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Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (Vienna, 4-8 October 2010)

Contents

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I. Introduction

1. The Commission considered the question of transparency in treaty-based investor-State arbitration at its forty-first session (New York, 16 June-3 July 2008). At that session, the Commission agreed that it would not be desirable to include at that time specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules ("UNCITRAL Arbitration Rules" or "Rules") themselves and that any work on treaty-based investor-State arbitration that the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in treaty-based investor-State arbitration. Written observations regarding that issue were presented by one delegation (A/CN.9/662) and a statement was also made on behalf of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. The Commission was of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency was a desirable objective in treaty-based investor-State arbitration and should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group (ibid., para. 69) in the field of treaty-based investor-State arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based investor-State arbitration and that broad discretion should be left to the Working Group in that respect. With a view to facilitating consideration of the issues of transparency in treaty-based investor-State arbitration by the Working Group at a future session, the Commission requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in treaty-based investor-State arbitration. It was emphasized that, when composing delegations to the Working Group sessions that would be devoted to that project, member States and observers should seek to achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration.[1]

2. 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 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 current revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic. The Commission was informed that, pursuant to the

[1] *Official records of the General Assembly, Sixty-third session, Supplement No. 17* (A/63/17), para. 314.

request received from the Commission at its forty-first session, the Secretariat had circulated a questionnaire to States with regard to their practice on transparency in treaty-based investor-State arbitration and that replies thereto would be made available to the Working Group.[2] Those replies are reproduced in document A/CN.9/WG.II/WP.159 and its addenda.

3. At the forty-third session of the Commission, 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 investor-State arbitration and that the mandate of the Working Group should be limited to the preparation of rules of uniform law on transparency in treaty-based investor-State arbitration. However, it was agreed that, while operating within that mandate, the Working Group might identify any other topic with respect to treaty-based investor-State arbitration that might also require future work by the Commission. It was agreed that any such topic might be brought to the attention of the Commission at its next session, in 2011.[3]

4. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.158, paragraphs 5-11.

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its fifty-third session in Vienna, from 4 to 8 October 2010. The session was attended by the following States members of the Working Group:[4] Argentina (2016), Armenia (2013), Australia (2016), Austria (2016), Belarus (2011), Bolivia (Plurinational State of) (2013), Botswana (2016), Brazil (2016), Canada (2013), Chile (2013), China (2013), Colombia (2016), Czech Republic (2013), Egypt (2013), France (2013), Germany (2013), Greece (2013), India (2016), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2013), Malaysia (2013), Mauritius (2016), Mexico (2013), Norway (2013), Paraguay (2016), Philippines (2016), Poland (2012), Republic of Korea (2013), Russian Federation (2013), Senegal (2013), Singapore (2013), South Africa (2013), Spain (2016), Sri Lanka (2013), Thailand (2016), Turkey (2016), Uganda (2016), Ukraine (2014), United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2016) and Venezuela (Bolivarian Republic of) (2016).

6. The session was attended by observers from the following States: Belgium, Croatia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland,

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

[3] Ibid., para. 191.

[4] The following six State members elected by the General Assembly on 3 November 2009 agreed to alternate their membership among themselves until 2016 as follows: Belarus (2010-2011, 2013-2016), Czech Republic (2010-2013, 2015-2016), Poland (2010-2012, 2014-2016), Ukraine (2010-2014), Georgia (2011-2015) and Croatia (2012-2016).

Hungary, Indonesia, Iraq, Netherlands, Portugal, Romania, Slovakia, Slovenia, Sweden, Switzerland, Togo and Yemen.

7. The session was attended by observers from the following organizations of the United Nations System: International Centre for Settlement of Investment Disputes (ICSID), the World Bank, United Nations Conference on Trade and Development (UNCTAD) and United Nations Educational, Scientific and Cultural Organization (UNESCO).

8. The session was attended by observers from the following international intergovernmental organizations invited by the Commission: Asian-African Legal Consultative Organization (AALCO), *Centre du Commerce International* (CNUCED/OMC), European Union, Permanent Court of Arbitration (PCA) and Permanent Observer Office of the League of Arab States in Vienna.

9. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association (AAA), American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Arbitration Institute of the Stockholm Chamber of Commerce, Asia Pacific Regional Arbitration Group (APRAG), Association for the Promotion of Arbitration in Africa (APAA), *Barreau de Paris*, Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), China International Economic Trade and Arbitration Commission (CIETAC), *Comité Français de l'Arbitrage* (CFA), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Council of Bars and Law Societies of Europe (CCBE), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Arbitration Institute (IAI), International Bar Association (IBA), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), International Law Institute (ILI), London Court of International Arbitration (LCIA), Milan Club of Arbitrators, Queen Mary University of London School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration — Lagos (RCICAL), Swiss Arbitration Association (ASA) and Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC).

10. The Working Group elected the following officers:

Chairman: Mr. Salim Moollan (Mauritius)
Rapporteur: Ms. Isabel Soares da Costa (Brazil)

11. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.158); (b) notes by the Secretariat regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.159 and its addenda; and A/CN.9/WG.II/WP.160 and its addendum).

12. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.
3. Adoption of the agenda.
4. Preparation of a legal standard on transparency in treaty-based investor-State arbitration.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

13. The Working Group commenced its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.159 and its addenda; and A/CN.9/WG.II/WP.160 and its addendum). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The deliberations and decisions of the Working Group with respect to agenda item 5 on other business are reflected in chapter V.

IV. Preparation of a legal standard on transparency in treaty-based investor-State arbitration

14. The Working Group recalled the discussion at the forty-first session of the Commission where the Commission agreed by consensus on the importance of ensuring transparency in treaty-based investor-State arbitration.[5] The Working Group also recalled that its mandate, as defined by the Commission at its forty-third session and referred to in paragraphs 2 and 3 above, was to focus on the preparation of a legal standard on transparency in treaty-based investor-State arbitration.[6]

15. The discussion of the Working Group at its current session took place on a preliminary and general basis, without any attempt to reach consensus yet. That was done in order to delineate the issues for discussion at the next session of the Working Group.

A. General remarks

16. General remarks were made regarding the policy context in which the matter of transparency in treaty-based investor-State arbitration arose. It was said that discussion on the need of ensuring transparency in treaty-based investor-State arbitration should be considered in the context of foreign direct investment as a tool for the long-term sustainable growth of developing countries. Amongst others, foreign direct investment was said to contribute to building productive capacities and improve infrastructure of countries; to enhance access to essential services such as water, education, and health care — including for the poor and marginalized; and it could also generate spill-over effects by increasing demand and encouraging

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[5] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 314.

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

domestic entrepreneurship. That, it was further said, could lead to a virtuous cycle of an increase in domestic employment, in domestic demand and, ultimately, to sustained economic growth.

17. In addition to the broader objective of promoting sustainable development through international investment law, ensuring transparency and meaningful opportunity for public participation in treaty-based investor-State arbitration was said to constitute a means to promote the rule of law, good governance, due process, fairness, equity and rights to access information. It was also seen as an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such. Those challenges were said to include, among others: an increasing number of treaty-based investor-State arbitrations, including an increasing number of frivolous claims; increasing amounts of awarded damages; increasing inconsistency of awards and concerns about lack of predictability and legal stability; and uncertainties regarding how the investor-State dispute settlement system interacted with important public policy considerations. It was said that legal standards on increased transparency would enhance the public understanding of the process and its overall credibility.

18. The fact that United Nations organs, agencies and entities, including the Special Representative of the United Nations Secretary-General on human rights and transnational corporations and other business enterprises, were working to promote transparency and address legitimacy concerns arising from the investment dispute settlement system was said to illustrate transparency and inclusiveness as expressions of core United Nations values such as human rights, good governance and the rule of law.

19. General agreement was expressed by the Working Group regarding the desirability of dealing with transparency in treaty-based investor-State arbitration, which differed from purely private arbitration, where confidentiality was an essential feature. According to principles of good governance, government activities might be subject to basic requirements of transparency and public access. A view was expressed that treaty-based investor-State arbitration might involve consideration of public policy and could lead to large potential monetary liability for public treasuries. In that light, it was said that certain investment treaties already contained provisions on transparency.

20. It was pointed out that the UNCITRAL Arbitration Rules were the second most widely used rules for resolving treaty-based investor-State disputes (after the rules of the International Centre for Settlement of Investment Disputes (ICSID)). It was said that the regulations and rules of ICSID were amended in 2006 to incorporate greater transparency and opportunity for public access to treaty-based investor-State arbitrations.

21. Views were expressed that a central feature of arbitration was its consensual nature, and that element should be kept in mind when discussing the form and content of a standard on transparency. Reservations were expressed on any standard that would seek to impose transparency as a mandatory rule, in particular, taking account of the ad hoc nature of arbitration under the UNCITRAL Arbitration Rules. Some delegations also noted that the efficiency and efficacy of the dispute settlement process needed to be borne in mind when discussing the issue of transparency in treaty-based investor-State arbitration in substance.

B. Form of a legal standard on transparency

22. The Working Group proceeded with a general discussion on the possible nature of a legal standard on transparency in treaty-based investor-State arbitration, and the various forms it might take. Further discussions on that matter took place at a later stage of the session (see below, paras. 76 to 100).

23. It was said that settlement of disputes arising in the context of multilateral or bilateral investment treaties ("investment treaties") had particular features that might lead arbitral tribunals to scrutinize the legislative, administrative or even judicial activities of a State. In addition, no appeal of decisions made by arbitral tribunals was generally allowed. Outside arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), arbitral awards were enforceable under the conditions laid out by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). It was pointed out that treaty-based investor-State arbitration had far reaching effects and was therefore different in nature as compared to other instances of international commercial arbitration. It was further said that, when considering the form of the legal standard on transparency, it should be borne in mind that there were two different levels of consent to be considered when dealing with treaty-based investor-State arbitration: the consent between States, parties to the investment treaty, and the consent between the host State and the investor, parties to the arbitration.

1. At the level of multilateral or bilateral investment treaties

24. One of the possibilities mentioned was that the Working Group could consider defining a set of rules on transparency with a normative effect for inclusion in investment treaties concluded between States. It was said that, at that level, experience had shown that, notwithstanding the existence of model investment treaties, clauses were negotiated on a case-by-case basis, and usually differed from the initial model. Consequently, it was said that it might be appropriate to draft model clauses for States to include in their investment treaties. Following that approach, any standard on transparency would only apply if States consented to it. Therefore, it would be left to the discretion of States to decide whether to amend their existing investment treaties to include those standards, and to include the relevant provisions in their future investment treaties.

25. Some delegations proposed to limit the consideration of a legal standard on transparency to a set of rules or model clauses for possible inclusion in investment treaties, while others considered that that option should be replaced or complemented by the adoption of a legal standard, for instance in the form of guidelines, applicable once a dispute arose between an investor and a State.

26. One suggestion was to prepare an annex to the UNCITRAL Arbitration Rules that would apply if the investor and the host State party to the arbitration agreed upon, or the investment treaty provided for, its application. It was said that legal standards on transparency would have more effect if associated to the Rules. The Working Group heard different views on whether such an annex should be optional or mandatory, and whether an opting-in or opting-out mechanism should be provided. It was agreed that those matters would need further consideration.

27. Questions were raised as to the binding effect legal standards on transparency might have on arbitration provisions referring to the UNCITRAL Arbitration Rules in existing investment treaties, in particular for those arbitration provisions that did not specify the applicable version of the Rules. It was said that most investment treaties referred to the application of the UNCITRAL Arbitration Rules, without any additional reference. In that context, it was said that an automatic application of any legal standard on transparency to investment treaties entered into prior to the adoption of such standards might be contrary to public international law, and the basic principle of consent in international arbitration.

28. Another view was that it was important to ensure that any legal standard on transparency applied to all existing investment treaties, and it was suggested that creative solutions should be developed to ensure a universal application of that standard. In that context, it was noted that article 1 (2) of the UNCITRAL Arbitration Rules as revised in 2010 provided for a presumption that the 2010 Rules would apply to an arbitration agreement concluded after 15 August 2010, but that that presumption would not apply where the arbitration agreement had been concluded by accepting after 15 August 2010 an offer made before that date. It was further noted that that modification had been inserted in article 1 (2) in order to cater for the effect of an unintended retroactive application (see document A/CN.9/646, para. 76) and the Working Group noted the need to provide for consistent solutions in that respect.

29. It was said that designing an annex to the UNCITRAL Arbitration Rules applying only to investment arbitration might raise difficult issues regarding the definition of investment arbitration (covered by that annex) as opposed to other types of arbitration (to which that annex would not apply), and that that matter would also need further consideration.

2. At the level of the relation between the host State and the investor

30. With respect to the relation between the host State and the investor, the Working Group considered that a policy decision should be taken at a later stage as to whether the investor should be given an opportunity to refuse an offer to arbitrate under legal standards of transparency.

C. Possible content of a legal standard on transparency

31. The Working Group commenced its discussion on the possible content of a legal standard to be prepared on transparency in treaty-based investor-State arbitration. There was general agreement that the substantive issues to be considered in that respect would be as follows: 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”).

1. Publicity regarding the initiation of arbitral proceedings

32. Some delegations said that the publication of initiation of arbitral proceedings was an important step for ensuring transparency and for making other provisions on

transparency meaningful. The Working Group heard a preliminary exchange of views regarding the conditions for publicity of the initiation of proceedings.

33. Different views were expressed regarding the information to be made public at that early stage of the proceedings, in particular, whether it should be limited to the existence of a dispute, or also include publication of the notice of arbitration. It was suggested that the notice of arbitration, that triggered the commencement of arbitration under article 3 of the UNCITRAL Arbitration Rules, should be made public. A concern was expressed that publicizing the notice of arbitration might not provide balanced information on the case. In turn, that might give rise to various issues such as protection of confidential or sensitive information and risks of frivolous claims. It was suggested that providing only preliminary information regarding the parties involved, their nationality, and the economic sector concerned might be sufficient. The example of publication by the ICSID Secretariat was given. It was highlighted that for arbitration under the ICSID Convention, the Secretariat did not make the notice of arbitration public and posted on its website, after registration, the name and subject matter of the case as well as the date of registration of the case in accordance with the ICSID Convention.

34. As to timing, different views were expressed on whether the information should be made public once the arbitration started at the time the notice of arbitration was received, or when the arbitral tribunal was constituted. Providing early information to the public on the existence of proceedings was said to be important in order to allow public awareness of procedural steps of the arbitration. A practical concern was expressed that the publication at a premature stage of the proceedings would not be advisable, as at the time of the notice of arbitration, no arbitral tribunal had yet been constituted and there existed a possibility that the arbitral proceedings would never take place. Also, views were expressed that it might be preferable to provide for publication of information once the arbitral tribunal had been constituted, in order to ensure the reliability of the information published.

35. As to the person responsible for taking the initiative of publication regarding the initiation of the proceedings, various views were expressed on whether the host State or the investor should be responsible for the publication. Views were expressed that the publication of information could be undertaken jointly by the parties, based on their consent to do so.

36. The Working Group agreed to further consider whether publication of information at that stage should be made mandatory, and if so, whether there should be any sanction in case of non-compliance. It was suggested that in case the obligation of publicity would rest with the parties, and the parties did not comply with that obligation, that responsibility could then be transferred to the arbitral tribunal. In response to that suggestion, it was said that the arbitral tribunal would not have the practical means to do so. Another question raised was the treatment of the situation where the parties agreed to refrain from disclosing information, despite their obligation to do so under applicable provisions.

37. With respect to the manner in which publicity could be organized, various suggestions were made, such as leaving it to the States to publish information on the website of their relevant ministries, or other appropriate channels in the countries concerned or establishing a central registry. Regarding the first option, it was said

that there was divergence in the experience of States with treaty-based investor-State arbitration. Experienced States would have the right channels in place to publicize such information, whereas for less experienced States, that option would be practically difficult to implement. Concerning the option of establishing a central registry, it was mentioned that possible institutions for carrying out that task could be the UNCITRAL secretariat, the Permanent Court of Arbitration at The Hague, or the appointing authorities. The Working Group agreed to further consider that matter when dealing with the question of repository of published information (see below, paras. 73-75).

38. It was also highlighted that publication of information on websites of international organizations would not necessarily be sufficient to achieve the desirable level of public awareness and that information might need to be made available in other forms.

39. A general remark was made regarding the drafting of provisions on publicizing the initiation of the arbitral proceedings. The Working Group was cautioned against providing too detailed procedures as their non-fulfilment might open the door to challenges on the basis of an arbitral procedure not being in compliance with the agreement of the parties. It was suggested that the Working Group should consider using only general language in provisions on publication, with the aim of allowing publication by any appropriate and effective means. It was also pointed out that provisions on transparency should provide for a default rule in case of disagreement between the parties in order to avoid lengthy debates on that matter during the arbitral proceedings.

2. Documents to be published

40. The Working Group considered the question of documents that could be published. Different views were expressed on whether and, if so, which documents should be published, and the persons responsible for publication.

41. The view was expressed that all documents submitted to, and issued by, the arbitral tribunal should be made available to the public, so as to ensure that the public was informed of the arbitral proceedings and to facilitate submission by third parties of amicus curiae briefs. An order in the case *Chemtura Corporation v. Government of Canada*[7] and the Canada Model Foreign Investment Protection Agreement were given as examples of documents containing provisions on publication. It was suggested that mechanisms could be designed to provide opportunity for protection of confidential or sensitive information and to resolve any dispute that might arise between the parties in relation to information to be protected from publication. The purpose of such mechanisms would be to ensure that transparency would not unduly prejudice one party. As an example of such mechanisms, it was explained that where full disclosure of documents was generally allowed, a twenty day notice of the intent to disclose a document by one party would be given to the other party. The document would be disclosed only if both parties would find an agreement on how protected information should be dealt with or the arbitral tribunal had resolved the issue. The Working Group agreed to further consider protection of confidential or sensitive information, as well as the issue of

[7] *Chemtura Corporation v. Government of Canada, Confidentiality Order, January 21, 2008.*

privileged information that could not be published under applicable laws at a later stage of its discussion (see below, paras. 67-72).

42. It was said 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. In that respect, the publication of briefs was viewed as burdensome but still manageable, whereas the publication of witness testimonies and expert reports was viewed as potentially costly. Consequently, it was proposed to differentiate between briefs of the parties and orders by arbitral tribunals, which could be published; and other evidentiary materials or exhibits which could be excluded from publication. It was pointed out that other documents were produced by the parties or the arbitral tribunal during the proceedings. Consequently, it would also be possible to classify the relevant documents as (a) formal submissions to the arbitral tribunal; (b) exhibits, written statements, expert reports and documentation submitted in support of the formal submissions; (c) decisions and orders from the arbitral tribunal; (d) records of live testimony and submissions; and (e) communications between the parties. Therefore, it was suggested that it might be preferable to refrain from establishing a list of documents subject to publication, and instead to provide for full disclosure of documents, accompanied with a discretionary power of the arbitral tribunal to decide which documents not to publish, considering such factors as the burden on the parties of reviewing all such documents to identify information that should not be disclosed.

43. Different views were expressed on whether the parties or the arbitral tribunal should be the ones to decide on publication of documents. It was suggested that the parties were in the best position to judge the appropriateness of publication of documents, so that they should be the ones deciding on that issue. In that regard, it was further said that the consent of the parties should be the prerequisite for the publication of documents. However, it was pointed out that, as shown in document A/CN.9/WG.II/WP.159 and its addenda, a number of States did not have experience in that field and that matter should be taken into account in designing provisions on transparency.

44. Other views were expressed that the arbitral tribunal should decide the issue of publication of documents on a case-by-case basis. Therefore, any provision on that matter could provide that publication of all materials submitted to, or issued by, the arbitral tribunal, should be as directed by the arbitral tribunal. Concerns were expressed that leaving the matter fully in the hands of the arbitral tribunal would give too much discretion and power to the arbitral tribunal in the absence of any guidelines. Another concern expressed was that it might be too burdensome for the arbitral tribunal to undertake that task. It was also suggested that parties could assist the arbitral tribunal in identifying documents to be published and information to be protected.

45. Another question raised referred to the practical aspects of the publication of documents, such as the language of publication.

3. Submissions by third parties (“amicus curiae”) in arbitral proceedings

46. Many delegations expressed strong support for allowing submissions by third parties, also known as amicus curiae submissions, in arbitral proceedings between

an investor and a State. It was said that amicus curiae submissions could be useful for the arbitral tribunal in resolving the dispute and promoted legitimacy of the arbitral process.

47. It was widely felt that there should be certain restricting criteria in place for such submissions, including the subject matter of the submission, expertise of the amicus curiae, relevance for the proceedings, appropriate page limits, and the time when such submissions would be allowed. To that end, it was proposed that it should be left to the parties to decide whether such submissions should be allowed, as they could result in additional costs and delay of the proceedings. In response, it was said that leaving the decision to the parties would not be advisable, as often amicus curiae submissions were done in favour of one side or even, as had already been the case, in favour of neither side. It was noted that the purpose of amicus curiae submissions was to enlighten the arbitral tribunal in its decision-making process. Therefore, support was expressed for the view that the arbitral tribunal itself should play a "gate-keeping" role and decide on whether to allow amicus curiae submissions based on certain criteria. It was said that there had been sufficient experience with such criteria, including in the context of the North American Free-Trade Agreement (NAFTA) with the Statement of the Free Trade Commission on Non-Disputing Party Participation and various model bilateral investment treaties.

48. The Working Group left open the question whether the arbitral tribunal would have full discretion to decide on amicus curiae submissions or whether it would have to consult the parties, in accordance with the consensual nature of arbitral proceedings.

49. It was observed that two possible types of amicus curiae should be distinguished and perhaps considered differently. The first type could be any third party that would have an interest in contributing to the solution of the dispute. A second type could be another State party to the investment treaty at issue that was not a party to the dispute. It was noted that such State often had important information to provide, such as information on *travaux préparatoires*, thus preventing one-sided treaty interpretation. In response, it was said that an intervention by a non-disputing State, of which the investor was a national, could raise issues of diplomatic protection and was to be given careful consideration. It was suggested that third parties who could contribute to the resolution of the dispute could be identified and invited by the arbitral tribunal to assist it. The home State of the investor could be one such third party.

50. It was also said that the role of amicus curiae should be considered from the point of view of domestic legal systems that were not familiar with the concept of amicus curiae. In that regard, the issue was raised whether an amicus curiae could be considered as an expert; that would in turn raise questions of the possibility of cross-examination of the amicus curiae. In response, it was said that the role of an amicus curiae was different from that of an expert, as experts were usually appointed by the arbitral tribunal in compliance with certain conditions such as impartiality and independence. The Working Group took note of the suggestion to define the term "amicus curiae" and the intended role of amicus curiae, including the issues of who could be accepted to appear as an amicus, whether it should be a person or an entity, the criteria for participation, and whether participation should be left to the arbitral tribunal's decision or agreed to by the parties, the form of amicus

briefs, and other practical matters, such as the determination and allocation of the cost of amicus interventions.

51. In the general framework of allowing amicus curiae submissions, the importance of access to documents was emphasized, as the quality of any amicus curiae submissions would depend on the permitted level of access to documents. With respect to the role of amicus curiae, it was questioned whether there should be different levels of access to documents provided for the general public on the one hand and amicus curiae on the other hand.

4. Hearings

(a) Public hearings

52. The Working Group considered whether hearings should be opened to the public. It was clarified that the notion of "open" or "public" hearings was understood by the Working Group as allowing the public to attend the hearings, but not to actively participate in them.

53. Many delegations expressed support for public hearings for various reasons. It was said that public hearings were a fundamental feature of a transparent system that should be promoted in international investment arbitration. It was further said that the same logic that might justify public access to documents should also apply in respect of hearings. Public hearings were seen as essential for enhancing awareness and confidence of the public regarding treaty-based investor-State arbitration.

54. It was suggested that a provision on open hearings in any legal standard to be prepared on transparency should reverse the default rule contained in article 25 (4) of the 1976 UNCITRAL Arbitration Rules and article 28 (3) of the Rules as revised in 2010, and provide that hearings should be held in public, unless the parties agreed otherwise. The Working Group agreed that the question of consent by the parties to open hearings was a matter to be further discussed at a later stage.

55. A question was raised whether public hearings would encompass media attendance, and the possibility that the arbitral proceedings would be broadcast worldwide. It was said that the ability to attend public hearings would depend on the geographical location of the interested public, and broadcasting would ensure the widest public access. A view was expressed that, should the media be allowed to attend the hearings, they should, as in ordinary court proceedings, not be allowed to record or broadcast the hearings.

56. It was noted that hearings could also touch upon confidential or sensitive information, so that access by the public was not desirable as a general rule, and should not be accepted in all instances. In that regard, it was said that, in some circumstances, mechanisms should be put in place to limit public access to hearings, and logistical arrangements could be made to allow for hearings in camera when dealing with confidential or sensitive information. There was general agreement that it would be best to leave the decision to the arbitral tribunal on closed hearings in exceptional circumstances on a case-by-case basis. In support, it was said that the arbitral tribunal was best placed to balance the public interest with countervailing interests such as the need to ensure that the hearings remained manageable, and avoid aggravation of the dispute. A suggestion was made that decisions of the

arbitral tribunal on organizing open or closed hearings should be made in consultation with the parties. It was noted that reasons for holding a closed hearing could be treated as part of the possible exceptions to the transparency rules (see below, paras. 67-72).

57. Reservations of a general nature were expressed regarding public hearings, a concept that was viewed to be contrary to the very nature of arbitration, which was said to be confidential and not to allow for third-parties' access to hearings. It was said that treaty-based investor-State arbitration would often raise issues of a political nature and open hearings were likely to put additional pressure on the participating State, thus creating the risk that the involvement of the general public would not facilitate but adversely affect the settlement of the dispute. Some views were expressed in favour of keeping the general default rule as contained in the UNCITRAL Arbitration Rules, which provided that hearings were to "be held in camera unless the parties otherwise agreed". Under a different view, hearings should not be opened to public access, but the transcripts of such hearings should be made publicly available, after confidential or sensitive information had been redacted.

(b) Transcripts of hearings

58. There was general agreement that the decision to be made regarding transcripts should depend upon the solution adopted in respect of public access to hearings. It was suggested that transcripts would be publicly available in cases where hearings had taken place in camera only in the exceptional circumstances where the closure was decided for logistical reasons and not for reasons of protection of confidential or sensitive information. In such circumstances, the publication of transcripts would allow the public that had been unable to attend hearings to nevertheless be informed about their content. It was observed that making the transcripts publicly available would positively reinforce the effect of making the hearings public. In that regard, one delegation explained that in a reported case of public hearings, it had been its practice to publish transcripts of the hearings on the Internet.

59. The Working Group was informed that, for arbitrations under the rules of ICSID, the decision to hold open hearings was left to the arbitral tribunal, unless either party objected. In contrast, to make transcripts publicly available, the consent of the parties was needed. It was further said that the publication of transcripts was a question usually left to the respondent State at least for cases under NAFTA and that ICSID so far had not published any transcripts on its website.

(c) Participation of third parties ("amicus curiae") in hearings

60. It was noted that the general practice with amicus curiae had been to allow submissions by amicus curiae, but not to permit appearance or active participation in hearings. However, the view was expressed that amicus curiae participation should not be precluded since arbitral tribunals might in some cases wish to question an amicus at a hearing, and that therefore any provision on that matter should provide for a certain level of discretion. As reasons for permitting participation of amicus curiae in hearings, it was said that an amicus curiae often had special knowledge of the subject matter underlying the dispute. It was further explained that written submissions might, in certain instances, need to be complemented with oral explanations. It was further said that participation of

amicus curiae in hearings would give more weight to such interventions in the process, thereby positively impacting the perception of treaty-based investor-State arbitration. On the other hand, it was noted that in NAFTA proceedings, where written amici submissions could be accepted by the arbitral tribunal, no need for such participation at hearings had been found.

5. Publication of arbitral awards

61. The Working Group considered the question of publication of awards and took note of the provisions on that matter contained in article 32 (5) of the 1976 UNCITRAL Arbitration Rules, and in article 34 (5) of the Rules, as revised in 2010. Both versions of the Rules required, in substance, the consent of all parties for the publication of an award.

62. Many delegations expressed support for the establishment of a general provision under which awards rendered by arbitral tribunals in treaty-based investor-State arbitration should be published, thus departing from the principle contained in the UNCITRAL Arbitration Rules. It was said that if other documents were to be released, awards should obviously also be published. Even if no other documents were published, it was said that the publication of awards would be a decisive step towards enhancing the legitimacy of the process and collecting accessible and consistent jurisprudence. Publication of awards would also contribute to providing information on treaty interpretation, which might be useful to parties to the treaty that were not parties to the dispute, or even to parties to other treaties.

63. The view was expressed that a provision on that matter could also provide that awards should be made public, unless all parties to the arbitration agreed otherwise. Should that case arise, it was suggested that, as done by the ICSID Secretariat, it might still be possible to publish excerpts of awards containing the relevant legal reasoning. It was pointed out that any agreement between the parties to keep awards confidential would raise suspicion in the public, and unless there would be reasons of public security, refusing publication of awards would not be advisable.

64. It was said that a provision on publication of awards should also contain rules for the protection of confidential or sensitive information. It was explained that difficulties could arise if the arbitral tribunal were to consult with the parties regarding information of a confidential nature that should be deleted from the award, and publication might therefore have an impact on the manner in which awards would be drafted, and their content. It was noted that the reasons for redacting or not publishing an award could be treated as part of the possible exceptions to the transparency rules (see below, paras. 67-72).

65. It was suggested to differentiate among awards rendered at different stages of the proceedings by the arbitral tribunal and to make the publication of the last award mandatory, while leaving the publication of the other awards optional at the arbitral tribunal's or the parties' initiative. In response, it was said that it was not unusual for a tribunal to render awards on different matters at different times, and the public might have an interest in any or all of them. It was also suggested that together with the publication of awards, provisions on that matter might allow publication of documents referred to in the awards, in particular if such documents were not released at an earlier stage, and were not of a sensitive nature any more.

66. As a matter of drafting, it was pointed out that there were a number of provisions dealing with awards in the UNCITRAL Arbitration Rules, and a legal standard on that matter should be made consistent with those provisions.

6. Possible exceptions to transparency rules

67. The Working Group turned its attention to the possible exceptions to the transparency rules for the protection of confidential and sensitive information (referred to during the discussion as "carve outs"). The view was expressed that any provision on that matter should be drafted in a generic manner, thus circumventing the need to envisage all possible circumstances, but rather leaving a large degree of discretion to the arbitral tribunal. It was further suggested that generic definition of "confidential information" could be found in existing investment treaties. For example, "confidential information" could be defined as "any sensitive factual information not available in the public domain". Such a definition would cover information that might be identified as sensitive by either disputing party. It was said that other categories of information might need to be protected while they were not included by such notion of "confidential information", for example information that might be used to impede law enforcement and information otherwise protected from disclosure by the law of a party. The view was expressed that, while it was difficult to develop a comprehensive definition of confidential information, it would be useful to provide guidance to arbitral tribunals in the form of examples.

68. Another model which was said to provide useful guidance in investor-State arbitration were the IBA Rules on the Taking of Evidence in International Arbitration (2010) which contained provisions on confidentiality in paragraphs (3) and (4) of article 9 on admissibility and assessment of evidence.

69. The view was expressed that the determination of confidential and sensitive information should be handled by the arbitral tribunal. It was explained that, in the practice of certain States, it was the responsibility of a disputing party to identify confidential or other protected information to the arbitral tribunal, and that that identification to the tribunal was the trigger for the tribunal to consider the issue and make a decision.

70. General comments were made to the effect that while exceptions for reasons of protecting confidential or sensitive information were necessary, they should not be so wide as to weaken the main rules on transparency. It was also suggested that exceptions to transparency to protect confidential or sensitive information should provide clarity and guidance, in order to avoid disputes between the parties on that matter.

71. A question was raised on the conditions of enforcement of those exceptions and whether a sanction should be provided in case a party would breach confidentiality obligations. It was suggested that State immunities could be invoked as a defence. One possible sanction mentioned was related to costs. Article 9 (7) of the IBA Rules on the Taking of Evidence in International Arbitration (2010) was given as an example of a provision containing such sanction. It provided that "If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the

costs of the arbitration, including costs arising out of or in connection with the taking of evidence".

72. A question was raised whether specific exceptions should be contemplated to deal with the question of protection of the integrity of the arbitral process. It was generally recognized that that matter was important to take into account as part of the discussions on transparency, but did not necessarily fall under the subject matter of exceptions for protection of confidential and sensitive information. It was generally agreed that protection of the integrity of the arbitral process was to be handled by the arbitral tribunal, which in any case already enjoyed a wide discretion in that respect under article 15 of the 1976 UNCITRAL Arbitration Rules and article 17 of the Rules, as revised in 2010. The general question of case management was said to be an important one, to be further considered in respect of each substantive matter.

7. Repository of published information ("registry")

73. The Working Group recalled that a number of suggestions had been made regarding the mechanisms to be put in place to ensure the public availability of the information that might be publicized to ensure transparency in treaty-based investor-State arbitration. It was recalled that in the course of its deliberations on substantive matters, the Working Group had heard suggestions that information could be made publicly available by the parties, either the host State or the investor, or by a neutral registry. It was pointed out that the publication of information pertaining to arbitration under the UNCITRAL Arbitration Rules could be handled by the UNCITRAL secretariat and posted on its website. The Permanent Court of Arbitration at The Hague ("PCA") was also mentioned, among other institutions, as a possible entity that could provide that service (see above, para. 37).

74. It was generally felt that there was first a need to better delineate the role that such registry would play before deciding whether parties or other entities should be entrusted with that task. It was questioned whether, with respect to the publication on the initiation of arbitral proceedings, the registry would also have to make a prima facie examination of the information received, in particular in case a legal standard on that matter would provide that information had to be posted before an arbitral tribunal was constituted. In that case, the registry would have to determine whether the case fell under the scope of application of the legal standard on transparency to be prepared, and for instance whether there was indeed an arbitration agreement. Other matters included whether beside cases arising from treaty-based investor-State arbitration, those resulting from contracts between States and investors, arising under investment law and other cases, would also fall in the competence of the registry. In that regard, it was further questioned whether the registry would be in a position to refuse publication of such cases.

75. The Working Group was informed that, as the UNCITRAL Arbitration Rules were an instrument of the United Nations, it would be logical for the United Nations Secretariat to provide such services to States. It was further noted that the Office of Legal Affairs of the United Nations, to which the UNCITRAL secretariat belongs, had experience in handling comparable types of services, including the publication of instruments of deposits of ratifications, access or acceptance of international conventions. The PCA confirmed its readiness to provide such services in case the UNCITRAL secretariat would not do so.

D. Form of a legal standard on transparency

76. The Working Group recalled its prior discussion on the possible nature of a legal standard on transparency in treaty-based investor-State arbitration, and the various forms it might take (see above, paras. 22 to 30). As to form, many delegations expressed support for including legal standards on transparency as a supplement to the UNCITRAL Arbitration Rules, whether as an annex or, noting that the UNCITRAL Arbitration Rules did not make reference to an annex, stand-alone rules on transparency. Suggestions were made that provisions on transparency could also take the form of guidelines or model clauses.

77. With a view to facilitating discussion on the applicability of rules on transparency, it was proposed to draw a distinction between the offer to arbitrate made by State parties to a treaty, and the subsequent consent of the investor to arbitrate, at the investor-State level.

1. At the level of the multilateral or bilateral investment treaties

78. In relation to the first level of consent (treaty level), a further distinction was suggested to be made between future and existing investment treaties.

(a) Future multilateral or bilateral investment treaties

79. The Working Group considered whether an express reference in future investment treaties to rules on transparency would be necessary for their application beside a reference to the UNCITRAL Arbitration Rules. Views were expressed that, in order to avoid legal uncertainty and diverging interpretations that might result from the absence of reference to rules on transparency, a preferable solution would be to provide for an express consent of the parties. It was said that States would have knowledge of the existence of new rules on transparency, and the lack of an explicit reference to them in an investment treaty should be interpreted as an agreement not to apply such rules. In particular, it was highlighted that the UNCITRAL Arbitration Rules did not contain provisions on the publication of documents, open hearings, and third parties' participation and, therefore, it would be difficult to deduce from a reference to the Rules an implied agreement also to apply additional rules on transparency.

80. However, it was pointed out that requiring a specific reference for the rules on transparency to apply in the context of future investment treaties would undermine the importance of the work currently undertaken by the Working Group. Another view expressed was that including in the rules on transparency provisions on their applicability would enhance clarity as to their application and use. For instance, it could be provided that the rules on transparency applied once reference to the UNCITRAL Arbitration Rules, as revised in 2010, was made.

81. It was suggested that a possible solution to conciliate different views expressed could consist in drafting rules reflecting a high level of transparency, but which would be applicable only if parties had expressly opted into transparent arbitration. It was generally felt that those matters should be further examined at a future session.

82. It was recalled that the mandate given by the Commission to the Working Group at its forty-third session was to provide an instrument that ensured transparency in treaty-based investor-State arbitration (see above, para. 2), leaving to the Working Group discretion how to implement that objective. It was further said that, if the instrument to be drafted would only be applicable if expressly referred to in the investment treaty, it would amount to a significant failure in the implementation of the mandate. Further, it was said that there was a need to address criticisms under which the current investor-State arbitration system was sometimes described as being closed, and not serving the public interest. It was further said that it might be timely to respond to those criticisms by adopting provisions on transparency that received the widest application in treaty-based investor-State arbitration. In that regard, the view was expressed that the Working Group should provide in any instrument it would draft on transparency, a presumption that the rules on transparency would apply in investment arbitration in the future. It was suggested that the Working Group should consider how best to create that presumption.

83. In support of that view, it was said that a presumption on application of the rules on transparency could be structured in a way that provided the needed level of certainty to parties as to whether or not they were operating under the transparency provisions in a given arbitration. For instance, it was suggested that the part of the rules on transparency dealing with their applicability could include wording along the lines of "these rules will be incorporated in the UNCITRAL Arbitration Rules for any arbitration initiated under those rules pursuant to an investment treaty hereafter ratified unless the treaty expressly provides that these rules will not apply". It was said that such wording would have the benefit of creating a presumption in favour of transparency under the UNCITRAL Arbitration Rules.

84. There was a general agreement that the provisions to be drafted regarding application of the rules on transparency to future treaties should be clear, and provide the necessary level of certainty as to the existence of consent of parties to adopt such rules as part of their arbitration process under the UNCITRAL Arbitration Rules. It was also suggested that language adopted in respect of future treaties should be considered under the perspective of its impact on already concluded investment treaties.

(b) Existing multilateral or bilateral investment treaties

85. With respect to existing treaties, the Working Group considered the application of any new standard to existing investment treaties. That question was said to have an important practical impact as there were more than 2,500 investment treaties in force to date,[8] but less than 10 treaties had been concluded in 2010.

86. Many delegations expressed the view that it would be desirable for rules on transparency also to apply to existing investment treaties. Such application was viewed as furthering the mandate by the Commission to enhance transparency in treaty-based investor-State arbitration. However, it was questioned whether such application was practically feasible, for example, due to the wide variety of treaty

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[8] For an online compilation of all investment treaties, see the database of the United Nations Conference on Trade and Development (UNCTAD), available on 28 July 2010 at www.unctadxi.org/templates/ Startpage____718.aspx.

provisions referring to arbitration under the UNCITRAL Arbitration Rules, and could be achieved through any instrument prepared by the Working Group and adopted by the Commission.

87. The attention of the Working Group was drawn on the impact of article 1 (2) of the UNCITRAL Arbitration Rules, as revised in 2010, which provided that: "The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date." Further, it was recalled that the 1976 version of the Rules did not contain any presumption that the Rules would be subject to amendments.

88. The Working Group discussed various possible means to achieve certainty as to the application of rules on transparency to existing investment treaties. It was suggested that application of rules on transparency to already existing investment treaties should not imply any retroactive application of those standards.

89. It was said that the consent in the investment treaty of the State parties to investor-State arbitration under the UNCITRAL Arbitration Rules could be interpreted as consent to a system of arbitration that would develop over time. Under that view, rules on transparency would automatically apply, as they would be part of that evolving system of UNCITRAL arbitration. Under another view, it was uncertain whether it could be derived from a mere reference to the UNCITRAL Arbitration Rules in investment treaties that parties agreed automatically to be bound by any amendments thereto. It was further said that automatic application of rules on transparency to existing investment treaties referring to the UNCITRAL Arbitration Rules would be impossible, unless there were joint declarations by the State parties pursuant to article 31 of the Vienna Convention on the Law of Treaties (1969). In that regard, it was also noted that the UNCITRAL Arbitration Rules did not contain any reference to an annex or any instrument that should be read together with them.

90. The Working Group explored the question of the form that an express consent by States would take. Procedures for amendments to existing investment treaties were said to be burdensome and time-consuming.

91. It was said that UNCITRAL's mandate included preparing or promoting the adoption of new international conventions, model laws and uniform laws,[9] but that UNCITRAL had no authority to create by itself legislative obligations for States without their consent. Consequently, it was said that the only possibility for the Working Group to enhance transparency in treaty-based investor-State arbitration was to formulate provisions and to encourage States to use them.

92. The view was expressed that if a legal standard on transparency would take the form of a non-binding instrument, such as guidelines, the question of applicability would not arise. The Working Group felt that it might be premature to take a firm decision on the form of the legal standard to be prepared at that stage of the discussion.

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

93. With a view to enhancing certainty as to the applicability of the rules on transparency with respect to existing treaties, various suggestions were made, including unilateral declarations by Governments, a joint interpretation by Governments, an instrument open to signature or ratification whereby States could express consent or agree to apply the transparency rules under existing treaties. It was further said that, though unilateral declarations were possible, joint declarations would be preferable to ensure equal treatment and would correspond to existing treaty practice. The legal value of interpretative instruments was said to be limited.

94. The Working Group agreed that all suggestions would require further legal analysis, and that that matter should be further discussed at a future session.

2. At the level of the relation between the host State and the investor

95. As for the second level of consent (investor-State level), it was noted that a policy decision should be made as to whether an investor would be bound by an offer by a State to arbitrate under the UNCITRAL Arbitration Rules, including the rules on transparency, or whether the investor would have discretion to refuse the offer of transparent arbitration.

96. It was said that in arbitral practice, it was possible to negotiate the applicable arbitration rules. However, it was widely felt that providing the investor with the last word on the application of the rules on transparency would unduly privilege the investor and lead to a decrease of transparency. It was said that such approach would be contrary to the Commission's mandate to enhance transparency in treaty-based investor-State arbitration. It was further pointed out that, in contrast to commercial arbitration, treaty-based investor-State arbitration was conducted on the basis of an underlying treaty between State parties, which limited the ability of the investor to depart from offers made by the host State. However, it was said that, for the purpose of ensuring the equality of parties in treaty-based investor-State arbitration, it might be advisable to provide the right for an investor to react to the host State's offer of transparent arbitration.

97. A question arose as to the extent to which the disputing parties should be allowed to depart from certain provisions of the rules on transparency, and whether they could legally be prevented from doing so. The view was expressed that the underlying treaty between State parties would prevent one State party and the investor to depart from the transparency rules. A contrary view expressed was that the disputing parties could, as a matter of law, always amend their arbitration agreements (including the reference to the transparency rules contained therein) and that it was accordingly not possible to entrench non-derogable provisions in the transparency rules. Another view expressed was that the decision on departure from the rules on transparency should be formally made by the arbitral tribunal upon the request of the parties. In response, it was said that such approach would place the arbitral tribunal in a delicate position at an early stage of the proceedings.

98. It was suggested to make certain provisions of the rules on transparency non-derogable, for example, by omitting from the transparency rules any right for the parties to amend the transparency rules by subsequent agreement, such as that contained in article 1 (1) of the UNCITRAL Arbitration Rules. In support of that suggestion, it was said that also the UNCITRAL Arbitration Rules themselves

contained non-derogable provisions. It was suggested to specify for each provision of the rules on transparency, which ones would be derogable, bearing in mind the fact that given rules might be said to confer rights on third parties.

99. The view was reiterated that those difficulties could be avoided by preparing non-binding recommendations or guidelines.

100. The Working Group agreed that all those suggestions would require further legal analysis, and that those matters should be further discussed at a future session.

V. Other business

A. Preparation of the next session of the Working Group

101. The Working Group requested the Secretariat to prepare for its next session working papers that would set out an analysis of the matters on form and substance discussed at its current session, including examples of provisions on transparency in treaty-based investor-State arbitration. The Working Group further requested the Secretariat to prepare, to the extent feasible and advisable, model provisions for discussion. Delegations were encouraged to provide information, including written contributions or proposals, they would deem relevant to the Secretariat on the matters discussed at the current session.

B. Matters for consideration by the Commission as possible work in the field of treaty-based investor-State arbitration

102. In accordance with the decision of the Commission at its forty-third session (see above, para. 3), the Working Group proceeded on a discussion to identify other topics which arose more generally in treaty-based investor-State arbitration that would deserve additional work and thus might be brought to the attention of the Commission at a future session.

103. It was suggested to bring to the attention of the Commission at a future session the topic of the possible intervention of a non-disputing State party referred to in paragraph 49 above. After discussion, the Working Group agreed to seek guidance from the Commission on whether that topic could be dealt with by the Working Group in the context of its current work. Another suggestion was made regarding the matter of impartiality and independence of arbitrators. There was no support to report that topic to the Commission.