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

Note by the Secretariat

Addendum

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

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

Article 7. Exceptions to transparency *(formerly numbered article 8)*

1. Draft article 7 — Exceptions to transparency.

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 3 and 4, 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; or

Option 1: [“(c) Information that is protected against being made available to the public under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information.]

Option 2: [“(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.]

Option 3: [“(c) Information that is protected against being made available to the public under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information, taking account of the applicable law of the respondent when considering information disclosed by the respondent].

[“(d) information that both disputing parties agree not be made available to the public unless it constitutes a breach of the public interest.]

[“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 impede law enforcement or would be contrary to the public interest or its essential security interests.”]

“3. 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.

“4. 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

“5. 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 6.

“6. 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.”

Remarks

2. The purpose of article 7 is to define the exceptions to transparency, which are limited to the protection of confidential or protected information (paras. (1) to (4)) and the protection of the integrity of the arbitral process (paras. (5) and (6)) (A/CN.9/717, paras. 129-147; A/CN.9/736, paras. 110-130; A/CN.9/760, paras. 89-119).

Confidential or protected information

3. Paragraphs (1) to (4) reflect a draft proposal considered by the Working Group at its fifty-seventh session and include the drafting modifications agreed to by the Working Group (A/CN.9/760, paras. 89-119).

Paragraph (2) — Matters for further consideration

- Paragraph (2)(c)

4. The Working Group may wish to consider the three options under paragraph (2)(c) which reflect different views expressed at its fifty-seventh session: (i) option 1, under which the tribunal is given discretion to conduct a conflict of law analysis for all information; (ii) option 2, under which the tribunal is 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 tribunal is

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).

- *Paragraph (2)(d)*

5. Paragraph (2)(d) corresponds to a proposal made at the fifty-seventh session of the Working Group. Some support was expressed for the proposal, while other delegations expressed strong disagreement with the suggestion, and it was agreed to further consider this proposal during the third reading of the rules (A/CN.9/760, para. 117).

- *Paragraph (2)bis*

6. A new provision, tentatively numbered paragraph (2)bis, was proposed at the fifty-seventh session of the Working Group for further consideration (A/CN.9/760, paras. 105-109). The provision was said not to be intended as a further exception under article 7 but as a matter that a party (particularly a State party to a dispute) could determine for itself (A/CN.9/760, para. 106). The Working Group may wish to consider the extent to which the matter would already be covered under paragraph (2)(c) (A/CN.9/760, paras. 108 and 109).

Procedure for protecting the integrity of the arbitral process

7. At the fifty-third session of the Working Group, it was generally recognized that the question of protection of the integrity of the arbitral process should be taken into account as part of the discussion on limitations to transparency (A/CN.9/712, para. 72).

8. Paragraphs (5) and (6) define a procedure for the protection of the integrity of the arbitral process and were approved in substance by the Working Group at its fifty-seventh session (A/CN.9/760, paras. 118 and 119).

Article 8. Repository of published information (formerly numbered article 9)

9. Draft article 8 — 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

10. At its fifty-fourth session, the Working Group discussed whether establishing a neutral repository (also called a “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).

11. 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). The Working Group did not reach consensus on which of the two options set out therein would be preferable. The decision on that point was left for consideration at a future session. It was nonetheless agreed in principle that if the Working Group ultimately proceeded with option 1, then UNCITRAL would be the preferred registry institution, if it had the capacity to so act. It was also agreed that if multiple institutions were to be designated as registries under option 2, then a central website should be established, preferably by UNCITRAL, to serve as a hub of information linking to such institutions’ registry function (A/CN.9/760, paras. 120-121).

General issue of costs

Costs related to holding a public hearing

12. As requested by the Working Group at its fifty-fifth session (A/CN.9/736, para. 106), information on the costs related to holding public hearings has been provided by the International Centre for Settlement of Investment Disputes (ICSID), and is contained in document A/CN.9/WG.II/WP.170/Add.1.

Costs associated with establishing and maintaining a registry

13. At its fifty-fifth session, the Working Group invited interested arbitral institutions to provide information on the costs of establishing and maintaining a registry of information to be published in accordance with the rules on transparency (A/CN.9/736, para. 133). Pursuant 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

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.

questionnaire and the replies received from arbitral institutions are reproduced in document A/CN.9/WG.II/WP.170 and its addendum. Information produced by the UNCITRAL Secretariat is contained in document A/CN.9/WG.II/WP.169, Add.1, paras. 9 to 12.

III. Instruments for the application of the legal standard on transparency to existing investment treaties

14. At the fifty-fourth session of the Working Group, views had been expressed in favour of pursuing further the option to prepare an instrument that, once adopted by States, could make the legal standard on transparency applicable to existing treaties. That question was said to have an important practical impact as there were more than 2,500 investment treaties in force to date (A/CN.9/712, para. 85 and A/CN.9/717, paras. 33-35).² At its fifty-fifth session, the Working Group considered various instruments to make the rules on transparency applicable to existing investment treaties, as contained in document A/CN.9/WG.II/WP.166/Add.1, paragraphs 10-23. The instruments included (i) a recommendation urging States to make the rules applicable in the context of treaty-based investor-State dispute settlement, (ii) a convention, whereby States could express consent to apply the rules on transparency to arbitration under their existing investment treaties, and (iii) joint interpretative declarations pursuant to article 31(3)(a) Vienna Convention on the Law of Treaties (the “Vienna Convention”) or amendment or modification pursuant to articles 39-41 Vienna Convention. All proposed instruments were found to be interesting and it was noted that they were not mutually exclusive, but could complement one another. (A/CN.9/736, paras. 143 and 135).

15. As requested by the Working Group at its fifty-seventh session (A/CN.9/760, paras. 12 and 141), this note contains wording for a draft convention on transparency in treaty-based investor-State arbitration and for a model of unilateral declaration (see below, paras. 17 and 34, respectively). The Working Group may wish to consider possible wording developed by the Secretariat in document A/CN.9/WG.II/WP.166/Add.1 regarding the option of a recommendation urging States to make the legal standard applicable in the context of treaty-based investor-State dispute settlement, as well as regarding the options of making the legal standard on transparency applicable to existing treaties by joint interpretative declarations pursuant to article 31(3)(a) Vienna Convention on the Law of Treaties (the “Vienna Convention”), by amendment or modification pursuant to articles 39-41 Vienna Convention.

A. Possible UNCITRAL instruments

16. Possible instruments that UNCITRAL can prepare and promote for the application of the legal standard on transparency to treaties concluded before the date of adoption of the rules on transparency include a recommendation and a

² For an online compilation of all investment treaties, see the database of the United Nations Conference on Trade and Development (UNCTAD), available on 20 July 2011 at www.unctadxi.org/templates/Startpage___718.aspx.

convention. The text of a draft recommendation, with comments, is contained in document A/CN.9/WG.II/WP.166/Add.1, paragraphs 12-14.

17. At its fifty-seventh session, the Working Group mandated the Secretariat to prepare more detailed wording for a convention on transparency in treaty-based investor-State arbitration, to include a draft clause permitting a reservation thereto (A/CN.9/760, paras. 12 and 141). The text of a possible draft convention on transparency in treaty-based investor-State arbitration could read as follows.

Draft text

“The Parties to this Convention,

“Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

“Convinced that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, and common interest, and to the well-being of all peoples,

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

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

“Believing that the Rules on Transparency adopted by the United Nations Commission on International Trade Law (UNCITRAL) on [date] would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international [investment] disputes,

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

“Have agreed as follows:

Article 1

Scope of application

“1. This Convention shall apply to investor-State arbitration 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 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 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 conducted on the basis of a treaty providing for the protection of investments or investors, where treaty was concluded between Contracting Parties to this Convention. Nothing in this Convention prevents Contracting Parties from applying standards that provide a higher degree of transparency than the Rules on Transparency.

Article 4

Reservations

“1. A Contracting Party may declare that certain investment treaties fall outside the scope of this Convention. No other reservations are permitted to this Convention.

“2. Reservations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

“3. Reservations and their confirmations are to be formally notified to the depositary.

“4. A reservation takes effect simultaneously with the entry into force of this Convention in respect of the Contracting Party concerned. A reservation of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of [six] months after the date of its receipt by the depositary.

“5. Any Party that makes a reservation under this Convention may modify or withdraw it at any time by a formal notification in writing to the depositary. The modification or withdrawal is to take effect on the first day of the month following the expiration of [six] months after the date of receipt of the notification by the depositary.

Article 5

Depositary

“The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

*Article 6**Signature, ratification, acceptance, approval, accession*

- “1. This Convention is open until [date] for signature by any Party to a treaty providing for the protection of investments or investors.
- “2. This Convention is subject to ratification, acceptance or approval by the signatory Parties.
- “3. This Convention is open for accession by any entity referred to in article 7, paragraph (1), as from the date it is open for signature.
- “4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

*Article 7**Effect in territorial units*

- “1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all of its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
- “2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
- “3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.
- “4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

*Article 8**Participation by regional economic integration organizations*

- “1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.
- “2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its

member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

“3. Any reference to a ‘Contracting Party’ or ‘Contracting Parties’ in this Convention applies equally to a regional economic integration organization when the context so requires.

Article 9

Entry into force

“1. This Convention enters into force on the first day of the month following the expiration of [six] months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

“2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of [six] months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 10

Time of application

“This Convention and any declaration or reservation apply only to arbitral proceedings that have been commenced after the date when the Convention, declaration or reservation enters into force or takes effect in respect of each Contracting Party.

Article 11

Revision and amendment

“1. At the request of not less than one-third of the Contracting Parties to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting Parties for revising or amending it.

“2. Any instrument of ratification, acceptance, approval or accession, or any reservation, deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 12

Denunciation of this Convention

“1. A Contracting Party may denounce this Convention at any time by means of a notification in writing addressed to the depositary. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary.

“2. This Convention will continue to apply to arbitration in respect of which arbitral proceedings have been commenced before the denunciation takes effect.

“DONE at [place], this [date], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

“IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised [by their respective Governments], have signed the present Convention.”

Remarks

Draft article 1

18. Draft article 1 deals with the scope of application of the convention on transparency, and provides that the convention shall apply to treaty-based investor-State arbitration when Parties to the investment treaty are also contracting Parties to the convention on transparency. This is in line with the understanding expressed at the fifty-fifth session of the Working Group that 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).

19. The Working Group may wish to consider article 1 of the draft convention in concert with article 1 of the draft rules on transparency such that to the extent possible, consistency is maintained between the scope of application of both instruments. It may be noted that the definition of a “treaty providing for the protection of investments or investors” is similar to the definition of article 1 of the draft rules on transparency.

- Parties

20. As currently drafted, the convention on transparency only applies to investment treaties concluded between Parties which are also Parties to the convention on transparency (see above, para. 18). The Working Group may wish to consider whether, in the event an investment treaty has multiple signatories, only some of which are contracting Parties to the convention on transparency, whether this convention should apply in disputes between a contracting Party to this convention and a national of another contracting Party. If the Working Group believes that as a matter of principle, the transparency rules ought to apply in that instance, the wording of draft articles 1 and 3 may need to be amended to reflect such a possibility.

- Arbitration rules

21. The Working Group may wish to note that the convention would apply to any investor-State arbitration initiated under a treaty regardless of the set of institutional or ad hoc arbitration rules applicable to the settlement of the dispute.

Draft article 2

22. The principles reflected in draft article 2 have appeared in most of the UNCITRAL texts, and its formulation mirrors article 7 of the United Nations Sales Convention. The provision is aimed at facilitating uniform interpretation of the provisions in uniform instruments on commercial law.

Draft article 3

23. 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 whether article 3 should clarify the version of the rules on transparency that is included by reference in case those rules would be revised. The Working Group may wish to consider further the question whether the convention should also include the text of the rules on transparency (A/CN.9/736, para. 135; see also A/CN.9/WP.166/Add.1, para. 39).

Draft article 4

24. The Working Group may wish to recall its decision at its fifty-seventh session that a reservation be included in the convention on transparency (A/CN.9/760, para. 141). The Working Group may wish to consider the reservation permitted under paragraph (1) as presently drafted, and whether the scope of this reservation ought to remain broad, or to be more clearly prescribed.

25. The Working Group may also wish to consider whether any other reservations ought to be enumerated, or whether the convention should prohibit further reservations. The Working Group may wish to consider Article 19 of the Vienna Convention on the Law of Treaties 1969 in this respect.

Draft articles 5 to 12 — Final provisions

26. Provisions in draft articles 5 to 12 are customary provisions in multilateral treaties and are not intended to create rights and obligations for private parties. However, as these provisions regulate the extent to which a contracting Party is bound by the convention, including the time the convention or any declaration submitted thereunder enter into force, they may affect the ability of the disputing parties to rely on the provisions of the convention.

- Draft article 7

27. Draft article 7 permits a contracting State, at the time of signature, ratification, acceptance, approval or accession, to declare that the convention is to extend to all its territorial units or only to one or more of them and to amend its declaration by submitting another declaration at any time. This provision, often called “the federal clause”, is of interest to relatively few States — federal systems where the central Government lacks treaty power to establish uniform law for the subject matter covered by the convention. The effect of the provision would therefore be on the one hand to permit federal States to apply the convention progressively to their territorial units and on the other to permit those States that wish to do so to extend its application to all their territorial units from the very outset. The Working Group may wish to consider whether such a provision would be necessary.

- Draft article 8

28. In addition to “States”, the convention allows participation by international organizations of a particular type, namely “regional economic integration

organizations”, which are Parties to investment treaties. The text of the convention does not contain a definition of “regional economic integration organizations”. Usually, the notion of “regional economic integration organizations” encompasses two key elements: the grouping of States in a certain region for the realization of common purposes, and the transfer of competencies relating to those common purposes from the members of the regional economic integration organization to the organization.

- Draft article 9

29. The basic provisions governing the entry into force of the convention are laid down in draft article 9. Three ratifications correspond to the modern trend in commercial law conventions, which promotes their application as early as possible. A six-month period from the date of deposit of the third instrument of ratification, acceptance, approval or accession is provided so as to give Parties to the convention sufficient time to notify all the national organizations and individuals concerned that a convention that would affect them would soon enter into force. Paragraph 2 deals with the entry into force of the draft convention as regards those contracting Parties that become parties thereto after the time for its entry into force under paragraph 1 has already started.

- Draft article 10

30. While draft article 9 is concerned with the entry into force of the convention as regards the international obligations of the contracting Parties arising under the convention, draft article 10 determines the point in time when the convention would commence to apply in respect of the arbitral proceedings. The convention would only apply prospectively, that is to arbitral proceedings that are commenced after the date when the convention entered into force. The words “in respect of each Contracting Party” are intended to make it clear that the article refers to the time when the convention would enter into force in respect of the contracting Party in question, and not when the convention would enter into force generally.

B. Possible actions by States

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

32. Models of such instruments were proposed in document A/CN.9/WG.II/WP.161/Add.1, paragraphs 22 and 23. The Working Group may wish to recall that document A/CN.9/WG.II/WP.162 addresses joint interpretative declarations and unilateral declarations, in addition to other possible actions that

could be undertaken by States to ensure applicability of the rules on transparency to existing investment treaties (see A/CN.9/WG.II/WP.162, paras. 26-48).

33. It was also suggested at the fifty-third and fifty-seventh sessions of the Working Group that the applicability of the rules on transparency could be achieved through unilateral declarations by States (A/CN.9/712, para. 93 and A/CN.9/760, para. 141). The Working Group may wish to recall that it had noted that a declaration by only one State would not be sufficient to make the rules on transparency applicable to already existing treaties, because a treaty is based on the agreement of the States parties (A/CN.9/712, para. 93). Therefore, States parties to an investment treaty would each need to issue unilateral declarations to the same end to apply the legal standard on transparency to an existing treaty. Such unilateral declarations would then form a subsequent agreement between the States parties regarding the interpretation of the treaty or the application of its provisions under article 31(3)(a) Vienna Convention, which provides as a general rule of interpretation that any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions shall be taken into account, together with context. Such subsequent declarations do not necessarily need to take the form of a “joint” statement. However, there needs to be evidence of the agreement of the parties on the interpretation of the treaty, which could be expressed by an exchange of notes. As the International Law Commission has stated in its draft guidelines on declarations relating to bilateral agreements,³ an authentic interpretation of a treaty can result from an interpretive declaration made by only one State party to the treaty, if it has been accepted by the other party.⁴

34. Possible draft model of a unilateral interpretative declaration pursuant to article 31(3)(a) Vienna Convention could read as follows.

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

“The provision[s] of articles [__] of the [name of investment treaty] permitting an investor from a Contracting State to initiate an arbitration against another Contracting State [under the UNCITRAL Arbitration Rules] in the context of the [name of investment treaty] shall be understood as including the application of the UNCITRAL Rules on Transparency.”

³ The draft guidelines on declarations relating to bilateral agreements are included in the draft guidelines on reservations and authentic interpretation of a treaty pursuant to article 31(3)(a) of the Vienna Convention issued by the International Law Commission, Report of the International Law Commission on the work of its sixty-second session, *Official Records of the General Assembly, Sixty-fifth session, Supplement No. 10 (A/65/10)*, p. 40, available at <http://untreaty.un.org/ilc/reports/2010/2010report.htm>.

⁴ *Ibid.*, Draft Guidelines 1.5.3.