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Settlement of commercial disputes: Draft convention on transparency in treaty-based investor-State arbitration

Note by the Secretariat

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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 entrusted its Working Group II with the task of preparing a legal standard on transparency in treaty-based investor-State arbitration.¹ At its forty-fourth session (Vienna, 26 June-8 July 2011), the Commission confirmed that the question of applicability of the rules on transparency under preparation to investment treaties concluded before the date of adoption of such rules (“existing investment treaties”) was part of the mandate of the Working Group and a question of great practical interest, taking account of the high number of investment treaties currently in existence.² In that context, the Working Group discussed the options of making the rules on transparency applicable to existing investment treaties either by way of a convention, whereby States could express consent to apply the rules on transparency to arbitrations arising under their existing investment treaties, or by a recommendation urging States to make the rules applicable in the context of treaty-based investor-State dispute settlement. The possibility of making the rules on transparency applicable to existing investment treaties by joint interpretative declaration pursuant to article 31(3)(a) of the Vienna Convention on the Law of Treaties (1969) (the “Vienna Convention”), or by an amendment or modification of a relevant treaty pursuant to articles 39-41 of the Vienna Convention, was also considered by the Working Group.³

2. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”), together with the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013). The Commission, in its decision adopting the Rules on Transparency, recommended, *inter alia*, “that, subject to any provision in the relevant investment treaties that may require a higher degree of transparency, the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the date of coming into effect of the Rules on Transparency, to the extent such application is consistent with those investment treaties.”⁴

3. At that session, the Commission recorded consensus to entrust the Working Group with the task of preparing a convention (“convention” or “transparency convention”) on the application of the Rules on Transparency to existing investment treaties, taking into account that the aim of the convention was to give those States

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 190.

² *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 200. For an online compilation of all investment treaties, see the database of the United Nations Conference on Trade and Development (UNCTAD), available on 27 November 2013 at www.unctadxi.org/templates/DocSearch____779.aspx.

³ References to the reports of the Working Group where application of the Rules on Transparency to existing investment treaties was discussed: A/CN.9/712, paras. 85-94; A/CN.9/717, paras. 42-46; A/CN.9/736, paras. 134 and 135; A/CN.9/760, para. 141; A/CN.9/765, para. 14. Notes by the Secretariat on the matter: A/CN.9/WG.II/WP.162, paras. 22-40; A/CN.9/WG.II/WP.166/Add.1; A/CN.9/WG.II/WP.169/Add.1; A/CN.9/WG.II/WP.176/Add.1.

⁴ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 116.

that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention.⁵

4. At its fifty-ninth session (Vienna, 16-20 September 2013), the Working Group completed its first reading of the transparency convention, as contained in document A/CN.9/784. In accordance with the request of the Working Group at its fifty-ninth session, this note contains an annotated draft of the transparency convention, based on the deliberations and decisions of the Working Group (A/CN.9/794, para. 12). It has been prepared for the consideration by the Working Group for its second reading of the transparency convention.

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

A. General remarks

1. Relation between the convention on transparency and existing investment treaties

5. At its fifty-ninth session, the Working Group considered in broad terms the nature and effect of the transparency convention in relation to existing investment treaties, and specifically whether the transparency convention, upon coming into force, would constitute a successive treaty creating new obligations (pursuant to article 30 of the Vienna Convention, or whether it would constitute an amendment or modification of existing investment treaties (subject to amendment or modification provisions of those treaties and to which Part IV of the Vienna Convention would apply as a secondary source of law) (A/CN.9/794, paras. 17-22; see also A/CN.9/WG.II/WP.179, paras. 5-7). At that stage of deliberations, it was noted that a great number of delegations were inclined to view the transparency convention as a successive treaty pursuant to article 30 of the Vienna Convention, but that delegations would consider the matter further (A/CN.9/794, para. 22) (see also below, para. 30).

2. Draft proposal for a resolution of the General Assembly

6. The Working Group may wish to recall its decision at its fifty-ninth session that the mandate given by the Commission to the Working Group (as recalled above, in para. 3) would not be included in the preamble of the transparency convention, but rather, that text along the following lines would be included in the proposal for the General Assembly resolution recommending the transparency convention: “Recalling that the Commission recommended that the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the coming into effect of the Rules on Transparency, to the extent such application is consistent with those investment treaties; Recalling that the Commission decided to prepare a convention that was intended to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so,

⁵ Ibid., para. 127.

without creating any expectation that other States would use the mechanism offered by the convention; Acknowledging that the Rules on Transparency might be made applicable to investor-State arbitration initiated pursuant to investment treaties concluded before the date of coming into effect of the Rules on Transparency by means other than a convention ... Calls upon those Governments that wish to make the Rules on Transparency applicable to arbitrations under their existing investment treaties to consider becoming party to the Convention” (A/CN.9/794, para. 41).

B. Annotated draft convention on transparency in treaty-based investor-State arbitration

1. Text of the draft convention on transparency

7. The draft text of the convention on transparency reads as follows.

Preamble

“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 in Treaty-based Investor-State Arbitration adopted by the United Nations Commission on International Trade Law on 11 July 2013 (“UNCITRAL Rules on Transparency”), effective as of 1 April 2014, 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 treaties providing for the protection of investments or investors already in force, and the practical importance of promoting the application of the UNCITRAL Rules on Transparency to arbitration under those already concluded treaties,

“Have agreed as follows:

“Scope of application***“Article 1***

“1. This Convention applies to investor-State arbitration conducted on the basis of a treaty providing for the protection of investments or investors ([investment] treaty’).

“2. The term ‘[investment] treaty’ means any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to that [investment] treaty.

[“Interpretation***“Article 2***

“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.]

“Application of the UNCITRAL Rules on Transparency***“Article 3***

“1. Each Contracting Party to this Convention agrees that the UNCITRAL Rules on Transparency, as they may be revised from time to time, shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, conducted pursuant to a[n investment] treaty concluded before 1 April 2014:

“a. where the State of the claimant is a Contracting Party to this Convention; and

“b. where the State of the claimant is not a Contracting Party to this Convention or that State has made a relevant reservation under article 5, but the claimant agrees to the application of the UNCITRAL Rules on Transparency.

“2. The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to arbitrations arising under [investment] treaties falling under paragraph 1(a).

“3. A most favoured nation provision cannot be invoked to avoid the application of the UNCITRAL Rules on Transparency under this Convention, nor to render the UNCITRAL Rules on Transparency applicable would they otherwise not apply.

“Declaration on future [investment] treaties***“Article 4***

“A Contracting Party may declare that the UNCITRAL Rules on Transparency, as they may be revised from time to time, shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules,

conducted pursuant to a[n investment] treaty concluded on or after 1 April 2014:

“a. where the State of the claimant is a Contracting Party to this Convention; and/or

“b. where the State of the claimant is not a Contracting Party to this Convention or that State has made a relevant reservation under article 5, but the claimant agrees to the application of the UNCITRAL Rules on Transparency.

“Reservations

“Article 5

“1. A Contracting Party may declare that:

“a. a specific [investment] treaty, identified by title, name of Parties to that [investment] treaty, and date that [investment] treaty was concluded, shall not be subject to this Convention;

“b. article 3(1)(a) and/or (1)(b), and, if applicable, article 4(a) and/or (b) shall not apply to arbitrations conducted using certain sets of arbitration rules or procedures other than the UNCITRAL Arbitration Rules;

“c. article 3(1)(b) and/or, if applicable, article 4(b) will not apply to arbitrations to which it is a disputing party.

“2. In the event of amendment to the UNCITRAL Rules on Transparency, a Contracting Party may, within six months of the adoption of such amendment, make a reservation that such revised version of those Rules shall not apply under this Convention and that, instead, the most recent version of the UNCITRAL Rules on Transparency to which that Contracting Party had not filed a reservation pursuant to this paragraph, shall apply.

“3. No reservations are permitted to this Convention other than as provided in this article.

“Declarations and reservations

“Article 6

“1. Reservations and declarations may be made by a Contracting Party at any time, save for reservation under article 5(2).

“2. Declarations, reservations, and their confirmations are to be formally notified to the depositary.

“3. Declarations and reservations made at the time of signature are subject to confirmation upon ratification, acceptance or approval. Such a declaration or a reservation takes effect simultaneously with the entry into force of this Convention in respect of the Contracting Party concerned.

“4. A declaration or a reservation of which the depositary receives formal notification after the entry into force of the Convention takes effect on the first day of the month following the expiration of twelve months after the date of its receipt by the depositary.

“5. Any Party that makes a declaration or a reservation under this Convention may withdraw it at any time and may, subject to article 5, modify it at any time. Such modifications or withdrawals are to be formally notified to the depositary.

“6. [A modification or withdrawal which has the purpose or effect of expanding the application of the UNCITRAL Rules on Transparency 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.] Any [other] modification or withdrawal is to take effect on the first day of the month following the expiration of twelve months after the date of receipt of the notification by the depositary.

“Depositary

“Article 7

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

“Signature, ratification, acceptance, approval, accession

“Article 8

“1. This Convention is open until [date] for signature by (a) any State that is a Party to a[n investment] treaty; or (b) a regional economic integration organization constituted by sovereign States that is a Party to a[n investment] treaty.

“2. This Convention is subject to ratification, acceptance or approval by the signatories to this Convention.

“3. This Convention is open for accession by all States or regional economic integration organizations referred to in paragraph 1 which are not signatories as from the date it is open for signature.

“4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

“Effect in territorial units

“Article 9

“1. If a Contracting State has two or more territorial units, which are parties to [investment] treaties in their own name, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to such territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time. [The Contracting Party may, in such declaration, make any of the reservations under article 5 with respect to each territorial unit that it so designates.]

“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 such 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 Contracting State.

“Participation by regional economic integration organizations

“Article 10

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

“2. When the number of Contracting Parties is relevant in this Convention, the regional economic integration organization does not count as a Contracting Party in addition to its member States which are Contracting Parties.

“Entry into force

“Article 11

“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 or a regional economic integration organization 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 or a regional economic integration organization 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.

“Time of application

“Article 12

“This Convention and any declaration or reservation apply only to arbitrations 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.

“Revision and amendment

“Article 13

“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, deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

“Denunciation of this Convention

“Article 14

“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 arbitrations 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.”

2. Annotations to the draft convention on transparency

Remarks on the preamble

8. At its fifty-ninth session, the Working Group found the preamble acceptable in substance subject to further consideration of the first two paragraphs. The Working Group agreed to consider further whether to retain or delete these two paragraphs (now in square brackets), or to replace them with a single paragraph recalling the mandate of UNCITRAL (A/CN.9/794, para. 35).

9. Should the Working Group determine that a single paragraph recalling the mandate of UNCITRAL should replace these two paragraphs, it may wish to consider the following wording: “Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, by which the General Assembly established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade.”

10. The Working Group may wish to note that the date of adoption, effective date and title of the Rules on Transparency have been included in the fifth paragraph of the preamble. The words “providing for the protection of investments or investors” have been added after the word “treaties” in the first line of the sixth paragraph of the preamble in order to harmonize the language of the preamble with that of article 1 of the convention.

Remarks on draft article 1 — Scope of application

11. Article 1 deals with the material scope of application of the transparency convention and article 3 with the substantive obligations of Contracting Parties under the transparency convention.

12. At its fifty-ninth session, the Working Group agreed that the scope of application of the transparency convention should be drafted to give effect to the mandate given by the Commission, namely, to give those States that wished to apply

the Rules on Transparency an efficient mechanism to do so, and moreover to promote transparency in treaty-based investor-State arbitration (A/CN.9/794, para. 56). A broad scope of application of the transparency convention was agreed to on the basis that a Contracting Party could formulate specific reservations (pursuant to article 5 of the transparency convention) limiting that scope of application (A/CN.9/794, paras. 28, 32; 44-66).

Paragraphs (1) and (2)

13. Paragraphs (1) and (2) reflect the deliberations of the Working Group at its fifty-ninth session (A/CN.9/794, paras. 66 and 71). As matters of drafting, the phrase “including any treaty commonly referred to as (...) or bilateral investment treaty” has been placed before the words “which contains provisions (...)”. Furthermore, the Working Group may wish to consider whether the word “treaty”, which is defined in the first footnote of article 1(1) of the Rules on Transparency, or the phrase “investment treaty”, which was said possibly to be more appropriate in the context of the transparency convention, ought to be the relevant defined term in the convention (A/CN.9/794, paras. 69 and 71).

Remarks on draft article 2 — Interpretation

14. The Working Group agreed to consider further at its second reading whether to retain or to delete article 2 (now in square brackets) (A/CN.9/794, paras. 83-88), and in particular whether that provision would have any implications for interpreting the convention alongside the Vienna Convention.

Remarks on draft article 3 — Application of the UNCITRAL Rules on Transparency

15. Article 3 is based on draft proposals made at the fifty-ninth session of the Working Group (A/CN.9/794, paras. 51, 97 and 105).

Paragraph (1)

“as they may be revised from time to time”

16. At its fifty-ninth session, the Working Group agreed to include in article 3 language along the lines of “as they may be revised from time to time”, and further agreed to provide for a possible reservation in that respect (see article 5(2) of the transparency convention) (A/CN.9/791, paras. 91-93, 100).

“whether or not initiated under the UNCITRAL Arbitration Rules”

17. At its fifty-ninth session, the Working Group considered that the transparency convention should apply regardless of the arbitration rules selected by an investor under a relevant investment treaty. A reservation under article 5(1)(b) of the transparency convention provides for the limitation of the application of the transparency convention to arbitrations conducted under certain sets of procedural rules other than the UNCITRAL Arbitration Rules (A/CN.9/794, paras. 30-32) (see also below, para. 33).

“concluded before 1 April 2014”

18. Under article 3, the Rules on Transparency apply to investment treaties concluded before 1 April 2014. This reflects the decision of the Working Group that an application of the transparency convention to future investment treaties should be the exception, and that consequently Contracting Parties should expressly declare (under article 4 of the transparency convention) that the transparency convention would apply to investment treaties concluded on or after 1 April 2014 (A/CN.9/794, paras. 57, 58 and 90).

“State of the claimant”

19. The Working Group may wish to note that, to address the concern that the term “State of the claimant” (instead of “Contracting Party”) used in paragraph (1)(a) and (b) might lead to difficulties, for example in relation to regional economic integration organizations (A/CN.9/795, para. 95), article 10(1) has been amended to provide that any reference to a “State” in the transparency convention applies equally to a regional economic integration organization when the context so requires.

Subparagraphs (a) and (b)

20. Subparagraphs (a) and (b) address the request of the Working Group to keep separate the effect of the transparency convention where the home State of the investor and the respondent State have both acceded to the transparency convention, and the effect when only the respondent State has acceded to the transparency convention.

21. In the latter case, the Working Group considered that the transparency convention would amount to a general unilateral offer to investors to use the Rules on Transparency, even where that investor’s home State is not a Contracting Party to the transparency convention or where it has formulated a reservation (A/CN.9/794, paras. 23-29; 48; 104-114).

Paragraph (2)

22. Paragraph (2) aims to ensure that the last sentence of article 1(7) of the Rules on Transparency — which reads “Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail” — does not serve to nullify the effect and purpose of the transparency convention (A/CN.9/794, paras. 77, 79, 101, 109-112). Paragraph (2) is not applicable to unilateral offers (under article 3(1)(b) of the convention), nor to treaties concluded after 1 April 2014.

Paragraph (3)

23. As a matter of principle, the Working Group considered at its fifty-ninth session whether a most-favoured-nation clause (MFN clause) in an investment treaty could be triggered by a carve-out of certain investment treaties from the transparency convention (A/CN.9/794, para. 118). It was pointed out that arbitral practice was not uniform in relation to whether MFN clauses can apply to procedural matters, and that in any event, the deliberations of the Working Group on that matter could not, and should not, be interpreted as taking a position on the

question of whether MFN clauses applied to dispute settlement procedures under investment treaties (A/CN.9/794, para. 119).⁶

24. The purpose of inserting a provision relating to MFN clauses in the transparency convention is to clarify that a claimant could not (i) avoid application of the Rules on Transparency by invoking an MFN clause to claim that the non-transparent dispute resolution provisions of another treaty were more favourable to it; or (ii) conversely invoke an MFN clause to make the Rules on Transparency applicable to its arbitration in circumstances where the Rules would not otherwise apply (A/CN.9/794, paras. 120 and 121).

Remarks on draft articles 4 to 6

25. At its fifty-ninth session, the Working Group considered that the subject matters on which reservations could be made under the transparency convention could be described as follows: (i) exclusion of certain investment treaties from the application of the transparency convention; (ii) exclusion of arbitration under certain arbitration rules; (iii) exclusion of the application of the provisions of article 3(1)(b); and (iv) reserving out of the application of a revised or amended version of the Rules on Transparency. These reservations would limit the scope of application of the convention and are contained in article 5 (A/CN.9/794, paras. 116 and 117).

26. The Working Group unanimously agreed that it would be unacceptable for a Contracting Party to accede to the transparency convention and then carve out the entire content of the transparency convention by use of the reservations (A/CN.9/794, paras. 131-133).

27. The Working Group also agreed that a declaration expanding the scope of application of the transparency convention to future investment treaties ought to be included. That declaration is contained in article 4 (A/CN.9/794, paras. 116 and 117).

Article 4 (Declaration on future treaties)

28. At its fifty-ninth session, the Working Group determined that an application of the transparency convention to investment treaties concluded after 1 April 2014 (“future investment treaties”) should be permitted where Contracting Parties so declared (A/CN.9/794, paras. 53-58, 116-117).

29. As currently drafted, article 4 provides that a Contracting Party can apply the transparency convention to future investment treaties where the other Party(ies) to the investment treaty concerned has(have) made the same declaration, and/or unilaterally to any dispute to which it is a party. Thus article 4 is entirely an “opt-in” provision.

⁶ The Study Group on The Most-Favoured-Nation clause established by the International Law Commission has noted that whether or not an MFN provision is capable of applying to the dispute settlement provisions is a matter of treaty interpretation and thus depends on each particular treaty. The question of interpretation arises, as in the majority of cases, when the MFN provisions in existing BITs are not explicit as to the inclusion or exclusion of dispute settlement clauses. See, for instance, *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10 (A/67/10)*, para. 162.

30. In instances where the transparency convention applies to future investment treaties and the Parties to such treaties are also Contracting Parties to the transparency convention (see article 4(a)), the Working Group may wish to consider the relationship between such treaties with the obligations imposed under the transparency convention. For example, the Working Group may wish to consider whether a future investment treaty concluded after the coming into effect of the transparency convention would amount to a successive treaty, as regards its provisions on transparency and, in particular, how the existence of transparency — or indeed confidentiality — provisions in a future investment treaty would affect the obligations in the transparency convention.

31. The Working Group may wish to consider that the reservations under article 5 have been made expressly applicable in respect to the declaration under article 4.

Article 5 (Reservations) (numbered article 4 in the previous draft)

32. In relation to article 5(1)(a), the Working Group agreed that it would be contrary to the mandate given by the Commission to the Working Group to provide that the transparency convention would apply only to investment treaties positively listed by States at the time of adoption; rather it would be for States wishing to carve out certain treaties from the transparency convention to list the excluded treaties in their reservation (A/CN.9/794, para. 122).

33. The effect of the reservation under article 5(1)(b) would be to limit the operation of the transparency convention to options to arbitrate under certain sets of arbitration rules in the reserving Contracting Party's investment treaties, it being understood that the UNCITRAL Arbitration Rules are excluded from the scope of that reservation (A/CN.9/794, paras. 138 and 139).

34. In relation to article 5(1)(c), the Working Group may wish to recall its agreement that a reservation in respect of the provisions of article (3)(1)(b) (and the corresponding provisions in article 4) would mean that a Contracting Party was not willing to make a global unilateral offer for the application of the Rules on Transparency at a given point in time. However, that was not inconsistent with such a State agreeing to the application of the Rules on Transparency to a specific arbitration in accordance to article 1 (2)(a) of such Rules at a later point in time (A/CN.9/794, para. 113).

35. The Working Group may wish to consider that, where Parties to an investment treaty have formulated different reservations under the transparency convention (for instance, adopting different sets of Rules on Transparency in case of revision, or reserving from the application of the transparency convention different sets of arbitration rules under article 5(1)(b)), the applicable reservations should be those formulated by the State party to the dispute. The Working Group may wish to consider whether a provision should be added in the transparency convention to clarify the operation of the reservations in such situations.

36. In relation to paragraph (3), the Working Group may wish to recall the clear indication of consensus at its fifty-ninth session that the only reservations ought to be those enumerated in the transparency convention (A/CN.9/794, para. 147).

Article 6 (Declarations and reservations) (provisions contained in article 4 in the previous draft)

37. In relation to paragraph (4), the Working Group agreed that if reservations were to be allowed after accession, a point on which further deliberations would be needed, then a one-year period after the date of receipt of the notification by the repository should be required before the entry into force of the reservation (A/CN.9/794, paras. 123-126, 149-152). This period of time was considered sufficiently long to prevent abuse.

38. In relation to paragraph (6) and the modification or withdrawal of existing reservations or declarations, the Working Group considered that a shorter period of time than twelve months might be required if the modification or withdrawal provided for greater transparency, rather than less (A/CN.9/794, paras. 153-157). The Working Group may wish to consider whether having two different timings (one year for “decreased transparency” and six months for “increased transparency”) might lead to confusion and/or lack of certainty, and moreover whether the judgement implied in that determination would be sufficiently simple and uniformly applied.

Remarks on draft article 8 — Signature, ratification, acceptance, approval, accession (numbered article 6 in the previous draft)

39. Article 8 reflects the drafting suggestions made by the Working Group at its fifty-ninth session (A/CN.9/794, paras. 161-164).

Remarks on draft article 9 — Effect in territorial units (numbered article 7 in the previous draft)

40. Article 9 reflects the drafting suggestions made by the Working Group at its fifty-ninth session (A/CN.9/794, paras. 165-167). The Working Group may wish to consider whether a Contracting Party should be allowed to make reservations (defined in article 5) with respect to its territorial units, as provided in the last sentence of paragraph (1) (now in square brackets).

Remarks on draft article 10 — Participation by regional economic integration organizations (numbered article 8 in the previous draft)

41. As provided for under article 8, in addition to “States”, the transparency convention allows participation by international organizations of a particular type, namely “regional economic integration organizations” that are Parties to investment treaties. Following the definition of “regional economic integration organizations” under article 8, the drafting of article 10 has been simplified in accordance with the decision of the Working Group (A/CN.9/794, paras. 168-170).

Remarks on draft article 11 — Entry into force (numbered article 9 in the previous draft)

42. Article 11 includes the drafting modifications agreed to by the Working Group at its fifty-ninth session (A/CN.9/794, paras. 171-175). It reflects the consensus achieved in relation to the number of signatories to be required for the transparency convention to enter into force, that number being three (A/CN.9/794, para. 174).

Remarks on draft article 12 — Time of application (numbered article 10 in the previous draft)

43. While draft article 11 concerns the entry into force of the transparency convention as regards the international obligations of the Contracting Parties arising under the convention, draft article 12 determines the point in time when the transparency convention would commence to apply in respect of the arbitral proceedings. The transparency convention would only apply prospectively, that is to arbitrations 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 transparency convention would enter into force in respect of the Contracting Party in question, and not when the transparency convention would enter into force generally (A/CN.9/794, paras. 158 and 176).

Remarks on draft article 13 — Revision and amendment (numbered article 11 in the previous draft)

44. Article 13 reflects the drafting suggestions made by the Working Group at its fifty-ninth session (A/CN.9/794, paras. 177-178).
