



**United Nations Commission
on International Trade Law**
Working Group II (Arbitration and Conciliation)
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**Settlement of commercial disputes: Application of the
UNCITRAL Rules on Transparency in Treaty-based
Investor-State Arbitration to existing investment treaties —
Draft convention**

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 legal standard on transparency to investment treaties concluded before the date of adoption of the rules on transparency (“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 arbitration 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 (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.”

3. At that session, the Commission “recorded consensus to entrust the Working Group with the task of preparing a convention on the application of the UNCITRAL Rules on Transparency to existing investment treaties, taking into account that the aim of the convention was to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism

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 29 July 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.

to do so, without creating any expectation that other States would use the mechanism offered by the convention.”⁴

4. The text of the draft convention (“draft convention” or “convention”), with annotations, for consideration by the Working Group is contained in paragraphs 4 to 18 of document A/CN.9/784. This note contains additional remarks on the draft convention.

II. Matters for consideration

1. General matters

5. Article 1, paragraph (2) (b), of the Rules on Transparency provides that in investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1st April 2014, the Rules shall apply only when the Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1st April 2014 to their application. Article 1, paragraph (9), further provides that the Rules on Transparency are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules, or in ad hoc proceedings. The purpose of the draft convention is to provide for an efficient mechanism for Parties to investment treaties to express their consent to the application of the Rules on Transparency in the instances referred to under article 1, paragraphs (2)(b) and (9) of the Rules on Transparency.

6. The Working Group may wish to consider whether that mechanism, as embodied in the draft convention, constitutes a new obligation between Parties to that convention, or whether it constitutes an amendment or modification to existing investment treaties to which it relates. The Working Group may wish to consider whether that determination would be different depending on whether an existing investment treaty contains transparency obligations (which would be modified by the Rules on Transparency).

7. Should the Working Group determine that such an additional obligation does not merely constitute a new obligation between the Parties to the convention in relation to investment treaties covered by the scope of the convention, but rather serves to modify or amend existing investment treaties, the Working Group may wish to consider the procedures for amending or modifying treaties contained in Chapter IV of the Vienna Convention. This includes Article 39, which provides as a general rule that “[a] treaty may be amended by agreement between the Parties”, and Article 41 in relation to the procedures for two or more Parties to a multilateral treaty to modify the treaty as between themselves alone. The Working Group may also wish to have regard to any modification or amendment provisions within existing investment treaties (to which Chapter IV of the Vienna Convention applies as a secondary source of law). In particular, the Working Group may wish to consider whether any provision should be added in the draft convention on transparency in relation to the notification obligations attached to proposals to amend or modify existing investment treaties.

⁴ Report of the Commission on the work of its forty-sixth session, under preparation.

Consistency of definitions

8. The Working Group may wish to note that the definition of the term “treaty providing for the protection of investments or investors” in article 1, paragraph (2) of the draft convention as contained in paragraph 5 of document A/CN.9/784 should be made consistent with the definition of the same term contained in the footnote to article 1 of the Rules on Transparency, such that it reads: “The term ‘treaty’ means any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the 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.”

9. The Working Group may also wish to note that references to the “Rules on Transparency” in the draft convention (in the preamble, and draft article 3), ought to reflect the title of the Rules as adopted by the Commission at its forty-sixth session, namely the “UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration”.

2. Draft article 3 — Use of the UNCITRAL Rules on Transparency

Reference to the Rules on Transparency in the draft convention — Applicable version in case of revision

10. As stated in paras. 9 and 10 of document A/CN.9/784, article 3 of the draft convention proposes a general statement of applicability (article 3) of the Rules on Transparency; in other words, it reflects the agreement of the contracting Parties to apply the Rules on Transparency to arbitrations initiated pursuant to investment treaties concluded before the date of entry into force of the convention but does not reproduce the text of the Rules on Transparency.⁵ This raises the question whether article 3 of the draft convention should clarify the version of the Rules on Transparency that is incorporated by reference in the event those Rules would be revised. Another possible approach would be to provide in the draft convention that in the event of a revision of the Rules on Transparency, the Rules on Transparency, as revised, would apply, unless otherwise notified by a Party to the convention within [x] months from the date of adoption of such revision, and before that revision were to come into force.

3. Draft article 4 — Reservations

11. In certain cases, States make statements upon signature, ratification, acceptance, approval of or accession to a treaty. Such statements may be entitled “reservation”, “declaration”, “understanding”, “interpretative declaration” or “interpretative statement”. However phrased or named, any such statement purporting to exclude or modify the legal effect of a treaty provision with regard to

⁵ A similar approach has been adopted in the Inter-American Convention on International Commercial Arbitration (“Panama Convention”) which refers, under article 3, to the rules of procedure of the Inter-American Commercial Arbitration Commission, but does not incorporate those rules into the text of that Convention.

the declarant is, in fact, a reservation (see article 2 (1) (d) of the Vienna Convention).⁶

12. A reservation may enable a State to participate in a multilateral treaty in which the State would otherwise be unwilling or unable to participate. Draft article 4 contains provisions on reservations. In addition to the remarks contained in paragraphs 12 and 13 of document A/CN.9/784, the Working Group may wish to consider that the draft convention should provide certainty as to the application of the Rules on Transparency to existing investment treaties. Therefore, any reservations permitted under the draft convention should be precise enough to permit parties to a dispute under an investment treaty to ascertain whether the Rules on Transparency are applicable under that treaty.

4. Draft article 9 — Entry into force

13. As stated in paragraph 17 of document A/CN.9/784, the basic provisions governing the entry into force of the draft convention are laid down in draft article 9. Three ratifications correspond to the modern trend in commercial law conventions, which promotes early application of those conventions to the extent possible.

14. The Working Group may wish to note that when that matter was discussed by UNCITRAL in the context of the preparation of the United Nations Convention on the Use of Electronic Communications in International Contracts (2005), the Commission noted that existing UNCITRAL conventions required as few as three and as many as ten ratifications for entry into force.⁷

⁶ See United Nations treaty handbook, section 3.5, page 12, available on 29 July 2013 at <http://treaties.un.org/doc/source/publications/THB/English.pdf>.

⁷ *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 149.