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UNITED NATIONS CONVENTION ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

UNITED NATIONS CONVENTION ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (CONVENTION), DONE AT NEW YORK ON DECEMBER 10, 2014

DECEMBER 9, 2016.—Treaty was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

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LETTER OF TRANSMITTAL

THE WHITE HOUSE, *December 9, 2016.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, subject to certain reservations, I transmit herewith the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Convention), done at New York on December 10, 2014. The report of the Secretary of State, which includes an overview of the Convention, is enclosed for the information of the Senate.

The Convention requires the application of the modern transparency measures contained in the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules to certain investor-state arbitrations occurring under international investment agreements concluded before April 2014, including under the investment chapters of U.S. free trade agreements and U.S. bilateral investment treaties. These transparency measures include publication of various key documents from the arbitration proceeding, opening of hearings to the public, and permitting non-disputing parties and other interested third persons to make submissions to the tribunal. As the UNCITRAL Transparency Rules by their terms automatically apply to arbitrations commenced under international investment agreements concluded on or after April 1, 2014, and that use the UNCITRAL Arbitration Rules (unless the parties to such agreements agree otherwise), there is no need for the Convention to apply to international investment agreements concluded after that date.

Transparency in investor-state arbitration is vital, given that governmental measures of interest to the broader public can be the subject matter of the proceedings. The United States has long been a leader in promoting transparency in investor-state arbitration, and the 11 most recently concluded U.S. international investment agreements that contain investor-state arbitration already provide for modern transparency measures similar to those made applicable by the Convention. However, 41 older U.S. international investment agreements lack all or some of the transparency measures. Should the United States become a party, the Convention would require the transparency measures to apply to arbitrations under U.S. international investment agreements concluded before April 2014, to the extent that other parties to those agreements also join the Convention and to the extent the United States and such other parties do not take reservations regarding such arbitrations. The Convention would also require the transparency measures to apply in investor-state arbitrations under those agreements when the United States is the respondent and the claimants consent to their

application, even if the claimants are not from a party to the Convention.

The United States was a central participant in the negotiation of the Convention in the UNCITRAL. Ratification by the United States can be expected to encourage other countries to become parties to the Convention. The Convention would not require any implementing legislation.

I recommend, therefore, that the Senate give early and favorable consideration to the Convention and give its advice and consent to ratification by the United States, subject to certain reservations.

BARACK OBAMA.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, DC, April 26, 2016.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you, with a view to its transmittal to the Senate for advice and consent to ratification, the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, subject to the reservations set forth in the enclosed Overview of the Convention. The Convention was adopted in New York on December 10, 2014.

As a leader in the development of transparency measures in investor-state arbitration, the United States was a central participant in the negotiation of this treaty at the United Nations Commission on International Trade Law (UNCITRAL). The Convention requires the application of modern transparency measures, similar to those included in the investment chapters of recent U.S. free trade agreements (FTAs) and bilateral investment treaties (BITs), to investor-state arbitrations occurring under certain international investment agreements concluded before April 2014, most of which lack some or all such measures.

Transparency in investor-state arbitration is vital, given that government measures of interest to the broader public can be the subject matter of the proceedings. Moreover, transparency helps both the public and governments monitor how international investment agreements are being interpreted.

The transparency measures applied by the Convention are contained in the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (UNCITRAL Transparency Rules) adopted in 2013, which have three main effects on the transparency of investor-state arbitrations. First, the UNCITRAL Transparency Rules require a wide range of key documents from the arbitration proceeding to be made available to the public, which lets the public review the arguments that are being made on both sides of the dispute, as well as the reasoning of the arbitral tribunal in its award. Second, they require that hearings for the presentation of evidence or oral arguments be open to the public, which enables attendance at the proceedings just as if they had occurred in a domestic court. Third, they permit non-disputing parties and other third persons to make submissions to the arbitral tribunal, which provides an opportunity for those with a significant interest in the dispute to contribute their voices to the proceedings.

Every U.S. BIT and FTA concluded since 2003 that provides for investor-state arbitration already includes similar transparency measures. However, 41 older U.S. international investment agree-

ments lack all or some of the transparency measures. Should the United States become a party, the Convention would require the application of the UNCITRAL Transparency Rules in arbitrations under U.S. international investment agreements concluded before April 2014, to the extent that other parties to those agreements also join the Convention and if neither the United States nor those other parties take reservations permitted by the Convention pertaining to such arbitrations. The Convention would also require the application of the UNCITRAL Transparency Rules to investor-state arbitrations under U.S. international investment agreements where the United States is the respondent in the dispute and claimants in such arbitrations consent to their application, even if those claimants are from countries that are not parties to the Convention. As the 11 U.S. international investment agreements concluded between 2003 and 2008 already contain modern transparency standards that are as high as or higher than those applied by the Convention, it is recommended that the United States decline to apply the Convention to those 11 agreements by making a permissible reservation to that effect.

Only international investment agreements concluded before April 1, 2014, are within the scope of the Convention because the UNCITRAL Transparency Rules by their terms automatically apply to arbitrations under international investment agreements that are concluded on or after April 1, 2014, and that use the UNCITRAL Arbitration Rules, unless the parties to such agreements otherwise agree. Therefore, parties to international investment agreements concluded on or after April 1, 2014, who wish to apply the UNCITRAL Transparency Rules can easily incorporate those Rules into their agreements simply by calling for the application of the UNCITRAL Arbitration Rules or by otherwise explicitly incorporating the Transparency Rules into their agreements at the time of negotiation of their agreements.

In addition to the United States, fifteen other countries have signed the Convention thus far. Ratification by the United States can be expected to encourage other countries to sign and become parties to the Convention. Moreover, even to the extent that other countries do not ratify, the Convention will still apply the Transparency Rules to arbitrations in which the United States is the respondent if investors from those countries consent to the application of the Transparency Rules. The Convention would not be self-executing, and no implementing legislation would be needed.

I recommend, therefore, that you transmit the Convention to the Senate for advice and consent to ratification, subject to the reservations set forth in the enclosed Overview of the Convention.

Respectfully submitted.

JOHN F. KERRY.

Enclosure: As stated.

OVERVIEW OF THE CONVENTION

I. Background and Purpose

The 2014 United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration ("Convention") requires the application of modern transparency measures to investor-state arbitrations occurring under certain international investment agreements concluded between Parties. The transparency measures to be applied under the Convention are the Rules on Transparency in Treaty-Based Investor-State Arbitration adopted by the United Nations Commission on International Trade Law ("UNCITRAL") in 2013 ("UNCITRAL Transparency Rules" or "Transparency Rules"). The Transparency Rules are substantively similar to those included in recent U.S. bilateral investment treaties ("BITs") and investment chapters of free trade agreements ("FTAs"). The United States participated in the development and adoption of the UNCITRAL Transparency Rules and supports their widespread application. The text of the UNCITRAL Transparency Rules is included as an annex to this overview.

The Convention was negotiated under the auspices of UNCITRAL and was adopted by the U.N. General Assembly on December 10, 2014. It opened for signature on March 17, 2015, and, as of March 1, 2016, has sixteen signatories, including the United States. As of March 1, 2016, the Convention has not entered into force.

The Convention has three main effects on the transparency of investor-state arbitration occurring under an international investment agreement covered by the Convention. First, it requires a wide range of documents from the arbitration proceeding to be made available to the public (e.g., written statements by parties, transcripts of hearings, and awards issued by the tribunal). Second, it requires that hearings for the presentation of evidence or oral arguments be open to the public. Third, it permits non-disputing parties and other third persons to make submissions to the arbitral tribunal.

Every U.S. BIT and FTA that was concluded since 2003 and that provides for investor-state arbitration already includes similar transparency measures. However, 41 older U.S. international investment agreements do not include all of these transparency measures.

By their terms, the Transparency Rules only apply in disputes initiated under UNCITRAL Arbitration Rules and arising out of international investment

agreements that were concluded on or after April 1, 2014 (unless the disputing parties otherwise agree). The Convention in turn only applies to agreements concluded prior to April 2014. The Convention thus provides an efficient mechanism for countries to bind themselves to apply these transparency measures to international investment agreements concluded before April 2014 that lack such measures, without the need to reach separate agreements to that effect with the relevant partners for each such older agreement. Under the Convention, the transparency measures apply to investor-state arbitration under any international investment agreement concluded before April 1, 2014, as long as both relevant countries (the respondent in the arbitration as well as the investor's country) are parties to the Convention and have not taken a relevant reservation. The Convention also requires application of the transparency measures to investor-state arbitration under covered international investment agreements if the respondent is a Party to the Convention that has not made an applicable reservation and the claimant consents to such application (even if the claimant is from a state that is either a non-Party or that has made such a reservation). Each party to the Convention can take reservations to prevent the Convention (and therefore the UNCITRAL Transparency Rules) from applying to particular international investment agreements. Because recent U.S. BITs and FTAs already contain provisions that set a standard of transparency that is at least as high as that found in the Transparency Rules, it is proposed that the U.S. take reservations with respect to those 11 agreements.

II. Transparency Rules

As noted above, the Convention requires the application of UNCITRAL's Transparency Rules to certain investor-state arbitrations. The application of the Transparency Rules to a particular arbitration would have three main effects on the arbitration. It would require publishing certain documents, opening hearings to the public, and providing non-disputing parties and other third persons with the ability to file submissions.

The publication requirement has several elements. The Transparency Rules provide, in Article 2, that "[o]nce the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository," which then makes public the name of the disputing parties, the economic sector involved, and the international investment agreement under which the claim is being made. (UNCITRAL is currently operating the repository.) Article 3 of the Transparency Rules then provides for the publication by the repository of various documents during the arbitration. Under

Article 3, the repository is required to publish most of these documents as a matter of course. Other documents are to be made available to the public "upon request by any person to the arbitral tribunal" or, in some cases, on the initiative of the arbitral tribunal or upon request from any person "and after consultation with the disputing parties."

With regard to submissions by persons other than parties to the dispute, the Transparency Rules provide in Article 5 that the tribunal shall allow a non-disputing party to the international investment agreement to file a submission on issues of interpretation of the agreement, subject to the requirement that the submission "does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party." The Transparency Rules also enable arbitral tribunals to invite non-disputing party submissions on issues pertaining to interpretation of the international investment agreement, after consultation with the parties to the dispute. Moreover, after consulting with the disputing parties, the tribunal may also permit non-disputing parties to the agreement to file submissions on other matters. With respect to third persons other than non-disputing parties to the international investment agreement, Article 4 of the Transparency Rules also allows the tribunal to accept submissions after consultation with the disputing parties. The Transparency Rules set forth a number of factors for the tribunal to take into account in deciding how to exercise this discretion.

With regard to public hearings, Article 6 of the Transparency Rules requires that hearings for the presentation of evidence or oral arguments be open to the public. Parts of hearings can be held in private if necessary to protect confidential business information or the integrity of the arbitral process, and "the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons."

The Transparency Rules limit the application of these transparency measures by providing in Article 7 that "confidential or protected information" (including, for example confidential business information or information the disclosure of which would impede law enforcement) shall not be made available to the public. The tribunal is responsible for putting procedures in place to protect such information. Moreover, nothing in the Transparency Rules "requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests." Finally, the Transparency Rules provide that information shall not be made available to the public where doing so would "jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers

acting for disputing parties or members of the arbitral tribunal, or in comparably exceptional circumstances."

III. Article-by-Article Summary of the Convention

Preamble

The Preamble to the Convention identifies the need for provisions on transparency in arbitration proceedings used to settle investor-state disputes to take into account the public interest in such arbitrations. The Preamble notes the existence of many existing international investment agreements and highlights the Convention's goal of enabling countries to easily apply the Transparency Rules to arbitrations under those agreements.

Article 1. Scope of application

Article 1 identifies the scope of the Convention's application. It provides that the Convention applies to "arbitration between an investor and a State or a regional economic integration organization conducted on the basis of an investment treaty concluded before 1 April 2014." In turn, "investment treaty" is defined as "any bilateral or multilateral treaty … which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against contracting parties to that investment treaty."

Thus, the term "treaty" as used in this Convention has the meaning the term has under international law and refers to international agreements governed by international law, which under U.S domestic law and practice include both investment treaties made by the President with the advice and consent of the Senate under Article II of the U.S. Constitution (such as U.S. bilateral investment treaties) as well as executive agreements addressing investment (such as certain free trade agreements).

The United States has 52 existing agreements that qualify as "investment treaties" under the Convention: the North American Free Trade Agreement - NAFTA (to which Canada and Mexico are also parties); the Dominican Republic-Central America FTA (to which Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic are also parties); FTAs with Chile, Colombia, South Korea, Morocco, Oman, Panama, Peru, and Singapore; the Bilateral Trade Agreement with Vietnam; and BITs with Albania, Argentina, Armenia, Azerbaijan, Bahrain, Bangladesh, Bolivia, Bulgaria, Cameroon, the

Democratic Republic of the Congo, the Republic of Congo, Croatia, the Czech Republic, Ecuador, Egypt, Estonia, Georgia, Grenada, Honduras, Jamaica, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Mongolia, Morocco, Mozambique, Panama, Poland, Romania, Rwanda, Senegal, Slovakia, Sri Lanka, Trinidad and Tobago, Tunisia, Turkey, Ukraine, and Uruguay. (Although four of those BITs—those with Bolivia, Honduras, Morocco, and Panama—have been either terminated or suspended in part, their arbitration provisions continue to apply to certain investments in accordance with the terms of such terminations and suspensions.)

As noted below under the discussion of Article 3, 11 recent U.S. FTAs and BITs already contain provisions that set transparency standards at least as high as those contained in the Transparency Rules. As explained in more detail under the discussion of Article 3, it is proposed that the United States take reservations regarding these 11 international investment agreements. This approach would result in the United States applying the Convention to 41 international investment agreements.

Under each of these 41 international investment agreements, an investor of one party can choose binding arbitration as a means of settling certain investment disputes with another party. All of these agreements permit the investor to choose to submit the dispute to the International Centre for the Settlement of Investment Disputes (ICSID), and most also provide that, where applicable, the dispute can be submitted under the ICSID Additional Facility Rules (e.g., if the respondent state is not a party to the ICSID convention). Most of the international investment agreements also permit an investor to choose arbitration under the UNCITRAL Arbitration Rules or any other arbitration institution or rules to which the parties to the dispute agree. The Convention would apply the Transparency Rules to arbitrations occurring under any of these sets of arbitration rules, and the Transparency Rules would prevail in the event of a conflict with those other rules except to the extent a party takes a relevant reservation.

The Convention only applies to international investment agreements concluded before April 1, 2014, and thus would not apply to any new international investment agreements that the United States may conclude in the future.

Article 2. Application of the UNCITRAL Rules on Transparency

Article 2 establishes under what circumstances the Convention requires that the Transparency Rules be applied to investor-state arbitrations occurring under international investment agreements within its scope.

For arbitration under agreements within its scope, subparagraph 2(1) of the Convention provides that the UNCITRAL Transparency Rules shall apply to any investor-state arbitration in which the respondent is a Party to the Convention and the claimant is of a state (i.e., a country) that is also a Party to the Convention (as long as neither the respondent nor the state of the claimant has made a relevant reservation under Article 3). Thus, this provision requires the application of the UNCITRAL Transparency Rules only in cases where both relevant states (or, for a respondent, a regional economic integration organization ("REIO")) are Parties to the Convention. Only by agreement of both such states can the Convention supplement or supersede the procedures established in the international investment agreement under which the arbitration occurs. (If the claimant is from a state that is not a Party to the Convention or from a state that has taken a relevant reservation, Article 2(1) does not apply, even if the claimant's state is a member of a REIO that is a Party to the Convention. However, as described below, Article 2(2) might apply.) Thus, Article 2(1) would only affect U.S. international investment agreements within the scope of the Convention with respect to which a reservation is not taken, to the extent that other parties to those agreements also join the Convention and similarly do not take a reservation.

Subparagraph 2(2) further requires the application of the Transparency Rules to investor-state arbitration in which the respondent is a Party to the Convention that has not made an applicable reservation, but the claimant is from a state that is either a non-Party or that has made such a reservation, if the claimant agrees to application of the Transparency Rules. Thus, for situations in which the claimant's state has not agreed that the Transparency Rules should apply, this provision essentially establishes a "unilateral offer" by the respondent state to apply the Transparency Rules; the claimant can then choose whether or not to accept the offer. As noted below, Article 3(1)(c) permits a Party to take a reservation declining to apply Article 2(2) (i.e., declining to make the unilateral offer) when it is a respondent.

Subparagraph 2(3) provides that if the Transparency Rules are updated in the future, the most recent version will apply under Articles 2(1) and 2(2). When such an update occurs, a Party can opt out of this rule by making a reservation within six

month of the adoption of such update pursuant to Article 3(2), in which case the new version of the Transparency Rules will not apply to arbitrations in which it is the respondent. However, the newer version will apply to arbitrations in which that Party's investor is the claimant, unless the respondent has also made a reservation under Article 3(2). If the Transparency Rules are updated more than once in the future, the most recent version to which the respondent has not made a reservation will apply.

Subparagraph 2(4) provides that in an arbitration covered by Article 2(1) of the Convention, the final sentence of Article 1(7) of the Transparency Rules (which provides that the terms of the treaty under which the arbitration is conducted shall prevail in case of a conflict between the Rules and the treaty) shall not apply. As the Rules alone are not in the form of a legally binding instrument, they cannot trump binding treaty provisions. However, the Convention makes the Rules legally binding in cases covered by Article 2(1), and is intended to displace any conflicting provisions of the investment treaty under which the arbitration is being conducted. Therefore, applying this conflict rule would be contrary to the very purposes of the Convention, given that many international investment agreements that were in effect before April 2014 may have provisions that conflict with the Convention's transparency provisions.

Subparagraph 2(5) provides that "[t]he Parties to this Convention agree that a claimant may not invoke a most favoured nation provision to seek to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention." Article 2(5) does not suggest that use of the Transparency Rules should be considered either more or less favorable treatment. Instead, Article 2(5) establishes a procedural bar preventing claimants from invoking such an MFN clause to argue that the Transparency Rules should not apply when under the terms of the Convention they would otherwise apply, or that they should apply when under the terms of Convention they otherwise would not apply.

Article 3. Reservations

Article 3 permits Parties to make four specific types of reservations (and precludes all other reservations).

Article 3(1)(a) allows a Party to decline to apply the Convention to particular investment treaties to which it is a party. Eleven of the 52 U.S. international investment agreements that are within the scope of the Convention—all of the FTAs since 2003 that include in their investment chapters provisions on investor-

state arbitration, as well as the Rwanda and Uruguay BITs—already contain provisions that establish transparency standards slightly higher than those in the Transparency Rules. For example, unlike the Transparency Rules, these 11 agreements do not contain an exception explicitly permitting a hearing to be held entirely in private where necessary for logistical reasons, and most of these agreements provide arbitral tribunals with slightly broader discretion than under the Transparency Rules to accept submissions by third persons (i.e., amicus curiae). Thus, applying the Convention to those agreements would result in the application of a slightly lower standard of transparency than those agreements currently provide. Therefore, it is recommended that the United States decline to apply the Convention to those 11 agreements by including the following reservation in its instrument of ratification to the Convention:

> Pursuant to Article 3(1)(a) of the Convention, the United States declares that it shall not apply the Convention to investor-state arbitration under the following investment treaties:
>
> Title: Dominican Republic - Central America - United States Free Trade Agreement;
> Contracting Parties: the Republic of Costa Rica, the Republic of El Salvador, the Republic of Guatemala, the Republic of Honduras, the Republic of Nicaragua, the Dominican Republic, and the United States of America.
>
> Title: United States - Chile Free Trade Agreement;
> Contracting Parties: the Republic of Chile and the United States of America.
>
> Title: United States - Colombia Trade Promotion Agreement;
> Contracting Parties: the Republic of Colombia and the United States of America.
>
> Title: Free Trade Agreement between the United States of America and the Republic of Korea;
> Contracting Parties: the Republic of Korea and the United States of America.
>
> Title: United States - Peru Trade Promotion Agreement;
> Contracting Parties: the Republic of Peru and the United States of America.
>
> Title: United States - Morocco Free Trade Agreement;

Contracting Parties: the Kingdom of Morocco and the United States of America.

Title: Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area;
Contracting Parties: the Sultanate of Oman and the United States of America.

Title: United States - Panama Trade Promotion Agreement;
Contracting Parties: the Republic of Panama and the United States of America.

Title: Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment;
Contracting Parties: the Oriental Republic of Uruguay and the United States of America.

Title: 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;
Contracting Parties: the Republic of Rwanda and the United States of America.

Article 3(1)(b) allows a Party to reserve against the application of Articles 2(1) and 2(2) to arbitrations in which the Party is a respondent, where such arbitration is conducted under specific sets of arbitration rules or procedures other than the UNCITRAL Arbitration Rules. Without such a reservation, those Articles provide for the application of the Transparency Rules to arbitrations within their scope regardless of which arbitration rules or procedures are used. A Party cannot take such a reservation with respect to arbitrations conducted under the UNCITRAL Arbitration Rules. Moreover, any reservation made pursuant to Article 3(1)(b) applies only when the reserving Party is the respondent in an arbitration; if an investor of that Party brings a claim against another Party that has not made such a reservation, the Transparency Rules will still apply. It is not proposed that the United States make a reservation under Article 3(1)(b), thus enabling the application of modern transparency measures to investor-state arbitrations under older U.S. international investment agreements regardless of which set of arbitration rules is used.

Article 3(1)(c) allows a Party to opt out of Article 2(2)—the "unilateral offer" of application of the Transparency Rules. If a Party makes such a reservation, the Convention does not require the Transparency Rules to be applied in an arbitration brought against that Party by an investor from a state that is not a Party (or that has taken a relevant reservation under Article 3(1)(a) or 3(1)(b)), even if the investor wants the Transparency Rules to apply. In such a situation, the Party and the investor could still agree to apply the Transparency Rules; the Party simply would not be obliged pursuant to the Convention to so agree. It is not proposed that the United States make a reservation under Article 3(1)(c), in order to facilitate the application of modern transparency measures to investor-state arbitrations under these international investment agreements even when the claimant's state is not a Party to the Convention or has taken a relevant reservation under Article 3(1)(a) or 3(1)(b).

Article 3(2) provides that, if the Transparency Rules are revised in the future, a Party has six months after the adoption of the revised version to make a reservation declining to apply the revision. As with a reservation under Article 3(1)(b), a reservation under Article 3(2) only applies to arbitrations in which the reserving Party is a respondent; as noted above, Article 2(3) provides for the application of the most recent version of the Transparency Rules to which the respondent has not made such a reservation. No revision of the Transparency Rules has been adopted, nor is the negotiation of such revisions expected at this time. Therefore, this reservation cannot be made at this time. The possible future need for a reservation under Article 3(2) would be evaluated if the Transparency Rules are revised in the future. The executive branch would expect to consult with the Senate should such a circumstance arise. It is expected that the United States would participate in any revision of the Transparency Rules. Any such revision would be developed by UNCITRAL, which has a general practice of operating by consensus, and would be subject to approval by the U.N. General Assembly.

Article 3(3) provides that Parties may make multiple reservations in a single instrument for each of the permitted reservations: (i) in respect of a specific investment treaty under paragraph 3(1)(a); (ii) in respect of a specific set of arbitration rules or procedures under paragraph 3(1)(b); (iii) a "unilateral offer" under paragraph 3(1)(c); or (iv) in respect of a specific set of arbitration rules or procedures under paragraph 3(2). In such cases, however, Article 3(3) provides that each individual declaration shall constitute a separate reservation that can be withdrawn separately pursuant to Article 4(6). This approach encourages pro-transparency actions by Parties by facilitating the withdrawal of reservations and

thereby allowing the application of the Transparency Rules to a broader set of arbitrations.

Article 3(4) provides that no reservations to the Convention are permitted except as authorized in Article 3.

Article 4. Formulation of reservations

Article 4 contains provisions on the form, timing, and process for making and withdrawing reservations. Among other things, it provides that reservations can be made and withdrawn at any time, except for a reservation under Article 3(2) to the application of a revision of the UNCITRAL Rules, which can only be made within six months of the adoption of such revision. Reservations made after entry into force of the Convention for a Party take effect after twelve months from the date of deposit with the depositary.

Article 5. Application to investor-State arbitrations

Article 5 provides that the Convention, and any reservation or withdrawal of a reservation, only applies to arbitrations commenced after the date on which the Convention, the reservation, or the withdrawal enters into force or takes effect in respect of each Party concerned.

Article 6. Depositary

The Secretary-General of the United Nations is the depositary for the Convention.

Article 7. Signature, ratification, acceptance, approval, accession

Article 7 contains provisions on signature, ratification, acceptance, approval, and accession. Among other things, Article 7(1) provides that any state and any REIO that is constituted by states and is a contracting party to an investment treaty can become parties to the Convention.

Article 8. Participation by regional economic integration organizations

Article 8(1) requires any REIO that becomes a Party to the Convention to identify an investment treaty to which it is a party, in order to demonstrate that it qualifies to be a Party to the Convention under the terms of Article 7.

Article 8(2) provides that where the number of Parties is relevant under the Convention, a REIO shall not count as a Party in addition to its member states that are Parties.

Article 9. Entry into force

Article 9 provides for the Convention to enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval, or accession. For any state or REIO that joins after the date of deposit of the third instrument of ratification, acceptance, approval, or accession, the Convention will enter into force six months after the date of the deposit of its instrument.

Article 10. Amendment

Article 10 contains provisions regarding the process for amending the Convention. Any amendment that enters into force is only binding on those Parties that have expressed their consent to be bound by it. Any state or REIO that becomes a Party after an amendment enters into force shall be considered a Party to the Convention as amended.

Article 11. Denunciation of this Convention

Article 11 provides that, if a Party denounces the Convention, the denunciation will take effect after 12 months. The Convention shall continue to apply to arbitrations commenced before the denunciation takes effect.

UNITED NATIONS CONVENTION ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION

Preamble

The Parties to this Convention,

Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the extensive and wide-ranging use of arbitration for the settlement of investor-State disputes,

Also recognizing the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

Believing that the Rules on Transparency in Treaty-based Investor-State Arbitration adopted by the United Nations Commission on International Trade Law on 11 July 2013 ("UNCITRAL Rules on Transparency"), effective as of 1 April 2014, would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes,

Noting the great number of treaties providing for the protection of investments or investors already in force, and the practical importance of promoting the application of the UNCITRAL Rules on Transparency to arbitration under those already concluded investment treaties,

Noting also article 1(2) and (9) of the UNCITRAL Rules on Transparency,

Have agreed as follows:

Scope of application

Article 1

1. This Convention applies to arbitration between an investor and a State or a regional economic integration organization conducted on the basis of an investment treaty concluded before 1 April 2014 ("investor-State arbitration").

2. The term "investment treaty" means any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against contracting parties to that investment treaty.

Application of the UNCITRAL Rules on Transparency

Article 2

Bilateral or multilateral application

1. The UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a relevant reservation under article 3(1)(*a*) or (*b*), and the claimant is of a State that is a Party that has not made a relevant reservation under article 3(1)(*a*).

Unilateral offer of application

2. Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), and the claimant agrees to the application of the UNCITRAL Rules on Transparency.

Applicable version of the UNCITRAL Rules on Transparency

3. Where the UNCITRAL Rules on Transparency apply pursuant to paragraph 1 or 2, the most recent version of those Rules as to which the respondent has not made a reservation pursuant to article 3(2) shall apply.

Article 1(7) of the UNCITRAL Rules on Transparency

4. The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to investor-State arbitrations under paragraph 1.

Most favoured nation provision in an investment treaty

5. The Parties to this Convention agree that a claimant may not invoke a most favoured nation provision to seek to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention.

Reservations

Article 3

1. A Party may declare that:

(*a*) It shall not apply this Convention to investor-State arbitration under a specific investment treaty, identified by title and name of the contracting parties to that investment treaty;

(*b*) Article 2(1) and (2) shall not apply to investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules, and in which it is a respondent;

(*c*) Article 2(2) shall not apply in investor-State arbitration in which it is a respondent.

2. In the event of a revision of the UNCITRAL Rules on Transparency, a Party may, within six months of the adoption of such revision, declare that it shall not apply that revised version of the Rules.

3. Parties may make multiple reservations in a single instrument. In such an instrument, each declaration made:

(*a*) In respect of a specific investment treaty under paragraph (1)(*a*);

(*b*) In respect of a specific set of arbitration rules or procedures under paragraph (1)(*b*);

(*c*) Under paragraph (1)(*c*); or

(*d*) Under paragraph (2);

shall constitute a separate reservation capable of separate withdrawal under article 4(6).

4. No reservations are permitted except those expressly authorized in this article.

Formulation of reservations

Article 4

1. Reservations may be made by a Party at any time, save for a reservation under article 3(2).

2. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.

3. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.

4. Except for a reservation made by a Party under article 3(2), which shall take effect immediately upon deposit, a reservation deposited after the entry into force of the Convention for that Party shall take effect twelve months after the date of its deposit.

5. Reservations and their confirmations shall be deposited with the depositary.

6. Any Party that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect upon deposit.

Application to investor-State arbitrations

Article 5

This Convention and any reservation, or withdrawal of a reservation, shall apply only to investor-State arbitrations that are commenced after the date when the Convention, reservation, or withdrawal of a reservation, enters into force or takes effect in respect of each Party concerned.

Depositary

Article 6

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Signature, ratification, acceptance, approval, accession

Article 7

1. This Convention is open for signature in Port Louis, Mauritius, on 17 arch 2015, and thereafter at United Nations Headquarters in New York by any (*a*) State; or (*b*) regional economic integration organization that is constituted by States and is a contracting party to an investment treaty.

2. This Convention is subject to ratification, acceptance or approval by the signatories to this Convention.

3. This Convention is open for accession by all States or regional economic integration organizations referred to in paragraph 1 which are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Participation by regional economic integration organizations

Article 8

1. When depositing an instrument of ratification, acceptance, approval or accession, a regional economic integration organization shall inform the depositary of a specific investment treaty to which it is a contracting party, identified by title and name of the contracting parties to that investment treaty.

2. When the number of Parties is relevant in this Convention, a regional economic integration organization does not count as a Party in addition to its member States which are Parties.

Entry into force

Article 9

1. This Convention shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State or a regional economic integration organization ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State or regional economic integration organization six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Amendment

Article 10

1. Any Party may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to this Convention with a request that they indicate whether they favour a conference of Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties present and voting at the conference.

3. An adopted amendment shall be submitted by the Secretary-General of the United Nations to all the Parties for ratification, acceptance or approval.

4. An adopted amendment enters into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties which have expressed consent to be bound by it.

5. When a State or a regional economic integration organization ratifies, accepts or approves an amendment that has already entered into force, the amendment enters into force in respect of that State or that regional economic integration organization six months after the date of the deposit of its instrument of ratification, acceptance or approval.

6. Any State or regional economic integration organization which becomes a Party to the Convention after the entry into force of the amendment shall be considered as a Party to the Convention as amended.

Denunciation of this Convention

Article 11

1. A Party may denounce this Convention at any time by means of a formal notification addressed to the depositary. The denunciation shall take effect twelve months after the notification is received by the depositary.

2. This Convention shall continue to apply to investor-State arbitrations commenced before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

UNCITRAL | UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

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Contents

Resolution adopted by the General Assembly on 16 December 2013

[on the report of the Sixth Committee (A/68/462)]

68/109. United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations and the wide use of arbitration for the settlement of treaty-based investor-State disputes,

Recalling its resolutions 31/98 of 15 December 1976 and 65/22 of 6 December 2010, in which it recommended the use of the Arbitration Rules of the United Nations Commission on International Trade Law,[1]

Bearing in mind that the Arbitration Rules are widely used for the settlement of treaty-based investor-State disputes,

Recognizing the need for provisions on transparency in the settlement of such treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

Believing that rules on transparency in treaty-based investor-State arbitration would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient

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[1] *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17* (A/31/17), chap. V, sect. C; and ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), chap. III and annex I.

settlement of international investment disputes, increase transparency and accountability and promote good governance,

Noting that the Commission, at its forty-sixth session, adopted the Rules on Transparency in Treaty-based Investor-State Arbitration[2] and amended the Arbitration Rules as revised in 2010 to include, in a new article 1, paragraph 4, a reference to the Rules on Transparency,[3]

Noting also that the Rules on Transparency are available for use in investor-State arbitrations initiated under rules other than the Arbitration Rules or in ad hoc proceedings,

Noting further that the preparation of the Rules on Transparency was the subject of due deliberation in the Commission and that they benefited from consultations with Governments and interested intergovernmental and international non-governmental organizations,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for having prepared and adopted the Rules on Transparency in Treaty-based Investor-State Arbitration[2] and the Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013),[3] as annexed to the report of the Commission on the work of its forty-sixth session;[4]

2. *Requests* the Secretary-General to publish, including electronically, and disseminate broadly the text of the Rules on Transparency, both together with the Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013) and as a stand-alone text, and to transmit them to Governments and organizations interested in the field of dispute settlement;

3. *Recommends* the use of the Rules on Transparency in relation to the settlement of investment disputes within the scope of their application as defined in article 1 of the Rules, and invites Member States that have chosen to include the Rules in their treaties to inform the Commission accordingly;

4. *Also recommends* that, subject to any provision in relevant treaties that may require a higher degree of transparency

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[2]Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), chap. III and annex I.

[3]Ibid., chap. III and annex II.

[4]*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17).

than that provided in the Rules on Transparency, the Rules be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to treaties providing for the protection of investors or investments concluded before the date of coming into effect of the Rules, to the extent that such application is consistent with those treaties.

68th plenary meeting
16 December 2013

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

Article 1. Scope of application

Applicability of the Rules

1. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty")* concluded on or after 1 April 2014 unless the Parties to the treaty** have agreed otherwise.

2. In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when:

(a) The parties to an arbitration (the "disputing parties") agree to their application in respect of that arbitration; or

(b) The Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application.

Application of the Rules

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

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

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*For the purposes of the Rules on Transparency, a "treaty" shall be understood broadly as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty.

**For the purposes of the Rules on Transparency, any reference to a "Party to the treaty" or a "State" includes, for example, a regional economic integration organization where it is a Party to the treaty.

(b) The arbitral tribunal shall have the power, besides its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case, after consultation with the disputing parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.

Discretion and authority of the arbitral tribunal

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

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

(b) The disputing parties' interest in a fair and efficient resolution of their dispute.

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

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

Applicable instrument in case of conflict

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

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

Application in non-UNCITRAL arbitrations

9. These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings.

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

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

Article 3. Publication of documents

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

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

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

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

5. A person granted access to documents under paragraph 3 shall bear any administrative costs of making those documents available to that person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the repository.

Article 4. Submission by a third person

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

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

(a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);

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

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

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

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

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

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

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

4. The submission filed by the third person shall:

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

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

(c) Set out a precise statement of the third person's position on issues; and

(d) Address only matters within the scope of the dispute.

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

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

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

1. The arbitral tribunal shall, subject to paragraph 4, allow, 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 allow submissions on further matters within the

scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.

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

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

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

Article 6. Hearings

1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ("hearings") shall be public.

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

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

Article 7. Exceptions to transparency

Confidential or protected information

1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred

to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6.

2. Confidential or protected information consists of:

(a) Confidential business information;

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

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

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

3. The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate:

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

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

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

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

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

5. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.

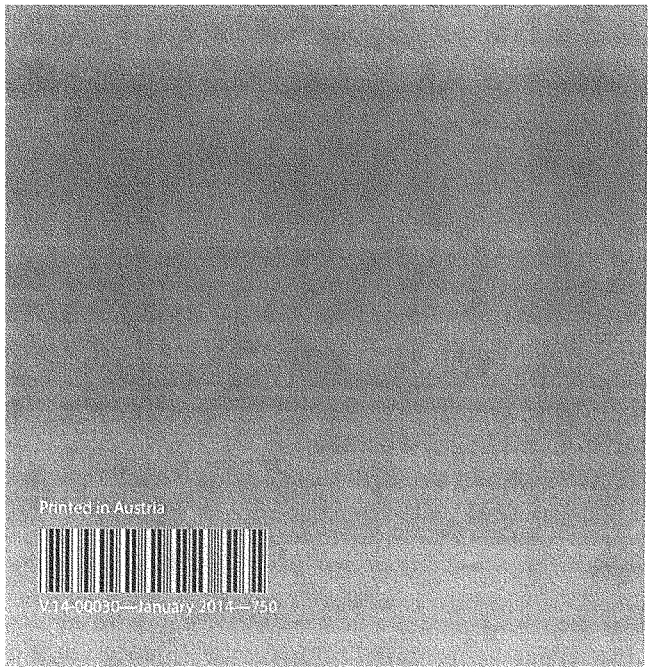
Integrity of the arbitral process

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

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

Article 8. Repository of published information

The repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations or an institution named by UNCITRAL.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