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Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session (New York, 4-8 February 2008)

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I. Introduction

1. At its thirty-first session (New York, 1-12 June 1998), the Commission, with reference to discussions at the special commemorative New York Convention Day held in June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("the New York Convention"), considered that it would be useful to engage in a discussion of possible future work in the area of arbitration. It requested the Secretariat to prepare a note that would serve as a basis for the consideration of the Commission at its next session.[1]

2. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) ("the UNCITRAL Model Law on Arbitration"), as well as the use of the UNCITRAL Arbitration Rules ("the UNCITRAL Arbitration Rules" or "the Rules") and the UNCITRAL Conciliation Rules, and to evaluate, in the universal forum of the Commission, the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[2] When the Commission discussed that topic, it left open the question of what form its future work might take. It was agreed that decisions on the matter should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide).[3]

3. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that the topic of revising the UNCITRAL Arbitration Rules should be given priority. The Commission noted that, as one of the early instruments elaborated by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were recognized as a very successful text, adopted by many arbitration centres and used in many different instances, such as, for example, in investor-State disputes. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit, its drafting style, and should respect the flexibility of the text rather than make it more complex. It was suggested that the Working Group should undertake to carefully define the list of topics which might need to be addressed in a revised version of the UNCITRAL Arbitration Rules.

4. The topic of arbitrability was said to be an important question, which should also be given priority. It was said that it would be for the Working Group to define whether arbitrable matters could be defined in a generic manner, possibly with an

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[1] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 235.

[2] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

[3] Ibid., para. 338.

illustrative list of such matters, or whether the legislative provision to be prepared in respect of arbitrability should identify the topics that were not arbitrable. It was suggested that studying the question of arbitrability in the context of immovable property, unfair competition and insolvency could provide useful guidance for States. It was cautioned however that the topic of arbitrability was a matter raising questions of public policy, which was notoriously difficult to define in a uniform manner, and that providing a predefined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.

5. Other topics mentioned for possible inclusion in the future work of the Working Group included issues raised by online dispute resolution. It was suggested that the UNCITRAL Arbitration Rules, when read in conjunction with other instruments, such as the UNCITRAL Model Law on Electronic Commerce and the United Nations Convention on the Use of Electronic Communications in International Contracts ("the Convention on Electronic Contracts"), already accommodated a number of issues arising in the online context. Another topic was the issue of arbitration in the field of insolvency. Yet another suggestion was made to address the impact of anti-suit injunctions on international arbitration. A further suggestion was made to consider clarifying the notions used in article I, paragraph (1), of the New York Convention of "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" or "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought", which were said to have raised uncertainty in some State courts. The Commission also heard with interest a statement made on behalf of the International Cotton Advisory Committee suggesting that work could be undertaken by the Commission to promote contract discipline, effectiveness of arbitration agreements and enforcement of awards in that industry.

6. After discussion, the Commission was generally of the view that several matters could be dealt with by the Working Group in parallel. The Commission agreed that the Working Group should resume its work on the question of a revision of the UNCITRAL Arbitration Rules. It was also agreed that the issue of arbitrability was a topic which the Working Group should also consider. As to the issue of online dispute resolution, it was agreed that the Working Group should place the topic on its agenda but, at least in an initial phase, deal with the implications of electronic communications in the context of the revision of the UNCITRAL Arbitration Rules.[4]

7. At its fortieth session, the Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.[5] The Commission noted that broad support had been expressed in the Working Group for a generic

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[4] Ibid.

[5] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 174.

approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations. However, the Commission noted that the extent to which the revised UNCITRAL Arbitration Rules should take account of investor-State dispute settlement or administered arbitration remained to be considered by the Working Group at future sessions.[6]

II. Organization of the session

8. The Working Group, which was composed of all States members of the Commission, held its forty-eighth session in New York, from 4 to 8 February 2008. The session was attended by the following States members of the Working Group: Algeria, Australia, Austria, Bahrain, Belarus, Benin, Bolivia, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Egypt, El Salvador, Fiji, France, Germany, Greece, Guatemala, Honduras, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Lebanon, Madagascar, Malaysia, Mexico, Mongolia, Norway, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Serbia, Singapore, South Africa, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.

9. The session was attended by observers from the following States: Albania, Angola, Antigua and Barbuda, Argentina, Belgium, Brazil, Côte d'Ivoire, Croatia, Cuba, Dominican Republic, Ethiopia, Finland, Holy See, Indonesia, Jordan, Kazakhstan, Mauritius, Netherlands, Philippines, Romania, Slovakia, Slovenia, Sweden, Syrian Arab Republic, Trinidad and Tobago and Turkey.

10. The session was attended by observers from the following organizations of the United Nations System: International Trade Centre, UNCTAD/WTO (ITC) and Office of the United Nations High Commissioner for Human Rights (OHCHR).

11. The session was attended by observers from the following international intergovernmental organizations invited by the Commission: Asian-African Legal Consultative Organization (AALCO), International Cotton Advisory Committee (ICAC) and Permanent Court of Arbitration (PCA).

12. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association (AAA), Arab Association for International Arbitration (AAIA), Arab Union for International Arbitration (AUIA), Asia Pacific Regional Arbitration Group (APRAG), Association for the Promotion of Arbitration in Africa (APAA), *Association Suisse de l'Arbitrage* (ASA), Association of the Bar of the City of New York (ABCNY), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Environmental Law (CIEL), Center for International Legal Studies (CILS), Chartered Institute of Arbitrators (CIArb), Corporate Counsel International Arbitration Group (CCIAG), European Law Students' Association (ELSA), Forum for International Commercial Arbitration C.I.C. (FICACIC), Inter-American Bar Association, International

[6] Ibid., para. 175.

Arbitration Institute (IAI), International Bar Association (IBA), International Institute for Sustainable Development (IISD), Kuala Lumpur Regional Centre for Arbitration (KLRCA), London Court of International Arbitration (LCIA), Milan Club of Arbitrators, School of International Arbitration of the Queen Mary University of London, Singapore International Arbitration Centre – Construction Industry Arbitration Association (SIAC–CIAA Forum) and Union Internationale des Avocats (UIA).

13. The Working Group elected the following officers:

Chairman: Mr. Michael E. Schneider (Switzerland);

Rapporteur: Ms. Shavit Matias (Israel).

14. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.148); (b) notes by the Secretariat on a revision of the UNCITRAL Arbitration Rules pursuant to the deliberations of the Working Group at its forty-sixth and forty-seventh sessions (A/CN.9/WG.II/WP.147, A/CN.9/WG.II/WP.147/Add.1 and A/CN.9/WG.II/WP.149).

15. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Revision of the UNCITRAL Arbitration Rules.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

16. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.145/Add.1, A/CN.9/WG.II/WP.147, A/CN.9/WG.II/WP.147/Add.1 and A/CN.9/WG.II/WP.149). The deliberations and conclusions of the Working Group with respect to this item are reflected in chapter IV. The Secretariat was requested to prepare a draft of revised UNCITRAL Arbitration Rules, based on the deliberations and conclusions of the Working Group. The deliberations and conclusions of the Working Group in respect of agenda item 5 are reflected in chapter V.

IV. Revision of the UNCITRAL Arbitration Rules

17. The Working Group recalled that it had concluded a first reading of articles 22 to 37 at its forty-seventh session (A/CN.9/641) and agreed to resume discussions on the revision of the Rules on the basis of document A/CN.9/WG.II/WP.145/Add.1.

Section IV. The award

Costs – Articles 38 to 40

Article 38

Subparagraphs (b), (c) and (d)

18. The Working Group agreed that subparagraphs (b), (c) and (d) be qualified by the word "reasonable".

Subparagraph (e)

19. The Working Group agreed to replace the word "party" with the word "parties" and to delete the word "legal". It also agreed to delete the word "successful" because article 38 provided a list of the different elements of the costs of arbitration and did not deal with the question of the criteria for apportionment of costs, which was dealt with under article 40.

Article 39

20. The Working Group considered whether it was advisable to provide for more control by an independent body over the fees charged by arbitrators. It was said that such control was advisable as a precaution to guard against the rare situations where an arbitrator might seek excessive fees. It would help avoid the difficult situation that might arise where one or more parties were concerned about the fees charged by arbitrators. Furthermore, the process for establishing the arbitrators' fees was crucial for the legitimacy and integrity of the arbitral process itself. It was observed that article 39 had been the source of difficulties in practice when exaggerated fees were charged by arbitral tribunals, leaving parties without practical solutions other than perhaps resorting to a State court. It was emphasized that it was important to avoid situations where the parties engaged a State court over a dispute regarding the arbitrators' fees, since in such a situation, the court might enter into the consideration of the merits of the case.

21. The necessity of providing for a neutral mechanism controlling the fees charged by arbitrators was underlined. The Working Group agreed that the appointing authority, or failing its designation the Permanent Court of Arbitration ("PCA"), were best placed to exercise supervision over arbitrators' fees.

Paragraph (1)

22. The Working Group adopted in substance the principles for determining the fees as expressed in paragraph (1).

Paragraph (2)

23. While the Working Group generally agreed with the substance of paragraph (2), it decided to reconsider it at a later stage in the context of the redrafted provisions on determination of arbitrators' fees. It was suggested that it might be useful to indicate that the fee charged by the appointing authority for its work in exercising supervisory authority over the amount of the arbitrators' fees

should be distinguished from the fee charged by the arbitral institution for the administration of cases conducted under its own rules.

Paragraphs (3) and (4)

24. The Working Group agreed to replace paragraphs (3) and (4) with new provisions that would implement the considerations in the Working Group reflected above. The Working Group considered the draft provision in paragraph 45 of document A/CN.9/WG.II/WP.145/Add.1 and made several suggestions for the future draft to be prepared by the Secretariat. It was suggested that, except in unusual cases involving special circumstances, the basis for determining the fees should be established promptly upon the appointment of the arbitral tribunal and that any disagreement should be resolved promptly by the appointing authority. Early resolution of open issues was desirable for the parties who typically were eager to obtain a predictable and fair basis for the determination of the fees, as well as for the persons who undertook to act as arbitrators.

25. It was also suggested that the wording should more clearly distinguish between the methodology for the determination of the fees (e.g. an hourly rate, a fee depending on the value of the dispute or a fee to be determined on another basis), which should be clarified promptly after the constitution of the arbitral tribunal, and the actual computation of the fees, which should be determined on the basis of the work performed by the arbitrators, either at the end of the proceedings or at appropriate stages during the proceedings. It was agreed that the authority of the appointing authority should also extend to the determination of the deposit for costs (article 41) and to any additional fees that might be charged by the arbitral tribunal for interpretation, correction or completion of the award (article 40 (4)). Support was expressed for the view that party's challenges to the determination of fees or deposits should be subject to time limits.

26. It was cautioned against including too much rigidity in the provision since this might jeopardize the flexibility of the Rules. It was said that a preferable approach would be to provide for a general supervisory power of the appointing authority, or failing its appointment, the PCA, over the methodology and the final computation of the fees. It was also proposed that the wording be flexible enough to permit parties, if and when they wished to contest arbitrators' fees, to seek designation of an appointing authority if one had not been agreed already.

27. The Secretariat was requested to prepare a revised draft for a future session of the Working Group.

Article 40

Paragraphs (1) and (2)

28. A proposal was made to amalgamate paragraphs (1) and (2), so as to make the apportionment of the costs of representation and assistance subject to the same principles as other costs currently governed by paragraph (1). While it was observed that the distinction between the different types of costs in paragraphs (1) and (2) reflected different legal traditions, it was considered by the Working Group that it was preferable to amalgamate both paragraphs as proposed.

29. It was suggested that it might not be easy in all instances to determine which party was to be considered the successful party, and that more neutral formulation be adopted for the determination of the apportionment of costs by the arbitral tribunal, along the lines of the provision contained in article 31 (3) of the Rules of Arbitration of the International Chamber of Commerce. That proposal did not receive support.

Paragraph (3)

30. The Working Group adopted paragraph (3) in substance, without any modification.

Paragraph (4)

31. The discussion focused on paragraph (4). A proposal for deletion of that paragraph was based on the view that paragraph (4) was implicitly premised on the belief that arbitrators would not deserve additional fees because the need for correction or completion of their award was due to their own fault. It was stated that such a rigorous premise did not account for legitimate work by arbitrators on unmeritorious requests for correction or completion of an award. Another reason given for deleting paragraph (4) was that it established a single rule for issues that should be dealt with separately, namely the issue of interpretation and correction, for which it was stated that no additional fee should be charged, and the issue of completion of the award, for which it was said that additional work by the tribunal could legitimately result in additional fees being charged.

32. A contrary view was that paragraph (4) was needed to encourage the tribunal both to draft its award with optimal clarity (to the effect that no interpretation or correction would be needed) and to deal expeditiously with any frivolous request for interpretation, correction or completion of the award that might be made by a party seeking a reversal of the initial award.

33. With a view to reconciling the above opposite views, a proposal was made that the issue might be dealt with by reformulating article 35 of the Rules, under which "either party, with notice to the other party" was entitled to "request that the arbitral tribunal give an interpretation of the award". It was suggested that such reformulation should draw inspiration from article 33 (1) (b) of the UNCITRAL Model Law on Arbitration, which had made such request possible only "if so agreed by the parties". A distinction could thus be drawn between collective requests for interpretation, correction or completion of the award (which should entail no additional fees) and unilateral requests (where fees could be charged).

34. Another proposal was made to retain paragraph (4) and add wording along the lines of "unless there are compelling reasons to charge such fees". An alternative suggestion was to use wording along the lines of "unless the request is unfounded". Yet another suggestion was made to rephrase paragraph (4) along the lines of "Only in exceptional circumstances may additional fees be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37". While considerable support was expressed for introducing an exception to tame the rigour of paragraph (4), concern was expressed regarding possible ethical issues that might stem from the fact that the arbitral tribunal itself would be called upon to qualify the circumstances for the purpose of justifying or not the charging of

additional fees to be paid to the arbitral tribunal. With a view to alleviating such concern, it was explained that having to correct errors or omissions in the award was normally neither contentious nor costly and could hardly be regarded as constituting an exceptional circumstance. A request presented in bad faith and aimed at producing the effect of a de facto appeal should be easy to identify and justify the charging of additional fees.

35. It was suggested that appropriate wording might be introduced in article 39 to clarify that the evaluation of exceptional circumstances under a revised version of paragraph (4) should fall within the sphere of scrutiny of the appointing authority. In that context, doubts were expressed about the limit of the supervisory power to be conferred upon the appointing authority.

36. After discussion, it was agreed that the discussion would be resumed at a future session, on the basis of a revised draft of both paragraph (4) (including its possible deletion) and article 39 to be prepared by the Secretariat to reflect the above discussion. It was agreed that, in preparing such a revised version, the Secretariat should bear in mind the need to limit the scope of paragraph (4) to fees, without affecting the ability of the arbitral tribunal to fix other additional costs as listed in article 38.

Article 41

37. The Working Group adopted article 41 in substance, as contained in document A/CN.9/WG.II/WP.145/Add.1.

Proposed additional provisions

Liability of Arbitrators

38. The Working Group discussed whether the question of liability of arbitrators and institutions performing the function of appointing authority under the UNCITRAL Arbitration Rules should be addressed. The Working Group considered a proposed draft provision, according to which arbitrators and appointing authorities should in principle be granted immunity or limitation of liability for their acts or omissions in connection with the arbitration, except in the case of "conscious and deliberate wrongdoing".

39. As to whether recognizing the immunity of arbitrators was desirable as a matter of general policy, a view was expressed that, since the current legislative trend in certain countries was to introduce stricter standards regarding the liability of judges for their acts or omissions in relation to State court proceedings, that trend should not be ignored in respect of arbitrators. It was said that protecting the interests of parties to arbitration was a goal of the Rules, the acceptability of which might be at risk if they appeared overly protective of arbitrators. In response, it was recalled that the Rules were not legislative but contractual in nature and inherently subject to the mandatory provisions of any applicable law. It was also explained that a large number of arbitration rules comparable to the UNCITRAL Arbitration Rules generally included provisions limiting the liability of arbitrators, and that failure to add such protection would leave arbitrators exposed to the threat of potentially large claims by parties dissatisfied with arbitral tribunals' rulings or awards who might

claim that such rulings or awards arose from the negligence or fault of an arbitrator. The prevailing view was that establishing a degree of immunity or exoneration from liability in favour of arbitrators was advisable in view of the fact that the absence of recourses against awards had occasionally resulted in increasing the number of lawsuits brought against arbitrators, who exercised quasi-judicial functions without enjoying any level of protection comparable to the immunity and privileges granted to judges by law or the insurance mechanisms available to certain categories of professionals through their professional associations. It was pointed out that ignoring the issue in the Rules would only result in the unhealthy situation where the arbitrators would have to negotiate with the parties regarding their immunity after the arbitral tribunal had been constituted. It was generally agreed that any provision that might be introduced in the Rules to exonerate arbitrators from liability should be aimed at reinforcing the independence of arbitrators and their ability to concentrate with a free spirit on the merits and procedures of the case. However, such a provision should not result or appear to result in total impunity for the consequences of any personal wrongdoing on the part of arbitrators or otherwise interfering with public policy. It was recognized that any such provision would not interfere with the operation of applicable law.

40. In that context, the view was expressed that further discussion might be needed regarding the professional and ethical standards of conduct to be met by arbitrators. It was explained that if the justification for exonerating arbitrators from liability was the quasi-judicial nature of their functions, such exoneration should be balanced by an obligation to perform these functions according to standards comparable to those applied by State judges. It was pointed out that it should be possible to combine the freedom of the parties in selecting their arbitrators with the imposition of a high standard of professionalism and ethical behaviour. On the other hand, it was pointed out that concerns about an alleged failure of an arbitrator to meet ethical or professional standards were designed to be addressed in the context of challenge proceedings. While no decision was made on that point, the Working Group agreed that the discussion should be reopened together with the issue of qualification of arbitrators in the course of the second reading of the revised Rules.

41. A discussion took place as to whether any immunity that might be recognized in the Rules in respect of arbitrators should also extend to such participants in the arbitral process as arbitral institutions, including the PCA, appointing authorities, experts appointed by the arbitral tribunal, expert witnesses, secretaries, assistants of arbitral tribunals or interpreters. However, doubts were expressed as to whether it was appropriate for a set of arbitration rules to exonerate the liability of institutions or individuals that did not share the quasi-judicial status of the arbitrators. After discussion the Working Group agreed to consider at a future session provisions establishing immunity to cover the broadest possible range of participants in the arbitration process. The Secretariat was requested to prepare wording to that effect for continuation of the discussion.

42. Having agreed on the desirability of a degree of immunity as a matter of general policy, the Working Group considered whether such policy should be reflected in the Rules or whether a legislative standard was required. The view was expressed that a contractual standard on immunity could be ineffective and lead to a diversity of legal consequences depending upon the provisions of applicable law, which, in many countries, were likely to treat the issue as a matter of public policy.

It was recalled that, under article 1, the Rules would govern the arbitration subject to any mandatory provision of "the law applicable to the arbitration". However, it was also pointed out that attempts to establish personal liability of arbitrators could be brought under laws distinct from the law applicable to the arbitration. After discussion, the Working Group recognized that, while a provision in the Rules regarding immunity might be void under certain national laws, as a contractual standard, it might still serve a useful purpose under the laws of other countries.

43. As to the contents of a rule on immunity, the Working Group heard different views as to whether the immunity of the arbitrators should be recognized in case of "gross" or "extremely serious" negligence. In certain countries, a contractual exoneration of liability for gross negligence would be contrary to public policy. In other countries where the concept of "gross negligence" was not in use, it would be possible for a party to exonerate itself from the consequences of its "negligence", except to the extent that negligent conduct would be of such a magnitude that it would amount to "dishonesty" or "conscious and deliberate wrongdoing", which would, for that purpose, appear to subsume the foreign concept of "gross negligence". While a standard based on "negligence" was, in the view of some delegations, more "objective" than (and thus preferable to) a "subjective" reference to "conscious and deliberate wrongdoing", it was generally realized that a provision relying on any notion of "negligence" should be avoided as it could lend itself to divergent interpretations in different countries.

44. With respect to drafting, support was expressed for adoption of the additional provision proposed in paragraph 47 of document A/CN.9/WG.II/WP.145/Add.1. It was also proposed that additional wording should be added along the lines of "Where an arbitrator cannot avail himself/herself of immunity under [the additional provision], he/she may avail himself/herself of the highest level of immunity available under applicable law". It was explained that the additional wording might be necessary to preserve a degree of exoneration in cases where the applicable law would allow contractual exoneration from liability only up to a threshold lower than that of "conscious and deliberate wrongdoing" and, at the same time, treat as unwritten any clause that would exonerate liability above that threshold. With a view to simplifying the provision, another proposal was made to avoid referring to any specific criterion such as "conscious and deliberate wrongdoing" and simply to indicate that "The arbitrators or [other participants in the arbitral process] shall be exempt from liability to the fullest extent possible under any applicable law for any act or omission in connection with the arbitration".

45. An alternative proposal was made along the lines of: "The arbitrators, the appointing authority and the Permanent Court of Arbitration shall not be liable for any act or omission in connection with the arbitration, except for the consequences of conscious or deliberate wrongdoing". It was explained that replacing "conscious and deliberate wrongdoing" by "conscious or deliberate wrongdoing" might practically produce the same effect as including a reference to "gross negligence". The Secretariat was requested to prepare a revised draft to reflect the above views and proposals.

General Principles

46. The Working Group considered the draft provision on general principles contained in paragraph 48 of document A/CN.9/WG.II/WP.145/Add.1. Suggestions

were made that, if the draft provision was adopted, it should be placed in the opening section of the Rules.

International origin and uniform interpretation

47. Support was expressed for retaining the first sentence of the draft provision. It was stated that the provision established useful principles which should be promoted in arbitration practice. It was observed that similar provisions were contained in international instruments, such as the United Nations Convention on Contracts for the International Sale of Goods, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Cross-border Insolvency and the latest revision of the UNCITRAL Model Law on Arbitration, as well as in the 2004 version of the Unidroit Principles of International Commercial Contracts.

48. Considerable opposition was expressed against the inclusion of that provision. It was stated that the need for uniformity was not a primary goal in the context of contractual arbitration rules, at least not to the same extent as in a legislative text. Furthermore, failure by the arbitrators to apply the Rules in a manner alleged not to follow a uniform interpretation might be argued to provide a basis for challenging the award. In addition, in view of the confidentiality of arbitration cases, it was difficult to obtain sufficient information about the way the Rules were applied.

49. After discussion, it was found that there was not sufficient support for including the first sentence of the draft provision in a revised version of the Rules.

Filling of gaps in the Rules

50. Considerable support was expressed in favour of retaining the concept in the second sentence of the draft provision. It was considered useful to emphasize that the Rules constituted a self-contained system of contractual norms and that any lacuna in the Rules were to be filled by reference to the Rules themselves, while avoiding reliance on applicable procedural law governing the arbitration. While it was recognized that article 15 of the Rules provided sufficient basis for finding solutions to procedural questions that arose during the proceedings, it was pointed out that issues not related to the conduct of proceedings might arise that were not addressed in the Rules; it was preferable to resolve those issues by reference to the general principles on which the Rules were based.

51. Some of the delegations that supported inclusion of a gap filling provision considered that it might be difficult to distil general principles from the system of the Rules, and that it was therefore preferable to empower the parties and the arbitral tribunal to determine how to fill the gaps. Wording along the following lines was suggested to address that consideration: “When the rules are silent on any matter, the arbitration shall be governed by any rules which the parties, or failing them, the arbitral tribunal may settle on.”

52. However, the contrary view was that it was either undesirable or unnecessary to include a provision of that nature in the Rules. In particular, the Rules themselves, such as article 15 provided sufficient basis for filling the gaps. In addition, it was said that both the draft provision and the proposed alternative version might give rise to complex issues of interpretation which outweighed the benefits of either proposed provisions.

53. After discussion, there was no majority, let alone consensus, in favour of a change of the Rules by such an addition. However, given the importance attributed by some delegations to gap filling, there should be a possibility for reconsidering the issue. The note to be prepared by the Secretariat for a future session should set out the text contained in paragraph 51 above and the text of the second sentence of the clause on general principles, as contained in paragraph 48 of document A/CN.9/WG.II/WP.145/Add.1.

Investor-State arbitration

General discussion

54. The Working Group recalled its mandate to maintain a generic approach to the Rules.

55. During the course of the discussion, the following views were expressed inter alia.

56. The Working Group heard a statement made on behalf of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises on the significant effect on human rights of rules governing global business, especially private investment agreements between investors and host States. The Working Group decided to reproduce the substance of that statement in annex I to this report.

57. General agreement was expressed by the Working Group regarding the desirability of dealing with transparency in investor-State arbitration, which differed from purely private arbitration, where confidentiality was an essential feature. According to principles of good governance, government activities might be subject to basic requirements of transparency and public participation. A view was expressed that investor-State arbitration might involve consideration of public policy and could lead to large potential monetary liability for public treasuries. Provisions on increased transparency would enhance the public understanding of the process and its overall credibility. It was said that certain bilateral investment protection treaties already contained provisions on transparency. It was stated that a high degree of transparency might be required for arbitrations in some jurisdictions by virtue of their particular legal and political systems.

58. It was observed that the existing UNCITRAL Arbitration Rules had been drafted primarily for commercial arbitration, and that the Rules lacked provisions on publicity of information relating to the proceedings conducted under the Rules. It was pointed out that the Rules were the second most widely used rules for resolving investor-States disputes (after the rules of the International Centre for Settlement of Investment disputes (ICSID)). It was said that the regulations and rules of ICSID were amended in 2006 to incorporate greater transparency and opportunity for public participation in investor-States disputes. It was suggested that a revision of the UNCITRAL Arbitration Rules should follow that trend. However, it was observed that while the provision of a second standard based on rules of ICSID might be desirable, it was also desirable to provide parties to investor-States disputes with real alternative solutions and to take into account that UNCITRAL

arbitration was not institutional arbitration, which might give rise to differences in rules and procedures.

59. In response to a question as to whether its mandate would allow the Working Group to deal with issues involving States, it was generally felt that while the mandate of the Working Group was consistent with the possible drafting of uniform law standards in respect of treaty-based investor-States arbitration, it would not easily extend to broader intervention in the field of good governance.

60. Reservations were expressed by many delegations in respect of the possible inclusion of provisions on transparency in the UNCITRAL Arbitration Rules because it was necessary to preserve the generic nature of the Rules and it was not certain that full transparency was in all circumstances desirable. Some support was expressed for dealing with the issue in investment treaties and not in the Rules, which would better allow States to reflect such circumstances. In that connection, it was suggested by one non-governmental organization (Milan Club of Arbitrators) that it might be worthwhile to consider preparing one or more optional clauses to address specific factors for investor-State arbitration taking place under investment protection treaties for consideration by States when negotiating such treaties. The Working Group decided to reproduce the statement made by the Milan Club of Arbitrators in annex II to this report.

61. Against the general background of the concern for promoting greater transparency, the Working Group did not discuss specific provisions but engaged in general discussion on how best to address treaty-based arbitrations in light of changes and developments that have occurred throughout the years. One suggestion was that the Rules themselves could include a specific regime, possibly as an annex to the Rules, applying only in the context of investor-State arbitration, while at the same time the general regime of the Rules would remain unamended in respect of other types of commercial arbitration to avoid undue delay, disruption or cost. Another suggestion was to prepare an annex to the Rules that would apply if the parties agreed upon, or the treaty provided for, its application. Another view was expressed that issues relating to whether such an annex might be optional or mandatory could be discussed at a later stage. Other possible approaches included guidelines or model clauses for inclusion in investment protection treaties.

Scope of possible future work

62. It was suggested that special provision on transparency should be limited to addressing investment arbitration brought under the terms of a treaty. On the question of how to distinguish between investor-State disputes to which a specific set of rules might apply and generic commercial arbitration, it was said that a definition along the lines of article 25 of the ICSID Convention might be useful. Concerns were expressed that that approach might give rise to preliminary jurisdictional issues.

63. Questions were raised as to the binding effect those provisions might have on existing agreements between private investors and States, in particular for those agreements that did not mention as the applicable version of the Rules the version in force at the date of commencement of the arbitration. It was said that most bilateral investment treaties referred to the application to the UNCITRAL Arbitration Rules, without mentioning which version would apply in case of revision. In that context,

it was stated that the revised Rules should not apply to treaties entered into prior to adoption of the revised Rules. However, examples were given of existing treaties that expressly referred to dispute settlement under the version of the Rules in effect at the date of commencement of arbitration.

64. One view was expressed that dealing with transparency in arbitrations brought by an investor against a State under the terms of a treaty should focus on improving the rules on public notice of proceedings, access to documents, open hearing, and *amicus curiae* briefs in respect of such arbitration. In all those instances, the arbitral tribunal would have discretion to protect truly confidential information but the presumption would be of open and public access to the process. It was explained that this corresponded to the position taken in North American Free Trade Agreement (NAFTA), in particular in a note of interpretation on access to documents issued in 2001. It was said that those provisions could be easily managed by arbitral tribunals, would not disrupt the proceedings, and did not interfere with the commercial interest of the parties.

65. In order to take account of the public interest aspects of investor-State arbitrations, a proposal was made to amend a limited number of provisions of the UNCITRAL Arbitration Rules. In that connection, the delegation that referred to the Milan Club of Arbitrators also referred to two non-governmental organizations (the Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD)) and the Working Group had no objection to hearing their proposal. The Working Group did not discuss the contents of that proposal and decided to reproduce the substance of the statement by the two non-governmental organizations in annex III to this report.

66. Other views were expressed that it might be overly simplistic to deal exclusively with the issue of transparency by amending few provisions in the Rules, as there were other aspects that might need to be dealt with in investor-State arbitration, such as the question of applicable law, or State immunity. That question was said to be a complex one, requiring careful consideration of many different aspects.

67. It was emphasized that it was a mistake to distinguish rules for “commercial” arbitration and rules for “investor-State” arbitration, given that the UNCITRAL Arbitration Rules were conceived as having broad application and, in particular, in view of UNCITRAL’s understanding of the term “commercial” as shown in footnote ** to article 1 (1) of the UNCITRAL Model Law on Arbitration. The attention of the Working Group was brought to the fact that investment was expressly included as an element of the definition of the term “commercial” contained in that footnote. Another delegation suggested that a more operational distinction could be made between “generic” or “ordinary” commercial arbitration on the one hand, and “treaty-based” arbitration on the other.

68. The Working Group was urged not to embark at this stage on the preparation of Rules governing transparency and possibly other issues since the complex negotiation would delay the current work of revising the Rules. There was an expectation that the revised Rules would be available to users of commercial arbitration as soon as feasible.

Conclusions

69. After in-depth consideration of the above issues, the Working Group reached the following conclusions. (a) It was generally recognized that arbitration proceedings in treaty-based arbitration raised issues that, in some respect, differed from ordinary commercial arbitration and a large number of delegations expressed the view that they required, on certain points, distinct regulation. The most frequently mentioned matter for such distinct regulation concerned transparency of the proceedings and the resulting award, an objective which received wide support in principle. (b) Many delegations expressed concern that considering the specificity of treaty-based arbitration would be a complex and time consuming task; others did not share that view. The widely prevailing view was that any work on treaty arbitration which the Working Group might have to undertake should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form and should be undertaken after the completion of such revision. (c) A wide range of suggestions was expressed with respect to the objective which could usefully be pursued by the Working Group in the field of treaty-based arbitration. These suggestions included preparing texts such as model clauses, specific rules or guidelines. Such texts could be adopted in the form of an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. There was general agreement, however, that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves. (d) The Working Group decided to proceed with its work on the revision of the UNCITRAL Arbitration Rules in their generic form and to seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take.

Section I. Introductory rules

70. The Working Group commenced its second reading of a revised version of the Rules on the basis of document A/CN.9/WG.II/WP.147.

Scope of application

Article 1

Paragraph (1)

71. One delegation opposed to the deletion of the writing requirement. The Working Group did not modify the substance of the revised version of paragraph (1), as reproduced in paragraph 7 of document A/CN.9/WG.II/WP.147.

Paragraph (1 bis) – Applicable version of the UNCITRAL Arbitration Rules

72. The Working Group considered the options contained in draft paragraph (1 bis). Some support was expressed for the provision contained in option 2, whereby the parties would be deemed to have submitted to the Rules in effect on the date of the arbitration agreement. It was stated that that option would better reflect the contractual nature of arbitration by relying on the parties'

understanding at the time of the arbitration agreement. It was also said that that option would minimize doubts regarding the chosen version of the Rules. However, it was recalled that it would run contrary to the expectation that the most recent version of the Rules would apply.

73. Considerable support was expressed for option 1, which put the parties on notice that, unless they agreed to apply the Rules in effect on the date of their agreement, then the Rules in effect on the date of the commencement of the arbitration would be deemed to apply. It was said that that provision corresponded to the solution commonly adopted by a number of arbitral institutions when revising their rules. That deeming rule of application of the revised version of the Rules in force on the date of commencement of arbitration was said to promote application of the last version of the Rules in a greater number of situations.

74. It was also noted that any deeming provision should be worded with the maximum degree of clarity to avoid disputes concerning which version of the Rules to apply in a given proceeding. While such disputes might be administratively resolved in the context of arbitration administered by arbitration centres, they could create difficulties in the context of ad hoc arbitration. It was observed that arbitration centres, when applying similar provisions usually decided, as a preliminary question, before the constitution of the arbitral tribunal, and on a case-by-case basis, which set of rules the parties intended to apply. In the absence of a supervisory authority fulfilling that function, it was said that in case of disagreement or doubts, it would be for the arbitral tribunal to interpret the will of the parties, and therefore the provision might need to be amended to provide more guidance to the arbitral tribunal.

75. A concern was expressed that that provision could lead to a situation where the revised version of the Rules would apply retroactively to agreements made before its adoption without sufficient regard for the principle of party autonomy. It was observed that certain national laws or arbitration practices might allow retroactive application. The Working Group agreed that the provision should not result in retroactive application of the revised version of the Rules to arbitration agreements and treaties concluded before its adoption.

76. Another concern was expressed that option (1), without amendment, could have unintended retroactive application where the arbitration agreement was formed by the claimant accepting (in a notice of arbitration) an open offer to arbitrate made by the respondent. This concern could arise in arbitration pursuant to a treaty, as well as in certain commercial contexts. It was emphasized that the Rules applicable to such a dispute should be those consented to in the offer to arbitrate (i.e., the treaty or other instrument). It was suggested that a revised version of that provision would be drafted to also make it clear that, “for agreements or offers to arbitrate made before [date], the parties shall be deemed to have submitted to the previous version of the Rules”. The Working Group generally looked with favour on that proposal recognizing that it had only been proposed during the discussion at this session and might benefit from further refinement.

77. An additional proposal was made to amend the provision contained in option 1 by adding the word “expressly” before the word “agreed” so as to clarify that a version of the Rules other than the one in effect at the commencement of arbitration would apply only if the intention of the parties was unambiguously established. It

was observed that those words would provide the arbitral tribunal with more guidance on their determination of the parties' intent. However, the Working Group did not adopt that proposal, for the reason that, by establishing a stricter standard for the applicability of the Rules, in this case, it would complicate the interpretation of other references to "agreement" in the Rules and could create new grounds for dispute. In addition, it was said that the parties should be able to agree on the applicable version of the Rules, either expressly or impliedly.

Paragraph (2)

78. The Working Group adopted paragraph (2), as reproduced in paragraph 7 of document A/CN.9/WG.II/WP.147, without modification.

Model arbitration clause

79. The Working Group adopted the Model Arbitration Clause, with the amendments suggested in paragraph 12 of document A/CN.9/WG.II/WP.147.

Notice, calculation of periods of time

Article 2

Paragraph (1)

80. The Working Group considered the proposed amendments to paragraph (1), as contained in paragraph 15 of document A/CN.9/WG.II/WP.147.

"Physically"

81. Reservations were expressed on the proposed deletion of the word "physically". It was said that that word had not given raise to difficulties in the application of that article and that its retention would clarify the distinction between the personal or physical delivery to the addressee and delivery at its residence. After discussion, the Working Group agreed to retain the word "physically".

"Mailing"

82. Views were expressed that the deletion of the word "mailing" before the word "address" might create unnecessary difficulties regarding the acceptability of postal box address. After discussion, it was decided to replace the reference to a mailing address by mention of a "designated address".

Paragraph (1 bis)

83. Diverging views were expressed as to whether paragraph (1 bis) should be revised to better align with either (a) the wording of comparable provisions in the arbitration rules of a number of arbitral institutions; (b) article 3 of the UNCITRAL Model Law on Arbitration; (c) previous standards prepared by UNCITRAL in the field of electronic commerce, such as the UNCITRAL Model Law on Electronic Commerce, or the 2005 Convention on Electronic Contracts. It was suggested that the provision should better distinguish between the designation of acceptable method of communication and rules to be adopted on evidencing receipt or dispatch of communication. It was agreed that the discussion should be reopened at a future session on the basis of revised draft prepared by the Secretariat.

Paragraph (2)

84. The Working Group adopted paragraph (2) in substance, as contained in paragraph 15 of document A/CN.9/WG.II/WP.147.

V. Other business

85. At the close of the session, on 8 February 2008, the Working Group adopted the following statement:

> "Working Group II (Arbitration and Conciliation) of the United Nations Commission on International Trade Law,
>
> "Being informed that Mr. Jernej Sekolec, Secretary, United Nations Commission on International Trade Law and Director, International Trade Law Division/Office of Legal Affairs is scheduled to retire at about the end of June 2008, and
>
> "Recognizing that his retirement will take place before the next session of this Working Group, and, therefore, the present session is the last meeting of the Working Group at which he will be present and is, thus, the last opportunity to express to him in person the deep appreciation of the Working Group for his many activities during his more than twenty-five years of United Nations service;
>
> "Declares that he has advanced the development of arbitration and conciliation as methods for harmoniously settling disputes arising in the context of commercial and other relations, and has thereby made lasting contributions to world peace. He has inspired the efforts of the Working Group, has strongly supported its work, has successfully completed major projects and has built enduring foundations for our ongoing projects and future endeavours. He is a model of the highest standards of conduct by a leader of an international secretariat. The friendship of the members of the Working Group will accompany him after his retirement;
>
> "Requests that this resolution be set forth in the Working Group report of the present session and thereby be recorded in the permanent history of the United Nations".

Annex I

Statement made on behalf of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises

The growing recognition that the rules governing global business might have significant effects on human rights practices led the United Nations to appoint a special representative for business and human rights. The results of the initial work done under that mandate had been submitted in a report to the Human Rights Council in 2007. They were well received both by Governments in the Council and by the G8 2007 Summit. The report surveyed a range of significant legal and policy innovations in the field of business and human rights by States, business and civil society. It concluded that imbalances remained between the scope of markets and business organizations on the one hand and the capacity of societies to protect and promote the core values of social community on the other: imbalances that could only be corrected by embedding global markets with shared values and institutional practices.

In specific recommendations to be made to the Human Rights Council in June 2008, the report would be based on three core principles that had gathered broad support in the course of the consultations: first, the "State duty to protect" with respect to preventing and punishing corporate abuse of human rights; second, the corporate responsibility to respect human rights in the course of their operations; and third, grievance and accountability mechanisms for addressing and redressing abuses.

Part of the work currently undertaken that might be of particular relevance to the work of the Working Group consisted in conducting, together with the International Finance Corporation, an empirical study exploring some aspects of private investment agreements between investors and host States. Issues relative to bilateral and regional investment treaties were also explored.

There were two dimensions to that research which were brought to the attention of the Working Group. The first aspect was the assessment whether and to what extent various stabilization provisions in private investment agreements between investors and host States might constrain a State ability to fulfil its international human rights obligations, and if they did so, how the legitimate needs of investors and governments could be better balanced. Another aspect of that work focused on the question of transparency or the lack thereof in arbitration processes with regards to disputes that raised human rights and other public policy issues.

From the perspective of the mandate, adequate transparency where human rights and other States responsibilities were concerned was essential if the public were to be aware of proceedings that might affect the public interest. Transparency lay at the very foundation of what the United Nations and other authoritative entities had been promulgating as the precept of good governance. The benefits of such cross-United Nations discussions of how shared values, including human rights could be embedded into institutional practices in the context of economic globalization was highlighted.

Annex II

Statement by the Milan Club of Arbitrators

The members of the Milan Club of Arbitrators:

(1) reaffirmed their support for the general principle of confidentiality in international commercial arbitrations and, in particular, in arbitrations taking place under the UNCITRAL Arbitration Rules;

(2) supported the current proposals in the Working Group to exclude from the new UNCITRAL Arbitration Rules any specific provision for investor-State arbitrations;

(3) recommended that one or more optional clauses be formulated by UNCITRAL to address specific factors for investor-State arbitrations taking place under investment treaties, consistent with the new UNCITRAL Arbitration Rules;

(4) proposed that such UNCITRAL optional clauses, whilst not forming part of the new UNCITRAL Arbitration Rules, be made available to States and investors in particular for use in negotiating dispute resolution provisions in future investment treaties;

(5) would welcome a further debate and a wider examination of the overall topic open to the broader international arbitration community before closing this debate within the Working Group.

Annex III

[Original: English, French, Spanish]

Statement by the Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD)

CIEL and IISD seek a very limited number of additions to the UNCITRAL Arbitration Rules in order to take account of the important public interest aspects of investor-State arbitrations, while at the same time leaving untouched the Rules' application to other types of arbitrations and avoiding undue delay, disruption or cost. The principles underlying our suggestions, and how they might be handled, are described below.

The public interest aspects of investor-State arbitrations can be accommodated in the UNCITRAL Arbitration Rules without affecting the Rules' application to other types of arbitrations.

- This can be done by introducing language to just four provisions.
- These amendments would apply only to investor-State arbitrations and leave other types of arbitrations completely unaffected.
- Investor-State arbitrations can be simply defined as arbitrations brought by an investor against a State under the terms of a treaty.

The fact that an investor-State arbitration has been initiated should be public, so that citizens know that their State is involved in a binding dispute settlement proceeding.

- This can be accomplished by providing that the investor-State tribunal once constituted dispatch a copy of the notice of arbitration and the composition of the tribunal to the UNCITRAL secretariat.
- The UNCITRAL secretariat would then post this information on its website.

The issues in an investor-State arbitration should be public, so that citizens know what is at stake.

- This can be accomplished by requiring the disclosure of pleadings received by the tribunal, and by providing that hearings in investor-State arbitrations will be open to the public, e.g., in person, via closed-circuit TV or web casting.
- Proprietary or privileged information deserving confidential treatment can be redacted.

The results of an investor-State arbitration should be public, so that citizens and other States can be informed about the outcome.

- This can be accomplished by providing that the investor-State tribunal dispatch copies of its decisions to the UNCITRAL secretariat.
- The UNCITRAL secretariat would then post these decisions on its website.

The public should have the opportunity to provide input to an investor-State tribunal.

- The public should have the right to petition the investor-State tribunal for permission to file an *amicus curiae* brief.
- If it grants such a petition, the tribunal may impose conditions to reduce delay or cost, such as with respect to timing and length.

Suggested texts for the above proposals, demonstrating how the public interest aspects of investor-State arbitrations can be simply accommodated without affecting the Rules' application to other arbitrations, are set out below.

Article	*Existing Rule*	*Proposed Changes*
3 (5)	[new]	3 (5) Following the appointment of an arbitral tribunal in an arbitration brought by an investor against a State under the terms of a treaty, the tribunal shall forthwith dispatch a copy of the notice of arbitration and communicate the composition of the tribunal to the UNCITRAL secretariat, which shall post this information on its website without delay.
15 (3)	15 (3) All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.	15 (3) All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party. In an arbitration brought by an investor against a State under the terms of a treaty, the tribunal shall forthwith dispatch a copy of all pleadings received by the tribunal to the UNCITRAL secretariat, subject to redaction of confidential business information and information which is privileged or otherwise protected from disclosure under a party's domestic law. The UNCITRAL secretariat shall post all such documents on its website without delay.
15 (4)	[new]	15 (4) In an arbitration brought by an investor against a State under the terms of a treaty, the arbitral tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "nondisputing party") to file a written submission with the tribunal. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a particular perspective, knowledge or insight; and

Article	*Existing Rule*	*Proposed Changes*
15 (4)	[new]	15 (4) In an arbitration brought by an investor against a State under the terms of a treaty, the arbitral tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "nondisputing party") to file a written submission with the tribunal. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a particular perspective, knowledge or insight; and (b) the non-disputing party submission would address a matter within the scope of the dispute. The tribunal shall ensure that the non-disputing submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.
25 (4)	Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.	25 (4) Except in an arbitration brought by an investor against a State under the terms of a treaty, hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.
25 (4) bis	[new]	25 (4) bis In an arbitration brought by an investor against a State under the terms of a treaty, hearings shall be open to the public. The arbitral tribunal shall establish appropriate logistical arrangements, including procedures for the protection of confidential business information or information which is privileged or otherwise protected from disclosure under a party's domestic law.
32 (5)	The award may be made public only with the consent of both parties.	32 (5) Except in an arbitration brought by an investor against a State under the terms of a treaty, the award may be made public only with

Article	*Existing Rule*	*Proposed Changes*
32 (5)	The award may be made public only with the consent of both parties.	32 (5) Except in an arbitration brought by an investor against a State under the terms of a treaty, the award may be made public only with the consent of both parties.
32 (5) bis	[new]	32 (5) bis In an arbitration brought by an investor against a State under the terms of a treaty, any award, order or decision of the arbitral tribunal may be made public by either of the parties without the consent of the other party; and the tribunal shall forthwith dispatch a copy of all awards, orders and decisions to the UNCITRAL secretariat, which shall without delay post them on its website.