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Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-sixth session (New York, 6-10 February 2012)

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 disputes, the Commission recalled the decision made at its forty-first session (New York, 16 June-3 July 2008)[1] that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic.[2]

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session regarding the importance of ensuring transparency in treaty-based investor-State arbitration. The Commission confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with a great practical interest, taking account of the high number of treaties already concluded.[3] Further, the Commission agreed that the question of possible intervention in the arbitration by a non-disputing State Party to the investment treaty should be regarded as falling within the mandate of the Working Group. Whether the legal standard on transparency should deal with such a right of intervention and, if so, the determination of the scope and modalities of such intervention should be left for further consideration by the Working Group.[4]

3. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.168, paragraphs 5-12.

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its fifty-sixth session in New York, from 6-10 February 2012. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, Greece, Honduras, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mauritius, Mexico, Nigeria, Norway, Pakistan, Philippines, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, South Africa, Spain, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Bangladesh, Belarus, Belgium, Croatia, Cuba, Democratic Republic of the Congo, Ecuador, Finland, Indonesia, Iraq, Kuwait, Luxemburg, Mozambique, Myanmar, Netherlands, Nicaragua, Panama, Peru, Romania, Slovakia, Sweden and Switzerland.

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[1] *Official records of the General Assembly, Sixty-third Session, Supplement No.17 and corrigendum* (A/63/17 and Corr.1), para. 314.

[2] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 190.

[3] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200.

[4] Ibid., para. 202.

6. The session was also attended by observers from Palestine and the European Union.

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

(a) *United Nations system*: International Centre for Settlement of Investment Disputes (ICSID) and United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: Energy Charter Secretariat, Organisation for Economic Co-operation and Development (OECD) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot, American Arbitration Association (AAA), American Bar Association (ABA), Arab Association of International Arbitration (AAIA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Association droit et méditerranée (Jurimed), Association of the Bar of the City of New York (ABCNY), Barreau de Paris, Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), Center for International Legal Studies (CILS), Chartered Institute of Arbitrators (CIARB), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICACIC), Institute of International Commercial Law (IICL), Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Arbitration Institute (IAI), International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), International Court of Arbitration (ICC), International Federation of Commercial Arbitration Institutions (IFCAI), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), London Court of International Arbitration (LCIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators, New York State Bar Association (NYSBA), Pakistan Business Council (PBC), Queen Mary University — London School of International Arbitration (QMUL), Swedish Arbitration Association (SAA), Swiss Arbitration Association (ASA), Tehran Regional Arbitration Centre (TRAC) and Union des Avocats Européens (UAE).

8. The Working Group elected the following officers:

Chairman: Mr. Salim Moollan (Mauritius)
Rapporteur: Mr. Shotaro Hamamoto (Japan)

9. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.168); (b) a note by the Secretariat regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.169 and its addendum); (c) a note by the Secretariat reproducing comments by arbitral institutions regarding the establishment of a repository of published information ("registry") (A/CN.9/WG.II/WP.170 and its addendum).

10. The Working Group adopted the following agenda:

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

III. Deliberations and decisions

11. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.169 and its addendum; and A/CN.9/WG.II/WP.170 and its addendum). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV.

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

12. The Working Group recalled the mandate given by the Commission at its forty-third session, set out above under paragraph 1, and the importance of ensuring transparency in treaty-based investor-State arbitration was reiterated. The Working Group resumed discussions on the preparation of a legal standard on transparency in treaty-based investor-State arbitration on the basis of document A/CN.9/WG.II/WP.169 and its addendum, and the proposed draft rules on transparency contained therein.

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

1. Article 1 (1) — Applicability of the rules on transparency

13. The Working Group considered article 1 (1) as contained in paragraph 8 of document A/CN.9/WG.II/WP.169.

Article 1 (1) as contained in paragraph 8 of document A/CN.9/WG.II/WP.169

14. Article 1 (1) contained two options, and variants. Under option 1, the opt-out solution, the rules on transparency would apply as an extension of the UNCITRAL Arbitration Rules under investment treaties providing for arbitration under the UNCITRAL Arbitration Rules, unless the investment treaty provided that the rules on transparency did not apply. That option contained two variants. Variant 1 provided for the application of the rules on transparency in relation to treaties concluded after the date of adoption of the rules (referred to as “future investment treaties”). Variant 2 provided for the application of the rules on transparency to both

future treaties and, in some instances, treaties concluded before the date of adoption of the rules (referred to as "existing investment treaties"). Under option 2, the opt-in solution, the rules on transparency would apply when High Contracting Parties (referred to as "Party (ies)") to an investment treaty expressly consent to their application. Option 2 contained two variants. Variant 1 provided for an application of the rules on transparency to arbitration irrespective of the applicable arbitration rules. Variant 2 limited the scope of application of the rules on transparency to arbitration under the UNCITRAL Arbitration Rules.

15. It was pointed out that options 1 and 2 were establishing different policies. Option 1 provided, as a principle, application of the transparency rules unless the Parties to an investment treaty agreed differently, thereby putting the burden of negotiating exclusion of the transparency rules on the Party advocating exclusion. In contrast, option 2 provided for the application of the rules on transparency only in case of express agreement of the Parties to an investment treaty, thereby putting the burden of negotiating application of transparency on the Party advocating for transparency.

16. A widely shared view was that, in light of the mandate given by the Commission to the Working Group, article 1 (1) should be drafted so as to permit a wide application of the rules on transparency. The view was expressed that that application must be in line with principles of international law that States could not be bound unless they consented. Diverging views were expressed as to the manner in which consent must be expressed.

Opt-out solution, future treaties (option 1, variant 1)

17. Views were expressed in favour of option 1, variant 1. It was clarified that the consent to apply the rules on transparency would be manifested when, in future investment treaties, parties would include a reference to the UNCITRAL Arbitration Rules, being on notice that the UNCITRAL Arbitration Rules included the rules on transparency (A/CN.9/736, para. 20). That solution was said to constitute the best means to carry out the mandate given by the Commission to the Working Group to foster transparency in treaty-based investor-State arbitration. It was further said that, while the rules on transparency would apply in conjunction with the UNCITRAL Arbitration Rules, nothing would preclude Parties to an investment treaty from applying those rules widely, irrespective of the applicable arbitration rules.

18. It was clarified that option 1, variant 1 was not intended to make the rules on transparency applicable to investment treaties concluded before the date of adoption of the transparency rules. With a view to clarifying that option 1, variant 1, would not apply to existing investment treaties, it was suggested to replace the bracketed language "[applicable version of the]" by a reference to the 2010 UNCITRAL Arbitration Rules.

Opt-out solution, future and certain existing treaties (option 1, variant 2)

19. Concerns were expressed that option 1, variant 1, did not contain a rule on the question of applicability of the rules on transparency to existing investment treaties. It was pointed out that option 1, variant 2, contained an additional sentence providing that "[T]he Rules on Transparency shall also apply (…), if the treaty provides for application of the version of the UNCITRAL Arbitration Rules as in

effect at the date of commencement of the arbitration". Those who underlined the importance of referring to existing investment treaties pointed out that approximately three thousand investment treaties were in force to date, and most investor-State arbitration in the coming years would arise under those treaties. It was said that variant 2 achieved the goal of wider application of the rules on transparency, and that it was in line with the mandate given by the Commission to the Working Group. It was also said that, as the rules on transparency would apply only where the existing investment treaty allowed for it, option 1, variant 2, would not carry with it any retroactive effect.

20. It was suggested that a reference in investment treaties to the "UNCITRAL Arbitration Rules" without any further indication of a version of the Rules could be interpreted as a "dynamic reference", encompassing further possible evolution of the Rules. It was said that very few investment treaties included wording as proposed under option 1, variant 2. Therefore, as a matter of drafting and to ensure wider application of the rules on transparency to arbitration under existing treaties, it was proposed to provide under option 1, variant 2, that the rules on transparency would apply where the investment treaty did not contain express reference to the 1976 version of the UNCITRAL Arbitration Rules.

21. However, reservations were expressed in relation to option 1, variant 2. It was said that the 1976 version of the UNCITRAL Arbitration Rules did not contain a provision on their possible evolution. In that context, it was noted that article 1 (2) of the UNCITRAL Arbitration Rules, as revised in 2010, provided for a presumption that the 2010 Rules would apply to an arbitration agreement concluded after 15 August 2010, but that that presumption would not apply where the arbitration agreement had been concluded by accepting after 15 August 2010 an offer made before that date.

22. Further, it was said that, in order to ensure application of the transparency rules to existing investment treaties, it might be necessary to include a reference to the transparency rules in the UNCITRAL Arbitration Rules. It would not be certain that arbitral tribunals would apply the transparency rules in particular in cases where the existing treaties would refer to the "1976 UNCITRAL Arbitration Rules", since arbitral tribunals might consider that the 1976 UNCITRAL Arbitration Rules were different from the 1976 UNCITRAL Arbitration Rules amended in, for instance, 2013, to incorporate the rules on transparency.

23. Therefore, for existing investment treaties, it was suggested that solutions such as those described in paragraphs 15 to 23 of document A/CN.9/WG.II/WP.166/Add.1 should be further considered.

Opt-in solution

24. Views were expressed in favour of option 2 for the reason that that approach would ensure that States had taken the conscious decision to apply those rules. It was recalled that the deliberations on the basis of rules had been agreed to by those initially in favour of a legal standard in the form of guidelines on the understanding that the rules on transparency would only apply where there was clear and specific reference to them (opt-in solution) (see A/CN.9/717, paras. 26 and 58).

25. It was also said that the opt-in solution complied with public international law and practice. It was pointed out that conclusion of investment treaties resulted in

obligations by States authorized through the necessary domestic process. Those obligations could not be subsequently modified by merely including an appendix to the UNCITRAL Arbitration Rules.

Opt-in solution, applicability irrespective of the selected arbitration rules (option 2, variant 1)

26. In support of option 2, variant 1, it was said that application of the rules on transparency irrespective of the selected arbitration rules would lead to a broader application of the rules and, therefore, would best fulfil the mandate given to the Working Group to foster transparency in treaty-based investor-State arbitration.

Opt-in solution, applicability limited to the UNCITRAL Arbitration Rules (option 2, variant 2)

27. Views were expressed in favour of option 2, variant 2 on the basis that transparency rules should be drafted in line with the fundamental principle of public international law that States Parties to investment treaties should not be bound unless they explicitly consented in the investment treaty. To those delegations, option 2, variant 2 would also provide for consistency and predictability.

Proposals

28. After discussion, the Working Group noted that, at its current session, option 1 received more support than at its fifty-fifth session (A/CN.9/736, para. 30), and that option 2 also received support. With a view to reconcile the two approaches, various proposals were made.

29. It was proposed to prepare both an appendix to the UNCITRAL Arbitration Rules and a stand-alone text on transparency. The proponents of that approach said that it would promote wide application of the rules on transparency. It was clarified that broad discretion had been left by the Commission to the Working Group regarding the form that the legal standard on transparency could take, including taking the form of an annex to the UNCITRAL Arbitration Rules.[5] In support of the form of a stand-alone text, it was further said that arbitral institutions referred to in document A/CN.9/WG.II/WP.170 and Add.1 had commented that the rules on transparency, in their current form, could operate in conjunction with their own institutional rules. It was questioned whether preparing two separate instruments was necessary, as the parties would always be free to opt into the transparency regime whether that regime was set out in stand-alone rules or in an appendix to the UNCITRAL Arbitration Rules.

30. It was suggested to include in the transparency rules a provision encouraging arbitral tribunals to use them as guidelines for the conduct of the proceedings. Questions were raised about the necessity of such a provision.

31. A further proposal was made to combine both options along the following lines: “[T]he Rules on Transparency shall apply to investor-State arbitration commenced under a treaty providing for the protection of investments or investors where the Parties have agreed that the Rules on Transparency shall apply either

[5] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 314.

expressly in the treaty, whether originally or by an amendment of the treaty, or reciprocal declarations by the Parties to the treaty, or otherwise, subject to such modification as the Parties may agree or have agreed. If the arbitration is conducted under the UNCITRAL Arbitration Rules, and the Parties agree that the 2010 UNCITRAL Arbitration Rules shall apply, that shall be considered to incorporate also the Rules on Transparency".

32. After discussion, the following approach had emerged. Article 1 (1) could contain a provision emphasizing first the consensual application of the rules on transparency, by providing that they would apply when agreed to by the Parties to an investment treaty or agreed to by the disputing parties. In addition, regarding future investment treaties, the transparency rules would apply if such treaties contained a reference to the UNCITRAL Arbitration Rules, unless the Parties to the treaty agreed otherwise. It was further understood that an express reference to the 1976 or 2010 versions of the UNCITRAL Arbitration Rules would not carry any presumption that the rules on transparency applied. Regarding existing investment treaties, views diverged on whether article 1 (1) should contain language preserving application of the rules on transparency where the investment treaty permitted application of the most up-to-date version of the UNCITRAL Arbitration Rules, or whether article 1 (1) should remain silent on that matter.

Revised draft of article 1 (1) ("the revised proposal")

33. With a view to reflecting the discussions of the Working Group, the following revised draft of article 1 (1) was proposed: "Subject to applicable international law rules on treaty interpretation: (1) These Rules shall apply to investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors ("treaty") when (a) the Parties to the treaty have agreed to their application; or (b) the disputing parties have agreed to their application. (2) In particular, in a treaty concluded after [date of adoption of the Rules on Transparency], a reference in the treaty to the UNCITRAL Arbitration Rules shall be presumed to include 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 include the Rules on Transparency".

34. The Working Group considered the substance of the proposal as contained above in paragraph 33 (referred to as "the revised proposal").

Paragraph (1) of the revised proposal — Agreement of Parties to an investment treaty or of disputing parties

35. Paragraph (1) of the revised proposal provided that the rules on transparency applied when the Parties to an investment treaty or the disputing parties agreed to their application. It permitted application of the rules on transparency to arbitration widely, as it did not limit the application of the transparency rules to arbitration under the UNCITRAL Arbitration Rules.

36. It was proposed that paragraph 1 (a) of the revised proposal be amended to refer to the express consent of Parties to the investment treaty, instead of merely consent, in order to provide an unambiguous rule as to how the consent of Parties should be expressed. In that context, the view was expressed that the chapeau of the revised proposal, which read "subject to applicable international law rules on treaty

interpretation:" was not desirable as it could provide a basis for interpretation by the arbitral tribunal that Parties to an investment treaty had given consent where they had not. It was proposed to delete the chapeau.

37. It was suggested that paragraph 1 (b) of the revised proposal, which aimed at permitting application of the transparency rules by the disputing parties where they so agreed, should be deleted for the reason that it might lead to confusion as to the scope of application of the rules on transparency. Further, it was questioned whether the disputing parties could decide to apply the rules on transparency where the Parties to the investment treaty themselves had not agreed to apply them.

38. It was also noted that paragraph (1) of the revised proposal did not include any time frame, and questions were raised regarding the impact of that provision on existing investment treaties (see below, paragraphs 47 to 53).

Paragraph (2) of the revised proposal — Application to future investment treaties

39. Paragraph (2) of the revised proposal provided that, for future investment treaties, a reference to the UNCITRAL Arbitration Rules in such treaties would be understood as including a reference to the rules on transparency. It clarified that, if the parties referred to the 2010 version of the UNCITRAL Arbitration Rules, the rules on transparency would not apply.

40. It was said that the presumption in paragraph (2) that the transparency rules would apply when the investment treaty contained a reference to the UNCITRAL Arbitration Rules raised questions as to the form that the transparency rules would take. It was said that such a presumption implied that the UNCITRAL Arbitration Rules be amended in order to include the transparency rules. It was questioned whether amending the UNCITRAL Arbitration Rules was part of the mandate of the Working Group. In response, it was clarified that the Commission, when it agreed that the issue of transparency should be addressed by future work, stated that the preparation of such an instrument might include preparation of an annex to the UNCITRAL Arbitration Rules.[6]

41. It was suggested that the question of the form the transparency rules would take, i.e., stand-alone rules or appendix to the UNCITRAL Arbitration Rules, should be considered before undertaking work premised on the rules on transparency being incorporated into the UNCITRAL Arbitration Rules, as a first and separate issue. In response, the view was expressed that that issue was intrinsically linked with the general issue dealt with in article 1 (1).

Reference to existing investment treaties in article 1 (1)

42. The Working Group turned its attention to the question whether article 1 (1) should deal with the question of the application of the rules on transparency to existing investment treaties. It was recalled that, regarding existing investment treaties, views diverged on whether article 1 (1) should contain language preserving application of the rules on transparency where the investment treaty permitted application of the most up-to-date version of the UNCITRAL Arbitration Rules (referred to in the discussions as the "dynamic interpretation of investment

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[6] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), paras. 313-314.

treaties"), or whether article 1 (1) should remain silent on that matter (see above, paragraph 20). Diverging views were expressed, that fell into three categories: those in favour of including a provision to the effect that the transparency rules would not apply to existing treaties by a dynamic interpretation of those investment treaties; those expressing preference for permitting application of the rules on transparency to existing investment treaties, where so permitted, by a dynamic interpretation of the investment treaties; and lastly, those in support of not providing any rules on that matter.

-Application to future investment treaties only

43. Views were expressed in favour of limiting the scope of application of the rules on transparency to future investment treaties only. It was recalled that, for existing investment treaties, the Working Group had agreed to explore a number of solutions, including recommendations or a convention, and that the transparency rules should not apply to existing investment treaties, unless consent would be expressed by Parties to the treaty to that effect. It was said by those in favour of the opt-in solution, that they accepted to consider paragraph (2) of the revised proposal on the basis that the scope of application of the rules on transparency would be limited to future investment treaties.

44. In support of limiting the application of the transparency rules to future investment treaties, it was said that States could not be put in a situation where they would have to reopen negotiations or issue declarations on interpretation of each of their existing investment treaties to indicate whether or not the rules on transparency would apply.

45. In that context, it was seen as important to indicate in the scope of the rules on transparency how those rules would come into play. It was pointed out that where the rules on transparency would be used in conjunction with the UNCITRAL Arbitration Rules, article 1 (2) of the UNCITRAL Arbitration Rules (as revised in 2010) would apply. It was suggested that a provision similar to article 1 (2) should be also included in the rules on transparency in order to avoid that both texts had a different rule on temporal application. If the rules on transparency were to take the form of stand-alone rules, that might limit the possibility of their application in the context of existing investment treaties. However, it was said that, even if the rules were to take the form of a stand-alone text, they could be considered by arbitral tribunals as part of the most up-to-date regime of UNCITRAL arbitration, and be applied.

46. In order to avoid application of the transparency rules to existing investment treaties without express consent of the parties, a suggestion was made to provide that the rules on transparency would not apply unless, after the date of their coming into effect, the parties expressly agreed that they applied.

-Future and existing investment treaties

47. Contrary views were expressed that, in consideration of the number of investment treaties already concluded, the rules should apply to existing investment treaties, where those treaties permitted such application.

48. With respect to the revised proposal, it was observed that paragraph (1) did not exclude a dynamic interpretation of a reference to the UNCITRAL Arbitration Rules in existing investment treaties, as it only referred to the agreement of the parties to

apply the rules on transparency. It was said, however, that the second paragraph of the revised proposal might be seen as ruling such dynamic interpretation out by excluding the application of the rules on transparency in case reference was made to a particular version of the UNCITRAL Arbitration Rules that did not include the rules on transparency. It was also said that dynamic interpretation was well recognized under public international law and the example of the jurisprudence of the International Court of Justice relating to the Continental Shelf was given. It was further said that allowing such dynamic interpretation was a policy decision and that it would be regrettable not to allow such dynamic interpretation, which would best further the mandate of the Working Group.

49. To address concerns raised, it was said that implied consent was recognized under public international law and the examples of forum prorogatum with respect to jurisdiction and article 20 of the Vienna Convention on the Law of Treaties (1969)[7] were given. In response, it was stated that those examples were not relevant to the issues being discussed by the Working Group.

-No specific provision on existing investment treaties

50. The Working Group was cautioned not to provide for any rule of interpretation on the scope of application of the transparency rules in relation to existing investment treaties. It was said that that matter would be better dealt with by means such as those referred to in paragraphs 15 to 23 of document A/CN.9/WG.II/WP.166/Add.1. It was said that a provision in the transparency rules on their application to existing investment treaties would be deprived of any legal effect, as that was a matter of treaty interpretation, which depended on the specific terms of each treaty.

51. It was suggested that the text of the rules on transparency should be directed at future investment treaties only, but that nothing in the text should be interpreted to preclude application of the rules on transparency to existing investment treaties if Parties to those treaties agreed that the rules on transparency should apply. Therefore, it was further suggested to not address that matter in the rules on transparency.

52. In response, it was said that it was the mandate of the Working Group to provide for a clear scope of application, in order to avoid uncertainties giving rise to disputes on interpretation. The determination of the scope of application of the rules on transparency should be done in a manner that would leave no ambiguity, and it was clarified that the efforts of the Working Group aimed at identifying the most widely acceptable rule of application, taking account of the divergence of views on the desired impact of the transparency rules on existing investment treaties.

53. It was said that, in deliberating that issue, terminology that suggested that States could be bound to a rule unless they took action to opt-out should best be avoided as it could raise unnecessary concerns on the part of States and polarized the debate.

General remarks on article 1 (1)

54. After discussion, it was noted that many delegations had moved from their original positions in a spirit of finding a solution and indicated their willingness to further work towards a compromise solution. In that light, the Working Group was

[7] United Nations, *Treaty Series*, vol. 1155, p. 331.

invited to consider the following approach. For investment treaties concluded after the date on which the rules on transparency would come into force (future treaties), a reference to the UNCITRAL Arbitration Rules would include a reference to the rules on transparency unless the State Parties agreed otherwise, which they would be able to do by choosing an earlier version of the UNCITRAL Arbitration Rules (i.e. the 2010 Rules). For existing investment treaties, the rules on transparency would only apply where the parties had expressly consented thereto, with wording being used to make it clear that there could be no dynamic interpretation of existing investment treaties which would make the transparency rules applicable to them.

55. Delegations carefully further considered the proposal contained in paragraph 54 above, which was seen as reflecting the majority view. It was said that, during the session, views had been fully expressed on the scope of application of the rules on transparency, a complex matter with important policy implications. It was noted that the positions on that matter, which were polarized on (i) whether an opt-in or opt-out approach was preferable and (ii) whether the possibility of dynamic interpretation for existing treaties should be left open, had evolved towards a compromise, whereby delegations with a strong view contrary to the majority view would make concessions in return for obtaining their preferred solution on other issues. That was the basis for the proposal in paragraph 54 above.

56. Some diverging views were reiterated as follows: on the one hand that article 1 (1) should leave open the possibility of legal application of the transparency rules to existing investment treaties, or that nothing in the rules should prohibit such an application and, on the other hand, that an opt-in approach was preferable, with the rules on transparency taking the form of a stand-alone text.

57. The Working Group entrusted the Secretariat with the preparation of a single revised version of article 1 (1) which would encapsulate the proposal contained in paragraph 54. Those delegations who found it difficult to agree with the proposal were invited to reflect on whether they could find that compromise acceptable in advance of the next session of the Working Group. It was also noted that some delegations had expressed the concern that it might be difficult to exclude the possibility of any dynamic interpretation (as was sought to be done) if the transparency rules were presented as an appendix to the UNCITRAL Arbitration Rules. The Secretariat was accordingly requested to provide an analysis of the implications of presenting the transparency rules in the form of an appendix to the UNCITRAL Arbitration Rules, or as a stand-alone text.

58. A few delegations still opposed to combine the transparency rules with the UNCITRAL Arbitration Rules, and insisted that stand-alone rules would guarantee Parties conscious and explicit consent to the rules on transparency. Those delegations felt that that would avoid that, through dynamic interpretation, the rules on transparency be made applicable to existing investment treaties without express consent of the Parties to the treaty. A few delegations reiterated that dynamic interpretation was legally possible and that they were not ready to accept a “blanket prohibition” that would preclude the effective implementation of provisions in investment treaties that envisaged the Parties benefiting from the most up-to-date provisions of the UNCITRAL Arbitration Rules in arbitrations under those treaties, which in that case would be the rules on transparency.

59. It was clarified that it would be open to those delegations, who would find it difficult to agree with the proposal articulated above in paragraph 54 and still wished to propose another solution (whether in favour of an opt-in or in favour of a dynamic interpretation), to do so at the next session of the Working Group on the basis of the proposals in paragraph 8 of document A/CN.9/WG.II/WP.169. It was noted that some delegations had indicated that it might be possible to find wording which would give those States that wished to exclude any possibility of dynamic interpretation of their treaties certainty in that respect, while preserving the possibility of such dynamic interpretation for other States. Those delegations were invited to coordinate their efforts and to communicate drafting suggestions in that respect to the Secretariat for consideration by the Working Group.

2. Article 1 (2) — Application of rules on transparency by the disputing parties

60. The Working Group considered article 1 (2) as contained in paragraph 8 of document A/CN.9/WG.II/WP.169, which prohibited disputing parties from opting out of, or diverging from, the rules on transparency once adopted by the Parties to the investment treaty (A/CN.9/736, paras. 32-36). The Working Group was reminded that, in treaty-based investor-State arbitration, there were two levels of legal relationships: the first level concerned the legal relationship between the Parties to the investment treaty and the second level concerned the legal relationship between the parties to disputes, i.e., the investor and the State.

Article 1 (2) as contained in paragraph 8 of document A/CN.9/WG.II/WP.169

61. It was explained that the purpose of paragraph (2) was to prohibit derogation by the disputing parties from the offer for transparent arbitration for the policy reason that it would not be appropriate for the disputing parties to reverse a decision made by Parties to the investment treaty on that matter. In addition, the rules on transparency were meant to benefit not only the investor and the host State but also the general public, with the consequence that it was not for the disputing parties to renounce transparency provisions adopted by the Parties to the investment treaty.

62. Comments were made regarding the interplay of paragraph (2) with treaty provisions and with the UNCITRAL Arbitration Rules.

63. A suggestion was made that paragraph (2) should be deleted for the reason that it was redundant as the question it dealt with was usually covered under the investment treaty. In response, it was said that, where the rules on transparency would operate in conjunction with the UNCITRAL Arbitration Rules, article 1 (1) of those Arbitration Rules would apply and permit parties to modify any provisions. Therefore, it would be necessary to indicate that the rules on transparency, because they were meant to address the need to protect public interest, could not be altered by the disputing parties.

64. Another proposal was made to include in paragraph (2) the words “unless the treaty provides otherwise”, in order to clarify that the provisions of the investment treaty would prevail in case of conflict, and that the rule contained in paragraph (2) could be overridden by a treaty provision. It was questioned whether such an addition was needed.

65. It was also questioned how the transparency rules would operate in connection with article 1 (3) of the UNCITRAL Arbitration Rules (as revised in 2010), which

provided that the mandatory provisions of the applicable law prevailed. It was further questioned how the disputing parties could be compelled to comply with transparency rules, in instances where those rules would be contrary to the applicable law. It was said that one possible effect could be that parties chose, as the place of arbitration, jurisdictions where mandatory legislation would not favour transparency.

66. As a matter of drafting, it was pointed out that paragraph (2) dealt with the disputing parties, but did not refer to the arbitral tribunal. Attention was called to article 17 (1) of the 2010 UNCITRAL Arbitration Rules, which provided that the arbitral tribunal might conduct the arbitration in such manner as it considered appropriate. It was suggested to clarify whether, and the extent to which, arbitral tribunals would be allowed to deviate from, or mitigate the effect of, the rules on transparency when such rules would operate in conjunction with the UNCITRAL Arbitration Rules.

67. Paragraph (2), it was further said, contained a certain degree of inflexibility, which might not be desirable with regard to the need to ensure efficiency of arbitral proceedings. In that respect, it was proposed to authorize the arbitral tribunal to vary from the rules on practical issues, such as the adjustment of a time period. With respect to the manner in which the arbitral tribunal could be authorized to make such variations, it was proposed to either include such rule in paragraph (2), or to tailor each provision of the rules accordingly. A proposal was made to add the following sentence at the end of paragraph (2): “Upon a request by [the disputing parties][a disputing party], the arbitral tribunal may exercise its discretion to decide not to apply or apply with modification specific provisions of these Rules on Transparency where it finds that a strict application would lead to excessive costs in relation to the amount in dispute, or would disrupt or unduly burden the arbitral proceedings, or would unfairly prejudice any disputing party”.

68. A comment was made that deviations from the rules on transparency might be needed for other reasons, such as public policy. Therefore, the ability of the arbitral tribunal to deviate from the rules on transparency should not be limited. In response and in order to avoid erosion of the transparency rules that could result from such a broad approach, it was suggested to instead identify matters where deviations from the rules would not be permitted. A question was raised whether it was feasible to exhaustively identify all matters where deviations from the rules would not be permitted.

69. A further suggestion was made to retain paragraph (2) and to address the matter of deviation from the rules under article 1 (3) of the transparency rules, which provided guidance on how the arbitral tribunal should exercise discretion. In response, it was said that deviation from the transparency rules would require a higher threshold than merely exercising discretion where permitted under the rules. The purpose of article 1 (3) was to determine how the arbitral tribunal would exercise the discretionary powers expressly provided in the rules, which was seen as different from the issue of defining the conditions for departing from the rules.

70. A further proposal was made to permit such variations from the rules by the disputing parties, instead of the arbitral tribunal, provided all disputing parties agreed. In that context, the view was expressed that the role of the arbitral tribunal was to decide on disputes between the disputing parties. According to that view, the

arbitral tribunal had no role when the parties had no disputes, such as where they both agreed to vary or derogate from the rules on transparency. According to that proposal, paragraph 2 could be deleted.

71. It was suggested that, instead of providing for a discretionary power of the arbitral tribunal to deviate from the rules on transparency, the arbitral tribunal should be given discretion to adapt the rules to the needs of the specific case.

72. The view was expressed that the proposals, aimed at allowing deviations from the rules, carried the risk of eroding the rules by creating opportunities to depart from them. It was said that, while it might be advisable to provide the arbitral tribunal with the power, for instance, to adjust time periods where needed, it would not be in favour of transparency to provide in general terms for full discretion of the arbitral tribunal to alter the rules.

73. After discussion, the following approach emerged. Article 1 (2) should be retained, and some flexibility should be crafted, based on the principle that the provision would not allow derogation from the rules, but adaptation of them by the arbitral tribunal, in circumstances that would need to be further considered by the Working Group.

Revised draft proposal of article 1 (2)

74. In that light, it was proposed to revise article 1 (2) as follows: "In any arbitration in which these Rules on Transparency apply pursuant to a treaty or to an agreement by the parties to that treaty, (a) 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, apart from its discretionary authority under certain provisions in these Rules on Transparency, to adapt the requirements of any specific provision of these Rules to the particular circumstances of a case if this is necessary to achieve the Rules' transparency objective in a practical manner". The Working Group considered the revised draft proposal of article 1 (2).

Chapeau

75. To a question whether the words "pursuant to a treaty or to an agreement by the parties to that treaty," contained in the chapeau of the revised draft proposal of article 1 (2), were needed, it was explained that the rules might come into play in the context of treaty-based investor-State arbitration, and also in the context of commercial arbitration. It was considered necessary to clarify that the disputing parties should not be entitled to derogate from the rules in the context of treaty-based investor-State arbitration only.

76. It was said that the reference to the application of the rules on transparency pursuant "to an agreement by the parties to [the] treaty" in the chapeau was redundant and should be deleted. In response, it was explained that that reference had been included in order to capture subsequent agreements by the Parties to an investment treaty to apply the rules on transparency to disputes arising under a treaty. Further, in response to the view that such subsequent agreement would constitute a modification of the treaty, being part of it, and the reference was not needed, it was said that article 31 (3)(a) of the Vienna Convention on the Law of

Treaties distinguished a treaty from a subsequent agreement regarding the interpretation of the treaty. Therefore, it was suggested to retain the chapeau.

Subparagraph (a)

77. It was said that subparagraph (a) of the revised draft proposal of article 1 (2) permitted departure from the rules on transparency only if the investment treaty permitted so. For the sake of consistency with subparagraph (b), it was suggested to add, at the end of subparagraph (a), the following words: "or if this is approved by the arbitral tribunal". It was said that if subparagraph (a) would not include those words, it should then be clarified in subparagraph (b) that the disputing parties were entitled to depart from the rules on transparency if so authorized by the arbitral tribunal. To address that concern, it was suggested to provide under subparagraph (b) that the arbitral tribunal should have the power, either at its own initiative or at the request of the parties, to adapt the rules.

Subparagraph (b)

78. With regard to subparagraph (b) of the revised draft proposal of article 1 (2), it was suggested to clarify that it was the responsibility of the arbitral tribunal to ensure application of the rules on transparency. To that end, it was suggested to include, at the beginning of subparagraph (b), wording along the following lines: "The arbitral tribunal shall ensure the application of the Rules on Transparency. In so doing,". That proposal found broad support. As a matter of drafting, it was suggested to refer in subparagraph (b) to the transparency objectives embodied in the rules. The drafting suggestion received support.

79. Another proposal made was to include wording similar to that contained in article 1 (3) of the transparency rules, in order to indicate that the arbitral tribunal should exercise its discretion to adapt the rules, with a view to ensure a fair and efficient resolution of the dispute. That proposal did not receive support.

80. A few delegations were not in favour of including a provision on the mandatory nature of the rules on transparency and proposed deleting paragraph (2), on the basis that the rules on transparency were procedural rules and, as such, in line with established principles of arbitration, the disputing parties should be allowed to derogate therefrom without any authorization from the arbitral tribunal. One delegation said that it would be counterproductive not to include the assumption that both disputing parties might request the arbitral tribunal to adapt the rules on transparency and that the arbitral tribunal could not reject the request from the disputing parties.

81. After discussion, the proposal under paragraph 74, with the modifications proposed in paragraph 78, was found acceptable with some delegations maintaining their position in favour of deleting paragraph (2) or reserving their position until all substantive matters in the transparency rules had been discussed.

3. Article 1 (3) — Discretion of the arbitral tribunal

82. The Working Group considered article 1 (3) as contained in paragraph 8 of document A/CN.9/WG.II/WP.169, which provided that the arbitral tribunal should exercise discretion where so permitted under the rules, taking into account the need to balance (a) the public interest in transparency in treaty-based investor-State

arbitration and of the particular arbitral proceedings and (b) the disputing parties' interest in a fair and efficient resolution of their dispute (A/CN.9/736, paras. 38-40).

83. The proposal to include a specific reference to the human right of information under subparagraph (a) did not receive support.

84. Several drafting suggestions were made. It was proposed to delete the comma following the word "discretion". Various proposals were made to replace the opening words of paragraph (3) by either of the following phrases: "[W]here the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the exercise of that discretion shall take into account"; "[W]here the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account", or "[W]hen exercising discretion granted under these Rules, the arbitral tribunal shall take into account".

85. After discussion, the Working Group agreed to adopt the substance of paragraph (3) and requested the Secretariat to prepare a revised draft of paragraph (3), taking account of the aforementioned proposals.

4. Article 1 (4) — Relationship between the rules on transparency and any transparency provisions in the investment treaty

86. Article 1 (4), as contained in paragraph 8 of document A/CN.9/WG.II/WP.169 clarified that the rules on transparency would not supersede a provision in the relevant investment treaty that actually required a higher level of transparency (A/CN.9/736, para. 31).

87. A question was raised as to how, under paragraph (4), the level of transparency would be assessed to determine which of the treaty provisions or the transparency rules would apply. It was proposed that paragraph (4), instead of providing for an assessment of the level of transparency, should deal with the prevalence of the treaty provisions in case of conflict with the transparency rules. In favour of that proposal, it was said that a similar approach had been adopted in article 1 (3) of the 2010 UNCITRAL Arbitration Rules (or article 1 (2) of the 1976 UNCITRAL Arbitration Rules). It was clarified that, according to that proposal, if the investment treaty provided for a transparency regime less favourable than that of the transparency rules, the treaty provisions would nevertheless prevail.

88. In that context, various drafting proposals were made. It was suggested to include a provision along the lines of "[I]f a treaty provision is in conflict with the Rules, the treaty provision prevails". Another proposal made was along the lines of "[T]o the extent that the substance matter is regulated in the treaty, the treaty prevails". Following the same approach, it was also proposed to draft article 1 (4) as follows: "[T]he transparency provisions contained in a treaty shall prevail over other provisions when these are in conflict".

89. After discussion, the prevailing view was that, regardless of the level of transparency, in case of conflict between the transparency rules and treaty provisions dealing with the same subject matter, the treaty provisions would prevail. However, the question remained whether there was a need to include a provision to deal with that issue in the transparency rules, as that was a matter of treaty

interpretation, not necessarily a matter to be addressed in rules. Diverging opinions were expressed on that question.

90. Support was expressed for including a provision along the lines of the proposals under paragraph 88, in order to provide clarity, not only for the arbitral tribunal, but also for the parties. It was further observed that the matter was not about treaty interpretation, but about which procedure to apply.

91. However, it was pointed out that article 1 (4) of the transparency rules aimed at providing a rule of interpretation, and the attention of the Working Group was called on the difficulties to deal with such a matter. It was said that the analogy with article 1 (3) of the UNCITRAL Arbitration Rules (as revised in 2010) was questionable because article 1 (3) dealt with an issue of conflict between the Rules and mandatory applicable law, whereas article 1 (4) of the transparency rules dealt with the relationship between the rules as referred to in a treaty and other provisions in that treaty. That relationship was a matter of interpretation regulated by the Vienna Convention on the Law of Treaties (1969). The treaty provisions and the transparency rules would need to be interpreted by the arbitral tribunal which would apply them.

92. Diverging views were expressed on whether the treaty provisions, drafted by Parties on the one hand, and the rules on transparency, which would be incorporated by reference into the treaty on the other hand, would be interpreted in the same manner. According to a view, it would be inaccurate to consider that the rules on transparency would be incorporated by reference in a treaty. Diverging views were also expressed as to whether those questions were questions of policy or rather technical issues of law and of treaty interpretation.

93. It was noted that there were different approaches to interpretation of treaties, and that it would not be appropriate to seek to provide for a rule of interpretation in the transparency rules.

94. After discussion, the Working Group agreed that article 1 (4) should be deleted.

5. Article 1 (5) — Relationship between the rules on transparency and the applicable arbitration rules

95. The Working Group considered article 1 (5), as contained in paragraph 8 of document A/CN.9/WG.II/WP.169 which dealt with the relationship between the rules on transparency and the arbitration rules.

96. It was suggested to include at the end of paragraph (5) a provision similar to article 1 (3) of the 2010 UNCITRAL Arbitration Rules, in order to clarify that where any of the rules on transparency was in conflict with the law applicable to the arbitration from which the parties could not derogate, that provision should prevail. That proposal received support.

97. After discussion, it was noted that a large majority was in favour of article 1 (5), as contained in paragraph 8 of document A/CN.9/WG.II/WP.169, as complemented by a provision along the lines of that contained in article 1 (3) of the 2010 UNCITRAL Arbitration Rules (see above, paragraph 96). A few delegations reserved their position on paragraph (5), as they considered that

paragraph (5) should be further considered in light of the scope of application of the rules.

6. Footnotes to article 1

-"investor-State arbitration"

98. The Working Group considered the first footnote under article 1, which aimed at clarifying that the rules on transparency would apply only to the settlement of disputes arising under investment treaties between an investor and a Party to the treaty and not to the settlement of disputes between Parties to the treaty (A/CN.9/736, para. 37).

99. It was said that the reference in the footnote to "one or more Parties" was unusual. In response, it was clarified that the phrase was aimed at dealing with multilateral treaties, and should be kept.

100. It was proposed to delete the first footnote, as it was clear from the provisions in article 1 that investor-State arbitration would be initiated "under a treaty", which itself was defined under the second footnote. That proposal was adopted by the Working Group.

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

101. The second footnote to article 1 aimed at clarifying the understanding that investment treaties to which the rules on transparency would apply should be understood in a broad sense.

102. As a matter of drafting, it was proposed to delete the word "intergovernmental" where it appeared after the word "integration". Further, it was proposed to refer to the "protection of investments and investors" in a consistent manner under the footnote. The second footnote was adopted by the Working Group with the proposed modifications.

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

103. The Working Group considered article 2, as contained in paragraph 25 of document A/CN.9/WG.II/WP.169, which dealt with publication of information at an early stage of the arbitral proceedings, before the constitution of the arbitral tribunal. Article 2 contained two options. Under option 1, general information would be conveyed to the public, and the publication of the notice of arbitration (and of the response thereto) would be dealt with under article 3, after the constitution of the arbitral tribunal. Option 2 contained a procedure for the publication of the notice of arbitration and the response thereto before the constitution of the arbitral tribunal.

104. The Working Group had also before it a proposal to amend option 2, that read as follows: "1. Once the notice of arbitration has been received by the respondent, the disputing parties shall promptly communicate to the repository referred to under article 9 a copy of the notice of arbitration. Upon receiving the notice of arbitration from any disputing party, the repository shall then promptly make available to the public information regarding the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being made. 2. Within [45] days of the receipt of the notice of arbitration by the respondent, each disputing party shall

identify to the repository referred to under article 9 any portions of the notice of arbitration that it contends constitutes [confidential or sensitive][protected] information as defined under article 8, paragraph 2. [The repository referred to under article 9 shall then make available to the public in a timely manner those portions of the notice of arbitration that are not identified by any disputing party in accordance with the foregoing sentence.] 3. Within [45] days of the receipt of the response to the notice of arbitration by the claimant, each disputing party shall identify to the repository referred to under article 9 any portions of the response to the notice of arbitration that it contends constitutes [confidential or sensitive][protected] information as defined under article 8, paragraph 2. [The repository referred to under article 9 shall then make available to the public in a timely manner those portions of the response to the notice of arbitration that are not identified by any disputing party in accordance with the foregoing sentence.] [Or as an alternative to the last bracketed sentence of paragraphs (2) and (3): The repository referred to under article 9 shall make available to the public at the same time the portions of the notice of arbitration and the response thereto that are not identified by any disputing party as containing [confidential or sensitive][protected] information as defined under article 8, paragraph 2.] 4. The tribunal, when constituted, shall rule on any disputes regarding the scope of information not made available to the public pursuant to paragraphs 2 and 3. If the tribunal rules that any such material is not [confidential or sensitive] [protected] information as defined under article 8, paragraph 2, the tribunal shall communicate such material to the repository referred to under article 9, which shall make such material available to the public in a timely manner".

105. The proposal under paragraph 104 received support as it clarified that the arbitral tribunal would deal with any dispute regarding the publication of the notice of arbitration and the response thereto and as it provided a procedure for the parties to redact the information. It was suggested that that option should clarify that the publication of the notice of arbitration and the response thereto should be made simultaneously. In addition, it was said that paragraph (4) of the proposal provided appropriate legal protection for the institutions that would carry out the functions of a registry.

106. However, various concerns were expressed in relation to option 2. The time period provided for the publication of the notice of arbitration and the response thereto were said to be too short. It was pointed out that such publication at an early stage of the proceedings might impede a settlement of the dispute. In response to that concern, it was said that where a similar provision had been provided in investment treaties, it did not create difficulties.

107. A question was raised how to deal with the situation where a notice of arbitration would be 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. The Working Group agreed to further consider that question.

108. The majority view was in favour of option 1, which left the question of the publication of the notice of arbitration and of the response thereto after the constitution of the arbitral tribunal.

109. After discussion, the delegations that had long been in favour of option 2, agreed, in a spirit of compromise, to option 1. The Working Group adopted option 1,

with the following drafting modifications. It should be clarified in the text of option 1 that all disputing parties should have the obligation to send the notice of arbitration to the registry. The registry should publish the information once it received the notice of arbitration from either party. The registry should publish the names of the disputing parties, as well as information regarding the economic sector involved and the treaty under which the claim arose.

110. As a general remark on drafting, it was suggested to harmonize the language used in the rules with regard to publication of information or documents as, for instance, the words "published" or "made available to the public" were used. The Working Group requested the Secretariat to examine whether a different meaning was intended in the use of the various terms referring to publication and to further examine how a consistent approach could be achieved.

8. Article 3 — Publication of documents

111. The Working Group considered article 3 as contained in paragraph 29 of document A/CN.9/WG.II/WP.169, which reflected a proposal made at its fifty-fifth session that the provision on publication of documents should provide: (i) a list of documents to be made available to the public; (ii) discretionary power of the arbitral tribunal to order publication of additional documents; and (iii) a right for third persons to request access to additional documents (A/CN.9/736, paras. 54-66). Such a provision had been 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, para. 58).

112. It was proposed to delete the reference to "exhibits" and "a table listing all exhibits" from the list of documents that should be made available to the public, as making public the exhibits could be too voluminous whilst, to the extent the second reference might require a party to draft a table listing all documents, that would add an unnecessary burden. Support was expressed for the deletion, as the publication of the exhibits and possibly requiring the creation of tables of exhibits were seen as too burdensome. Though acknowledging some additional burden, preference was expressed for the retention of exhibits in article 3 (1) as such publication was in the interest of transparency.

113. It was noted that the opening words of article 3 (1) to (3) referred to the exceptions set out in article 8 and that, in turn, article 8 (1) stated that it applied to articles 2-7. It was noted that such repetition was redundant and it was suggested to delete the reference to article 8 from those articles. It was said that, though repetitive, the reference might be preferable, as it provided for clarity.

114. It was further suggested to provide for the simultaneous publication of the notice of arbitration and the response to it.

115. It was also suggested that more flexibility should be provided with respect to the publication of documents in article 3, as article 3 (1) required automatic publication, whereas article 3 (2) permitted the arbitral tribunal to order, on its own motion or upon request from a disputing party, the publication of any other document. In that light, it was proposed to delete from article 3 (1) reference to "any further statements or written submissions", "exhibits" and "orders and decisions of the arbitral tribunal".

116. Due to lack of time, the Working Group could not complete consideration of article 3, and it was agreed that discussions on article 3 would continue at a future session of the Working Group.