty-fifth session (A/CN.9/736).

[8] Report of the Working Group on the work of its fifty-sixth (A/CN.9/741) and fifty-seventh (A/CN.9/760) sessions.

articles 7 and 8 in the addendum to this note). The question of instruments that could be prepared regarding the application of the rules on transparency to the settlement of disputes arising under investment treaties concluded before the date of adoption of the rules on transparency is addressed in part III (in the addendum to this note), as well as in document A/CN.9/WG.II/WP.166/Add.1, part III.

II. Draft rules on transparency in treaty-based investor-State arbitration

A. General remarks

List of outstanding issues for the consideration by the Working Group

6. At its fifty-seventh session, the Working Group noted matters left open for its consideration as part of the third reading of the rules on transparency, as follows: article 1(1) on the scope of application (see below, paras. 8-16); article 5(1), regarding whether the word "may" or "shall" should be used in relation to permission by the arbitral tribunal of submissions on issues of treaty interpretation from a non-disputing Party to the treaty (see below, para. 40); article 6(1), regarding the question of open hearings, and whether a disputing party should have a unilateral right to hearings being closed (see below, para. 45); article 7(2)(c) and a draft proposal for two new paragraphs, tentatively numbered (2)(d) and (2)bis, regarding the definition of confidential or protected information and a provision on the respondent's ability to prevent the disclosure of certain information, respectively (see document A/CN.9/WG.II/WP.176/Add.1, paras. 4-6); and article 8, on the organization of a repository of published information (see document A/CN.9/WG.II/WP.176/Add.1, para. 10 and 11).

B. Content of draft rules on transparency in treaty-based investor-State arbitration

Article 1. Scope of application

7. Draft article 1 — Scope of application.

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

Option 1 (see document A/CN.9/WG.II/WP.172, paras. 6-18)

> *"1. The Rules on Transparency shall apply to investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors ("treaty")* when the Parties to the treaty [or all parties to the arbitration (the "disputing parties")] have agreed to their application. In a treaty concluded after [date of coming into effect of the Rules on Transparency], a reference in the treaty to the UNCITRAL Arbitration Rules shall be presumed to incorporate the Rules on Transparency, unless the Parties to the treaty have agreed otherwise, such as through a reference to a particular version of the UNCITRAL Arbitration Rules [that does not refer to the Rules on Transparency]."*

Option 2 (see document A/CN.9/760, para. 132)

"*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 respect of (i) 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] and (ii) investor-State arbitrations initiated under other arbitration rules or ad hoc, the Rules on Transparency shall [only] apply [if] [provided that]:

(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, have agreed to the application of these Rules [after] [in an instrument adopted after] [date of coming into effect of the Rules on Transparency]."

Option 3 (see document A/CN.9/WG.II/WP.174)

"*1. If a treaty concluded prior to [date of adoption/effective date of the Rules on Transparency] refers to the UNCITRAL Arbitration Rules, that reference means the version of the UNCITRAL Arbitration Rules that incorporates the Rules on Transparency if the treaty, as interpreted in accordance with international law, reflects the agreement of the Parties to the treaty to the application of that version of the UNCITRAL Arbitration Rules. The Parties to the treaty may also agree, after [date of adoption/effective date of the Rules on Transparency], to apply the Rules on Transparency under a treaty concluded prior to that date.*

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

"*2. "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.

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

"*3. 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.

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

"*4. 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.*

Paragraph (5) — Discretion of the arbitral tribunal

"*5. 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.*

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.*"

Remarks

Paragraph (1) — Applicability of the rules on transparency

8. At its fifty-sixth session, the Working Group entrusted the Secretariat with the preparation of a revised version of article 1(1) (A/CN.9/741, paras. 54 and 57). At that session, the Working Group had considered two solutions for the applicability of the rules on transparency. Under the "opt-out" solution, the rules on transparency would be incorporated into the UNCITRAL Arbitration Rules (as revised in 2010), and consequently would apply under investment treaties providing for arbitration under the UNCITRAL Arbitration Rules, unless the investment treaty provided that the rules on transparency did not apply (A/CN.9/741, para. 14). It was discussed whether, under this "opt-out" solution, the rules on transparency would also apply to arbitrations arising under existing treaties. It was said that the application of the rules to existing treaties might result from a "dynamic interpretation" of an investment treaty, meaning that a reference in such a treaty to the UNCITRAL Arbitration Rules might be interpreted to incorporate the rules on transparency (A/CN.9/741, paras. 20 and 42). Under the "opt-in" solution, the rules on transparency would only apply when the High Contracting parties (referred to as "Parties") to an investment treaty expressly consent to their application (A/CN.9/741, para. 14).

- Option 1

9. At that session, views expressed differed on (i) whether an opt-in or opt-out approach was preferable and (ii) whether the possibility of dynamic interpretation for existing investment treaties should be left open (A/CN.9/741, para. 55). Pursuant to the instructions from the Working Group to redraft article 1(1) based on the deliberations at its fifty-sixth session (A/CN.9/741, paras. 54 and 57), option 1, reproduced above in paragraph 7, was proposed in document A/CN.9/WG.II/WP.172, paragraph 6. The first sentence of draft paragraph (1) states the general principle of public international law that treaty Parties can only be bound by an external set of rules if they have so agreed. The second sentence of paragraph (1) refers to treaties concluded after the date of coming into effect of the rules on transparency. It establishes a presumption in favour of the applicability of the rules on transparency.

10. Delegations that found it difficult to agree with the approach described above under paragraph 9 were invited to communicate drafting suggestions in that respect to the Secretariat for consideration by the Working Group (A/CN.9/741, para. 59). Options 2 and 3 correspond to proposals by delegations.

- Option 2

11. Option 2 was proposed for further consideration during the fifty-seventh session the Working Group. Paragraph (1) establishes the principle that for investment treaties concluded after the date of adoption of the rules on transparency, the rules shall apply when a dispute is initiated under the UNCITRAL Arbitration Rules unless the Parties to the investment treaty have agreed otherwise. Paragraph (2) establishes the principle that for investment treaties concluded before the date of adoption of the rules on transparency, the rules on transparency would apply to a dispute initiated under any arbitration rules where (a) the disputing parties agree to their application in relation to that arbitration; or (b) the Parties to the treaty have so agreed after the date of adoption/effective date of the rules on transparency. As part of option 2, a proposal was made to amend article 1 of the 2010 UNCITRAL Arbitration Rules (see below, para. 15).

- Option 3

12. Option 3 also aims at establishing principles of application of the rules on transparency for investment treaties concluded before the date of adoption of the rules on transparency. This proposal (also reproduced with comments in document A/CN.9/WG.II/WP.174) was made on the basis that no rule or presumption should be established in the transparency rules regarding their application under existing investment treaties, but rather that internationally accepted rules of treaty interpretation should prevail (A/CN.9/760, para. 140).

- Rules on transparency as stand-alone rules or as appendix

13. At its fifty-sixth session, the Working Group requested the Secretariat to provide an analysis of the implications of presenting the rules on transparency in the form of an appendix to the 2010 UNCITRAL Arbitration Rules or as a stand-alone text. If the rules on transparency were to become an appendix to the 2010 UNCITRAL Arbitration Rules, this would result in three sets of UNCITRAL

Arbitration Rules: 1976 UNCITRAL Arbitration Rules, 2010 UNCITRAL Arbitration Rules and the 2013 UNCITRAL Arbitration Rules (see document A/CN.9/WG.II/WP.172, paras. 11-16).

14. At the fifty-sixth session of the Working Group, concerns had been expressed that it might be difficult to exclude a dynamic interpretation if the transparency rules were presented as an appendix to the UNCITRAL Arbitration Rules (A/CN.9/741, para. 57). If the rules on transparency were to take the form of a stand-alone text, the possibility of a dynamic interpretation would be more limited.

15. At the fifty-seventh session of the Working Group, a proposal was made to articulate the link between the 2010 UNCITRAL Arbitration Rules and the rules on transparency, without formally making the rules on transparency part of, or an annex to, the 2010 UNCITRAL Arbitration Rules. That proposal was made in conjunction with option 2 (see above, para. 11) (A/CN.9/760, para. 133). In this respect, it was proposed to amend article 1 of the 2010 UNCITRAL Arbitration Rules was as follows: "*4. For investor-State arbitrations initiated pursuant to a treaty providing for the protection of investments or investors, these Rules of Arbitration include the UNCITRAL Rules on Transparency [as amended from time to time] subject to article 1 of the UNCITRAL Rules on Transparency*." The Working Group may wish to consider that, if the rules on transparency are a stand-alone text, it may then not be necessary to amend the 2010 UNCITRAL Arbitration Rules. The rules on transparency would apply in conjunction with the UNCITRAL Arbitration Rules, as they would apply in conjunction with any other sets of arbitration rules.

- *Date of adoption/effective date of the rules on transparency*

16. The Working Group may wish to consider whether the date of coming into effect of the rules on transparency should be the date of their adoption by the Commission, or a later date.

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

17. Paragraph (2) reflects the modifications found acceptable at the fifty-sixth session of the Working Group (A/CN.9/741, paras. 74, 78 and 81). It establishes the principle that the disputing parties may not derogate from the rules on transparency unless permitted to do so by the investment treaty, for the policy reason that it would not be appropriate for the disputing parties to reverse a decision made by the Parties to the investment treaty regarding application of the rules, particularly as the rules are intended to benefit not only the investor and the host State but also the general public (A/CN.9/741, para. 61). Pursuant to the decision made by the Working Group at its fifty-sixth session, paragraph (2) provides, in addition, for the possibility that the arbitral tribunal could adapt the rules on transparency (A/CN.9/741, paras. 73, 74, 78 and 81). As a matter of drafting, if the reference to the disputing parties is retained under paragraph (1), the definition of disputing parties in paragraph (2)(a) would be deleted.

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

18. At the fifty-sixth session of the Working Group, a large majority was in favour of including a provision on the relationship between the rules on transparency and the applicable arbitration rules (A/CN.9/741, para. 97).

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

19. At its fifty-sixth session, the Working Group mandated the Secretariat to complement the provision on the relationship between the rules on transparency and the applicable arbitration rules with a provision on the relationship between the rules on transparency and the applicable law pursuant to the provision contained in article 1(3) of the 2010 UNCITRAL Arbitration Rules (A/CN.9/741, para. 97). The Working Group may wish to consider article 1(4) as contained above in paragraph 7, which closely follows the wording of article 1(3) of the 2010 UNCITRAL Arbitration Rules. The Working Group may wish to note that, depending on the applicable domestic law, disputing parties could then derogate from the rules on transparency (see also document A/CN.9/WG.II/WP.176/Add.1, paras. 4-6).

Paragraph (5) — Discretion of the arbitral tribunal

20. At its fifty-sixth session, the Working Group adopted the substance of paragraph (5) (A/CN.9/741, para. 85).

Footnote to article 1, paragraph (1)

21. The footnote to article 1(1) on the definition of the term "a treaty providing for the protection of investments or investors" reflects the drafting proposals made at the fifty-sixth session of the Working Group. The footnote aims at clarifying the understanding that investment treaties to which the rules on transparency would apply should be understood in a broad sense. The footnote was approved by the Working Group, subject to the deletion of the word "intergovernmental" after the word "integration" and the use of reference to the "protection of investments and investors" in a consistent manner (A/CN.9/741, paras. 101 and 102).

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

22. Draft article 2 — Publication of information at the commencement of arbitral proceedings.

> "*Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 8. Upon its receipt of the notice of arbitration from either disputing party, 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.*"

Remarks

23. At its fifty-sixth session, the Working Group adopted article 2 in the version that left the publication of the notice of arbitration (and of the response thereto) to be dealt with under article 3, after the constitution of the arbitral tribunal (A/CN.9/741, para. 109). Article 2 encapsulates the drafting modifications agreed to by the Working Group (A/CN.9/741, para. 109) in order to clarify that all disputing parties should have the obligation to send the notice of arbitration to the repository. The repository in turn should publish the information once it receives the notice of arbitration from either disputing party.

24. The Working Group may wish to consider: (i) how to address a situation where a notice of arbitration is sent by a claimant to the repository before the arbitral proceedings had commenced, i.e., before the notice of arbitration had been received by the respondent (A/CN.9/741, para. 107); (ii) whether the opening words "once the notice of arbitration has been received by the respondent" sufficiently address that matter; (iii) the difficulties of fulfilling the administrative functions involved for the repository in that regard.

Article 3. Publication of documents

25. Draft article 3 — Publication of documents.

"*1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration; the response to the notice of arbitration; the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves, which must be requested separately under paragraph 3; any written submissions by the non-disputing Party(ies) to the treaty and by third persons; transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.*

"*2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto which must be requested separately under paragraph 3, shall be made available to the public, upon request by any person.*

"*3 Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified site.*

"*4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under article 7. The documents to be made available pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in a redacted form in accordance with article 7. The*

repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.

"*5. A person, who is not a disputing party, granted access to documents under paragraphs 2 or 3, shall bear any administrative costs of such access (such as photocopying or shipping documents).*"

Remarks

26. Article 3 reflects a proposal made at the fifty-fifth session of the Working Group that the provision on publication of documents should provide: (i) a list of documents made available to the public; (ii) discretionary power of the arbitral tribunal to order publication of additional documents and (iii) an opportunity for third persons to request access to additional documents (A/CN.9/736, paras. 54-66). Such a provision was seen as establishing a good balance between the documents to be published and the exercise by the arbitral tribunal of its discretion in managing the process (A/CN.9/736, paras. 58 and 65).

Paragraph (1) — List of documents

- *Table listing exhibits*

27. The words ", if such table has been prepared for the proceedings, but not the exhibits themselves, which must be requested separately under paragraph 3" have been included to reflect the decisions of the Working Group at its fifty-seventh session that: (i) where a table of exhibits already exists, there will be an obligation to produce it pursuant to paragraph (1), but if a list of exhibits has not been produced in the course of proceedings, there will not be a requirement to create one for the purposes of disclosure under article 3 (A/CN.9/760, para. 16); and (ii) exhibits themselves should not fall within the scope of paragraph (1), but should rather be subject to disclosure on a discretionary basis under other provisions of article 3 (A/CN.9/760, para. 15).

- *Expert reports and witness statements*

28. The reference to "witness statements and expert reports" has been deleted from the list under paragraph (1) in accordance with the decision of the Working Group at its fifty-seventh session that those documents be taken out of the ambit of paragraph (1), and dealt with separately (A/CN.9/760, paras. 20-22) (see below, para. 31).

- *Transcripts*

29. At its fifty-seventh session, the Working Group recalled its previous discussion, and agreement (see document A/CN.9/736, paras. 107 to 109) to include transcripts in article 3(1) on the basis, inter alia, that confidential information in transcripts could be redacted and that therefore transcripts should be treated in the same fashion as the other documents listed in paragraph (1). The words "where available" are intended to clarify that article 3 does not impose a requirement that transcripts be produced where none have been made in the course of proceedings (A/CN.9/760, paras. 23 and 24).

- *Arbitral award*

30. Further to a decision of the Working Group at its fifty-seventh session, arbitral awards are now included in the list of documents to be made available to the public under article 3(1), thus rendering article 4 of the previous draft rules (as contained in document A/CN.9/WG.II/WP.169, para. 33) obsolete (A/CN.9/760, para. 38). That article has consequently been deleted, and the draft rules have been renumbered accordingly.

Paragraph (2) — Expert reports and witness statements

31. Paragraph (2) is a new paragraph reflecting the decision of the Working Group at its fifty-seventh session that expert reports and witness statements be taken out of the ambit of paragraph (1), and a separate category created under article 3 for those documents. Expert reports and witness statements shall be made available upon request by any person, subject to article 7 (A/CN.9/760, paras. 20-22). Exhibits to those documents would be subject to separate request under the provisions of article 3(3), as with exhibits to pleadings or other submissions (A/CN.9/760, para. 20).

Paragraph (3) — Further documents

32. Paragraph (3) reflects the decision of the Working Group at its fifty-seventh session that the arbitral tribunal, on its own initiative or upon request from a disputing party or a person who is not a disputing party, would have the discretion to decide whether and how to make available to the public any other documents submitted to, or issued by, the arbitral tribunal, not falling within paragraphs (1) or (2) (A/CN.9/760, paras. 28-30). (As a result, paragraphs (2) and (3) of article 3, as contained in document A/CN.9/WG.II/WP.169, paragraph 29 have been merged into a single paragraph (3)). The last sentence of paragraph (3) is meant to provide guidance to the arbitral tribunal as to alternative measures for making such documents public at a certain location.

Paragraph (4) — Communication of documents to the repository

33. Paragraph (4) corresponds to a drafting proposal approved by the Working Group at its fifty-seventh session (A/CN.9/760, paras. 34 and 35), which has been modified slightly to retain consistency with article 7.

Paragraphs (1) to (4) — Relationship with article 7 (previously article 8)

34. In order to reflect the decision of the Working Group at its fifty-seventh session that article 3 should refer to article 7, instead of "exceptions set out in" article 7, the opening words of the respective paragraphs read "Subject to article 7 (…)" (A/CN.9/760, paras. 32 and 33).

Paragraph (5) — Costs

35. Paragraph (5) is a new provision reflecting the decision of the Working Group at its fifty-seventh session that persons, other than the disputing parties, requesting access to documents would be required to meet the administrative costs of such access (such as photocopying, shipping, etc.) (A/CN.9/760, para. 130).

Article 4. Submission by a third person (*formerly numbered article 5*)

36. Draft article 4 — Submission by a third person.

"*1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party and not a non-disputing Party to the treaty ("third person(s)") to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.*

"*2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any such page limits as may be set by the arbitral tribunal: (a) describe the third person, including, where relevant, its membership and legal status (e.g. trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the third person); (b) disclose any connection, direct or indirect, which the third person has with any disputing party; (c) provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the request, such as, for instance, funding around 20 per cent of its overall operations annually; (d) describe the nature of the interest that the third person has in the arbitration; and (e) identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.*

"*3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other things (a) whether the third person has a significant interest in the arbitral proceedings; and (b) the extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.*

"*4. The submission filed by the third person shall: (a) be dated and signed by the person filing the submission; (b) be concise, and in no case longer than as authorized by the arbitral tribunal; (c) set out a precise statement of the third person's position on issues; and (d) only address matters within the scope of the dispute.*

"*5. The arbitral tribunal shall ensure that the submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.*

"*6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on the submission by the third person.*"

Remarks

37. Article 4 addresses submission by a third person and provides for a detailed procedure on information to be provided regarding the third person that wishes to make a submission (para. (2)); matters to be considered by the arbitral tribunal

(paras. (3), (5) and (6)); and the submission itself (para. (4)). It is based on decisions made by the Working Group at its fifty-seventh session, as follows: paragraphs (1), (3), (4) and (5) were approved in substance without modifications (A/CN.9/760, paras. 42, 53, 55 and 56); paragraph (2) corresponds to a drafting proposal agreed to by the Working Group (A/CN.9/760, paras. 43-51); and paragraph (6) includes the drafting suggestion approved by the Working Group to delete the word "also" (A/CN.9/760, para. 57) and to include the word "reasonable" before the word "opportunity" (A/CN.9/760, para. 74).

Article 5. Submission by a non-disputing Party to the treaty (*formerly numbered article 6*)

38. Draft article 5 — Submission by a non-disputing Party to the treaty.

> "*1. The arbitral tribunal [shall] [may] allow or, after consultation with the disputing parties, may invite submissions on issues of treaty interpretation from a non-disputing Party to the treaty.*
>
> "*2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. In exercising its discretion to allow such submissions, the arbitral tribunal shall take into consideration, among other things, the factors referred to in article 4, paragraph 3.*
>
> "*3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.*
>
> "*4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.*
>
> "*5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.*"

Remarks

39. At its fifty-fifth session, the Working Group took note of the broad agreement for (i) addressing submissions by a non-disputing Party to the treaty in a provision distinct from the provision on third person submissions (A/CN.9/736, paras. 83, 84 and 97); (ii) providing that the arbitral tribunal should consult the disputing parties in the exercise of its discretion; and (iii) allowing disputing parties to present their observations on the submission (A/CN.9/736, para. 97).

Paragraph (1) — Matter for further consideration: "[shall] [may]"

40. The Working Group agreed to consider further whether the arbitral tribunal should enjoy discretion to accept submissions by a non-disputing Party to the treaty, and therefore whether the word "shall" before the word "allow" should be replaced by the word "may" (A/CN.9/736, paras. 90 and 98; A/CN.9/760, paras. 59-63). The Working Group invited States to review their treaties to identify whether they contained provisions giving the non-disputing Party to the treaty the right to submit its opinion on treaty interpretation to the arbitral tribunal (A/CN/760, para. 63).

Paragraph (2)

41. The question whether, in addition to making submissions on matters of treaty interpretation, a non-disputing Party to the treaty could also make submissions on questions of law or fact or on matters within the scope of the dispute was extensively discussed by the Working Group at its fifty-fifth (A/CN.9/736, paras. 85-89 and 98) and fifty-seventh (A/CN.9/760, paras. 64-67) sessions. Paragraph (2) reflects the decision of the Working Group that a non-disputing Party to the treaty could also make submissions on matters within the scope of the dispute (A/CN.9/760, para. 67), but does not contain any express provision for the tribunal to invite such submissions (A/CN.9/760, para. 70).

Paragraphs (3) and (4)

42. Paragraphs (3) and (4) were approved in substance by the Working Group without modifications at its fifty-seventh session (A/CN.9/760, paras. 72 and 73).

Paragraph (5)

43. Consistent with the proposal agreed in relation to article 4(6), set out above in paragraph 37, the word "also" has been deleted from the text of paragraph (5). Furthermore, the word "reasonable" has been inserted before the word opportunity. With those modifications, paragraph (5) was approved in substance by the Working Group at its fifty-seventh session (A/CN.9/760, paras. 74 and 75).

Article 6. Hearings (*formerly numbered article 7*)

44. Draft article 6 — Hearings.

> "*1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ("hearings") shall be public, unless otherwise decided by the arbitral tribunal, after consultation with the disputing parties.*
>
> "*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 may 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) and may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this is or becomes necessary for logistical reasons.*"

Remarks

Paragraph (1) — Matter for further consideration: public hearings

45. At the fifty-seventh session of the Working Group, there was very significant support for the principle that the default would remain that hearings would be public under the rules, subject only to the exceptions in paragraphs (2) and (3), with some delegations supporting the view that a disputing party should have a unilateral right

to hearings being closed. In order to progress the second reading, it was ultimately agreed to leave paragraph (1) open for further deliberation (A/CN.9/760, para. 82).

Paragraphs (2) and (3) — Exceptions to public hearings

46. Paragraphs (2) and (3) provide guidance on the exceptions to the principle that hearings shall be public. Paragraph (2) refers to the exceptions contained in article 7. Paragraph (3) addresses the concerns expressed in the Working Group that all or part of hearings may have to be held in private for practical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible (A/CN.9/717, para. 109 and A/CN.9/736, para. 104).

"*Hearings for the presentation of evidence or for oral argument*"

47. The words "for the presentation of evidence or for oral argument" have been added after the word "hearings" in paragraph (1) in order to clarify that hearings should be open where they are substantive (including jurisdictional hearings and hearings in which evidence by witnesses or experts, or oral arguments, were presented), but not where mere matters of procedure are to be addressed (A/CN.9/760, paras. 86 and 88). These words mirror the language used in article 24(1) of the UNCITRAL Model Law on International Commercial Arbitration.