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Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-ninth session (Vienna, 16-20 September 2013)

Contents

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session (New York, 16 June-3 July 2008)[1] that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic.[2]

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session regarding the importance of ensuring transparency in treaty-based investor-State arbitration. 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]

3. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission adopted[4] the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[5] (the "Rules on Transparency", or the "Rules") and the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013).[6] The decision of the Commission adopting the Rules on Transparency included the recommendation 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."[7] At that session, the Commission agreed by consensus to entrust the Working Group with the task of preparing a convention (the "transparency convention") on the application of the Rules on Transparency to existing investment treaties, taking into account that the aim of the transparency convention was to give those States 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 transparency convention.[8]

4. 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.178, paragraphs 5 to 8.

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[1] *Official records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314.
[2] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 190.
[3] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200.
[4] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 128.
[5] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), Annex I.
[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), Annex II.
[7] Ibid., para. 116.
[8] Ibid., para. 127.

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its fifty-ninth session in Vienna, from 16-20 September 2013. The session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Denmark, Ecuador, El Salvador, France, Georgia, Germany, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Jordan, Kenya, Kuwait, Mauritius, Mexico, Nigeria, Pakistan, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Angola, Bolivia (Plurinational State of), Chile, Cyprus, Czech Republic, Democratic Republic of the Congo, Dominican Republic, Finland, Lithuania, Netherlands, Norway, Peru, Poland, Qatar, Romania, Slovakia, Sweden and Vietnam.

7. The session was also attended by observers from the European Union.

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

(a) *Intergovernmental organizations*: European Centre for Peace and Development (ECPD), Organisation for Economic Cooperation and Development (OECD), Permanent Court of Arbitration (PCA);

(b) *Invited non-governmental organizations*: American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Association Suisse de l'Arbitrage (ASA), Barreau de Paris, Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), China International Economic and Trade Arbitration Commission (CIETAC), Construction Industry Arbitration Council (CIAC), Council of Bars and Law Societies of Europe (CCBE), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Inter-Parliamentary Assembly of the Eurasian Economic Community (IPA EURASEC), International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), Korean Commercial Arbitration Board (KCAB), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators, Moot Alumni Association (MAA), New York State Bar Association (NYSBA), P.R.I.M.E. Finance Foundation (PRIME FINANCE), Tehran Regional Arbitration Centre (TRAC), Vienna International Arbitral Centre (VIAC).

9. The Working Group elected the following officers:

Chairman: Mr. Salim Moollan (Mauritius)

Rapporteur: Mr. Shotaro Hamamoto (Japan)

10. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.178); (b) notes by the Secretariat regarding the preparation of a convention on transparency in treaty-based investor-State arbitration (A/CN.9/784 and A/CN.9/WG.II/WP.179).

11. 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 convention 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

12. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/784 and A/CN.9/WG.II/WP.179). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The Secretariat was requested to prepare a revised draft of the transparency convention, based on the deliberations and decisions of the Working Group.

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

13. The Working Group recalled the consensus recorded at the forty-sixth session of the Commission to entrust the Working Group with the task of preparing the transparency convention, taking into account that the aim of the transparency convention was to give those States 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 transparency convention (see above, para. 3).[9]

14. It was recalled that the draft text of the transparency convention as set out in paragraph 5 of document A/CN.9/784 was a proposal by the Secretariat which had not yet been the subject of any discussion in the Working Group and that it provided a starting point for discussions in relation to achieving the mandate.[10]

15. The Working Group proceeded to address the issues in relation to, and the substance of, the transparency convention.

A. General matters

16. The Working Group considered three general issues arising in relation to the transparency convention.

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[9] Ibid.

[10] Ibid., para. 124.

1. Relation between the transparency convention and existing investment treaties

17. First, the Working Group considered in broad terms the effect of the transparency convention in relation to 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 on the Law of Treaties (1969) (the "Vienna Convention")), or whether it would constitute an amendment or modification (pursuant to provisions of existing investment treaties and Chapter IV of the Vienna Convention) to such investment treaties (A/CN.9/WG.II/WP.179, paras. 5-7).

18. It was said that logically one could not refer to an amendment or modification to investment treaties in the context of a subsequent treaty creating new obligations between Contracting Parties, but rather, that the transparency convention would amount to a successive agreement between Contracting Parties. Significant support was expressed for that view.

19. A different view was expressed on an initial basis, namely that the transparency convention might be seen to constitute an amendment to relevant investment treaties.

20. The Working Group considered whether the outcome of the determination as to whether the transparency convention was a successive one, or an amending one, would affect the drafting of the transparency convention. A view was expressed, again on a preliminary basis, that in case of the latter, and concerning multilateral investment treaties, notification provisions (to other Parties to investment treaties to which the transparency convention would apply) might need to be included in the transparency convention, but that in the case of the former, no additional provisions were likely to be required.

21. The point was raised that in investment treaties that did contain extensive transparency provisions, complications might arise in relation to, for example, which transparency regime applied, but that those might be dealt with in the deliberations under article 3 of the transparency convention (see below, paras. 73 to 77, 80 and 102).

22. It was noted that, at that stage of deliberations, 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.

2. Unilateral offer to arbitrate under the Rules on Transparency

23. The Working Group took note that, under article 1, the transparency convention would apply when Parties to a relevant investment treaty were also Contracting Parties to the transparency convention (A/CN.9/784, para. 6).

24. As a second general issue, the Working Group considered whether a Contracting Party's consent to be bound by the transparency convention (whether by ratification, acceptance, approval or accession) would amount to a unilateral offer to an investor initiating a claim under a relevant investment treaty, where that investor's home State was not a party to the transparency convention, for that investor to accept the application of the Rules on Transparency.

25. The Working Group considered in that respect, first, whether such an outcome was within the mandate given by the Commission to the Working Group (see above, paras. 3 and 13), and second, if so, whether language indicating that such a unilateral offer was being made by Contracting Parties to the transparency convention ought to be included in the transparency convention itself.

26. It was said in support of the view that the transparency convention should amount to a unilateral offer by a Contracting Party that such unilateralism was the basis on which most offers to initiate an investor-State claim were made, and that it would provide a broader application to the Rules on Transparency.

27. It was said in response that the application of the transparency convention should be based on reciprocity of consent between Parties to relevant investment treaties.

28. A proposal was made to include separate provisions in the transparency convention in relation to the application of the Rules on Transparency. The first would make the Rules on Transparency applicable when both the investor's home State and the respondent State were Contracting Parties to the transparency convention. The second would indicate that the transparency convention amounted to a unilateral offer by a Contracting Party as set out above in paragraph 24. It was said that that solution would clarify the scope of application of the transparency convention. It was also suggested that the transparency convention should provide for the possibility for the Contracting Parties to formulate a reservation under article 4 that would preclude the application of the second provision should they so wish.

29. The Working Group agreed to consider that matter further at a later stage of its deliberations (see below, paras. 104-114).

3. Application to arbitrations under the UNCITRAL Arbitration Rules or under all arbitration rules

30. Third, the Working Group considered whether the transparency convention ought to apply only to UNCITRAL Arbitration Rules-based disputes, or whether it ought to apply to disputes under all arbitration rules provided as options to the investor in an investment treaty. It was clarified that consultations with arbitral institutions during the drafting of the Rules on Transparency had confirmed that the Rules on Transparency worked in conjunction with other institutional rules (see A/CN.9/WG.II/WP.173).

31. It was said that if the transparency convention were made applicable to all disputes arising under relevant investment treaties irrespective of the arbitration rules selected by the investor under those treaties, the proceedings would be transparent, but if it were only made applicable to arbitrations under UNCITRAL Arbitration Rules, the investor would have the opportunity to determine whether proceedings would be transparent or not.

32. After discussion, the Working Group stated that the transparency convention should apply regardless of the arbitration rules selected by an investor under a relevant investment treaty. It was suggested that a reservation could be considered under article 4 of the transparency convention in order that Contracting Parties

could limit the application of the transparency convention to UNCITRAL Arbitration Rules-based disputes (see below, paras. 138-139).

B. Consideration of the draft text of the transparency convention

1. Preamble

33. The Working Group considered the draft preamble as set out in paragraph 5 of document A/CN.9/784.

First two paragraphs

34. A suggestion was made to delete the two first paragraphs of the preamble on the basis that they were unnecessary. If they were to be retained, it was suggested that they should include a reference to investment, instead of trade. In response, it was pointed out that these paragraphs were referring in general terms to the principles on which the mandate of UNCITRAL, as contained in the General Assembly resolution 2205 (XXI) of 17 December 1966, was based, and that similar paragraphs could be found in other conventions recently prepared by UNCITRAL, such as the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) or the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules"). It was further said that the notion of trade in the context of UNCITRAL texts was to be understood broadly as to include investment.

35. After discussion, the Working Group agreed to consider further at its second reading of the transparency convention whether to retain or delete these paragraphs or replace them by a single paragraph recalling the mandate of UNCITRAL.

Reference to the mandate of the Working Group in the preamble

36. Reference was made to the forty-sixth session of the Commission where the Commission agreed that there was not, and should not be, any value judgement attached to whether a State decided to accede to the transparency convention, and that pressure ought not be brought to bear on States to accede to a convention. At that session, it was said that that matter could be clarified, for instance, in the preamble to the transparency convention.[11]

37. In that light, the Working Group considered whether language recalling the mandate of the Working Group as proposed by the Commission (see above, paras. 3 and 13) could be included in the preamble. It was said that adding such a provision in the preamble would give the necessary level of confidence to States that are not ready to adopt a convention on transparency that no pressure would be brought to bear on them to do so.

38. It was said in response that including such language, even as a recollection of a mandate given to the Working Group, in the preamble, would be awkward for Contracting Parties to the transparency convention to accept. It was said that a Contracting Party ought not to have to recall the fact that other States were not

[11] Ibid., para. 123.

obliged to sign the transparency convention, and that to the contrary, a Contracting Party would hope that other States did accede to the transparency convention in order that it would come into effect.

39. A proposal was made to include in the preamble, in addition to the mandate of the Commission to the Working Group, as set out in paragraph 3 of document A/CN.9/WG.II/WP.179 (see also above paras. 3 and 13), the decision of the Commission adopting the Rules on Transparency, as set out in paragraph 2 of document A/CN.9/WG.II/WP.179 (see also above para. 3). It was agreed that the two mandates were not mutually incompatible.

40. By way of alternative, it was suggested that, as with other United Nations conventions, the mandate of the Working Group could be recalled in the General Assembly resolution recommending the text of the transparency convention, but that the preamble itself not include that language. That proposal received some support.

41. After discussion, it was agreed that the preamble would not include any text intended to reflect the mandate given by the Commission to the Working Group, but that the proposal for the General Assembly resolution recommending the transparency convention contain wording along the lines of the following: "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, 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".

42. A subsequent proposal was made to delete, in the fifth paragraph of the preamble of the transparency convention, the words "fair and efficient settlement of international [investment] disputes" and replace that language with the words "transparency of such arbitration". That proposal did not receive support.

Concluding remarks

43. Subject to further consideration of the first two paragraphs of the preamble, to be determined at the second reading of the transparency convention, and in light of its discussions resulting in the text set out above in paragraph 41, the Working Group found, at its first reading, the preamble as contained in paragraph 5 of document A/CN.9/784 acceptable in substance.

2. Draft article 1 — Scope of application

Draft proposal

44. The Working Group proceeded to consider a proposal that would replace articles 1 and 3, as set out in paragraph 5 of document A/CN.9/784, as follows (the "draft proposal"): "1. Subject to Article 4, each contracting party to this Convention ("Contracting Party") agrees that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Transparency Rules") shall apply to any Covered Arbitration conducted pursuant to an Investment Treaty to which it is a party that is concluded before April 1, 2014. 2. The term "Covered Arbitration" means any arbitration between a Contracting Party and a claimant of another Contracting Party conducted pursuant to an Investment Treaty. 3. The term "Investment Treaty" means any bilateral or multilateral investment treaty to which two or more Contracting Parties are parties 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. 4. Where a Contracting Party that is a disputing party to Covered Arbitration has otherwise agreed to apply standards of transparency in that arbitration that require a higher degree of transparency than that provided by the Transparency Rules in any particular respect, this Convention shall not prevent the application of that higher standard."

45. It was explained that the basis for the draft proposal was twofold. First, it was intended to clarify matters of drafting, and it was said that defining terms as the draft proposal did, would eliminate undue repetition in the text of the transparency convention. Second, and more substantively, it was said that the combined effect of articles 1 and 3 as set out in paragraph 5 of document A/CN.9/784 might provide for a broader application of the transparency convention than intended. Specifically, it was said in that respect that in the context of multilateral investment treaties, articles 1 and 3 might oblige Contracting Parties to the transparency convention to offer the Rules on Transparency to an investor from a State that was Party to the multilateral treaty, but not a Contracting Party to the transparency convention.

46. It was clarified that article 1 of the draft proposal did not address the question of unilateral offer to arbitrate by a Contracting Party to the transparency convention (see above, paras. 23 to 29).

47. The question was raised whether the structure proposed under articles 1 and 3 of the transparency convention as contained in paragraph 5 of document A/CN.9/784 should be retained in order to differentiate between the material scope of application of the transparency convention and the substantive obligations of Contracting Parties under the transparency convention.

48. In response, it was suggested that one could attain the same effect by linking the scope of application to obligations of the Contracting Parties, as set out in the draft proposal, as by having a general provision on scope and a separate provision on the obligations of the Contracting Parties as currently set out in article 3 of document A/CN.9/784. The primary concern was not, it was said, structural, but rather, the need to keep separate the effect of the transparency convention where the home State of the investor and the respondent State had both acceded to the

transparency convention, and the effect when only the respondent State had acceded to the transparency convention and purported to make a unilateral offer to investors to use the Rules on Transparency where that investor's home State was not a Contracting Party to the transparency convention.

Revised draft proposal

49. After discussion, a revised draft of articles 1 and 3 was proposed (the "revised draft proposal"), on the basis of the draft of those articles set out in paragraph 5 of document A/CN.9/784, as well as on the draft proposal set out above in paragraph 44.

50. The revised draft proposal in respect of article 1 read as follows: "*Article 1: Scope of application*: 1. This Convention applies to certain investor-State arbitration conducted on the basis of a treaty providing for the protection of investments or investors concluded before April 1, 2014. 2. The term "treaty providing for the protection of investments or investors" 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. 3. Where a Party to this Convention that is a disputing party to arbitration conducted under a treaty providing for the protection of investments or investors has otherwise agreed to apply standards of transparency in that arbitration that require a higher degree of transparency than that provided by the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") in any particular respect, this Convention shall not prevent the application of those higher standards."

51. The revised draft proposal in respect of article 3 read as follows: "*Article 3: Use of the Rules on Transparency*: 1. Each Party to this Convention agrees to apply the Rules on Transparency, as may be revised from time to time, to investor-State arbitration to which it is a disputing party conducted pursuant to a treaty providing for the protection of investments or investors to which it is a party, where the State of the claimant is also a Party to this Convention that has not made a relevant declaration under Article 4. [2. Each Party to this Convention also agrees to apply the Rules on Transparency, as may be revised from time to time, to investor-State arbitration conducted pursuant to a treaty providing for the protection of investments or investors to which it is a party, where the State of the investor is not a Party to this Convention or has made a relevant declaration under Article 4, on the condition that the claimant agrees to the application of the UNCITRAL Rules on Transparency.]"

52. The Working Group agreed to proceed on the basis of the revised draft proposal set out above in paragraphs 50 and 51.

Paragraph (1)

- *Temporal limitation*

53. The Working Group considered whether the temporal limitation set out in paragraph (1) of the revised draft proposal, namely, limiting the scope of application of the transparency convention to relevant investment treaties concluded before the

entry into force of the Rules on Transparency, ought to be retained, or whether the transparency convention ought to provide Contracting Parties with the means to apply the Rules on Transparency to arbitrations arising under investment treaties concluded both before ("existing investment treaties") and after ("future investment treaties") 1 April 2014.

54. Diverging views were expressed on the temporal limitation contained in paragraph 1 of the revised draft proposal. In support of retaining it, it was said that such a temporal limitation would create clarity in relation to the investment treaties to which the transparency convention applied. Moreover, it was pointed out that the mandate given to the Working Group by the Commission was in respect of existing investment treaties only.

55. Concerns were expressed that providing for a temporal limitation in the scope of application of the transparency convention would create a disjunctive situation in relation to the application of the Rules on Transparency. It was explained that under the transparency convention, the Rules on Transparency would apply to disputes arising under relevant investment treaties regardless of the applicable arbitration rules. However, under the Rules on Transparency, parties to a dispute or Contracting Parties would need to agree to apply the Rules on Transparency to non-UNCITRAL Arbitration Rules-based disputes arising under future investment treaties. In that respect, it was foreseeable that where a Contracting Party would wish to apply the Rules on Transparency to disputes arising under existing investment treaties regardless of the applicable arbitration rules, it might also wish to apply the Rules on Transparency to disputes arising under future investment treaties in the same fashion.

56. It was further said that, although the strict wording of the mandate given to the Working Group by the Commission was in respect of existing investment treaties, the object and purpose of the mandate was to give those States that wished to apply the Rules on Transparency an efficient mechanism to do so, and moreover that the Commission had also consistently underlined the importance of promoting transparency in treaty-based investor-State arbitration. It was said that not including a temporal limitation was within the spirit of such mandate.

57. In order to reconcile the views expressed in relation to the inclusion of a temporal limitation in the application of the transparency convention, it was proposed to delete the temporal limitation but to include a reservation allowing Contracting Parties to limit the scope of application of the transparency convention to existing investment treaties. In response, it was said that an application of the transparency convention to future investment treaties should be the exception, and that consequently Contracting Parties ought to have to formulate a declaration that the transparency convention would apply to future investment treaties.

58. As a consequence of that suggestion, it was agreed to remove the words "concluded before 1 April 2014" from paragraph (1), and to reinsert these words in articles 3(1) and 3(2) on the basis that that relocation would permit such a reservation without contradicting the provision on scope of application.

- *"Concluded"/"Entered into force"*

59. The question was raised whether, in order to define the meaning of an "existing investment treaty", the word "concluded" as it appeared in paragraph (1) of the revised draft proposal should be replaced by the words "entered into force".

60. In response, the Working Group was reminded that article 1 of the Rules on Transparency referred to investment treaties "concluded" on or after 1 April 2014. It was said that consistency in that respect was paramount because otherwise investment treaties concluded before 1 April 2014 and entering into force after that date would not be covered by the scope of either instrument.

61. The Working Group was further reminded of the discussions that had taken place during the deliberations on the Rules on Transparency where the Working Group decided that the words "entered into force" used in the initial drafts of the Rules on Transparency should be replaced by the word "concluded" because it was at the time of conclusion of the investment treaty (and not at the time of its coming into force) that Parties might consent to the application of the Rules on Transparency (see A/CN.9/WG.II/WP.169, para. 12).

62. Finally, it was said that the Rules on Transparency could not in any event apply to investment treaties that had been concluded but not entered into force.

63. After discussion, the word "concluded" was retained.

- *"Certain"*

64. The Working Group considered the meaning and utility of the word "certain" as it appeared in paragraph (1) of the revised draft proposal. It was said in support of the inclusion of that word that its purpose was avoid a broader application of the transparency convention than intended, as highlighted above in paragraph 45. However it was generally felt that the word "certain" was ambiguous.

65. After discussion, it was agreed to delete the word "certain", it being understood that article 1 dealt with the general scope of application of the transparency convention and that limitations in relation thereto were to be expressed under other provisions of the transparency convention.

- *Conclusion*

66. Further to the deliberations on paragraph (1) of the revised draft proposal, that paragraph would read as follows: "This Convention applies to investor-State arbitration conducted on the basis of a treaty providing for the protection of investments or investors."

Paragraph (2)

67. The Working Group proceeded to consider paragraph (2) of the revised draft proposal.

68. It was said that the defined term "treaty providing for the protection of investments or investors" could be more concise, and better reflect the approach adopted under the Rules on Transparency, were that term to be instead defined as "treaty" (as contained in the first footnote to article 1(1) of the Rules on Transparency).

69. A suggestion was made to define that term instead as "investment treaty", which it was said would be more appropriate in the context of the transparency convention.

70. A separate point was raised in relation to the slight difference between the definition of the term "treaty" as contained in the Rules, which included the words "shall be understood broadly as encompassing", and the term as defined in the revised draft proposal, which omitted those words. In that respect, it was clarified that in relation to the former, the definition was intended to give guidance to users of the Rules, whereas in a convention, the definition needed to be clearly set out.

71. After discussion, it was agreed that the words "treaty providing for the protection of investments or investors" would be replaced by the word "treaty" and, as an alternative, "investment treaty", both in square brackets, for consideration by the Working Group at its second reading of the transparency convention.

Paragraph (3)

- *"Unless otherwise agreed to apply standards ... that require a higher degree of transparency"*

72. It was queried in relation to paragraph (3) of the revised draft proposal what the words "unless otherwise agreed" signified in practice. In response, it was clarified that the aim of that phrase was to include flexibility in the situation where the transparency convention would normally apply to bring in the Rules on Transparency, but where the disputing parties to the arbitration and/or the Parties to the relevant investment treaty had agreed to higher levels of transparency than those provided for in the Rules on Transparency through a mechanism outside the transparency convention.

- *A higher degree of transparency*

73. As a general matter, it was suggested that referring to a standard requiring a higher degree of transparency itself posed various difficulties, including (i) the determination of what might constitute a higher or a lower degree of transparency where treaty or rules-based obligations differed would be difficult and possibly litigious, both in relation to a provision-by-provision assessment and when considering transparency regimes as a whole; (ii) whether there would have to be a requirement to apply the higher degree of transparency; and (iii) what the consequences might be if the arbitral tribunal were to apply a standard which would not be considered as the highest one.

74. It was considered whether and how to give the arbitral tribunal discretion to make that determination.

75. Concerns were expressed regarding how a higher standard would be determined and applied, given existing investment treaties that contained extensive transparency provisions which were different than those set out in the Rules on Transparency, but which were not necessarily "higher" or "lower" standards.

76. A suggestion was made that, rather than pursue such a determination, it might be more efficient for Contracting Parties wishing to preserve the application of what that Contracting Party perceived as a higher standard in existing investment treaties,

to reserve those specific investment treaties from the application of the transparency convention.

77. A suggestion to delete paragraph (3) altogether, on the basis that, as a successive treaty, the transparency convention would prevail in relation to the transparency provisions in an existing investment treaty, was considered to give rise to the following difficulty: the transparency convention obliged each Contracting Party to apply the Rules on Transparency, but article 1(7) of the Rules on Transparency set out that where the Rules conflicted with the relevant investment treaty, the provisions of that investment treaty would prevail. Consequently, should an investment treaty set out a lower standard of transparency to that in the Rules on Transparency, that lower standard would prevail under such an interpretation (see also below, para. 101).

- *Conclusion*

78. After discussion, the Working Group identified the basis on which it would proceed to its second reading.

79. First, it was agreed that, for the reasons identified above in paragraph 77, the second sentence of article 1(7) of the Rules on Transparency ought to be carved out of the obligations of Contracting Parties to apply the rules on transparency, as set out in article 3 of the revised draft proposal.

80. Second, it was also noted that as a successive treaty pursuant to article 30 of the Vienna Convention, the transparency convention would prevail to the extent of any conflict over any pre-existing transparency regimes contained in investment treaties to which the transparency convention applied; therefore, it was not necessary to create a complex provision in relation to a hierarchy of transparency standards in the transparency convention. Contracting Parties that wished to apply a higher or different standard of transparency as contained in existing investment treaties would be required to reserve the application of the transparency convention in relation to those investment treaties.

81. In relation to disputing parties, reference was made to article 1(3)(a) of the Rules on Transparency, in relation to which agreement was expressed that that provision as drafted allowed disputing parties to agree to a higher standard of transparency than that provided for in the Rules on Transparency.

82. Further to the considerations set out above in paragraphs 78 to 81, it was agreed to delete paragraph (3) of the revised draft proposal.

3. Draft article 2 — Interpretation

83. The Working Group considered draft article 2 as contained in paragraph 5 of document A/CN.9/784.

84. A suggestion was made to delete article 2. It was said in support of that proposition that although the language in article 2 was standard for commercial law treaties, usually that wording would be used when a treaty set out requirements for application and implementation within a Contracting Party's domestic legal framework, to ensure or encourage that the national court of a Contracting Party interpreted the treaty internationally rather than in line with that country's domestic law. It was said however that in the context of the transparency convention, the

intended audience were the Contracting Parties themselves, as well as disputing parties and arbitral tribunals, and that in that context the provision was unnecessary.

85. In response, it was said that the provision was included in a number of other UNCITRAL instruments. It was said that on the one hand, consistency ought to be maintained as between UNCITRAL texts where possible, and that moreover, if it were to be deleted, negative inferences could be drawn when the transparency convention was interpreted in the future. It was furthermore observed that the substance of article 2 was applicable to the transparency convention.

86. In response, it was said that the transparency convention was not of the same nature as other UNCITRAL instruments, which were private law instruments, and that the article could generate confusion when read alongside article 31 of the Vienna Convention. In response, it was said that the two provisions were compatible. A suggestion to include reference to the Vienna Convention in article 2 did not receive support.

87. A further suggestion, to retain article 2 but to delete the words "and the observance of good faith in international trade", did not receive support.

88. After discussion, it was agreed that two options remained in relation to article 2, namely to retain it in the form set out in paragraph 5 of document A/CN.9/784, or to delete it. The Working Group agreed to consider that matter further at its second reading of the transparency convention.

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

89. The Working Group considered article 3 of the revised draft proposal, as set out above in paragraph 51.

Paragraph (1) of the revised draft proposal (para. 51 above)

90. Pursuant to its consideration of article 1, it was clarified that (i) the term "treaty providing for the protection of investments or investors" would be replaced with the definition of that term (["treaty"/"investment treaty"]) (see above para. 71); (ii) the words "concluded before 1 April 2014" would be added after that defined term (see above, para. 58); and (iii) consideration would be given to language in order to carve out the second sentence of article 1(7) of the Rules on Transparency.

- *Dynamic language*

91. Some delegations expressed concern with the language incorporating the Rules on Transparency "as may be revised from time to time", on the basis that such dynamic language might not provide sufficient certainty as to the scope of application of the transparency convention should the Rules be revised.

92. In response, it was said that the Rules on Transparency were a new standard and that the transparency convention ought not to exclude the possibility of updating the Rules. To address the concerns expressed above in paragraph 91, it was proposed that the transparency convention could provide for a Contracting Party to formulate a reservation precluding the application of amended Rules if it so wished.

93. After discussion, it was agreed to proceed on the basis of the compromise set out in the last sentence of paragraph 10 of document A/CN.9/WG.II/WP.179, namely

that any Contracting Party could, in the event of a revision of the Rules on Transparency, formulate a reservation indicating that the Rules on Transparency, as revised, would not apply within [x] months of the date of adoption of such revision, and before that revision were to come into force (see below, paras. 100, and 142-146).

- *"Where the State of the claimant is also a Party to this Convention that has not made a relevant declaration under Article 4"*

94. Having regard to the subordinate clause of paragraph (1) of article 3 of the revised draft proposal, it was queried whether it was necessary to refer to the possibility of a declaration/reservation in a provision setting out the obligations of Contracting Parties. It was suggested that a simpler drafting approach might be to replace the words "where the State of the claimant is also a Party to this Convention that has not made a relevant declaration under Article 4" with the words "where the State of the claimant is also a party to this Convention with respect to that treaty".

95. It was observed that the drafting in that respect might require further consideration both because it was potentially linked to the drafting of article 4 in relation to reservations, and because the term "State of the claimant" instead of "Contracting Party" might lead to difficulties for example in relation to regional economic integration organizations (see below, para. 129).

New proposal on article 3

96. A revised proposal in relation to article 3(1) was put forward, split into two paragraphs, under which (i) the instances where the Rules on Transparency could be made applicable were more clearly set out; and (ii) it was made clear that the transparency convention would apply in relation to disputes arising under the relevant investment treaty whether conducted under the UNCITRAL Arbitration Rules or not, taking account of articles 1(2)(b) and 1(9) of the Rules on Transparency.

97. That new proposal read as follows (the "new proposal on article 3"): "*Article 3: Use of the Rules on Transparency*: 1. Each Party to this Convention agrees to apply the Rules on Transparency, as may be revised from time to time, to any investor-State arbitration (whether conducted under UNCITRAL Arbitration Rules or otherwise): a. in which it is a disputing party; b. that is conducted pursuant to an Investment Treaty concluded before April 1, 2014 to which it is a party and to which it has not made a declaration under Article 4; and c. in which the claimant is of a Contracting Party that has not made a declaration regarding that Investment Treaty under Article 4. 2. In the event of a conflict between such an Investment Treaty and the Rules on Transparency, notwithstanding any provision in the Rules on Transparency regarding such conflicts, the Rules on Transparency shall apply pursuant to paragraph 1."

Paragraph (1) of the new proposal on article 3

98. It was suggested that, in relation to the reference to declarations under paragraphs (1)(b) and (c) of the new proposal on article 3, because declarations/reservations would apply irrespective of whether they were mentioned in that provision, the language "and to which it has not made a declaration under

Article 4" in subparagraph (b), and "that has not made a declaration regarding that Investment Treaty under Article 4" in subparagraph (c), would be placed in square brackets for further consideration. For the sake of consistency, such a reference to declarations/reservations would either be retained in both subparagraphs, or deleted from both.

99. As a matter of drafting it was also said that in relation to subparagraph (b), the phrase (now in brackets) "to which it has not made a declaration", if retained, ought to be replaced by "in respect of which it has not made a declaration".

100. A concern was expressed in relation to the dynamic wording in paragraph (1) of the new proposal on article 3, in response to which it was said that the solution arrived at previously, and as set out above in paragraph 93, was that the dynamic wording would be retained, but that an option to formulate a reservation in that respect would be included in article 4 of the transparency convention. After discussion, it was agreed that that approach would serve as the basis for the first reading of article 4.

Paragraph 2 of the new proposal on article 3

101. In relation to paragraph (2) of the new proposal on article 3, it was clarified that that paragraph was intended to address the potential for article 1(7) of the Rules on Transparency to undermine the object of the transparency convention in relation to existing investment treaties (see above, para. 77). By way of further clarification, it was said that, while article 1(7) of the Rules on Transparency worked in relation to the application of the Rules on Transparency to future investment treaties, when considered in relation to the transparency convention, which would expressly import the application of the Rules on Transparency into existing investment treaties, the Rules would then indicate that the provisions of that existing investment treaty, which may be inconsistent with the Rules, would apply, which would be circular in that it would (or at least might) prevent the application of the Rules which the transparency convention was intended to bring into effect.

102. It was said that delegations would review their existing investment treaties to determine whether, as an alternative, there might be a way by which, in practice, an assessment could be made between the transparency provisions in an existing investment treaty and those in the Rules on Transparency, and the higher standard of the two, applied. It was said however that the deliberations of the Working Group had highlighted that considerable difficulties seemed to exist in identifying the standard that an arbitral tribunal would be able to apply in that respect (see above, paras. 73 to 77).

103. It was said as a matter of drafting that the word "such" qualifying the term "Investment Treaty" in paragraph (2) of the new proposal on article 3 might require clarification to ensure that the investment treaties to which it referred were clear. The Working Group requested the Secretariat to modify language in the transparency convention where necessary to ensure clarity of drafting.

Paragraph (2) of the revised draft proposal (unilateral offer)/Paragraph (3) of the new proposal on article 3

104. The Working Group proceeded to consider paragraph (2) of article 3 of the revised draft proposal (as contained above in para. 51). It was said that in principle

such a provision, permitting Contracting Parties to make a unilateral offer to investors from non-Contracting Parties, served a useful purpose in a convention such as the transparency convention.

105. After discussion, and in light of various drafting suggestions including to make the draft consistent with the new proposal on article 3, it was suggested to redraft paragraph (2) of the revised draft proposal (as contained above in para. 51), with the following text, which would become the third paragraph in the new proposal on article 3: "3. Each Party to this Convention also agrees to apply the Rules on Transparency, as may be revised from time to time, to investor-State arbitration (whether conducted under UNCITRAL rules or otherwise): a. in which it is a disputing party; b. that is conducted pursuant to an Investment Treaty concluded before April 1, 2014, to which it is a party and in respect of which it has not made a declaration under Article 4; and c. where the State of the claimant is not a Party to this Convention or has made a relevant declaration under Article 4, on the condition that the claimant agrees to the application of the UNCITRAL Rules on Transparency."

106. A number of delegations expressed support for the inclusion of that provision. Other views were expressed that it would be problematic to include a provision that did not include an element of reciprocity as between Contracting Parties in relation to the application of the Rules on Transparency.

107. It was clarified that paragraph (3) as set out above in paragraph 105 applied to existing investment treaties, but would also apply to future investment treaties were a Contracting Party to formulate a declaration to that effect (see above, para. 57). In relation to existing investment treaties, it was said that the transparency convention could permit a Contracting Party to formulate a reservation precluding the application of paragraph (3).

108. A suggestion to include, at the end of paragraph (3), the phrase "and it is not prohibited by the investment treaty", did not receive support.

109. It was considered whether the paragraphs in the new proposal on article 3 (including paragraph (3) as set out above in para. 105) would need to be reordered such that paragraph (2) would come after paragraphs (1) and (3).

110. It was said that paragraph (2) might not apply to paragraph (3), because in the case of a unilateral offer by a Contracting Party to a claimant from a non-Contracting Party, where there was a conflict between the provisions of the Rules on Transparency and those of the underlying investment treaty, the provisions of the underlying investment treaty ought to prevail in accordance with article 1(7) of the Rules on Transparency.

111. A different view was expressed that paragraph (2) should be made applicable to both paragraphs (1) and (3), as in both situations, there was a possibility of conflict with the underlying investment treaty; in relation to paragraph (3), where a unilateral offer to apply the Rules on Transparency was made, it would not be logical to apply the provisions of the investment treaty instead where that offer was accepted.

112. After discussion, it was agreed not to restructure the provision until further consideration had been given as to whether paragraph (2) applied to both paragraphs (1) and (3).

113. It was also questioned whether a Contracting Party, by excluding through a reservation the application of paragraph (3), would then be prevented from availing itself of the mechanism under article 1(2)(a) of the Rules on Transparency, under which a State and a disputing party could agree to the application of the Rules in UNCITRAL arbitrations pursuant to an existing investment treaty. In response, it was clarified, and agreed, that a reservation in respect of the provisions of paragraph (3) would mean that a State 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.

114. In light of the discussions set out above, and particularly in light of the clarification set out above in para. 107, the Working Group agreed to proceed on the basis of the new proposal on article 3 for its second reading of the transparency convention.

5. Draft article 4 — Reservations

115. The Working Group considered draft article 4 as contained in paragraph 5 of document A/CN.9/784.

List of reservations or declarations

116. Pursuant to the discussions of the Working Group, the subject matters on which reservations or declarations could be made under the transparency convention were listed as follows: (i) exclusion of (a) certain investment treaties; (b) the application of a future revised version of the Rules on Transparency; (c) arbitration under certain arbitration rules; (d) the application of article 3(3); and (ii) a declaration for the application of the transparency convention to future investment treaties.

117. It was noted that the reservations under item (i) in paragraph 116 above aimed at limiting the scope of application of the transparency convention, whereby the declaration under item (ii) aimed at expanding its application to future investment treaties. It was suggested that the items listed under paragraph 116 above should be characterized under article 4 as declarations (for further discussion on the matter, see below, paras. 134-137).

Most Favoured Nation ("MFN") clauses

118. As a matter of principle, it was questioned whether a MFN clause in an investment treaty could be triggered by a carve-out of certain investment treaties from the transparency convention. In other words, if, for example, of three Contracting Parties to the transparency convention, one (Contracting Party A) had reserved from the scope of that convention one of its bilateral investment treaties with another Contracting Party B, but not that with Contracting Party C, an investor from Contracting Party C might seek to refer to an MFN clause in the bilateral investment treaty between Contracting Parties A and C under which it was initiating proceedings, which investment treaty had not been reserved from the scope of the transparency convention, to claim that it was entitled to non-transparent arbitration

pursuant to the non-transparent regime under the investment treaty between Contracting Parties A and B.

119. It was suggested that MFN clauses would not be triggered in the context of the transparency convention, which applied a procedural regime of transparency rather than addressing the treatment of investors or promotion of investment. However, it was pointed out that arbitral practice was not uniform in relation to that matter. In any event, it was clarified that the deliberations of the Working Group on that matter should not be interpreted as taking a position on the question of whether MFN clauses applied to dispute settlement procedures under investment treaties.

120. It was suggested that an approach that might address that concern, at the level of the rights of the investor, might be to include wording in the transparency convention along the following lines: "A claimant may not avoid the application of the Rules on Transparency by invoking the provisions of another treaty on the basis of a MFN clause." It was further suggested that language could also be inserted in order to capture the converse possibility, namely when a claimant under an investment treaty reserved from the application of the transparency convention tried to use a MFN clause to make the rules on transparency applicable to its arbitration notwithstanding that reservation.

121. It was agreed that the Working Group would proceed to its second reading on the basis of the suggestion set out above in paragraph 120, adapted by the Secretariat to capture that converse possibility.

Scope of reservations

122. In relation to the scope of reservations and the manner in which they ought to be framed, it was clarified 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 when adopting the transparency convention; rather it would be for States wishing to carve out certain treaties from the transparency convention to list the excluded treaties in their reservation. The Working Group agreed with that clarification.

Timing of reservations

123. It was queried whether reservations or declarations could be made at any time or only at the time of entry into force of the transparency convention for the Contracting Party concerned.

124. It was pointed out that article 4 as contained in paragraph 5 of document A/CN.9/784 permitted reservations to be made at any time after accession. A concern was expressed in that respect that under such a provision a Contracting Party might lodge a reservation in relation to a certain treaty if an investment dispute under that treaty became foreseeable.

125. It was said that two options existed in relation to the timing of reservations. First, the timing could be left completely open such that reservations or declarations could be made at any time, but there would then be a need to create at least a temporal mechanism to prevent abuse (e.g. with a declaration/reservation coming into force a certain amount of time after being notified to the depositary), and second, declarations or reservations could be available only at accession, with the

only subsequent possibility being withdrawal of a declaration or reservation made at accession.

126. It was agreed to consider that matter further at a later stage of the deliberations (see below, paras. 149 to 157).

Article 4 proposal

127. Bearing in mind the list of reservations and declarations identified above in paragraph 116, a draft proposal in relation to article 4 was made ("article 4 proposal"). It was suggested to proceed on the basis of that draft, which read as follows: "*Article 4 — Declarations*: 1. A Contracting Party may declare any or all of the following: a. that Investment Treaties that are specifically listed in the declaration are not subject to article 3.1; b. that article 3.1 shall also apply to Investment Treaties concluded after April 1, 2014; c. that article 3.1 shall only apply to arbitrations conducted using certain sets of arbitral rules or procedures authorized for use under an Investment Treaty; d. that article 3.3 shall not apply to that Contracting Party. 2. If a Contracting Party does not make a declaration pursuant to subparagraph d of paragraph 1, that Contracting Party may declare any or all of the following: a. that Investment Treaties that are specifically listed in the declaration are not subject to article 3.3; b. that article 3.3 shall also apply to Investment Treaties concluded after April 1, 2014; c. that article 3.3 shall only apply to arbitrations conducted using the certain sets of arbitral rules or procedures authorized for use under an Investment Treaty. 3. In the event that UNCITRAL revises the Rules on Transparency, a Contracting Party may declare any or all of the following within [X] months of the adoption of such revision: a. that the reference to the Rules on Transparency in article 3.1 shall not be understood to refer to the version of the Rules on Transparency as revised; b. if that Contracting Party has not made a declaration pursuant to subparagraph d of paragraph 1, that the reference to the Rules on Transparency in article 3.3 shall not be understood to refer to the version of the Rules on Transparency as revised. Notwithstanding paragraph 7, any declaration made pursuant to this paragraph takes effect on the date of its receipt by the depositary. 4. Except as provided in this article, no other reservations are permitted to this Convention. 5. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance, or approval. 6. Declarations and their confirmations are to be formally notified to the depositary. 7. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the Contracting Party concerned. [A declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of [six months] after the date of its receipt by the depositary.] 8. Any Contracting Party that makes a declaration under this Convention may [modify or] withdraw it at any time by a formal notification in writing to the depositary. The [modification or] withdrawal is to take effect on the first day of the month following the expiration of [six months] after the date of receipt of the notification by the depositary. 9. This Convention and any declaration apply only to arbitrations that have been commenced after the date when the Convention or declaration enters into force or takes effect in respect of that Contracting Party. 10. In the event that a Contracting Party [modifies or] withdraws a declaration pursuant to paragraph 8, the declaration shall continue to apply to any arbitration to which article 3.1 or 3.3 applies, if that arbitration has been

commenced after the date referred to in paragraph 8 but before the [modification or] withdrawal takes effect."

128. The Working Group proceeded to consider the article 4 proposal.

Paragraph (1)

- General

129. It was said that the relationship between the obligations in article 3, which referred to declarations in square brackets (see above, para. 98), and the declarations as they were drafted in paragraph (1) of the article 4 proposal, appeared tautological. It was said in response that, as agreed (see above, paras. 94-95), the relevant wording in article 3 had been placed in square brackets, and the Working Group would accordingly return to that issue during its second reading of article 3.

130. Another suggestion was made, recalling the discussion of the Working Group as set out above in paragraph 113, that the reservation permitted by paragraph (1)(d) contravened one of the fundamental pillars of the Rules on Transparency, namely the ability, in article 1(2)(a) of the Rules, for the parties to an arbitration to agree to their application. That view was not supported, for the reasons set out above in paragraph 113.

- Policy concern

131. A policy concern was raised that the list of declarations/reservations set out in the article 4 proposal would permit a country to accede to the transparency convention but effectively to opt out entirely from its scope, pursuant to the reservation listed under paragraph (1)(a), or via a combination of the reservations listed in paragraphs (1)(a) and (1)(c). Furthermore, it was said that, as the reservation under paragraph (1)(d) would allow a Contracting Party to derogate from the application of article 3(3) paragraph (1)(d) should be deleted since, otherwise, application of a basic provision of the transparency convention would be excluded. It was said that that concern might be dealt with by way of drafting, such as including the word "certain" before the word "investment treaties" in paragraph (1). It was also said that it would be unlikely that a Contracting Party would expend the time to accede to the transparency convention but then negate its effect by reserving out of its scope all of that Party's treaties, and that in any event declarations/reservations would be made public. However, the Working Group acknowledged that it was conceivable that a Contracting Party might so act.

132. After discussion, 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 in paragraph (1).

133. The Working Group proceeded to consider whether the text of article 4 ought to reflect that consensus. In that respect, the Working Group had regard to article 19 of the Vienna Convention, as well as to the works of the International Law Commission in relation to the Guide to Practice on Reservation of Treaties (A/66/10/Add.1, the "ILC Guide", and in particular Guideline 3.1.4), and took the preliminary view that as the issue was dealt with under public international law,

there might be no need to include specific wording in the transparency convention to address such a risk of abuse.

- *Declarations or reservations*

134. After discussion, and in light of its consideration of the provisions of the Vienna Convention and the ILC Guide, the Working Group agreed that the declarations as enumerated in article 4 (other than those set out in paragraphs (1)(b) and (2)(b)) were in fact reservations, rather than declarations, and ought to be referred to as such in that article.

135. It was questioned whether, in that respect, those reservations would be subject to objection by Contracting Parties. It was said in response that if the transparency convention permitted specific reservations, then a Contracting Party could not object to such a reservation being formulated.

136. A question was raised in relation to whether, because paragraphs (1)(b) and (2)(b) of the article 4 proposal enlarged the scope of application of the transparency convention, while the other subparagraphs within paragraphs (1) and (2) limited the scope of application of that convention, those subparagraphs should be separated, and remain as "declarations" rather than "reservations".

137. Support was expressed for that proposal and the Secretariat was requested to streamline and restructure the article 4 proposal as required.

Paragraph (1)(c)

138. It was proposed to modify paragraph (1)(c) of the article 4 proposal so that the effect of the reservation would be to limit the operation of the transparency convention to options to arbitrate under UNCITRAL Arbitration Rules in the reserving Contracting Party's investment treaties. In that respect, it was suggested to replace the text of paragraph (1)(c) of the article 4 proposal with the following: "that Article 3.1 shall not apply to arbitrations conducted using certain sets of arbitration rules or procedures other than the UNCITRAL Arbitration Rules authorized for use under an Investment Treaty."

139. That proposal was agreed and the Secretariat requested to streamline and modify the language to the extent required.

Paragraph (2)

140. It was suggested that the chapeau of paragraph (2) was unnecessary, first because it was theoretically possible, if unlikely, that a Contracting Party would want to apply the unilateral option mechanism under article 3(3) of the transparency convention to future investment treaties, even where it did not wish to do so for reciprocal obligations, and second, because a single provision in relation to the carve-outs in relation to article 3(3) of the transparency convention might provide for greater clarity in any event.

141. After discussion, the Working Group requested the Secretariat to prepare a revised draft of the article 4 proposal, and to include in that revised draft an option in square brackets along the lines set out above in paragraph 140.

Paragraph (3)

142. A suggestion to include a mechanism whereby a Party acceding to the transparency convention after a revision to the Rules on Transparency, but which wanted the previous version of the Rules to apply, could do so, did not receive support.

143. A question was raised in relation to the effect on reciprocity in relation to existing reservations if one Contracting Party were to adopt an amended set of Transparency Rules, and another Contracting Party were not. It was said there would no longer be reciprocity in respect of pre-existing reservations, and that a rule would need to be included to provide that when such a situation arises, the pre-existing Rules on Transparency would still apply in relation to those reservations.

144. In response, it was said that where one Contracting Party A made a reservation in relation to the applicability of an amended set of Rules on Transparency, that should not deprive another Contracting Party B of offering those amended Rules under paragraph (1) of article 3 (e.g., in relation to an arbitration with a claimant from Contracting Party A). It was suggested that wording could be included in the transparency convention to the effect that Contracting Parties agreed that such a reservation would apply only to arbitral proceedings to which the reserving Contracting Party was a party.

145. It was agreed that the Secretariat would propose language to that effect.

146. In relation to the timing applicable to a reservation under paragraph (3), it was agreed to proceed on the basis of six months.

Paragraph (4)

147. A suggestion that paragraph (4) was not necessary did not receive support. It was said that there was a clear indication of consensus that the only reservations ought to be those enumerated, subject to any further instructions delegations might require from their Governments.

Paragraphs (5) and (6)

148. After discussion, it was agreed that the language in paragraphs (5) and (6) constituted standard wording in treaties and ought to be retained.

Paragraph (7)

149. The Working Group recalled its discussions as set out above in paragraphs 123 to 126, including its determination that two options existed in relation to the timing of a reservation: either at the time of accession, or subsequently, with a mechanism to avoid abuse.

150. It was said that consideration would need to be given in relation to an anti-abuse mechanism, one element of which would be the timing in relation to which such a reservation would become effective. On the one hand, six months was said to be too short in light of the fact that that standard cooling off periods in investment treaties normally amounted to six or nine months. On the other hand, it

was said that if too long a period were specified, a State, or an investor, might take advantage of that period in a way that might defeat the objective of transparency.

151. After discussion, it was 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 by the notification of the repository should be required before the entry into force of the reservation.

152. Another suggestion was made to consider in addition to timing, as an anti-abuse mechanism, that where both the home State of an investor and the State of a respondent, were Contracting Parties to the transparency convention, the agreement of both States would be required in order to exclude the relevant investment treaty. That suggestion did not receive support.

Paragraph (8)

153. The Working Group considered in relation to paragraph (8) of the article 4 proposal whether Contracting Parties ought to be able to modify existing reservations.

154. It was said that if the possibility was provided for Contracting Parties to make a later reservation under paragraph (7), then that possibility could be used to withdraw or modify a previous reservation thus negating the need for paragraph (8). In response, it was said that retaining the possibility of withdrawing a previous reservation rather than simply lodging a new one would avoid confusion.

155. It was also said that were later reservations to be permitted, the time period in which to do so ought to be consistent with the time period in which to make a modification or withdrawal under paragraph (8). The Working Group recalled that the period it had agreed upon in relation to that period under paragraph (7) was one year (see above, para. 151).

156. It was recalled that that period had been considered sufficient to prevent abuse, but that conversely, it might also comprise too long a period should a Contracting Party wish to modify or withdraw a reservation that would have the effect of making the regime applicable to that Party more, rather than less, transparent.

157. In that respect, the Secretariat was requested to draft language creating a mechanism providing for a shorter period of time if the withdrawal or modification provided for greater transparency, for consideration at the second reading of the transparency convention.

Paragraph (9)

158. The Working Group agreed that that paragraph, which mirrored article 10 of the draft transparency convention as contained in paragraph 5 of A/CN.9/784 (time of application) should form the subject of a separate article in relation to the timing of application of the transparency convention in respect of the arbitral proceedings.

6. Draft article 5 — Depository

159. The Working Group agreed to retain the substance of draft article 5 as contained in paragraph 5 of document A/CN.9/784.

7. Draft article 6 — Signature, ratification, acceptance, approval, accession

160. The Working Group considered draft article 6 as contained in paragraph 5 of document A/CN.9/784.

Paragraph (1)

161. It was proposed to amend paragraph (1) as follows: "This Convention is open until [date] for signature by (a) any State that is party to [an investment treaty][a treaty]; or (b) a regional economic integration organization constituted by sovereign States that is party to [an investment treaty][a treaty]."

162. It was agreed to proceed on the basis of that proposal for the second reading of the transparency convention.

Paragraph (2)

163. Pursuant to paragraphs 161 and 162 above, it was agreed to replace the words "signatory Parties" by the words "signatories to this Convention".

Paragraph (3)

164. For the sake of clarity, it was agreed to amend paragraph (3) to read as follows: "This convention is open for accession by all States that are not signatory States as from the date it is open for signature".

8. Draft article 7 — Effect in territorial units

165. The Working Group considered draft article 7 as contained in paragraph 5 of document A/CN.9/784.

166. A suggestion was made to delete article 7 for the reason that such a provision was not entirely relevant with respect to the legal application of the transparency convention and in particular whether such application had different effect within different territorial units. In response, it was said that territorial units could be Parties to investment treaties, and that article 7 therefore retained some relevance.

167. After discussion, it was agreed that that provision should be retained for the second reading on the basis of an amended version wherein the phrase in paragraph (1) "in which different systems of law are applicable in relation to the matters dealt with in this Convention," would be deleted, and replaced by the phrase: "which are parties to [investment treaties][treaties] in their own name". Delegations, and particularly those directly concerned by the matters addressed by the revised article 7, were invited to consult internally in advance of the second reading to ensure that such a draft would operate satisfactorily.

9. Draft article 8 — Participation by regional economic integration organizations

168. The Working Group considered draft article 8 as contained in paragraph 5 of document A/CN.9/784.

169. An initial suggestion, which received support, was made to delete article 8, save for the last sentence of paragraph (1), and the entirety of paragraph (3). It was said that both those provisions ought to be retained and relocated where appropriate within the transparency convention. In support of that proposal, it was pointed out

that the definition of a regional economic integration contained in the first sentence of paragraph (1) was not necessary, as that matter was covered under article 6 (1) (see above, para. 161).

170. That suggestion was agreed and the Secretariat was requested to proceed on that basis.

10. Draft article 9 — Entry into force

171. The Working Group considered draft article 9 as contained in paragraph 5 of document A/CN.9/784.

Paragraph (1)

172. A proposal was made that the number of Parties required to consent to be bound by the transparency convention (by reference to the deposit of an instrument of ratification, acceptance, approval or accession; hereinafter, "signatories") in order for it to enter into force ought to be two. It was said in response that that number was not high enough, and that more signatories ought to be required for the transparency convention to enter into force in order for it to achieve a degree of universality, enhance its significance and make it more attractive to potential signatories.

173. In support of the suggestion for a lower number of signatories, such as two or three, for the transparency convention to enter into force, it was said, inter alia, that the mandate given to the Working Group was to create an efficient mechanism for those States that wanted to apply the Rules on Transparency to be able to do so, and requiring a great number of States to sign the transparency convention before it came into effect would undermine that objective; that specifically, the transparency convention was intended to give effect to article 1(2)(b) of the Rules on Transparency, which envisaged a bilateral application, in relation to which those States that wanted to apply it ought not to be impeded; and that efficiency in that respect and in relation to a portfolio of existing investment treaties could not be attained by applying the Rules to existing investment treaties on a bilateral basis. It was added that while it was desirable that a great number of parties signed the transparency convention, a great number ought not to have to sign in order for it to come into effect.

174. After discussion, consensus was achieved in relation to the number of signatories to be required for the transparency convention to enter into force, that number being three. The goodwill of delegations in arriving at that consensus was acknowledged.

Paragraph (2)

175. A proposal that the language in paragraph (2) be made consistent with paragraph (1) of article 6 was accepted.

11. Draft article 10 — Time of application

176. In relation to draft article 10 as contained in paragraph 5 of document A/CN.9/784, the Working Group recalled its discussions on that provision in the context of article 4(9) (see above, para. 158).

12. Draft article 11 — Revision and amendment

177. The Working Group considered draft article 11 as contained in paragraph 5 of document A/CN.9/784. A proposal was made to delete that article altogether on the basis that the function it served was addressed under article 40 of the Vienna Convention.

178. After discussion, it was agreed to retain article 11, on the basis that it provided for greater detail and clarity than the Vienna Convention. It was further agreed that the words ", or any reservation" were not required and should be deleted.

13. Draft article 12 — Denunciation of this Convention

179. The Working Group considered draft article 12 as contained in paragraph 5 of document A/CN.9/784. After discussion, the Working Group agreed to retain the substance of that provision.