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on International Trade Law**  
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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

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction . . . . .	1-4	2
II. Draft rules on transparency in treaty-based investor-State arbitration . . . . .	5-54	3
A. General remarks . . . . .	5-7	3
B. Content of draft rules on transparency in treaty-based investor-State arbitration . . . . .	8-54	4
Article 1. Scope of application . . . . .	8-24	4
Article 2. Publication of information at the commencement of arbitral proceedings . . . . .	25-28	8
Article 3. Publication of documents . . . . .	29-32	9
Article 4. Publication of arbitral awards . . . . .	33-34	11
Article 5. Submission by a third person . . . . .	35-36	11
Article 6. Submission by a non-disputing Party to the treaty . . . . .	37-40	12
Article 7. Hearings . . . . .	41-44	13
Article 8. Exceptions to transparency . . . . .	45-54	14

\* This document is submitted later than the required ten weeks prior to the start of the meeting because of the need to complete consultations.



## 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)<sup>1</sup> 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.<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 regarding the importance of ensuring transparency in treaty-based investor-State arbitration. 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 such treaties already concluded.<sup>3</sup>

3. At its fifty-third (Vienna, 4-8 October 2010) and fifty-fourth (New York, 7-11 February 2011) sessions, the Working Group considered the matters of form, applicability and content of a legal standard on transparency in treaty-based investor-State arbitration.<sup>4</sup> At its fifty-fifth session (Vienna, 3-7 October 2011), the Working Group completed a first reading of draft rules on transparency in treaty-based investor-State arbitration (as contained in document A/CN.9/WG.II/WP.166 and its addendum).<sup>5</sup>

4. In accordance with the decision of the Working Group at its fifty-fifth session,<sup>6</sup> part II of this note contains a revised draft of rules on transparency (section B). Articles 1 to 8 of the draft rules on transparency are dealt with in this note and article 9 on the establishment of a repository of published information (“registry”) is dealt with in the addendum to this note. Comments received from arbitral institutions on the establishment of a registry can be found in document A/CN.9/WG.II/WP.170 and its addendum. As requested by the Working Group,<sup>7</sup> an overview on the interplay of the rules on transparency with arbitration rules can be found in section C in the addendum to this note. The question of applicability 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 dealt with in part III in the addendum to this note, as well as in document A/CN.9/WG.II/WP.166/Add.1, part III.

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<sup>1</sup> *Official records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17)*, para. 314.

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

<sup>3</sup> *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 205.

<sup>4</sup> Reports of the Working Group on the work of its fifty-third (A/CN.9/712) and fifty-fourth (A/CN.9/717) sessions.

<sup>5</sup> Report of the Working Group on the work of its fifty-fifth session (A/CN.9/736).

<sup>6</sup> *Ibid.*, para. 11.

<sup>7</sup> *Ibid.*, para. 30.

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

### A. General remarks

#### Form of the legal standard on transparency

5. At its fifty-fourth session, the Working Group had agreed to proceed with a discussion on developing the content of the highest standards on transparency, on the basis that the legal standard on transparency be drafted in the form of rules. That was done on the understanding that delegations that had initially proposed that the legal standard on transparency take the form of guidelines had agreed on the preparation of rules if those rules would only apply where there was an express reference to them (opt-in solution). It was said that the content of the rules on transparency might need to be reconsidered, and possibly diluted, in the event the Working Group would at a later stage decide that the application of the rules would be based on an opt-out approach (A/CN.9/717, paras. 26 and 58). That understanding was reiterated at the fifty-fifth session of the Working Group (A/CN.9/736, para. 41).

#### Structure of the draft rules on transparency

6. Article 1 deals with the scope of application of the rules on transparency, and articles 2 to 7 with substantive issues on transparency. Article 8 addresses exceptions to transparency, which are limited to the protection of confidential or sensitive information as well as of the integrity of the arbitral process. Article 9 determines the means of conveying the information to the public (A/CN.9/736, para. 13).

7. At its fifty-fifth session, the Working Group considered the substance of the following text, as a possible preamble to 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 fair and efficient resolution of their dispute. These purposes shall guide disputing parties and arbitral tribunals in the application of these Rules.”* (A/CN.9/736, paras. 14-17). The Working Group may wish to note that the substance of that text is contained in article 1(3) of the rules (see below, paras. 8 and 20), and that the principles it contains may also be reflected in the decision of the Commission adopting the rules as well as in the text of the resolution of the General Assembly recommending their use. Therefore, the revised version of the rules does not include a preamble.

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

### **Article 1. Scope of application**

#### 8. Draft article 1 — Scope of application

##### Option 1 (opt-out solution) for paragraph 1

##### Variant 1 (UNCITRAL Arbitration Rules, future treaties)

*“1. The Rules on Transparency shall apply to investor-State arbitration\* initiated under the [applicable version of the] UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”)\*\* concluded after [date of adoption of the Rules on Transparency], unless the treaty provides that the Rules on Transparency do not apply.”*

##### Variant 2 (UNCITRAL Arbitration Rules, future and certain existing treaties)

*“1. The Rules on Transparency shall apply to investor-State arbitration\* initiated under the [applicable version of the] UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”)\*\* concluded after [date of adoption of the Rules on Transparency], unless the treaty provides that the Rules on Transparency do not apply. The Rules on Transparency shall also apply to arbitration initiated after [date of adoption of the Rules on Transparency] under the UNCITRAL Arbitration Rules pursuant to a treaty, if the treaty provides for application of the version of the UNCITRAL Arbitration Rules as in effect at the date of commencement of the arbitration.”*

##### Option 2 (opt-in solution) for paragraph 1

##### Variant 1 (applying irrespective of the selected arbitration rules, future and, possibly, existing treaties)

*“1. The Rules on Transparency shall apply to investor-State arbitration\* initiated under a treaty providing for the protection of investments or investors (“treaty”)\*\* where the treaty expressly provides for the application of the Rules.”*

##### Variant 2 (UNCITRAL Arbitration Rules, future and, possibly, existing treaties)

*“1. The Rules on Transparency shall apply to investor-State arbitration\* initiated under the [applicable version of the] UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”)\*\* where the treaty expressly provides for the application of the Rules.”*

##### Paragraphs 2-5

*“2. Where the Rules on Transparency apply to an arbitration pursuant to paragraph 1, they shall be of mandatory effect between the parties to*

*that arbitration (“the disputing party(ies)”), so that the disputing parties shall not be entitled to opt out thereof or derogate therefrom.*

*“3. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal shall exercise that discretion, taking into account the need to balance (a) the public interest in transparency in treaty-based investor-State arbitration and of the particular arbitral proceedings and (b) the disputing parties’ interest in a fair and efficient resolution of their dispute.*

*“4. Where the treaty provides in any respect for a higher level of transparency than the Rules on Transparency, the relevant provision(s) of the treaty shall prevail, so that this higher level of transparency shall apply to the arbitration.*

*“5. The Rules on Transparency shall supplement the applicable [version of the UNCITRAL Arbitration Rules] [arbitration rules]. Where there is any conflict between the Rules on Transparency and the applicable [version of the UNCITRAL Arbitration Rules] [arbitration rules], the Rules on Transparency shall prevail.”*

Footnotes to article 1, paragraph 1:

*“\* For the purpose of these Rules, “investor-State arbitration” shall mean any arbitration taking place between one or more investors and one or more Parties to a treaty providing for the protection of investments or investors pursuant to that treaty.*

*“\*\* For the purpose of these Rules, 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 integration inter-governmental organizations, including free trade agreements, economic integration agreements, trade and investment framework or cooperation agreements, and bilateral and multilateral investment treaties, that contain provisions on the protection of an investor and its right to resort to investor-State arbitration.”*

## **Remarks**

### *Paragraph (1) — Applicability of the legal standard on transparency*

9. Two options have been considered by the Working Group regarding the applicability of the rules on transparency under paragraph (1) (A/CN.9/736, paras. 18-30). Under the first option, the opt-out solution, the consent to apply the rules on transparency would be manifested when Parties provide in their investment treaties for investor-State dispute settlement under the UNCITRAL Arbitration Rules, being on notice that, as from the date of adoption of the rules on transparency by UNCITRAL, the UNCITRAL Arbitration Rules include the rules on transparency (A/CN.9/736, para. 20). Under the second option, the opt-in solution, the rules on transparency would apply when Parties to an investment treaty expressly consent to their application (A/CN.9/736, para. 25).

- *Existing/future treaties*

10. Under both options, the rules on transparency would apply to investor-State arbitration initiated under treaties concluded after the date of adoption by UNCITRAL of the rules on transparency.

11. For treaties concluded before the date of adoption by UNCITRAL of the rules on transparency, consent of Parties to apply the rules would need to be expressed through means described in document A/CN.9/WG.II/WP.166/Add.1, paras. 15 to 23. Also, if Parties to a treaty concluded before the date of adoption by UNCITRAL of the rules on transparency have consented to the application of the version of the UNCITRAL Arbitration Rules in force at the date of commencement of the arbitration, then, under option 1, variant 2, the transparency rules would apply. In such cases, if Parties wish to opt-out of the transparency rules, they would have to amend or modify their investment treaty pursuant to articles 39 ff. Vienna Convention on the Law of Treaties or issue a joint interpretative declaration pursuant to article 31 (3) (a) Vienna Convention on the Law of Treaties to that effect.

- *Option 1: opt-out solution*

12. Under the first option (opt-out solution), variant 1, the rules on transparency would apply as an extension of the UNCITRAL Arbitration Rules, unless States otherwise provide in the investment treaty concluded after the date of adoption of the transparency rules by opting out of the rules on transparency (A/CN.9/736, paras. 20-24). (For option 1, variant 2, see above, para. 11). The word “concluded” is proposed to be used under option 1, in replacement of the words “entered into force” used in the previous draft version of the rules, as it is at the time of conclusion of the treaty (and not at the time of the coming into force of the treaty) that Parties may consent to the application of the transparency rules.

13. Under option 1, the rules on transparency would have to be integrated with the UNCITRAL Arbitration Rules, probably in the form of an appendix to the Arbitration Rules.

14. The Working Group may wish to discuss the formulation of an opting-out declaration so as to avoid any unintended impact of a decision to opt-out of the rules on transparency on the applicability of the UNCITRAL Arbitration Rules.

- *Option 2: opt-in solution*

15. Under the second option (opt-in solution), variant 1 provides that the rules on transparency shall apply in respect of arbitration initiated under any arbitration rules, while variant 2 limits the application of the rules to arbitration under the UNCITRAL Arbitration Rules. At the fifty-fifth session of the Working Group, the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration at The Hague (PCA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the ICC International Court of Arbitration (ICC) confirmed that, as a matter of principle, application of transparency rules in conjunction with their institutional rules was unlikely to create problems (A/CN.9/736, para. 28). Some arbitral institutions have proposed to further identify how to practically apply the rules on transparency to arbitration cases administered under their arbitration rules (A/CN.9/WG.II/WP.169/Add.1, para. 35).

16. Under option 2, the rules on transparency could take the form of stand-alone rules.

- “*applicable version of the UNCITRAL Arbitration Rules*”

17. In relation to option 1 and option 2, variant 2, where a reference to the UNCITRAL Arbitration Rules is made, the Working Group may wish to consider whether the words in brackets “[applicable version of the]” would permit clarifying that the transparency rules may apply in conjunction with the applicable version of the UNCITRAL Arbitration Rules, including any future revision thereof.

18. An overview of the interplay between the rules on transparency and the UNCITRAL Arbitration Rules can be found in section C (A/CN.9/WG.II/WP.169/Add.1, paras. 13 to 34) (A/CN.9/736, para. 30).

*Paragraph (2) — Application of the rules on transparency by the disputing parties*

19. The Working Group may wish to consider paragraph (2) which prohibits disputing parties from opting-out of, or diverging from, the rules on transparency once adopted by the Parties to the treaty (A/CN.9/736, paras. 32-36).

*Paragraph (3) — Discretion of the arbitral tribunal*

20. Paragraph (3) reflects the discussions of the Working Group on the exercise by the arbitral tribunal of its discretion (A/CN.9/736, paras. 38-40).

*Paragraph (4) — Relationship between the rules on transparency and any transparency provisions in the investment treaty*

21. Paragraph (4) clarifies that the rules on transparency will not supersede a provision in the relevant investment treaty that actually requires a higher level of transparency (A/CN.9/736, para. 31).

*Paragraph (5) — Relationship between the rules on transparency and the applicable arbitration rules*

22. The rules on transparency will supplement and, in certain instances, amend the applicable arbitration rules in conjunction to which they will apply. The Working Group may wish to consider whether a provision should be included along the lines of paragraph (5) to clarify the relation between the two sets of rules. In light of possible future arbitration rules which might provide an even higher level of transparency than the rules on transparency, the Working Group may wish to consider including in paragraph (5) a rule for the prevalence of arbitration rules providing for more transparency. The interplay between the rules on transparency and the applicable arbitration rules is discussed under section C (A/CN.9/169/WG.II/WP.169/Add.1, paras. 13 to 35).

*Footnotes to article 1 (1)*

- “*investor-State arbitration*”

23. The Working Group may wish to consider the first proposed footnote to paragraph (1), which clarifies that the rules on transparency only apply to the

settlement of disputes arising under investment treaties between an investor and a Party to the treaty and not to the settlement of disputes between Parties to the treaty (A/CN.9/736, para. 37).

- “a treaty providing for the protection of investments or investors”

24. The Working Group agreed that the term “a treaty providing for the protection of investments or investors” used under article 1 (1) should be clarified in order to delineate its scope of application. It is proposed to include a footnote to clarify the understanding that treaties to which the rules on transparency apply should be understood in a broad sense (A/CN.9/736, para. 37). Alternatively, the Working Group may wish to consider whether that provision should be placed in a separate paragraph of article 1 instead of a footnote.

#### **Article 2. Publication of information at the commencement of arbitral proceedings**

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

##### Option 1

*“Once the notice of arbitration has been received by the respondent, the disputing parties shall promptly communicate to the repository referred to under article 9 a copy of the notice of arbitration. The repository shall then 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.”*

##### Option 2

*“1. Once the notice of arbitration has been received by the respondent, the disputing parties shall promptly communicate to the repository referred to under article 9 a copy of the notice of arbitration. The repository shall then 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.*

*“2. Within [30] days of the receipt of the notice of arbitration by the respondent, the disputing parties shall indicate to the repository referred to under article 9 whether the notice of arbitration contains [confidential or sensitive] [protected] information as defined under article 8, paragraph 2, and they shall communicate to the repository the notice of arbitration in the form in which the parties agree that it should be published. [The repository referred to under article 9 shall then make the notice of arbitration available to the public in a timely manner, in the form and in the language in which it receives it from the disputing parties.]*

*“3. Within [30] days of the receipt of the response to the notice of arbitration by the claimant, the disputing parties shall communicate to the repository referred to under article 9 the response to the notice of arbitration in the form in which the parties agree that the response should be published. The disputing parties may redact from the response to the notice of arbitration [confidential or sensitive] [protected] information as defined under article 8,*

*paragraph 2. [The repository referred to under article 9 shall then make the response to the notice of arbitration available to the public in a timely manner, in the form and in the language in which it receives it from the parties.] [Or as an alternative to the last bracketed sentence of paragraphs (2) and (3): The repository referred to under article 9 shall make the notice of arbitration and the response thereto available to the public at the same time, in the form and in the language in which it receives them from the disputing parties.]”*

## **Remarks**

26. The Working Group may wish to consider the title of article 2 which has been modified from the previous version (where it read “initiation of arbitral proceedings”), in order to better reflect the content of article 2.

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

27. At its fifty-fifth session, the Working Group expressed general agreement on the need to provide information to the public at an early stage of the arbitral proceedings, as proposed under option 1 (A/CN.9/736, para. 43). It was agreed that the information should be published via a repository of published information (“registry”) and that information could be conveyed by any party (A/CN.9/736, para. 44). Under that option, the publication of the notice of arbitration (and of the response thereto) would be dealt with under article 3, after the constitution of the arbitral tribunal (see below, paras. 29-32 on publication of documents).

### *Option 2 — Publication of general information, of the notice of arbitration and of the response thereto*

28. At the fifty-fifth session of the Working Group, with respect to the question of timing for the publication of the notice of arbitration and the response thereto (A/CN.9/736, paras. 47-52), the majority view was not in favour of publication before the constitution of the arbitral tribunal, while a minority favoured prompt publication as provided for under option 2 (A/CN.9/736, para. 53). Option 2 contains a procedure for the publication of the notice of arbitration and the response thereto before the constitution of the arbitral tribunal. It is possible that an arbitral tribunal is constituted before disputing parties agree on the information to be redacted from the notice of arbitration and the response. In case the Working Group would favour option 2, there would be a need to ensure consistency between articles 2 and 3 on that matter.

## **Article 3. Publication of documents**

29. Draft article 3 — Publication of documents.

*“1. Subject to the exceptions set out in article 8, 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] [exhibits]; witness statements and expert reports; any written submissions by the non-disputing Party(ies) to the treaty and by third persons; transcripts of hearings, where available; and orders and decisions of the arbitral tribunal.*

“2. Subject to the exceptions set out in article 8, the arbitral tribunal may, on its own initiative or upon request from a disputing party, decide to order publication of any other documents provided to, or issued by, the arbitral tribunal. The said decision shall be taken in the exercise of the tribunal’s discretion after consultation with the disputing parties.

“3. Subject to the exceptions set out in article 8, a person that is not a disputing party may request access to any other documents provided to, or issued by, the arbitral tribunal, and the arbitral tribunal shall, in the exercise of its discretion and after consultation with the disputing parties, decide whether and how to grant such access.

“4. The documents 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 9 as they become available and, if applicable, in a redacted form in accordance with article 8. The documents made available [to the public] [to the person requesting access to them] pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 9 as they become available and, if applicable, in a redacted form in accordance with article 8. The repository shall make the documents available in a timely manner, in the form and in the language in which it receives them.”

#### **Remarks**

30. Article 3 reflects a proposal made at the fifty-fifth session of the Working Group that the provision on publication of documents should provide: (i) a list of documents made available to the public; (ii) discretionary power of the arbitral tribunal to order publication of additional documents; and (iii) a right for third persons to request access to additional documents (A/CN.9/736, paras. 54-66). Such a provision was seen as establishing a good balance between the documents to be published and the exercise by the arbitral tribunal of its discretion in managing the process (A/CN.9/736, paras. 58 and 65).

#### *Paragraph 1 — List of documents*

31. The Working Group may wish to consider the list of documents in paragraph (1) (A/CN.9/736, para. 65). Publication of awards is dealt with under article 4 and therefore, awards are not contained in that list. Minutes or transcripts of hearings have been included in that list following the consideration by the Working Group that the publication of transcripts should follow the same rules as publication of documents (instead of being dealt with under the provision on public hearings) (A/CN.9/736, para. 109). The Working Group may wish to consider whether the exhibits or a table listing all exhibits to documents should be published.

#### *Paragraphs 2 to 4 — Further documents*

32. Regarding the treatment under paragraph (4) of documents referred to under paragraph (3), the Working Group may wish to consider whether those documents would be made publicly available via the registry for the general public, or whether only the requesting third person would be granted access to such documents. The current draft of paragraphs (3) and (4) provides for discretion by the arbitral tribunal to decide how to deal with the request of access to additional documents by a

third person. The arbitral tribunal may decide, after consultation with the parties, how to provide access taking into account the relevant circumstances, including the nature of the documents. For instance, the third person may have to travel to a certain location to view the documents; or access may be provided by sending a copy of the documents to the person requesting them. In case the Working Group would decide that documents referred to under paragraph (3) should all be published via the registry, the drafting of article 3 would then be simplified as follows: in the first sentence of paragraph 2, the words “or from any person that is not a disputing party” would be added after the words “disputing party”. Paragraph (3) and the second sentence of paragraph (4) would be deleted. References to article 3 in article 8, paragraphs (4) and (6), would be amended accordingly.

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

33. Draft article 4 — Publication of arbitral awards.

*“1. Subject to the exceptions set out in article 8, all arbitral awards shall be made available to the public.*

*“2. Arbitral awards shall be communicated by the arbitral tribunal to the repository referred to under article 9 as they become available and, where applicable, in their redacted form in accordance with article 8. 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.”*

#### **Remarks**

34. At the fifty-fifth session of the Working Group, broad support was expressed for article 4 (A/CN.9/736, para. 67).

#### **Article 5. Submission by a third person**

35. Draft article 5 — 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 provide the following written information in a language of the arbitration, in a concise manner, and within such page limits as may be set by the arbitral tribunal: (a) description of 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) disclosure whether or not the third person 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 third person has in the arbitration; and (e) identification of 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 things (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; (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 also ensure that the disputing parties are given an opportunity to present their observations on the submission by the third person.”

#### **Remarks**

36. Article 5 deals with submission by a third person, also known as amicus curiae submission. It reflects modifications agreed to by the Working Group at its fifty-fifth session (A/CN.9/736, paras. 70-77) and it provides for a detailed procedure on information to be provided regarding the third person that wishes to make a submission (paragraph (2)); matters to be considered by the arbitral tribunal (paragraphs (3), (5) and (6)); and the submission itself (paragraph (4)).

#### **Article 6. Submission by a non-disputing Party to the treaty**

37. Draft article 6 — Submission by a non-disputing Party to the treaty.

“1. The arbitral tribunal [shall] [may] 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 or invite submissions on [questions of law [or fact]] [matters within the scope of the dispute] from a non-disputing Party to the treaty. In exercising its discretion whether to accept or invite such submissions, the arbitral tribunal shall take into consideration, among other things, the factors referred to in article 5, 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 also ensure that the disputing parties are given an opportunity to present their observations on any submission by a non-disputing Party to the treaty.”*

### **Remarks**

38. At its fifty-fifth session, the Working Group took note of the broad agreement for (i) dealing with submission by a non-disputing Party to the treaty in a provision distinct from the provision on third person’s submission (A/CN.9/736, paras. 83, 84 and 97); (ii) providing that the arbitral tribunal should consult the disputing parties where the tribunal would exercise its discretion; and (iii) allowing disputing parties to present their observations on the submission (A/CN.9/736, para. 97). The matters referred to under paragraphs 39 and 40 were noted for further consideration.

*Paragraph (1) — “[shall] [may]”*

39. It was questioned whether the arbitral tribunal should enjoy discretion to accept submission by a non-disputing Party, and therefore whether the word “shall” before the word “accept” should be replaced by the word “may” (A/CN.9/736, paras. 90 and 98).

*Paragraph (2) — “question of law [or fact] [matters within the scope of the dispute]”*

40. The question whether, in addition to making submissions on matters of treaty interpretation, a non-disputing Party could also make submissions on questions of law or facts or on matters within the scope of the dispute was extensively discussed by the Working Group at its fifty-fifth session, and was considered an open question for further consideration (A/CN.9/736, paras. 85-89 and 98).

### **Article 7. Hearings**

41. Draft article 7 — Hearings.

*“1. Subject to article 7, paragraphs 2 and 3, hearings shall be public, unless otherwise decided by the arbitral tribunal, after consultation with the disputing parties.*

*“2. Where there is a need to protect [confidential or sensitive] information or the integrity of the arbitral process pursuant to article 8, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.*

*“3. The arbitral tribunal may make logistical arrangements to facilitate the public’s right of access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate) and may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this is or becomes necessary for logistical reasons.”*

**Remarks***Paragraph (1) — Public hearings*

42. Paragraph (1) reflects the proposal that hearings should, in principle, be public, unless otherwise decided by the arbitral tribunal after consultation with the disputing parties (A/CN.9/736, paras. 100 and 102). Paragraph (1) was seen as establishing a good balance and allowing the arbitral tribunal to exercise its discretionary powers in accordance with article 1 (3).

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

43. Paragraphs (2) and (3) are intended to provide guidance on the exceptions to the principle that hearings shall be public. Paragraph (2) refers to the exceptions contained in article 8. Paragraph (3) addresses the concerns expressed in the Working Group that hearings may have to be held in private for practical reasons (A/CN.9/717, para. 109 and A/CN.9/736, para. 104).

*Costs related to holding a public hearing*

44. As requested by the Working Group at its fifty-fifth session (A/CN.9/736, para. 106), information on the costs related to holding public hearings has been provided by the International Centre for Settlement of Investment Disputes (ICSID), and is contained in document A/CN.9/WG.II/WP.170/Add.1.

**Article 8. Exceptions to transparency**

45. Draft article 8 — Exceptions to transparency.

***[Confidential or sensitive] [Protected] information***

“1. *[Confidential or sensitive] [Protected] information, as defined in paragraph 2 below and as identified pursuant paragraphs 3 to 9 below, shall not be made available to the public or to non-disputing Parties pursuant to articles 2 to 7.*

“2 *[Confidential or sensitive] [Protected] information consists of:*

“(a) *Confidential business information;*

“(b) *Information which is protected against being made available to the public under the treaty;*

“(c) *Information which is protected against being made available to the public under the law of a disputing party or any other law or rules determined to be applicable to the disclosure of such information by the arbitral tribunal.*

“3. *When a document other than an order or decision of the arbitral tribunal is to be made available to the public pursuant to article 3, paragraph 1, the disputing party, non-disputing Party or third person who submits the document shall, at the time of submission of the document, indicate whether it contends that the document contains information which [is of a confidential or sensitive nature] [must be protected from publication] and shall, promptly or within the time set by the arbitral tribunal, submit a redacted version of the document that does not contain the said information.*

“4. When a document other than an order or decision of the arbitral tribunal is to be made available to the public pursuant to a decision of the arbitral tribunal under article 3, paragraphs 2 and 3, the disputing party, non-disputing Party or third person who has submitted the document shall, within 30 days of the tribunal’s decision that the document is to be made available to the public, indicate whether it contends that the document contains information which [is of a confidential or sensitive nature] [must be protected from publication] and submit a redacted version of the document that does not contain the said information.

“5. Where a redaction is proposed under paragraph 3 or 4 above, any disputing party other than the person who submitted the document in question may object to the proposed redaction and/or propose that the document be redacted differently. Any such objection or counter-proposal shall be made within 30 days of receipt of the proposed redacted document.

“6. When an order, decision or award of the arbitral tribunal is to be made available to the public pursuant to article 3, paragraph 1 and article 4, the tribunal shall give all disputing parties an opportunity to make submissions as to the extent to which the document contains information which [is of a confidential or sensitive nature] [must be protected from publication] and to propose redaction of the document to prevent the publication of the said information.

“7. The arbitral tribunal shall rule on all questions relating to the proposed redaction of documents under paragraphs 3 to 6 above, and shall determine, in the exercise of its discretion, the extent to which any information contained in documents which are to be made available to the public, should be redacted.

“8. If the arbitral tribunal determines that information should not be redacted from a document pursuant to paragraphs 3 to 5 above, the disputing party, non-disputing Party or third person that submitted the document may, within 30 days of the arbitral tribunal’s determination (i) withdraw all or part of the document containing such information from the arbitral proceedings [with the effect that it shall no longer be entitled to rely on such information for any purpose in the arbitral proceedings], or (ii) resubmit the document in a form which complies with the tribunal’s determination.

“9. Any disputing party that intends to use information which it contends to be [confidential or sensitive] [protected] information in a hearing shall so advise the arbitral tribunal. The arbitral tribunal shall, after consultation with the disputing parties, decide whether that information is [of a confidential or sensitive nature] [shall be protected] and shall make arrangements to prevent any [confidential or sensitive] [protected] information from becoming public in accordance with article 7, paragraph 2.

#### ***Integrity of the arbitral process***

“10. Information shall not be made available to the public pursuant to articles 2 to 7 where the information, if made available to the public, would jeopardise the integrity of the arbitral process as determined pursuant to paragraph 11 below.

*“11. 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 (a) because it could hamper the collection or production of evidence, or (b) because it could lead to the intimidation of witnesses, lawyers acting for disputing parties, or members of the arbitral tribunal, or (c) in comparably exceptional circumstances.”*

#### **Remarks**

46. The purpose of article 8 is to define the exceptions to transparency, which are limited to the protection of confidential or sensitive information (paragraphs 1 to 9) and the protection of the integrity of the arbitral process (paragraphs 10 and 11) (A/CN.9/717, paras. 129-147; A/CN.9/736, paras. 110-130). At its fifty-fifth session, the Working Group agreed that only those two categories should constitute exceptions to transparency provisions (A/CN.9/736, para. 111).

#### **[Confidential or sensitive] [protected] information**

47. The Working Group may wish to decide whether the words “sensitive or confidential” or the word “protected” should be used to characterize the information to be kept confidential (A/CN.9/736, para. 117).

#### **Paragraph (2) — Definition of [confidential or sensitive] [protected] information**

48. The Working Group may wish to consider the definition of “[confidential or sensitive] [protected] information” contained in paragraph (2), which is based on a proposal made at the fifty-fifth session of the Working Group (A/CN.9/736, para. 122).

49. It may be recalled that, at the fifty-fifth session of the Working Group, concerns were expressed regarding the ability of the arbitral tribunal to determine whether the law of a disputing party applied to the disclosure of information. It was stated that the arbitral tribunal should be under an obligation to apply the laws of a disputing party in that regard. The Working Group may wish to further consider that matter under paragraph 2 (A/CN.9/736, para. 127).

#### *Paragraphs (3) to (8) — Procedure for identifying and protecting confidential and sensitive information*

50. The procedure for identifying information to be protected is determined in paragraphs (3) to (8). Paragraphs (3) to (5) deal with the question of redaction of confidential or sensitive information in documents submitted by the disputing parties or by any person involved in the proceedings (A/CN.9/736, para. 129). Article 6 deals with the redaction of documents issued by the arbitral tribunal. In all cases, the arbitral tribunal shall oversee the process pursuant to paragraph (7) (A/CN.9/736, para. 129). Paragraph (8) contains a provision that is also found in certain investment treaties allowing a person that submits a redacted version of a document to withdraw all or part of information in that document in case it disagrees with the decision of the arbitral tribunal that certain information contained

in the document should not be redacted.<sup>8</sup> The Working Group may wish to note that paragraph (8) clarifies that the party that decides to withdraw information shall not rely during the proceedings on such withdrawn information (A/CN.9/736, para. 129).

51. Paragraph (9) aims at providing a procedure for protecting information during hearings consistent with article 7.

#### **Procedure for protecting the integrity of the arbitral process**

52. At the fifty-third session of the Working Group, it had been generally recognized that the question of protection of the integrity of the arbitral process should be taken into account as part of the discussion on limitations to transparency (A/CN.9/712, para. 72).

53. Paragraphs 10 and 11 define a procedure for the protection of the integrity of the arbitral process. It provides that the arbitral tribunal should consult the parties where it decides, on its own motion, to restrain the publication of information. Further, the consultation would take place “if practicable”, to take account of the exceptional circumstances in which the arbitral tribunal may have to restrain publication (A/CN.9/736, para. 113). The arbitral tribunal may “delay” (and not only “restrain”) publication to allow publication once the threat that prohibited publication dissipates (A/CN.9/736, para. 130).

#### **Time periods**

54. The Working Group may wish to note that articles 2 and 8 of the rules on transparency contain references to time periods. The Working Group may wish to consider whether a provision on calculation of time periods should be included in the rules on transparency, or whether that matter should be left to be dealt with under the applicable arbitration rules.

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<sup>8</sup> See for instance, Art. 15.20(4) of the United States of America – Singapore Free Trade Agreement (USSFTA) ([http://www.fta.gov.sg/ussfta/chapter\\_15\\_us.pdf](http://www.fta.gov.sg/ussfta/chapter_15_us.pdf)); Art. 29(4)(d) of the 2004 Model Bilateral Investment Treaty of the United States of America ([www.state.gov/documents/organization/117601.pdf](http://www.state.gov/documents/organization/117601.pdf)); Art. 10.21(4)(d) of the Central American Free Trade Agreement (CAFTA) ([www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file328\\_4718.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf)); Art. 29(4)(d) of the “Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment”, ([www.ustr.gov/sites/default/files/uploads/agreements/bit/asset\\_upload\\_file743\\_14523.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file743_14523.pdf)).