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Settlement of commercial disputes: draft UNCITRAL rules 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), with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session (New York, 16 June-3 July 2008)¹ that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic.² The Working Group started its consideration of the matter at its fifty-third session (Vienna, 4-8 October 2010), and agreed that the legal standard on transparency would take the form of rules on transparency in treaty-based investor-State arbitration.³

2. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission urged the Working Group to pursue its efforts and to complete its work on the rules on transparency for consideration by the Commission preferably at its next session.⁴ Accordingly, at its fifty-eighth session (New York, 4-8 February 2013), the Working Group completed its third reading of the rules on transparency.⁵

3. In accordance with the decisions of the Working Group at its fifty-eighth session, part II of this note contains a revised draft of the rules on transparency and a draft amendment to article 1 of the UNCITRAL Arbitration Rules (A/CN.9/765, para. 14). The question of instruments that could be prepared regarding the application of the rules on transparency to the settlement of disputes arising under investment treaties concluded before the date of adoption of the rules on transparency is addressed in document A/CN.9/784.

¹ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314.

² *Ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 190.

³ At its fifty-third (A/CN.9/712) and fifty-fourth (A/CN.9/717) sessions, the Working Group considered the matters of form, applicability and content of a legal standard on transparency in treaty-based investor-State arbitration; at its fifty-fifth (A/CN.9/736), fifty-sixth (A/CN.9/741) and fifty-seventh (A/CN.9/760) sessions, the Working Group completed a first and second reading of the draft rules on transparency.

⁴ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 65-69.

⁵ The report of the Working Group on the work of its fifty-eighth session is contained in document A/CN.9/765. At that session, the Working Group completed its third reading of the rules on transparency based on document A/CN.9/WG.II/WP.176 and its addendum.

II. Draft UNCITRAL rules on transparency in treaty-based investor-State arbitration

A. Content of draft UNCITRAL rules on transparency in treaty-based investor-State arbitration

4. Draft article 1 — Scope of application

“Article 1. Scope of application

“Applicability of the Rules

“(1) The Rules on Transparency shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors* (“treaty”) concluded after (*date of coming into effect of the Rules on Transparency*), unless the Parties to the treaty** have agreed otherwise.

“(2) In investor-State arbitrations initiated [(i)] under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before (*date of coming into effect of the Rules on Transparency*), [or (ii) in treaty-based investor-State arbitrations initiated under other arbitration rules or ad hoc], these Rules shall apply only when:

“(a) the parties to an arbitration (the “disputing parties”) agree to their application in respect of that arbitration; or,

“(b) the Parties to the treaty or, in the case of a multilateral treaty, the home State of the investor and the respondent State, have agreed after (*date of coming into effect of the Rules on Transparency*) to their application.

“Application of the Rules

“(3) In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty:

“(a) the disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty;

“(b) the arbitral tribunal shall have the power, beside its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case if such adaptation is necessary to conduct the arbitration in a practical manner, whilst not undermining the transparency objective of the Rules.

“Discretion and authority of the arbitral tribunal

“(4) Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:

“(a) the public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and

“(b) the disputing parties’ interest in a fair and efficient resolution of their dispute.

“(5) These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons.

“(6) In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

“Applicable instrument in case of conflict

“(7) Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.

“(8) Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.

Footnotes to article 1, paragraph (1):

“*For the purpose of the Rules on Transparency, a ‘treaty providing for the protection of investments or investors’ shall be understood broadly as encompassing any agreement concluded between or among States or regional economic integration organizations, including free trade agreements, economic integration agreements, trade and investment framework or cooperation agreements, and bilateral and multilateral investment treaties, so long as it contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty.

“**For the purpose of the Rules on Transparency, any reference to a ‘Party to the treaty’ or ‘State’ applies equally to regional economic integration organization where it is a Party to the treaty.”

Remarks⁶

Consensus on the scope of application

5. The Commission may wish to note that, at its fifty-eighth session, the Working Group expressed formal and unanimous support for a revised compromise proposal (“the revised compromise proposal”), which included article 1 on the scope of application (A/CN.9/765, paras. 75 and 78). The Commission may wish to note the drafting suggestions, and modifications made in accordance with the mandate to the Secretariat to make necessary drafting amendments (A/CN.9/765, para. 14), in paragraphs 6 to 10 below.

⁶ References to reports of the Working Group in respect of article 1 (Scope of application): A/CN.9/717, paras. 19-46 and 48-55; A/CN.9/736, paras. 18-40; A/CN.9/741, paras. 13-102; A/CN.9/760, paras. 131-139; A/CN.9/765, paras. 16-40 and 67-78.

Reordering of paragraphs

6. The paragraphs of article 1 as contained in paragraph 75 of document A/CN.9/765 have been re-ordered and grouped according to the matters they address.

*Drafting suggestions**- Paragraphs (1) and (2)*

7. Paragraphs (1) and (2) address application of the rules on transparency to investor-State arbitration initiated under the UNCITRAL Arbitration Rules. The application of the rules on transparency in conjunction with other arbitration rules is dealt with indirectly under paragraph (7). For the sake of consistency with that provision, and to clarify that the rules on transparency can apply irrespective of the applicable arbitration rules, the Commission may wish to consider whether the words in brackets “[or [ii] in treaty-based investor-State arbitrations initiated under other arbitration rules or ad hoc]” should be added in the chapeau of paragraph (2).

8. In relation to the use of the word “State” in paragraph (2), the Commission may wish to note that such a word would not be appropriate in respect of a regional economic integration organization that could be a Party to treaties. Therefore, it is proposed to clarify in a second footnote to article 1 that a reference in the rules to a “Party to the treaty” or “State” applies equally to a regional economic integration organization in the rules.

- Paragraph (3)

9. In accordance with the decision of the Working Group at its fifty-eighth session, paragraph (3)(b) has been redrafted to provide some flexibility to the arbitral tribunal to adapt the rules should the circumstances of the proceedings so require (see A/CN.9/765, para. 35).

- Date of adoption/effective date of the rules on transparency

10. The Commission may wish to consider whether the date of coming into effect of the rules on transparency should be the date of their adoption by the Commission, or a later date.

11. Draft article 2 — Publication of information at the commencement of arbitral proceedings

“Article 2. Publication of information at the commencement of arbitral proceedings

“Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 8. Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being made.”

Remarks⁷

12. Article 2 was approved in substance by the Working Group at its fifty-eighth session (A/CN.9/765, para. 90).

13. Draft article 3 — Publication of documents

“Article 3. Publication of documents

“1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party(ies) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

“2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.

“3 Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above. [This may include, for example, making such documents available at a specified site.]

“4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under article 7. The documents to be made available pursuant to paragraph 3 may 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 all documents available in a timely manner, in the form and in the language in which it receives them.

“5. A person, who is not a disputing party, granted access to documents under paragraphs 2 or 3, shall bear any administrative costs ancillary to the costs of making those documents available to the public (such as the cost of photocopying or shipping documents to that person).”

⁷ References to reports of the Working Group in respect of article 2 (Publication of information at the commencement of arbitral proceedings): A/CN.9/712, paras. 32-39; A/CN.9/717, paras. 59-74; A/CN.9/736, paras. 41-53; A/CN.9/741, paras. 103-110; A/CN.9/765, para. 90.

Remarks⁸

14. At its fifty-eighth session, the Working Group approved article 3 in substance, with some drafting suggestions, which are included in article 3 as set out in paragraph 13 above (A/CN.9/765, paras. 91-94).

Paragraph (3)

15. The Commission may wish to decide whether the last sentence of paragraph (3), in square brackets, needs to be retained in the text, as it only provides an example of how documents could be made available and therefore may not be appropriate for an instrument such as the rules.

Paragraph (5)

16. The Commission may wish to consider whether, under paragraph (5), the words “ancillary to the costs of making those documents available to the public” sufficiently clarify that third parties will not have to pay for the administrative costs relating to publication, such as uploading documents onto the registry website (A/CN.9/765, para. 94).

17. Draft article 4 — Submission by a third person

“Article 4. Submission by a third person

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

“2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any such page limits as may be set by the arbitral tribunal:

“(a) describe the third person, 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 third person);

“(b) disclose any connection, direct or indirect, which the third person has with any disputing party;

“(c) provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article, such as, for example, funding around 20 per cent of its overall operations annually;

⁸ References to reports of the Working Group in respect of article 3 (Publication of documents): A/CN.9/712, paras. 40-45 and 61-66; A/CN.9/717, paras. 75-100; A/CN.9/736, paras. 54-67; A/CN.9/741, paras. 111-116; A/CN.9/760, paras. 13-38; A/CN.9/765, para. 91-94.

“(d) describe the nature of the interest that the third person has in the arbitration; and

“(e) identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

“3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

“(a) whether the third person has a significant interest in the arbitral proceedings; and

“(b) the extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

“4. The submission filed by the third person shall:

“(a) be dated and signed by the person filing the submission on behalf of the third person;

“(b) be concise, and in no case longer than as authorized by the arbitral tribunal;

“(c) set out a precise statement of the third person’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 or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

“6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on the submission by the third person.”

Remarks⁹

18. Article 4 addresses submission by a third person and includes detailed information to be provided by the third person regarding its own interests, composition and connections to the proceedings (para. (2)); matters to be considered by the arbitral tribunal when determining to accept the submission (paras. (3), (5) and (6)); and the submission itself (para. (4)). Article 4 was approved in substance by the Working Group at its fifty-seventh session (A/CN.9/760, paras. 42-57).

19. Draft article 5 — Submission by a non-disputing Party to the treaty

“Article 5. Submission by a non-disputing Party to the treaty

⁹ References to reports of the Working Group in respect of article 4 (Submission by a third person): A/CN.9/712, paras. 46-51 and 60; A/CN.9/717, paras. 116-128; A/CN.9/736, paras. 68-77; A/CN.9/760, paras. 39-57.

“1. The arbitral tribunal shall, subject to paragraph 4, accept, or, after consultation with the disputing parties, may invite submissions on issues of treaty interpretation from a non-disputing Party to the treaty.

“2. The arbitral tribunal, after consultation with the disputing parties, may accept submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. In exercising its discretion to accept such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3.

“3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.

“4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

“5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.”

Remarks¹⁰

20. At its fifty-eighth session, the Working Group agreed that the arbitral tribunal should accept submissions on treaty interpretation by a non-disputing Party to the treaty, provided that any submissions would not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party. Paragraph (1) reflects the agreement reached by the Working Group on that matter (A/CN.9/765, para. 51).

21. **Draft article 6 — Hearings**

“Article 6. Hearings

“(1) Subject to paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument (“hearings”) shall be public.

“(2) Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.

“(3) The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.”

¹⁰ References to reports of the Working Group in respect of article 5 (Submission by a non-disputing Party to the treaty): A/CN.9/712, para. 49; A/CN.9/717, para. 124; A/CN.9/736, paras. 78-98; A/CN.9/760, paras. 58-75; A/CN.9/765, paras. 41-51. See also *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 202.

Remarks¹¹*Consensus on the provision on hearings*

22. At its fifty-eighth session, the Working Group expressed formal and unanimous support for the revised compromise proposal, which included article 6 on hearings (A/CN.9/765, paras. 75 and 78). The Commission may wish to note that the revised compromise proposal included an agreement by the Working Group that paragraph (1) would provide for public hearings subject to only paragraphs (2) and (3) of the same article.

23. Draft article 7 — Exceptions to transparency

“Article 7. Exceptions to transparency

“*Confidential or protected information*

“(1) Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to in paragraphs 3 and 4, shall not be made available to the public or to non-disputing Parties to the treaty pursuant to articles 2 to 6.

“(2) Confidential or protected information consists of:

“(a) confidential business information;

“(b) information that is protected against being made available to the public under the treaty;

“(c) information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or

“(d) information the disclosure of which would impede law enforcement.

“(3) The arbitral tribunal, in consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public or to non-disputing Parties to the treaty including by putting in place, as appropriate:

“(a) time limits in which a disputing party, non-disputing Party to the treaty, or third person shall give notice that it seeks protection for such information in documents;

“(b) procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and

“(c) procedures for holding hearings in private to the extent required by article 6, paragraph 2.

¹¹ References to reports of the Working Group in respect of article 6 (Hearings): A/CN.9/712, paras. 52-59; A/CN.9/717, paras. 101-115; A/CN.9/736, paras. 99-109; A/CN.9/760, paras. 76-88; A/CN.9/765, paras. 52-57 and 67-78.

“Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.

“(4) Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

“(5) Nothing in these Rules requires a respondent State to make available to the public or to non-disputing Parties to the treaty information the disclosure of which it considers to be contrary to its essential security interests.

“Integrity of the arbitral process

“(6) Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardise the integrity of the arbitral process as determined pursuant to paragraph 7.

“(7) The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardise the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties, or members of the arbitral tribunal, or in comparably exceptional circumstances.”

Remarks¹²

Consensus on the provision on exceptions to transparency

24. At its fifty-eighth session, the Working Group expressed formal and unanimous support for the revised compromise proposal which included article 7 on exceptions to transparency. The Working Group agreed to limit the exceptions to transparency to the protection of confidential or protected information (paras. (1) to (5)) and the protection of the integrity of the arbitral process (paras. (6) and (7)) (A/CN.9/765, paras. 75 and 78).

Drafting matters

25. As a matter of drafting, the Commission may wish to note that paragraph (3) of article 7 as it appeared in paragraph 75 of document A/CN.9/765, has been relocated to paragraph (5). The word “State” has been added after the word “respondent” in paragraphs (2)(c) and (5), for the sake of clarification and consistency with article 1, paragraph (2)(b). The words “or to non-disputing Parties to the treaty” have been added in paragraph (5) for the sake of consistency with paragraph (1). In addition, the Commission may wish to consider whether there is a

¹² References to reports of the Working Group in respect of article 7 (Exceptions to transparency): A/CN.9/712, paras. 67-72; A/CN.9/717, paras. 129-147; A/CN.9/736, paras. 110-130; A/CN.9/760, paras. 89-119; A/CN.9/765, paras. 58-78.

need to clarify that “third persons” are included in the generic term “public” under paragraphs (1) and (5).

26. Draft article 8 — Repository of published information

“Article 8. Repository of published information

“The repository of published information under the Rules shall be -----.”

Remarks¹³

27. At its fifty-eighth session, the Working Group expressed the unanimous view that the best institution to serve as a registry under the rules on transparency would be UNCITRAL (A/CN.9/765, para. 84). The Working Group also took note of the willingness of two other institutions, the International Centre for Settlement of Investment Disputes (ICSID), and the Permanent Court of Arbitration at The Hague (PCA), to undertake the function of a single registry under the rules on transparency should UNCITRAL not be in a position to take up that role (A/CN.9/765, para. 85).

B. Draft amendment to article 1 of the UNCITRAL Arbitration Rules

28. The Commission may wish to note that, following the decision made by the Working Group on the scope of application of the rules on transparency (see para. 4 above), the Working Group agreed that article 1 of the UNCITRAL Arbitration Rules would require amendment, in order to articulate a link with the rules on transparency.

Proposal

29. The Working Group agreed that the following language would be presented to the Commission in relation to a new paragraph to article 1, numbered paragraph (4), to modify the UNCITRAL Arbitration Rules (as revised in 2010): “4. For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency [as an appendix] [as amended from time to time], subject to article 1 of the UNCITRAL Rules on Transparency.” (A/CN.9/765, para. 79).

30. It was furthermore agreed by the Working Group that such an amendment would result in a new version of the UNCITRAL Arbitration Rules, bearing the date of the adoption of the amendment (referred to below as the “UNCITRAL Arbitration Rules 2013”) and becoming effective as from the date of coming into effect of the rules on transparency (A/CN.9/765, paras. 33 and 79).

Treaty references to previous versions of the UNCITRAL Arbitration Rules

31. The Commission may wish to note that the establishment of the UNCITRAL Arbitration Rules 2013, which create a link to the rules on transparency, will necessarily have an implication for references to the UNCITRAL Arbitration Rules in treaties concluded after the coming into force of the rules on transparency.

¹³ References to reports of the Working Group in respect of article 8 (Repository of published information): A/CN.9/712, paras. 73-75; A/CN.9/717, paras. 148-151; A/CN.9/736, paras. 131-133; A/CN.9/760, paras. 120-122; A/CN.9/765, paras. 81-88.

Specifically, in order for draft article 1, paragraph (1) of the rules on transparency to take effect, and consequently for the rules on transparency to apply to an investor-State arbitration initiated under the UNCITRAL Arbitration Rules, the relevant arbitration would need to be initiated under the UNCITRAL Arbitration Rules 2013. A reference to the UNCITRAL Arbitration Rules as adopted in 1976, or as revised in 2010, in a treaty concluded after the coming into force of the rules on transparency would have the effect of precluding the application of the rules on transparency.

Appendix to the UNCITRAL Arbitration Rules 2013 or stand-alone rules

32. At its fifty-eighth session, the Working Group agreed that the words “[as an appendix]” be inserted into draft article 1, paragraph (4) of the UNCITRAL Arbitration Rules (set out in para. 29 above) for a determination by the Commission as to the form in which the rules on transparency will be presented.

33. The UNCITRAL Arbitration Rules 2013 would in practice, if modified to include the rules on transparency as an appendix, constitute a specific set of arbitration rules for treaty-based investor-State arbitration. The Commission may wish to consider whether such a format would: (i) modify the generic applicability of the UNCITRAL Arbitration Rules; (ii) create difficulties for parties arbitrating in a context other than in treaty-based disputes and/or be less attractive to commercial parties; or (iii) raise a question as to whether other investment-specific provisions should be added to this new set of rules.

34. If the rules on transparency were to constitute stand-alone rules, they could be more easily applied in addition to any other generic arbitration rules governing an arbitral proceeding, thus providing for a wider application of the rules on transparency. The application of the rules on transparency alongside other arbitration rules is envisaged in article 1 of the rules on transparency, which establishes the supplementarity role of the rules on transparency with other arbitration rules, and moreover establishes the precedence of the rules on transparency should a conflict arise between those rules and other arbitration rules. The Commission may wish to take note that arbitral institutions providing feedback on an earlier iteration of the rules on transparency had commented that those rules in the form of a stand-alone text could operate in conjunction with their own institutional rules (A/CN.9/741, para. 29; see also document A/CN.9/WG.II/WP.173).

35. The Commission may also wish to consider whether the stand-alone format would lead to a greater likelihood of promotion of the rules on transparency by other arbitral institutions.

Other consequential amendments

36. The proposed new paragraph (4) to article 1 of the UNCITRAL Arbitration Rules uses the phrase, “treaty providing for the protection of investments or investors”, which phrase is defined in a footnote to draft article 1 of the rules on transparency. The Commission may wish to consider including the same definition as a footnote to the UNCITRAL Arbitration Rules 2013, in order to facilitate the non-interference of the rules on transparency for users of the UNCITRAL Arbitration Rules 2013 in a purely commercial context.

37. No other consequential amendments to the UNCITRAL Arbitration Rules would be required, should the proposed amendment to article 1 of the UNCITRAL Arbitration Rules be adopted. Article 1, paragraph (2), of the UNCITRAL Arbitration Rules already provides for the application of the most recently amended version of those Rules, unless the parties explicitly request otherwise.

38. Moreover, draft article 1, paragraph (7), of the rules on transparency establishes the requisite hierarchy of application should the rules on transparency conflict with the relevant arbitration rules. For example, the provisions of the rules on transparency regarding publication of arbitral awards and hearings would modify the corresponding provisions of the UNCITRAL Arbitration Rules (see also A/CN.9/WG.II/WP.169/Add.1, paras. 15-17).

Practical points

39. The Commission may wish to consider the following practical points in respect of the UNCITRAL Arbitration Rules 2013: (i) whether the revised Rules be entitled “UNCITRAL Arbitration Rules (effective as of [date of coming into effect of the rules on transparency])” or whether an additional phrase, indicating that article 1 had been amended, be appropriate for inclusion in the title; and (ii) if the rules on transparency are to be included in an appendix to the UNCITRAL Arbitration Rules, whether this appendix would be referenced in the proposed article 1, paragraph (4) of the UNCITRAL Arbitration Rules.
