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Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration

Note by the Secretariat

Contents

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission entrusted the Working Group with the task of preparing a legal standard on the topic of transparency in treaty-based investor-State arbitration.[1] Support was expressed for the view that the Working Group could also consider undertaking work in respect of those issues that arose more generally in treaty-based investor-State arbitration and that would deserve additional work. The prevailing view, in line with the decision previously made by the Commission, was that it was too early to make a decision on the precise form and scope of a future instrument on treaty-based arbitration and that the mandate of the Working Group should be limited to the preparation of rules of uniform law on transparency in treaty-based investor-State arbitration. However, it was agreed that, while operating within that mandate, the Working Group might identify any other topic with respect to treaty-based investor-State arbitration that might also require future work by the Commission. It was agreed that any such topic might be brought to the attention of the Commission at its next session, in 2011.[2]

2. At its fifty-third session (Vienna, 4-8 October 2010), the Working Group commenced its work on the preparation of a legal standard on transparency in treaty-based investor-State arbitration. The discussion of the Working Group at that session, reflected in document A/CN.9/712, took place on a preliminary and general basis, without attempting to reach consensus at that stage. That approach was chosen in order to delineate the issues for discussion at the next session of the Working Group (A/CN.9/712, para. 15). The Working Group proceeded with a general discussion on the possible nature and the various forms a legal standard on transparency might take (A/CN.9/712, paras. 22 to 30 and 76 to 100) as well as its possible content (A/CN.9/712, paras. 31 to 75).

3. In accordance with the decision of the Commission at its forty-third session (see above, para. 1), the Working Group also proceeded on a discussion to identify other topics that arose more generally in treaty-based investor-State arbitration that would deserve additional work and thus might be brought to the attention of the Commission at a future session. In that regard, the Working Group agreed to seek guidance from the Commission on whether the possible intervention in an arbitration of a State party to the investment treaty at issue that was not a party to the dispute could be dealt with by the Working Group in the context of its current work (A/CN.9/712, paras. 102 and 103).

4. In accordance with the request of the Working Group at its fifty-third session, this note seeks to set out an analysis of the matters identified by the Working Group with respect to the possible form (section II), applicability (section III) and substance (section IV) of a legal standard on transparency, for consideration by the Working Group at its fifty-fourth session (A/CN.9/712, para. 101). Unless otherwise indicated, all references to deliberations by the Working Group in this note are to deliberations made at the fifty-third session of the Working Group.

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

[2] Ibid., para. 191.

II. Scope and possible forms of a legal standard on transparency

A. Scope of a legal standard on transparency

5. The mandate given by the Commission to the Working Group at its forty-first[3] and forty-third[4] sessions was to provide a legal standard on transparency in treaty-based investor-State arbitration. At its forty-first session, the Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based arbitration and that broad discretion should be left to the Working Group. The various possibilities envisaged by the Commission indicated that work in that respect was meant to address a general issue that arose in all investor-State arbitrations. The Commission did not limit the scope of a legal standard on transparency to arbitration under the UNCITRAL Arbitration Rules. It included the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties.[5]

6. The Working Group may wish to consider whether a legal standard on transparency should be of general application, i.e., apply to treaty-based investor-State arbitration, irrespective of whether a specific set of arbitration rules applies to the settlement of the dispute (see below, paras. 16, 20 and 21). The Working Group may wish also to consider whether broad applicability of the legal standard on transparency, not tied to any specific set of rules, would be best suited to achieve the mandate given by the Commission to the Working Group to provide an instrument that would promote transparency in treaty-based investor-State arbitration.[6]

B. Possible forms of a legal standard on transparency

7. At its fifty-third session, the Working Group generally discussed the possible nature of a legal standard on transparency in treaty-based investor-State arbitration and the various forms it might take (A/CN.9/712, paras. 22-30 and paras. 76-100), and decided that all suggestions in that regard would require further legal analysis (A/CN.9/712, para. 94).

8. It should be noted that the discussion on applicability of a legal standard on transparency in section III as well as the proposed draft text of provisions on transparency in section IV below are not intended to indicate a preference for any possible option. The questions of the nature of a legal standard on transparency, and its possible forms remain matters for decision by the Working Group.

9. The Working Group may also wish to note that the various possible forms of a legal standard on transparency listed below are not necessarily mutually exclusive.

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[3] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 314.

[4] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 190 and 191.

[5] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 314.

[6] Ibid., *Sixty-fifth session, Supplement No. 17* (A/65/17), paras. 190 and 191.

1. Model statement of principle

10. The Working Group may wish to consider whether, with a view to encouraging and facilitating transparency, it would be useful to prepare a model statement of principle that would be offered to States for adoption.

11. A model statement of principle could possibly state substantive rules on transparency and provide the text of a provision whereby a State could indicate that those rules would either apply or be offered for application in case of arbitration with an investor under a specific investment treaty. The statement of principle could be adopted by States through joint or unilateral declarations (see below, paras. 32-37), and could therefore constitute an option to deal with the application of rules on transparency to existing treaties.

12. Depending on the manner in which it is drafted, the statement, once given effect by States parties to the investment treaty concerned could be considered as constituting either an obligation for transparent arbitration or an additional offer to an investor for arbitration in compliance with the transparency provisions that the statement would contain (see below, paras. 50-53).

2. Model clauses for inclusion in investment treaties

13. Model clauses for inclusion in dispute settlement provisions of investment treaties have also been cited as a possible form for a legal standard on transparency. It may be noted that dispute settlement provisions in investment treaties are often premised on the commercial arbitration model and, in most cases, do not address such issues as the disclosure of the existence of the proceedings, the disclosure of any procedural document, and open hearings or submissions by non-arbitrating parties.

14. By adopting such clauses in investment treaties, States would demonstrate their willingness to promote transparency in arbitration. Model clauses could be drafted in such a manner that they would provide a binding obligation for the investor to arbitrate under transparency provisions or an offer to that effect (see below, paras. 50-53).

3. Guidelines

15. Another possible option to deal with transparency in treaty-based investor-State arbitration would consist in drafting guidelines for States to consider when negotiating investment treaties, for arbitral tribunals when deciding on such issues, for parties to arbitration and other parties with a legitimate interest in the outcome of the arbitration. They could apply in instances of arbitration under existing or future treaties, as long as parties to the arbitration agree to their application.

4. Stand-alone rules

16. Support was expressed at the fifty-third session of the Working Group for a legal standard either in the form of a supplement to the UNCITRAL Arbitration Rules or of stand-alone rules on transparency (A/CN.9/712, para. 76). The Working Group may wish to consider the scope of application of such rules (see above, paras. 5 and 6). Rules on transparency could be intended for application only in relation to arbitral proceedings conducted under the UNCITRAL Arbitration Rules,

or more broadly for application to arbitral proceedings irrespective of whether those proceedings were governed by another set of rules.

(i) Rules complementing the UNCITRAL Arbitration Rules in their generic form, and applying to treaty-based investor-State arbitration only

17. The Working Group may wish to consider the option of drafting specific rules addressing transparency in treaty-based investor-State arbitration, thereby complementing the UNCITRAL Arbitration Rules in their generic form.

18. The Working Group may wish to consider the extent to which that option would preserve the general applicability of the UNCITRAL Arbitration Rules. Furthermore, the existence of a specific set of distinct rules applying only to investment arbitration may raise difficult issues regarding the definition of investment arbitration (covered by those rules) as opposed to other types of arbitration (to which those specific rules would not apply). Another matter for consideration would be whether limiting the drafting of new rules for investment arbitration to issues of transparency would be appropriate, taking account of additional matters that might be expected to be addressed in arbitration rules on investment.

19. Application to investment treaties of rules on transparency complementing the UNCITRAL Arbitration Rules would suppose that States parties to those treaties have expressed their consent to such application (see below, paras. 27-31, 44 and 47).

(ii) Rules applicable to any treaty-based investor-State arbitration

20. The Working Group may wish to consider whether stand-alone rules on transparency should be made applicable to treaty-based investor-State arbitration, irrespective of the applicable arbitration rules (see above, paras. 5, 6 and 16).

21. That option would imply that rules on transparency be drafted in a generic manner, and would apply if States parties to an investment treaty have expressed their consent to such application (see below, paras. 27-31, 44 and 46).

III. Applicability of a legal standard on transparency

A. Relation between States parties to investment treaties

1. Possible UNCITRAL instruments on the application of a legal standard on transparency to both existing and future investment treaties

(i) Recommendation on the application of a legal standard on transparency

22. Depending on the form of the legal standard on transparency, UNCITRAL could undertake to further the application of a legal standard on transparency to investment treaties through a recommendation urging States to apply the standard to existing and future treaties. The purpose of the recommendation would be to highlight the importance of transparency in the context of treaty-based investor-State arbitration. The recommendation would leave it to States to decide on the

means of implementing the transparency standard in the context of both existing and future treaties (see below, paras. 26-40 and 45-48).

(ii) Convention on transparency in treaty-based investor-State arbitration

23. With a view to promoting application of a legal standard on transparency to investment treaties, another proposal made at the fifty-third session of the Working Group was that an international convention on transparency in treaty-based investor-State arbitration should be prepared whereby States could express consent or agree to apply a legal standard on transparency (A/CN.9/712, para. 93).

24. Regarding existing treaties, the purpose of such an approach would be to avoid the need for a State to enter into procedures to amend each of its already concluded investment treaties (see below, a description of those procedures under paras. 32-40).[7] However, a new convention would make the legal standard on transparency only applicable to investment treaties between such States parties that are also parties to the new convention.

25. The text of a new convention on transparency would also make it clear that transparency standards apply to future investment treaties, under conditions to be determined by the convention.

2. Possible actions by States regarding existing investment treaties

26. At its fifty-third session, the Working Group considered the possible actions that could be undertaken by States to ensure applicability of a legal standard on transparency to existing multilateral or bilateral investment treaties. Many delegations had expressed support for the desirability of applying a legal standard on transparency also to existing investment treaties. However, it was questioned whether such application to existing treaties was legally and practically feasible (A/CN.9/712, paras. 85-86).

(i) Consent by States parties to investment treaties

27. An investment treaty is an international agreement concluded between States in written form and governed by international law pursuant to article 2 (1) of the Vienna Convention on the Law of Treaties (1969)[8] ("the Vienna Convention"), which has been recognized as customary international law.

28. Investment treaties usually include a dispute settlement provision between the host State and an investor, which provides for a choice of arbitration rules for dispute resolution. Application of a legal standard on transparency to such provision

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[7] A comparable approach was taken in the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) regarding the use of electronic communications in connection with the formation or performance of a contract under certain Conventions. A provision along the lines of article 20 (1) of that Convention could be envisaged for such an instrument. It reads as follows: "1. *The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply…*".

[8] Done at Vienna on 23 May 1969, entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331.

of an existing treaty cannot be done automatically, because such legal standard would constitute an amendment to the treaty provision on dispute settlement, which could not be done without the agreement of the treaty parties (see articles 39-41 of the Vienna Convention), who are the "masters" of their treaty.

29. For that agreement to materialize, it would not be sufficient that UNCITRAL as intergovernmental body would have developed a legal standard on transparency under any of the forms listed above under paragraphs 10 to 21. UNCITRAL does not have the authority to impose on States application of UNCITRAL texts.[9]

30. It was suggested to the Working Group at its fifty-third session that automatic application of a legal standard on transparency to already existing treaties could be achieved by interpreting consent in the investment treaty to investor-State arbitration under the UNCITRAL Arbitration Rules as having anticipated that the UNCITRAL system of arbitration would develop over time. Under that view, a legal standard on transparency would automatically apply, as it would be part of that evolving system of UNCITRAL arbitration (A/CN.9/712, para. 89). The Working Group may wish to note that application of a legal standard to already existing treaties without the States parties agreeing to such application, for example by way of a joint interpretative declaration (see below, paras. 32-35) might be regarded as a violation of the treaty and of applicable international law, as it would result in incorporating into an existing treaty a legal standard that came into effect only after that treaty had been concluded. It may be recalled that article 31 (1) of the Vienna Convention provides as a general rule of treaty interpretation that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

31. The Working Group may wish to recall that it had been well aware of the difficulty of retroactive application in the context of investment treaties and thus drafted article 1 (2) of the UNCITRAL Arbitration Rules as revised in 2010 to cater for the effect of an unintended retroactive application (A/CN.9/646, para. 76).

(ii) Joint interpretative declaration by States

32. Application of a legal standard on transparency to existing investment treaties could be achieved through a joint interpretative declaration by States parties. Article 31 (3) (a) of the Vienna Convention provides that "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" shall be taken into account, together with the context.

33. There are many examples of joint interpretative declarations by States in public international law. As an illustration, in 1993, the States parties to the Treaty on Conventional Forces in Europe (CFE) 1990 concluded a "Document of the States parties" which included an understanding on the interpretation and application of certain provisions of the CFE Treaty, that in effect amounted to amendment of the treaty. Another example of authoritative treaty interpretation involves the joint decision of member States of the, at that time, European Community to replace the term "ECU" with the term "Euro" to refer to the European currency unit in the treaty of the European Community. The member States reached agreement on that term, thereby avoiding an amendment to the treaty, which might have involved a

[9] See General Assembly resolution 2205 (XXI), sect. II, para. 8.

time consuming ratification procedure and parliamentary scrutiny. The wording of the agreement reached at the meeting of member States in Madrid in 1995 was the following: "The specific name 'Euro' will be used instead of the generic term 'ECU' used in the treaty to refer to the European currency unit. The Governments of the 15 member States have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant Treaty provisions."

34. A joint interpretative declaration by States parties to an investment treaty could express the agreement between the States parties that the provision of the treaty providing for investor-State arbitration should be interpreted as including application of the legal standard on transparency. Such interpretation under article 31 (3) (a) of the Vienna Convention does not require any special form,[10] i.e. treaty form, but would have to clearly demonstrate the intention of the parties that their declaration constitutes an agreed basis for interpretation.

35. Such interpretative declaration may be viewed as coming close to a modification or amendment of the original treaty. International courts and tribunals have accepted as authentic interpretation subsequent declaration that deviated from the original intention of the parties under the treaty and/or the plain words of the treaty.[11] However, the distinction between treaty interpretation and amendment is far from being clear under public international law. The Working Group may wish to consider that, despite the recognition of a modifying or amending effect of an interpretative declaration by States parties under customary international law, certain States might be reluctant to choose that option in view of the risk that possible controversies regarding the effect of such interpretation might arise.

(iii) Unilateral declarations by States

36. It was also suggested at the fifty-third session of the Working Group that the applicability of a legal standard on transparency could be achieved through unilateral declarations by States (A/CN.9/712, para. 93).

37. A declaration by only one State would not be sufficient to make a legal standard on transparency applicable to already existing treaties, because a treaty is based on the agreement of the States parties and action by the other State(s) party/ies that it/they share the same understanding would be needed. Therefore,

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[10] See, for example, Judgment of the International Court of Justice in the Kasikili/Sedudu Island (Botswana/Namibia), Judgement of 13 December 1999, I.C.J. Reports 1999, p. 1045, para. 49, available at www.icj-cij.org/docket/files/98/7577.pdf, clarifying that article 31 (3) (a) of the Vienna Convention did not envisage that a subsequent agreement needed to be included with the same formal requirements as a treaty for such an agreement to play a role in treaty interpretation.

[11] See, for example, *Case concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of the International Court of Justice of 13 July 2009, para. 64, available at www.icj-cij.org/docket/files/133/15321.pdf; *Interpretation of the Air Transport Services Agreement of 27 March 1946 (France v. United States of America)*, Award of 22 December 1963, pp. 60 ff., available at http://untreaty.un.org/cod/riaa/cases/vol_XVI/5-74.pdf; *Location of Boundary Markers in Taba (Egypt v. Israel)*, Award of 28 September 1988, para. 210, available at http://untreaty.un.org/cod/riaa/cases/vol_XX/1-118.pdf; *Interpretation of the Air Transport Services Agreement of 6 February 1948 (Italy v. United States of America)*, Award of 17 July 1965, pp. 99 ff., available at http://untreaty.un.org/cod/riaa/cases/vol_XVI/75-108.pdf.

States parties to an investment treaty would need to issue unilateral declarations to the same end so that a legal standard on transparency would apply to an existing treaty. Such unilateral declarations would then form a subsequent agreement between the States parties regarding the interpretation of the treaty or the application of its provisions under article 31 (3) (a) of the Vienna Convention (see above, paras. 32-35). Such subsequent declarations do not necessarily need to take the form of a "joint" statement. However, there needs to be evidence of the agreement of the parties on the interpretation of the treaty, which could be expressed by an exchange of notes. As the International Law Commission has stated in its draft guidelines on declarations relating to bilateral agreements,[12] an authentic interpretation of a treaty can result from an interpretive declaration made by only one State party to the treaty, if it has been accepted by the other party.[13]

(iv) Amendment or modification of an investment treaty

38. Article 39 of the Vienna Convention provides that "A treaty may be amended by agreement by the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide." Articles 40 and 41 of the Vienna Convention provide further details on the amendment or modification of treaties. The possibility for amendment of a treaty only by a new and separate agreement flows from the principle of *pacta sunt servanda*. The agreement will be binding only between the agreeing States parties.

39. The provisions of articles 39 to 41 of the Vienna Convention apply only if the treaty does not provide otherwise for the amendment or modification of the treaty. The Working Group may wish to note that many investment treaties contain provisions for amendment of the treaty. Even where the treaty provides for a certain amendment procedure, the subsequent unanimous agreement of the States parties can overrule such procedures. The Working Group may wish to note that an informal agreement to amend or modify a treaty may raise domestic constitutional difficulties, even if articles 39 to 41 of the Vienna Convention do not require that, as a matter of public international law, a treaty should be amended or modified in the same manner as it was concluded.

40. Some investment treaties expressly provide for the approval by the States parties for such amendments in accordance with their respective legal procedures. As an illustration of an investment treaty expressly providing for an agreement of the parties to amend the treaty, the Free Trade Agreement between the United States, Central America and Dominican Republic (CAFTA-DR) of 2004 provides in article 22.2 that: "(1) The Parties may agree on any amendment of this Agreement. […] (2.) When so agreed, and approved in accordance with the applicable legal procedures of each Party, an amendment shall constitute an integral part of this Agreement to take effect on the date on which all Parties have notified the Depositary in writing that they have approved the amendment or on such other date

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[12] The draft guidelines on declarations relating to bilateral agreements are included in the draft guidelines on reservations and authentic interpretation of a treaty pursuant to article 31 (3) (a) of the Vienna Convention issued by the International Law Commission, Report of the International Law Commission on the work of its sixty-second session, *Official Records of the General Assembly, Sixty-fifth session, Supplement No. 10* (A/65/10), p. 40, available at http://untreaty.un.org/ilc/reports/2010/2010report.htm.

[13] Ibid., Draft Guidelines 1.5.3.

as the Parties may agree."[14] Another example is the Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership ("Japan-Mexico FTA") of 2004, which provides in article 174 that: "(1.) Unless otherwise provided for in this Agreement, this Agreement may be amended by agreement between the Parties. Such amendment shall be approved by the Parties in accordance with their respective legal procedures. Such amendment shall enter into force on the thirtieth day after the date of exchange of diplomatic notes indicating such approval. (2.) Any amendment to this Agreement shall constitute an integral part of this Agreement."[15] There are also investment agreements that do not expressly mention the requirement of approval by the States parties in accordance with the respective legal procedures. For example, the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) of 2009 provides in article 6 of Chapter 18 that: "This Agreement may be amended by agreement in writing by the Parties and such amendments shall come into force on such date or dates as may be agreed among them."[16]

(v) Could States be legally prevented from making a legal standard on transparency applicable to already existing treaties?

41. The Working Group may wish to consider whether any right of an investor or any legitimate expectation of non-transparent arbitration under an investment treaty could prevent States from making a legal standard on transparency applicable to an already existing treaty. Such preclusion or estoppel would presuppose that the investor has a right or legitimate expectation of non-transparent arbitration for the investor under the investment treaty. The Working Group might wish to note that it is doubtful whether the investment treaty could be considered as creating such a right or legitimate expectation. If an investment treaty provides for arbitration under certain existing arbitration rules, it does not necessarily exclude by offering those arbitration rules that the actual arbitration proceedings would take place in a transparent manner. Further, many investment treaties refer to the possibility for an investor to submit a claim to arbitration under "any other body of rules", sometimes requiring agreement by both parties for these other rules to apply.[17]

42. The Working Group may wish to note that a right or legitimate expectation of an investor could be considered to come into existence only once the investor had accepted the offer for arbitration under the investment treaty, which, in many instances, takes place at the time of the submission of its claim.

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[14] Available at www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

[15] Available at www.mofa.go.jp/region/latin/mexico/agreement/agreement.pdf.

[16] Available at www.dfat.gov.au/trade/fta/asean/aanzfta/contents.html.

[17] See, for example, the United States of America Model Treaty concerning the Encouragement and Reciprocal Protection of Investment ("US Model BIT") of 2004, which provides in article 24 (3) (b) that a claimant may submit a claim "if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules"; the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) of 2009, which provides in article 21 (1) that "if the disputing parties agree, to any other arbitration institution or under any other arbitration rules" and the Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership ("Japan-Mexico FTA") of 2004, which provides in article 79 (1) (d) "if agreed by the disputing parties, any arbitration in accordance with other arbitration rules".

3. Possible actions by States regarding future treaties

(i) Consent by States parties to investment treaties

43. Regarding the application of a legal standard on transparency to future treaties, it was said at the fifty-third session of the Working Group that a presumption of application of a legal standard on transparency could be provided for in a way that ensured the needed level of certainty to parties as to whether or not they were operating under transparency rules in a given arbitration (A/CN.9/712, paras. 82-84).

44. In that respect, the Working Group may wish to note that application of a legal standard on transparency to future investment treaties cannot be done automatically. At the fifty-third session of the Working Group, it was viewed as important that the provisions to be drafted regarding application of the rules on transparency to future treaties should be clear, and provide the necessary level of certainty as to the existence of consent of the States parties to adopt such standard as part of their arbitration process (A/CN.9/712, para. 84).

(ii) Possible options for application of a legal standard on transparency to future treaties

45. Consent of States to apply the legal standard on transparency could be materialized, either by the adoption by States of a convention on transparency in treaty-based investor-State arbitration (see above, paras. 23-25), or failing such a convention, by inclusion in investment treaties of provisions on transparency based on model clauses (see above, paras. 13 and 14), or by reference to a set of stand-alone rules on transparency (see above, paras. 16-21).

46. In case a legal standard on transparency would take the form of stand-alone rules, one possible approach would be for the legal standard on transparency to apply only if States parties to the investment treaty had expressly opted into transparent arbitration. Stand-alone rules on transparency could include wording along the lines of "the rules on transparency will apply to any arbitration initiated pursuant to an investment treaty hereafter ratified provided that the Parties have expressly agreed to their application."

47. A different approach could be for the rules on transparency to establish a presumption regarding their application in the limited context of arbitration under the UNCITRAL Arbitration Rules. The formulation of the presumption would depend on the manner in which the UNCITRAL Arbitration Rules would be supplemented by rules on transparency. It was suggested at the fifty-third session of the Working Group that stand-alone rules on transparency could include wording along the lines of "these rules will be incorporated in the UNCITRAL Arbitration Rules for any arbitration initiated under those rules pursuant to an investment treaty hereafter ratified unless the treaty expressly provides that these rules will not apply" (A/CN.9/712, para. 83).

48. At the fifty-third session of the Working Group, it was suggested that any solution that might be chosen in respect of future treaties should be evaluated as to its impact on the already concluded investment treaties (A/CN.9/712, para. 84).

B. Relation between the host State and the investor parties to the arbitration

49. Once the States parties to an investment treaty agree on the applicability of the legal standard, the legal standard would be applicable to disputes between the host State and an investor. Questions for consideration are whether an investor could refuse an offer for transparent arbitration, or accept it partially only, and whether both parties could decide not to apply the rules on transparency.

1. Could the investor deviate from a legal standard on transparency?

50. At its fifty-third session, the Working Group had considered the question whether an investor should be given an opportunity to refuse an offer to arbitrate under the legal standard on transparency contained in the treaty or to deviate from the provisions of the legal standard (A/CN.9/712, paras. 30 and 95-96). In that regard, it was pointed out that, in contrast to commercial arbitration, treaty-based investor-State arbitration was conducted on the basis of an underlying treaty between States parties, which limited the ability of the parties to the arbitration to depart from the prescribed route of the underlying treaty.

51. It had been further said that providing the investor with the last word on the application of the legal standard on transparency would unduly privilege the investor, lead to a decrease in transparency and would be contrary to the Commission's mandate to enhance transparency in treaty-based investor-State arbitration. However, it was also said that, for the purpose of ensuring the equality of parties in treaty-based investor-State arbitration, it might be advisable to provide the right for an investor to react to the host State's offer of transparent arbitration (A/CN.9/712, para. 96).

52. In that regard it was suggested to make some of the provisions of the legal standard on transparency non-derogable and to specify for each provision, which ones would be derogable and which ones not (A/CN.9/712, para. 98). The Working Group may wish to consider the policy decision to be made whether the legal standard itself or the underlying investment treaty should provide for non-derogability of the legal standard or of some of its provisions.

2. Could the disputing parties deviate from a legal standard on transparency?

53. The Working Group further discussed whether the disputing parties should be allowed to depart from the legal standard on transparency. As mentioned above, the underlying treaty, depending on how it provides for the application of a legal standard on transparency would or not prevent such deviation. If the treaty does not allow for such deviation, the host State party to the arbitration could not unilaterally deviate from the provisions of the treaty.