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Settlement of commercial disputes

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

Proposal by Governments of Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States of America

Note by the Secretariat

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* Submission of this document was delayed because of its late receipt.

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I. Introduction

1. At the fifty-sixth session of Working Group II (Arbitration and Conciliation), delegations were invited to coordinate their efforts to propose alternative solutions for the determination of the scope of application of the draft rules on transparency to the proposal contained in paragraph 54 of document A/CN.9/741 and to communicate drafting suggestions in that respect to the secretariat for consideration by the Working Group (A/CN.9/741, para. 59). The Governments of Argentina, Australia, Canada, Mexico, Norway, South Africa and the United States of America submitted a proposal, the text of which is reproduced below in the form in which it was received by the secretariat.

II. Proposal by Governments of Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States of America

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Application of the Rules on Transparency to Existing Investment Treaties

The Report of the Fifty-sixth Session of Working Group II (A/CN.9/741), held in New York February 6-10, 2012, addresses the question of the applicability of the new rules on transparency under existing investment treaties, i.e., those investment treaties concluded before the [date of adoption] [effective date] of the rules on transparency. See, e.g., paragraphs 50-53 of A/CN.9/741, which demonstrate that there were differing views within the Working Group on this question.

Paragraph 54 of A/CN.9/741 states that "the Working Group was invited to consider the following approach ... . For existing investment treaties, the rules on transparency would only apply where the parties had expressly consented thereto, with wording being used to make it clear that there could be no dynamic interpretation of existing investment treaties which would make the transparency rules applicable to them."

"Dynamic interpretation" of an investment treaty could arise in cases where the treaty, interpreted in accordance with applicable rules of treaty interpretation, provides for the application of the UNCITRAL Arbitration Rules as they might evolve over time, and thus a version of the UNCITRAL Arbitration Rules [adopted] [that becomes effective] on a date after the conclusion of the treaty could apply under that treaty, e.g., "the UNCITRAL Arbitration Rules in effect on the date of the notice of arbitration."

The Report makes clear that a number of delegations did not agree with the approach proposed in paragraph 54. Paragraph 56, for example, states: "Some diverging views were reiterated as follows: on the one hand that article 1(1) should leave open the possibility of legal application of the transparency rules to existing investment treaties, or that nothing in the rules should prohibit such an application ..." Additionally, paragraph 58 includes this language: "A few delegations reiterated that dynamic interpretation was legally possible and that they

were not ready to accept a 'blanket prohibition' that would preclude the effective implementation of provisions in investment treaties that envisaged the Parties benefiting from the most up-to-date provisions of the UNCITRAL Arbitration Rules in arbitrations under those treaties, which in that case would be the rules on transparency."

Paragraph 59 of A/CN.9/741 provides, in its entirety:

> It was clarified that it would be open to those delegations, who would find it difficult to agree with the proposal articulated above in paragraph 54 and still wished to propose another solution (whether in favour of an opt-in or in favour of a dynamic interpretation), to do so at the next session of the Working Group on the basis of the proposals in paragraph 8 of document A/CN.9/WGII/WP.169. It was noted that some delegations had indicated that it might be possible to find wording which would give those States that wished to exclude any possibility of dynamic interpretation of their treaties certainty in that respect, while preserving the possibility of such dynamic interpretation for other States. Those delegations were invited to coordinate their efforts and to communicate drafting suggestions in that respect to the Secretariat for consideration by the Working Group.

This paper is provided in response to that invitation.

In preparing this paper, the co-sponsors identified above have been guided by certain fundamental principles:

1. The Commission, at its forty-fourth and forty-fifth sessions, reaffirmed its commitment regarding the importance of ensuring transparency in treaty-based investor-State arbitration.[1]

2. To be effective in promoting transparency, it is essential to consider the investment treaties currently in force internationally.[2]

3. Application of the rules on transparency under an existing investment treaty is subject to the agreement of the Parties to that treaty.

4. In most cases, it will be clear if an existing treaty did not envision the application of the rules on transparency, and where it is not clear, the Parties to the treaty can take steps to prevent such application if they so desire.

5. However, those who do not wish the rules on transparency to apply under their treaties should not attempt to compel a similar result in cases where others desire the rules on transparency to apply under their own treaties and the language of the treaties provides for such application. To suggest

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[1] See, e.g., *General Assembly Official Records, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200 (stating that the Commission "reiterated its commitment expressed at its forty-first session, in 2008, regarding the importance of ensuring transparency in investor-State arbitration" and citing *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314).

[2] See id. (stating that the Commission "confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with great practical interest, taking account of the high number of treaties already concluded.").

otherwise would be unfair and not in keeping with the mandate from the Commission.

6. Moreover, the rules on transparency cannot purport to establish rules of treaty interpretation, which are governed by international law, including the Vienna Convention on the Law of Treaties.

Bearing in mind those principles, following is proposed language for Article (1) of the draft rules on transparency:

> If a treaty concluded prior to [date of adoption/effective date of the Rules on Transparency] refers to the UNCITRAL Arbitration Rules, that reference means the version of the UNCITRAL Arbitration Rules that incorporates these Rules on Transparency if the treaty, as interpreted in accordance with international law, reflects the treaty Parties' agreement to the application of that version of the UNCITRAL Arbitration Rules. The Parties may also agree, after [date of adoption/effective date of the Rules on Transparency], to apply these Rules on Transparency under a treaty concluded prior to that date.

This approach accommodates the interests of all concerned. It is based on the consent of the Parties to the investment treaty. If there is a disagreement between the Parties to the investment treaty on whether it should be interpreted to provide for application of the rules on transparency, that is a matter to be resolved by a tribunal or court in accordance with the relevant rules of treaty interpretation under international law; the rules on transparency cannot dictate that result.