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**United Nations Commission  
on International Trade Law**  
**Working Group II (Arbitration and Conciliation)**  
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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**

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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.<sup>1</sup> 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.<sup>2</sup>

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session (New York, 16 June-3 July 2008)<sup>3</sup> regarding the importance of ensuring transparency in treaty-based investor-State arbitration. The Commission noted that the Working Group had considered matters of content, form and applicability to both future and existing investment treaties of the legal standard on transparency. It was confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with a great practical interest, taking account of the high number of treaties already concluded (see A/CN.9/WG.II/WP.166/Add.1, paras. 10-23). Further, the Commission agreed that the question of possible intervention in the arbitration by a non-disputing State party to the investment treaty should be regarded as falling within the mandate of the Working Group. It was said that whether the legal standard on transparency should deal with such a right of intervention, and if so, the determination of the scope and modalities of such intervention should be left for further consideration by the Working Group (see below, paras. 43 and 49-51).<sup>4</sup>

3. At its fifty-third (Vienna, 4-8 October 2010)<sup>5</sup> and fifty-fourth (New York, 7-11 February 2011)<sup>6</sup> sessions, the Working Group considered the matters of form, applicability and content of a legal standard on transparency in treaty-based investor-State arbitration.

4. In accordance with the decisions of the Working Group at its fifty-fourth session, this note contains a draft of rules on transparency and deals with the question of applicability of the rules on transparency to the settlement of disputes

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

<sup>2</sup> *Ibid.*, para. 191.

<sup>3</sup> *Ibid.*, *Sixty-third Session, Supplement No. 17 (A/63/17)*, paras. 313-314.

<sup>4</sup> Report of the Commission on the work of its forty-fourth session, paras. 203-205.

<sup>5</sup> A/CN.9/712.

<sup>6</sup> A/CN.9/717.

arising under existing investment treaties. The preamble and articles 1 to 6 of the draft rules on transparency are dealt with in this note and articles 7 and 8 as well as the question of applicability of the rules on transparency are dealt with in the addendum to this note.

## **II. Content of rules on transparency in treaty-based investor-State arbitration**

### **A. General remarks**

#### *Form of the legal standard on transparency*

5. The draft rules on transparency are intended to comply with the decision of the Working Group that the legal standard on transparency should be drafted in the form of clear rules, rather than guidelines (A/CN.9/717, para. 58). It may be recalled that those delegations that had expressed preference for guidelines agreed that the legal standard on transparency be drafted in the form of clear rules rather than looser and more discursive guidelines. That agreement was reached on the strict understanding that their prior insistence on guidelines was motivated by a desire to ensure that the legal standard on transparency should only apply where there was clear and specific reference to it (opt-in solution, see below, para. 16) (A/CN.9/717, paras. 26 and 58).

#### *Legal standard on transparency applicable as a supplement to the UNCITRAL Arbitration Rules, or more generally to treaty-based investor-State arbitration, irrespective of the applicable arbitration rules*

6. At its fifty-fourth session, the Working Group did not take a final decision on whether the legal standard on transparency should apply in the context of arbitration under the UNCITRAL Arbitration Rules, or irrespective of the set of rules chosen by the parties (A/CN.9/717, paras. 27-32). Therefore, where appropriate, this note and its addendum present different drafting proposals reflecting both options for consideration by the Working Group.

#### *Content of the legal standard on transparency*

7. At its fifty-third and fifty-fourth sessions, the Working Group generally agreed that the substantive issues to be addressed in the legal standard on transparency were the following: publicity regarding the initiation of arbitral proceedings; documents to be published (such as pleadings, procedural orders, supporting evidence); submissions by third parties (“amicus curiae”) in proceedings; public hearings; publication of arbitral awards; possible exceptions to the transparency rules; and repository of published information (“registry”) (A/CN.9/712, para. 31; A/CN.9/717, para. 56). At its fifty-fourth session, the Working Group agreed to resume its discussion on each of the identified substantive issues and gave indications as to their possible content. The draft rules on transparency contained in section B below seek to reflect the various options that were discussed by the Working Group.

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

### Preamble

#### 8. Draft preamble — Purposes of the rules

*“The UNCITRAL Rules on Transparency have been developed to apply in treaty-based investor-State arbitrations [initiated under the UNCITRAL Arbitration Rules] in order to ensure transparency in treaty-based investor-State arbitration so as to enhance the legitimacy of, and to foster the public interest inherent in, treaty-based investor-State arbitration, in a way that is compatible with the disputing parties’ interest in a fast and efficient resolution of their dispute. These purposes shall guide disputing parties and arbitral tribunals in the application of these Rules.”*

### Remarks

9. The preamble to the rules on transparency reflects a suggestion made in the Working Group that the purposes the rules on transparency were intended to serve should be clarified (A/CN.9/717, para. 112). The preamble clarifies the balance that the rules seek to achieve in preserving both a meaningful opportunity for public participation and a fair and efficient resolution of the dispute for the parties. That approach is further developed under article 1, paragraph (2) dealing with the structure of the rules (see below, paras. 10 and 23).

### Article 1. Scope of application and structure of the rules

#### 10. Draft article 1 — Scope of application and structure of the rules

Option 1 (opt-out solution): *“1. The Rules on Transparency shall apply to any arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments (“treaty”) [which entered into force] after [date of adoption of the Rules on Transparency], unless the treaty provides that the Rules on Transparency do not apply.*

Option 2 (opt-in solution), Variant 1 (applying irrespective of the applicable set of arbitration rules): *“1. The Rules on Transparency shall apply to any arbitration initiated under a treaty providing for the protection of investments (“treaty”) where States Parties to the treaty under which the dispute arose have expressed consent to their application.*

Variant 2 (applying only in the context of arbitration under the UNCITRAL Arbitration Rules): *“1. The Rules on Transparency shall apply to any arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments (“treaty”) where States Parties to the treaty under which the dispute arose have expressed consent to their application.*

*“2. Articles 2 to 6 of the Rules on Transparency contain rules relating to disclosure of the initiation of arbitral proceedings (article 2), publication of documents (article 3), publication of arbitral awards (article 4), submissions by third parties in arbitral proceedings (article 5), and [public/open] hearings*

*and publication of transcripts (article 6). These rules are subject to the express exceptions set out in article 7. Where the Rules on Transparency provide for the exercise of a discretion by the arbitral tribunal, that discretion shall be exercised by the arbitral tribunal as it considers appropriate, taking into account all circumstances it deems relevant, including where applicable the need to balance (i) the legitimate public interest in transparency in the field of treaty-based investor-State arbitration and in the arbitral proceedings and (ii) the arbitrating parties' own legitimate interest in a fast and efficient resolution of their dispute."*

## **Remarks**

### *Paragraph (1) — Scope of the rules on transparency*

11. Paragraph (1) deals with the scope of application of the rules on transparency and contains two options, and variants.

#### **- Option 1: opt-out solution**

12. Under the first option (opt-out solution), the provision establishes a presumption that the rules on transparency apply as an extension of the UNCITRAL Arbitration Rules, unless States otherwise provide in the investment treaty by opting out of the rules on transparency (A/CN.9/717, paras. 19 and 20). The Working Group may wish to discuss the formulation of an opting-out declaration so as to avoid unintended impact of a decision to opt-out of the rules on transparency on the applicability of the UNCITRAL Arbitration Rules.

*"[which entered into force]"*

13. The Working Group may wish to consider whether the words "which entered into force", which appear in square brackets in paragraph (1), option 1, should be retained.

14. If the words "which entered into force" were to be retained in the text of that paragraph, the rules on transparency would apply, without a retroactive effect, to treaties concluded after the date of adoption of the rules on transparency.

15. If those words were deleted, the rules on transparency would then apply to any arbitration initiated after the date of adoption of the rules on transparency, even if the treaty entered into force before that date (provided that the treaty itself does not prohibit application of transparency rules). That option would require further consideration in order to clarify the instances where the rules on transparency could apply to treaties concluded before the date of adoption of the rules.

#### **- Option 2: opt-in solution**

16. Under the second option (opt-in solution), express consent of States is required for the rules on transparency to apply (A/CN.9/717, paras. 19 and 21). Two variants are proposed for consideration by the Working Group: variant 1 provides that the rules on transparency shall apply in respect of arbitration initiated under any set of arbitration rules, and variant 2 limits the application of the rules to arbitration under the UNCITRAL Arbitration Rules. In both cases, consent of States to apply the rules on transparency can be given in respect of arbitration initiated under investment treaties concluded either before or after the date of adoption of the rules on transparency.

*- Additional matters for consideration*

*Relationship between the rules on transparency and the UNCITRAL Arbitration Rules*

17. Under option 1 and option 2, variant 2, the rules on transparency apply only in the context of arbitration under the UNCITRAL Arbitration Rules (A/CN.9/717, paras. 19 and 20). The Working Group may wish to consider whether a footnote should be added in order to clarify that the operation of the rules on transparency under the UNCITRAL Arbitration Rules would apply under both the 1976 UNCITRAL Arbitration Rules and their 2010 revised version.

18. Further, the Working Group may wish to consider whether the 2010 UNCITRAL Arbitration Rules should be amended to refer to the application of the rules on transparency (A/CN.9/717, para. 20). On that matter, diverging views were expressed at the fifty-fourth session of the Working Group: it was said that there could be clarity in amending article 1 on the scope of application of the UNCITRAL Arbitration Rules to refer to the legal standard on transparency; other views were expressed that it might be confusing to propose three different sets of UNCITRAL Arbitration Rules (1976 Rules, 2010 Rules, and those revised to address the specific matter of transparency in treaty-based investor-State arbitration). After discussion, it was decided to defer that question to a later stage of the deliberations (A/CN.9/717, paras. 31 and 32).

*Relationship between the rules on transparency and any applicable set of arbitration rules*

19. The Working Group may wish to consider whether a provision should be included in the rules on transparency to address the relation between the rules on transparency and the applicable set of arbitration rules.

*Relationship between the rules on transparency and any transparency provisions in the investment treaty*

20. Another matter for consideration is the relationship between the rules on transparency and any transparency provisions in the investment treaty under which the arbitration arises. For instance, the Working Group may wish to consider the need to clarify that the rules on transparency will not supersede a provision in the relevant investment treaty that actually requires greater levels of transparency.

*Application of the rules on transparency by the disputing parties*

21. The Working Group may wish to consider whether article 1 should include a provision regarding the application of the rules on transparency by the disputing parties to reflect the discussion at its fifty-fourth session (A/CN.9/717, paras. 47-55). The purpose of such an additional provision would be to clarify that once the States Parties to the investment treaty agree that rules on transparency shall apply according to article 1, paragraph (1), the disputing parties are not entitled to exclude their application. That provision could be drafted along the following lines: *“The Rules on Transparency are designed to confer rights and benefits on the general public, and they shall accordingly be of mandatory effect so that the disputing parties shall not be entitled to opt out thereof or derogate therefrom in the*

*course of the arbitration*". The Working Group may wish to discuss further the desirability and effectiveness of such a provision.

*"a treaty providing for the protection of investments"*

22. As a general matter, the Working Group may wish to consider whether the rules on transparency should clarify that the term "a treaty providing for the protection of investments" should be understood in a broad sense as including free trade agreements, bilateral and multilateral investment treaties, as long as they contain provisions on the protection of an investor and its right to resort to investor-State arbitration (see also A/CN.9/WG.II/WP.166/Add.1, para. 18).

*Paragraph (2) — structure of the rules on transparency*

23. Paragraph (2) deals with the structure of the rules on transparency. It clarifies that each of the substantive norms set out in articles 2 to 6 is subject to the limited exceptions set out in article 7. It further reflects discussions held in the Working Group to the effect that, while there is a need to balance the public interest in transparency in the field of treaty-based investor-State arbitration with the arbitrating parties' own legitimate interest in a fast and efficient resolution of their dispute, the exceptions in article 7 should be applied strictly and constitute the only limitations to the transparency rules under articles 2 to 6 (A/CN.9/717, paras. 129-143).

## **Article 2. Initiation of arbitral proceedings**

24. Draft article 2 — Initiation of arbitral proceedings

Option 1: *"Once the notice of arbitration has been received by the respondent, the respondent shall promptly [communicate to the repository referred to under article 8][make available to the public] information regarding the name of the disputing parties, their nationalities [and][the economic sector involved][and][a brief description of the subject matter of the claim]."*

Option 2: *"Once the notice of arbitration has been received by the respondent, the respondent shall promptly [communicate to the repository referred to under article 8][make available to the public] (i) information regarding the name of the disputing parties, their nationalities [and][the economic sector involved][and][a brief description of the subject matter of the claim]; and (ii) the notice of arbitration,*

*Variant 1: except with respect to any portion of the notice to which either the claimant (at the time it submits the notice) or the respondent objects on the ground that it contains confidential and sensitive information as defined under article 7, paragraph 2."*

*Variant 2: [unless any disputing party objects to its publication.][provided all disputing parties agree to its publication.]"*

## **Remarks**

25. At its fifty-fourth session, the Working Group expressed general agreement on the need to provide information to the public on the initiation of arbitral

proceedings. The Working Group focused its attention on whether and when the notice of arbitration should be made public (A/CN.9/717, paras. 60-74). The Working Group generally agreed that the notice of arbitration should be disclosed (A/CN.9/717, para. 61). However, diverging views were expressed on the question whether the notice of arbitration should be published at the early stage of the initiation of the arbitral proceedings, before the constitution of the arbitral tribunal, in particular taking account of the fact that, where applied to ad hoc arbitration under the UNCITRAL Arbitration Rules, the rules on transparency could not rely on an institution to handle issues that might arise before the constitution of the arbitral tribunal (A/CN.9/717, para. 62).

***Option 1 — Publication of general information***

26. Option 1 provides that some information should be made public once the arbitral proceedings are initiated, and does not address publication of the notice of arbitration (A/CN.9/717, paras. 67 and 68). Under that option, the publication of the notice of arbitration would be dealt with under article 3 of the rules on transparency, after the constitution of the arbitral tribunal (see below, paras. 32-38 on publication of documents).

***Option 2 — Possible publication of the notice of arbitration in addition to general information***

27. Option 2 deals with publication of the notice of arbitration when the proceedings are initiated, before the constitution of the arbitral tribunal, and includes two variants.

*Variant 1*

28. Variant 1 provides that the notice of arbitration should be published, with redaction of information considered as confidential and sensitive by either party (A/CN.9/717, paras. 69 and 70). Variant 1 is also intended to clarify how information should be redacted at this early stage of the proceedings, in view of the fact that the procedure defined under article 7, paragraphs (3) and (4), which foresees a possible intervention of the arbitral tribunal, could not apply.

*Variant 2*

29. Variant 2 establishes the right of parties to oppose publication of the notice of arbitration, based on a suggestion made at the fifty-fourth session of the Working Group that there might be various reasons why a party would not wish to have information contained in the notice of arbitration made public at the early stage of the proceedings (A/CN.9/717, para. 71).

***Means of publication in options 1 and 2***

30. Both options contain variants within brackets regarding the means of publication: a first variant foresees publication of information through a repository (see A/CN.9/WG.II/WP.166/Add.1, paras. 8 and 9); the second variant envisages publication by the respondent, most probably the disputing State. The Working Group may wish to note that the same options are also found in article 3 (see below, paras. 32 and 38) and article 4 (see below, paras. 41 and 42).

**Response to the notice of arbitration in option 2**

31. Under the UNCITRAL Arbitration Rules, as revised in 2010, or under other possibly applicable arbitration rules, a response to the notice of arbitration is to be sent before the constitution of the arbitral tribunal. In case option 2 would be retained, the Working Group may wish to consider whether a reference to the publication of the response to the notice of arbitration should be added.

**Article 3. Publication of documents**

32. Draft article 3 — Publication of documents

***Documents to be published***

Option 1:

*“Subject to the express exceptions set out in article 7, all documents submitted to, or issued by, the arbitral tribunal shall be made available to the public. If the tribunal determines that certain documents are not to be published because of the undue burden such publication would impose, those documents not published should be made available to third parties upon request.*

Option 2:

*“Subject to the express exceptions set out in article 7, the arbitral tribunal shall decide which documents to make available to the public [in consultation with the disputing parties][unless [a][all] disputing part[y] [ies] object[s] to the publication].*

Option 3:

*“1. Subject to the express exceptions set out in article 7, [the following documents][the arbitral tribunal shall decide which of the following documents] shall be made available to the public: the notice of arbitration; pleadings, submissions, including their exhibits, to the tribunal by a disputing party; any submissions [by the non-disputing State Party(ies) to the treaty and] by third parties (amicus curiae); and orders by the tribunal.*

*“2. Subject to the express exceptions set out in article 7, the arbitral tribunal may order [in consultation with the disputing parties][unless any disputing party objects] publication of any documents provided to, or issued by, the tribunal.*

*“3. Subject to the express exceptions set out in article 7, third parties may request access to any documents provided to, or issued by, the arbitral tribunal, and the tribunal shall decide whether to grant such access [after consultation with the disputing parties].*

***Form and means of publication***

Option 1: *“The documents to be published pursuant to [paragraph] [section] 1 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in a redacted form in accordance with article 7. The repository shall make the documents*

*available to the public in a timely manner, in the form and in the language in which it receives them.”*

Option 2: *“The respondent shall make available to the public in a timely manner the documents to be published pursuant to [paragraph][section] 1, in their redacted form in accordance with article 7 if applicable, and in the language in which the documents have been issued.”*

## **Remarks**

### ***Documents to be published***

33. At the fifty-third session of the Working Group, different views were expressed on whether, and if so, which documents should be published (A/CN.9/712, paras. 40 to 42). The view was expressed that all documents submitted to, and issued by, the arbitral tribunal should be made available to the public. A contrary view was that not all documents would need to be published, in particular in view of the necessity to find the right balance between the requirements of public interest and the legitimate need to ensure manageability and efficiency of the arbitral procedure.

34. At the fifty-fourth session of the Working Group, different approaches emerged from the consideration of the matter (A/CN.9/717, paras. 87-92). Those approaches have been articulated as follows in article 3.

#### *Option 1 — Publication of all documents*

35. Under option 1, documents to be published are all documents submitted to, or issued by the arbitral tribunal, subject to article 7. If certain documents to be published cannot be made publicly available, third parties should have a right to access the information (A/CN.9/717, para. 89).

#### *Option 2 — Publication of documents, at the discretion of the arbitral tribunal*

36. Under option 2, the arbitral tribunal shall decide which documents to publish (A/CN.9/717, para. 88). Questions for consideration under option 2 are whether the arbitral tribunal should consult the parties on that matter and whether a disputing party could oppose the publication of documents. At the fifty-fourth session of the Working Group, it was pointed out that, under the UNCITRAL Arbitration Rules, the arbitral tribunal might order publication of documents if it considered it appropriate without any party having a right to oppose (A/CN.9/717, para. 88).

#### *Option 3 — List of documents to be published*

37. Under a third option, the provision on publication of documents would contain a list of documents that could be made available to the public (A/CN.9/717, paras. 90 and 91). Questions for consideration are whether: (1) the arbitral tribunal shall decide which of the documents listed should be made available to the public; (2) the arbitral tribunal shall have the ability to order publication of a document not listed in the provision; and (3) disputing parties should be consulted or be given the right to object to publication. The Working Group may wish to note that matters regarding publication of awards and of minutes or transcripts of hearings are dealt

with under articles 4 and 6, respectively, and therefore, those documents are not contained in the list under option 3.

#### ***Form and means of publication***

38. Two options are proposed for the consideration of the Working Group regarding the question of form and means of publication (see above, para. 30).

#### ***Manageability of the arbitral proceedings***

39. At its fifty-fourth session, the Working Group had said that the manageability of the arbitral proceedings was an important aspect to take into account when designing rules on transparency, because rules on transparency should also aim at preserving the disputing parties' right of effective access to justice (A/CN.9/717, para. 145). However, concerns were expressed that a general rule on manageability of the arbitral proceedings would contribute to a significant erosion of transparency (A/CN.9/717, para. 146). After discussion, the Working Group considered that the right balance might well need to be found in relation to each provision in the rules on transparency, rather than as part of the exceptions to transparency set out in article 7 (A/CN.9/717, para. 147).

40. The Working Group may wish to consider whether the drafting proposals properly address those concerns (see, for instance, under the section on "documents to be published": in option 1, the words "because of the undue burden"; in option 2, the decision on which documents to publish is left to the arbitral tribunal's discretion; and in option 3, a limitative list of documents is provided).

#### **Article 4. Publication of arbitral awards**

41. Draft article 4 — Publication of arbitral awards

*"1. Subject to the express exceptions set out in article 7, all arbitral awards shall be published.*

Option 1: *"2. Arbitral awards shall be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, where applicable, in their redacted form in accordance with article 7. The repository shall make the arbitral awards available to the public in a timely manner, in the form and in the language in which it receives them."*

Option 2: *"2. The respondent shall make arbitral awards available to the public in a timely manner, in their redacted form in accordance with article 7 if applicable, and in the language in which it receives them. The arbitral tribunal shall be responsible for redacting confidential and sensitive information from the awards."*

#### **Remarks**

42. At the fifty-fourth session of the Working Group, broad support was expressed for a simple provision whereby awards would be made publicly available, with those delegations which had expressed reservations in that respect requesting that the Working Group ensured adequate protection of confidential and sensitive information (A/CN.9/717, para. 100). To address that concern, paragraph (1) provides that arbitral awards shall be published, subject to the provisions of

article 7. Paragraph (2) contains two options that deal with the question of form and means of publication (see para. 30 above).

**Article 5. Submissions by third parties (“amicus curiae”) in arbitral proceedings**

43. Draft article 5 — Submissions by non-disputing parties

Option 1:

*“The arbitral tribunal may accept and consider amicus curiae submission from a person or entity that is not a party to the dispute.”*

Option 2:

***“Submission by third parties***

*“1. After consulting the parties, the arbitral tribunal may allow a person or entity that is not a party to the dispute and not a non-disputing State Party to the treaty (a “third party”) to file a written submission with the tribunal regarding a matter within the scope of the dispute.*

*“2. A third party wishing to make a submission shall apply to the arbitral tribunal, and provide the following written information in a language of the arbitration[, in a concise manner, within the limit of [5 typed pages]]: (a) description of the applicant, including, where relevant, its membership and legal status (e.g. trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant); (b) disclosure whether or not the applicant has any affiliation, direct or indirect, with any disputing party; (c) information on any government, person or organization that has provided any financial or other assistance in preparing the submission; (d) description of the nature of the interest that the applicant has in the arbitration; and (e) identification of the specific issues of fact or law in the arbitration that the applicant wishes to address in its written submission.*

*“3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration (a) whether the third party has a significant interest in the proceeding and (b) the extent to which the submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.*

*“4. The submission filed by a non-disputing party shall: (a) be dated and signed by the person filing the submission; (b) be concise, and in no case longer than [as authorized by the arbitral tribunal] [20 typed pages, including any appendices]; (c) set out a precise statement of the applicant’s position on issues; and (d) only address matters within the scope of the dispute.*

*“5. The arbitral tribunal shall ensure that the 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 submission by the third party.*

***“Submission by a non-disputing State Party to the investment treaty***

*“[2] [6]. The arbitral tribunal may accept or request submission from a non-disputing State Party to the treaty, provided that such submission shall be restricted to issues of law and of treaty interpretation and shall not include submission on the factual aspects of the dispute.”*

**Remarks**

44. At the fifty-third session of the Working Group, many delegations had expressed strong support for allowing amicus curiae submissions on the ground that they could be useful for the arbitral tribunal in resolving the dispute and promoting the legitimacy of the arbitral process (A/CN.9/712, para. 46).

45. At its fifty-fourth session, the Working Group discussed various drafting options for a provision on submissions to the arbitral tribunal by third parties. During the discussion, it was said that any provision on that matter should clarify that there would not be an automatic entitlement for amici to have their submissions accepted (A/CN.9/717, paras. 117-123). The Working Group may wish to consider whether that clarification has been adequately addressed by the requirements for admission of an amicus submission.

*Option 1*

46. Option 1 is based on a provision used in certain investment agreements, which was said to reflect an evolution in practice (A/CN.9/717, para. 118). It deals only with the principle that amicus curiae submissions should be permitted, and leaves discretion to the arbitral tribunal regarding the procedure for allowing such submissions.

*Option 2*

47. Option 2 corresponds to a suggestion that guidance should be provided to third parties and the arbitral tribunal, taking account of the fact that a number of States have little experience in that field (A/CN.9/717, paras. 119 and 120). It reflects the proposal to draft a provision along the lines of Rule 37 (2) of the ICSID Arbitration Rules, as complemented by elements dealt with under paragraph B.2 of the NAFTA Free Trade Commission’s “Statement of the Free Trade Commission on non-disputing party participation of 7 October 2004” (A/CN.9/717, para. 122).

48. Option 2 includes in its paragraph (1) the provision that the arbitral tribunal shall consult the parties, as discussed by the Working Group (A/CN.9/717, paras. 120 and 125). It provides for a detailed procedure regarding: information to be provided regarding the third party that wishes to make a submission (para. (2)); matters to be considered by the arbitral tribunal (paras. (3) and (5)); and the submission itself (para. (4)).

**Intervention of the non-disputing State(s) Party(ies) to the investment treaty**

49. At the fifty-third session of the Working Group, it was observed that another State Party to the investment treaty that was not a party to the dispute could also wish, be invited, or have a treaty right to make submissions. It was noted that such State(s) often had important information to provide, such as information on the

*travaux préparatoires*, thus preventing one-sided treaty interpretation (A/CN.9/712, para. 49). The Working Group agreed to bring that matter to the attention of the Commission and ask its guidance on whether that matter should be made part of the scope of its current work (A/CN.9/712, para. 103, A/CN.9/717, para. 124).

50. At its forty-fourth session, the Commission agreed that the question of possible intervention in the arbitration by a non-disputing State party to the investment treaty should be regarded as falling within the mandate of the Working Group. It was said that whether the legal standard on transparency should deal with such a right of intervention, and if so, the determination of the scope and modalities of such intervention should be left for further consideration by the Working Group (see above, para. 2).<sup>7</sup>

51. The proposed draft paragraph on that matter reflects a provision contained in Chapter 11 of NAFTA (article 1128), and is meant to limit non-disputing State intervention to issues of law and matters of interpretation. This limited scope of intervention is meant to address concerns raised that an intervention by a non-disputing State, of which the investor was a national, could raise issues of diplomatic protection (A/CN.9/712, para. 49).

#### **Article 6. Hearings and publication of transcripts of hearings**

52. Draft article 6 — Hearings and transcripts of hearings

##### ***Hearings***

Option 1: “1. *Subject to article 6, paragraphs 2 and 3, hearings shall be [public] [held openly] [, unless a disputing party objects thereto].*”

Option 2: “1. *The arbitral tribunal shall decide whether to hold [public] [open] hearings. Where the tribunal decides to hold [public] [open] hearings, the hearings shall be [public] [held openly] subject to article 6, paragraphs 2 and 3.*”

##### ***Mandatory exceptions to public hearings***

“2. *Where a hearing is to be [public] [held openly] and there is a need to protect confidential and sensitive information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements for all or part of the hearing to be [held in private][closed].*”

##### ***Logistical arrangements and discretionary exception to public hearings***

“3. *The arbitral tribunal may make logistical arrangements to facilitate the public’s right of access to hearings (including where appropriate by organising attendance through video links or such other means as it deems appropriate) and may [hold the hearings in private][close the hearings] where this is or becomes necessary for logistical reasons.*”

<sup>7</sup> Report of the Commission on the work of its forty-fourth session, paras. 204 and 205.

***Transcripts of hearings***

“4. *Save where [the arbitral tribunal has decided not to hold [public] [open] hearings under article 6, paragraph 1 and where] a hearing has been [held in private] [closed] for mandatory reasons under article 6, paragraph 2, transcripts of hearings shall be made available to the public. [The repository referred to under article 8][The respondent] shall publish transcripts of hearings in the form and in the language in which it receives them from the arbitral tribunal.*

“5. *Transcripts of [closed] hearings [held in private] shall be made available pursuant to paragraph 4 in all cases where the decision to close the hearings was taken only for logistical reasons under article 6, paragraph 3, and not for mandatory reasons under article 6, paragraph 2.”*

**Remarks***Paragraph (1) — Hearings*

53. At the fifty-fourth session of the Working Group, various views were expressed regarding public/open hearings (A/CN.9/717, paras. 102-111). As a matter of drafting, the Working Group may wish to decide which of the words “public” — “open/openly”, and the words “closed hearings” — “hearings held in private”, in article 6 would be the most appropriate.

*Options 1 and 2*

54. Option 1 reflects the view that, in principle, hearings shall be public/open, and contains within brackets the provision that each disputing party has a right of veto in that regard. At the fifty-fourth session of the Working Group, questions were raised as to whether such a veto would contribute to implementing transparency and whether such a provision was compatible with the mandate of the Working Group (A/CN.9/717, paras. 104, 105 and 114).

55. Option 2 leaves the decision on public hearings to the arbitral tribunal, subject to guidance under article 6, paragraphs (2) and (3)

*Paragraphs (2) and (3) — Exceptions to public/open hearings*

56. Paragraphs (2) and (3) are intended to provide guidance on the exceptions to the rule of public/open hearings. Paragraph (2) refers to the exceptions contained in article 7. Paragraph (3) addresses the concerns expressed in the Working Group that hearings may have to be held close for practical reasons (A/CN.9/717, para. 109).

*Paragraphs (4) and (5) — Transcripts of hearings*

57. Paragraphs (4) and (5) address the matter of publication of transcripts of hearings and provide guidance on that matter in cases where hearings were held in private. It may be recalled that, at the fifty-fourth session of the Working Group, some delegations questioned whether the decision to be made regarding transcripts should depend upon the solution adopted in respect of public access to hearings. It was agreed to further consider that matter in conjunction with the various drafting proposals that would be prepared by the Secretariat (A/CN.9/717, para. 115). The Working Group may wish to note that the language in the first bracket in

paragraph (4), that read “[*the arbitral tribunal has decided not to hold [public] [open] hearings under article 6, paragraph 1 and where]*” is meant to reflect option 2 under paragraph (1). That text would be deleted in case the Working Group would decide that that option should not be retained.

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