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Settlement of commercial disputes: draft UNCITRAL rules on transparency in treaty-based investor-State arbitration

Compilation of comments by Governments

Contents

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I. Introduction

1. In preparation for the forty-sixth session of the Commission (Vienna, 8-26 July 2013), the text of the draft UNCITRAL rules on transparency in treaty-based investor-State arbitration as it resulted from its third reading by Working Group II (contained in document A/CN.9/783) was circulated at the request of the Working Group to all Governments for comment (see A/CN.9/765, para. 14).

2. The present document reproduces the comments received by the Secretariat on the draft revised UNCITRAL rules on transparency in treaty-based investor-State arbitration. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

II. Comments received from Governments

Germany

[Original: English]
[Date: 26 April 2013]

1. *Draft article 4 — Submission by a third person*: it is proposed to delete from article 4, paragraph (2) (a) the words "(including any organization that directly or indirectly controls the third person)".

2. *Draft amendment to article 1 of the UNCITRAL Arbitration Rules*: Germany has some sympathy for the Annex solution, and supports the provision in paragraph 29 of document A/CN.9/783, with the retention of the words "as an appendix".

3. These UNCITRAL Arbitration Rules would include the rules on transparency as an appendix and constitute a specific set of arbitration rules for treaty-based investor-State arbitration (UNCITRAL Arbitration Rules 2013). Parties who have started arbitration under another set of Arbitration Rules nevertheless will be able to include the UNCITRAL Transparency Rules.

4. *Draft article 1 — Scope of application, paragraph (2)*: "(2) In investor-State arbitrations initiated (i) under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before (date of coming into effect of the Rules on Transparency), or (ii) in treaty-based investor-State arbitrations initiated under other arbitration rules or ad hoc, these Rules shall apply when: "(a) the parties to an arbitration (the "disputing parties") agree to their application in respect of that arbitration; or, "(b) the Parties to the treaty or, in the case of a multilateral treaty, the home State of the investor and the respondent State, have agreed after (date of coming into effect of the Rules on Transparency) to their application."

Kenya

[Original: English]
[Date: 30 April 2013]

1. The Office of the Attorney General of the Republic of Kenya wishes to congratulate the Working Group for a job well done.

2. On draft Article 1 (7), the Commission may wish to reconsider the contradiction posed by the said paragraph in stating that rules of transparency shall be supplementary to the applicable arbitration rules but where there is a conflict between the two the rules of transparency shall prevail over the very rules they are supposed to supplement. Save for that observation we are in general agreement with the draft.

Liberia

[Original: English]
[Date: 1 May 2013]

The Republic of Liberia is a member of UNCITRAL, and is also a signatory to a number of concession agreements entered into with investors, many of which provide for arbitration under UNICITRAL Rules. The Ministry of Justice of the Republic of Liberia is of the opinion that the proposed transparency rules in arbitration proceedings, especially including public hearings, are not in conflict with the Constitution and laws of Liberia. We therefore commend the Working Group for the development of these draft rules.

Notwithstanding, we express reservations on the following provisions of the revised rules:

A. Granting broad discretionary powers to the Tribunal in the interest of transparency to accept submissions from non-disputing treaty members.

1. The primary reason for a State party or an investor submitting a case for arbitration under UNCITRAL is because they both perceive the process to be fair, speedy, and inexpensive. The promotion of the public interest in transparency is not their overriding objective.

2. Most of the major investors in Liberia and in Africa for that matter are multinational corporations with extensive support from their national governments, who are known to vigorously protect the interest of their nationals. Granting member States to treaties who are not parties to an arbitration proceeding, the right to make submissions before an UNCITRAL Tribunal will create an imbalance in the equality of arms. The investor's home country, invariably a treaty member, will make submissions to the Tribunal not for the purpose of transparency, but with the sole desire to protect the investment of their nationals. Such an eventuality will pit the State on one hand, against the disputing Investor and the non-disputing member on the other. This is unfair, and it enhances the very evil sought to be avoided under Article 1(7).

3. Granting a right to non-disputing party to the Treaty to make unilateral submissions without a showing of an interest, or the lack thereof, or a showing of a

duty or obligation to intervene in a matter pending before the Tribunal, is tantamount to permissive intervention. The draft rules do not require the non-disputing party to meet any requirements as a condition to the acceptance of their submission. Rather the rules impose a duty on the Tribunal, in furtherance of transparency, to "accept" submissions from non-disputing parties to the treaty as a matter of right. We are not convinced that the intervention of a non-disputing treaty member, regardless of expertise, enhances transparency. If anything, it promotes unfairness and undermines justice.

4. We are of the opinion, therefore, that where a non-disputing party to the Treaty intends to make a submission in a matter pending before the Tribunal, the concurrence of both the State and the investor must be obtained as a condition precedent. In the absence of such consent, no submissions shall be entertained.

B. Article 1 (6) which provides that "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."

1. The proposed language under Article 1(6) does not incorporate situations in which exceptions will apply to undermine the objectives of the transparency rules. Although such exceptions are addressed in other sections of the rules (e.g. confidential and protected information), it is proposed that the exceptions should be mentioned under this section to make it clear that there will be situations when actions that undermine the transparency objectives will have to prevail.

2. Accordingly, we propose the following language: "(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 unless the conduct, measure or other action is justified as an acceptable exception provided for under the Rules."

Singapore

[Original: English]
[Date: 30 April 2013]

1. The Republic of Singapore thanks the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for the documents prepared in connection with the draft UNCITRAL rules on transparency in treaty-based investor-State arbitration. The comments by the Republic of Singapore refer to the draft rules and comments contained in document A/CN.9/783.

Draft article 1 — Scope of application

2. We recommend that the words in brackets "[or (ii) in treaty-based investor-State arbitrations initiated under other arbitration rules or ad hoc]" be added in the chapeau of paragraph (2). This would expressly include the UNCITRAL rules on transparency as one of the standards of transparency which disputing parties may choose to apply in their arbitration, even if the treaty pursuant to which the arbitration is initiated provides for its own rules on transparency or does not provide for arbitration under the UNCITRAL Arbitration Rules.

3. We have no objection to the proposal to include the second footnote to article 1, to clarify the application of the rules on transparency to regional economic integration organizations.

4. We recommend that the date of coming into effect of the rules on transparency be a date later than their adoption by the Commission. The rules on transparency should only come into effect after the repository has been established and operationalized. We recommend that the Commission decide at a subsequent Session on an appropriate date for the rules on transparency to come into effect, after the Commission is in receipt of updates on the status of the establishment of the repository.

Draft article 3 — Publication of documents

5. We recommend that the last sentence of paragraph (3), in square brackets, not be retained in the text. We agree that the last sentence only provides one example of how documents could be made available, and does not fully reflect the other factors a tribunal would need to consider regarding how and whether to make exhibits and other documents available.

Draft article 7 — Exceptions to transparency

6. We do not see a need to clarify that "third persons" are included in the generic term "public" under paragraphs (1) and (5). "third persons" are a subset of the general public, which the phrase "the public", used throughout the rules on transparency, refers to.

7. We recommend that the word "would" in paragraph (7) be deleted and replaced with the word "could". This is to capture the intention behind paragraph (7), which is to enable a tribunal to take appropriate measures in the face of potential risks to the integrity of the arbitral process. As stated in paragraph 114 of document A/CN.9/736, paragraph (7) refers to "instances where publication could jeopardize the integrity of the arbitral process".

Draft amendment to article 1 of the UNCITRAL Arbitration Rules

8. We agree with the points raised in paragraphs 33 and 34 of the Secretariat's Note. We recommend that the rules on transparency be constituted as stand-alone rules.

Slovakia

[Original: English]
[Date: 30 April 2013]

Please find bellow the comments of the Ministry of Finance of the Slovak Republic on the open issues of the Rules on Transparency:

(i) *Article 1(2)*: We confirm that we have no objections against the insertion of the text "[or (ii) in treaty-based investor-State arbitrations initiated under other arbitration rules or ad hoc]".

(ii) *Footnote "**"*: We confirm that we have no objections against footnote ** to Article 1.

(iii) *Article 1(3) (former Article 1(4))*: We confirm that we have no objections against the revised Article 1(3)(b). However, it is not clear whether the arbitration tribunal may exercise this power solely on its own initiative or also upon the application of a disputing party.

(iv) *Date of adoption/effective date of the Rules on Transparency*: Date of coming into effect: (i) adoption of Rules on Transparency or (ii) later date. We prefer to have a later date, since certain procedures might be necessary for the new UNCITRAL rules 2013 to come into effect. We suggest 1 January 2014 for entry into force.

(v) *Article 3(3)*: We confirm that we have no objections against the second sentence of Article 3(3).

(vi) *Article 3(5)*: We believe that the wording "ancillary to the costs of making those documents available to the public" is sufficiently clear.

(vii) *Article 7 — modification and clarification*: We confirm that we have no objections against the drafting modification of Article 7. However, we believe that it is not necessary to clarify that third persons are included in the term "public" under paras. (1) and (5), since the term "public" clearly includes the term "third party".

(viii) *Article 1(4) of the UNCITRAL Arbitration Rules — appendix or stand-alone document*: We do not have strong preference as to whether the rules shall be adopted as an appendix or as a stand-alone document. However, could you please provide us with more advantages and disadvantages for each form?

(ix) *Article 1(4) of the UNCITRAL Arbitration Rules — footnote from Article 1(1) of Rules on Transparency*: We confirm that we have no objections against including footnote 1 in the Rules on Transparency in order to clarify that Rules on Transparency do not apply to commercial dispute.

(x) *Title of UNCITRAL Arbitration Rules 2013*: We do not have any strong preference in this relation.

United States of America

[Original: English]
[Date: 2 May 2013]

1. *Article 1(2)*: The United States of America recommends deletion of the bracketed language "or (ii) treaty-based investor-State arbitrations initiated under other arbitration rules or ad hoc." The "bright line" rule reflected in Article 1(2) was included to distinguish the application of the Rules on Transparency under existing treaties (opt-in) from the application of the Rules under future treaties (opt-out), in both cases where investor-State arbitration is initiated under the UNCITRAL Arbitration Rules. We see no reason to apply the "bright line" rule to arbitrations initiated under other arbitration rules or ad hoc. In such arbitrations, other arbitral institutions or, in ad hoc situations, the disputing parties will decide whether to use the Rules — likely on an opt-in basis anyway.

2. In order to underscore the availability of the Rules on Transparency in contexts other than under the UNCITRAL Arbitration Rules, the United States recommends the addition of a new Article 1(9) as follows: "These Rules are available for use in investor-State arbitrations initiated under other arbitration rules where permitted by the relevant institution or in ad hoc proceedings."

3. *Article 1(3)(b)*: The United States recommends replacing "whilst not undermining" with "whilst achieving", which is closer to the earlier version of this provision.

4. *Second footnote*: The United States recommends that the footnote designated "**" be slightly edited as follows: "For the purpose of the Rules on Transparency, any reference to a 'Party to the treaty' or a 'State' that is a Party to the treaty applies equally to a regional economic integration organization where it is a Party to the treaty."

5. *Paragraph 10*: The United States does not have a view regarding on which date the Rules shall come into effect. We recall that the 2010 version of the UNCITRAL Arbitration Rules came into effect a few weeks after its adoption by the Commission; we understand that this was to accommodate translations in the official languages of the United Nations. We believe that this might again be a sensible precaution but would urge that the Rules come into effect as soon as is practicable.

6. *Article 3(3)*: The United States supports retention of the bracketed text "This may include, for example, making such documents available at a specific site." We believe that this example is helpful. We note that examples are used elsewhere in the text of the Rules, e.g., in Article 3(5); Article 4(2)(a); and Article 4(2)(c).

7. *Article 3(5)*: In order to clarify the meaning of this provision, the United States recommends revising paragraph (5) as follows: "A person that is not a disputing party and is granted access to documents under paragraph (3) shall bear any administrative costs associated with the costs of making those documents available to that person (such as the cost of photocopying or shipping documents to that person) other than the costs of transmitting documents to the repository and uploading them to a site."

8. This proposed revision deletes the reference to paragraph (2) of Article 3, as it is our understanding (see paragraph (4)) that, where a request is made for documents identified in paragraph (2), those documents would be transmitted by the arbitral tribunal to the repository and would not otherwise be made available to an individual.

9. *Article 4, paragraphs (1) and (3)* refer to "allow" regarding submissions, while *Article 5, paragraphs (1) and (2)* (the latter twice) refer to "accept". The United States recommends that there be consistent usage of one term or the other, to avoid any suggestion that there is a difference in meaning. We recall that the Working Group initially agreed to change "accept" to "allow" because it was thought that the former might suggest that the tribunal agreed with the content of the submission. Subsequently, however, "allow" was changed back to "accept" in Article 5. We recommend sticking with one term. Another possibility might be "accept and consider".

10. *Article 4(2) chapeau*: The United States recommends deletion of the words "as may be" so as to avoid any suggestion that the page limits would typically be established only after submissions are made.

11. *Article 4(2)(c)*: Funding "around 20 per cent" is an odd standard that sacrifices certainty in the interest of avoiding arbitrariness. If it is to be retained, the United States suggests emphasizing that it is illustrative only by setting it off in a parenthetical phrase: "... by the third person under this article (e.g., funding around 20 per cent of its overall operations annually)."

12. *Article 5(2)*: For purposes of conformity with Article 4(3) and to avoid any suggestion that the intended meaning is different, the United States recommends that "In exercising its discretion to accept" be replaced with the language used in 4(3): "In determining whether to allow".

13. *Paragraph 20*: In case the first sentence is misinterpreted, it should be clarified to the Commission that, as Article 5(1) expressly provides, the arbitral tribunal shall (not should) accept submissions on issues of treaty interpretation from a non-disputing Party to the treaty, subject only to Article 5(4).

14. *Article 7, paragraphs (1), (3) and (5)*: The United States recommends that the reference in each paragraph to "non-disputing Parties to the treaty" be deleted, as it is our understanding that the term "public" encompasses all those other than the disputing parties.

15. *Paragraph 29*: The United States recommends that the new paragraph (4) under Article 1 of the 2013 UNCITRAL Arbitration Rules read as follows in order to avoid any controversy about the relationship between the Arbitration Rules and the Rules on Transparency: "For investor-State arbitrations initiated pursuant to a treaty providing for the protection of investments or investors, the UNCITRAL Rules on Transparency (see Appendix), as may be amended from time to time, form an integral part of these Rules and apply subject to Article 1 of the UNCITRAL Rules on Transparency."

16. *Paragraphs 32-35*: The United States believes that it is appropriate and preferable to include the Rules on Transparency as an appendix to the 2013 UNCITRAL Arbitration Rules. It would be unusual to incorporate the Rules on Transparency through a new Article 1(4) in the UNCITRAL Arbitration Rules but not attach the Rules on Transparency in a tangible and visible way. Not attaching them as an appendix might invite legal challenges to, and create legal uncertainty about, the application of the Rules on Transparency in given cases. In the absence of a visible appendix, those intending to use the 2013 UNCITRAL Arbitration Rules may not scrutinize Article 1(4) and thus may be unaware that the Rules on Transparency apply to investor-State arbitration brought under the 2013 Rules.

17. The United States does not believe that including the Rules on Transparency as an appendix would affect the generic applicability of the UNCITRAL Arbitration Rules. The 2013 UNCITRAL Arbitration Rules would be equally applicable for commercial arbitration, as Article 1(4) and the appendix would be relevant only in cases of investor-State arbitration. Nor do we believe that using this format raises any new questions as to whether other investment-specific provisions should be added to the 2013 UNCITRAL Arbitration Rules. We are not aware of any such proposals.

18. Moreover, the United States does not believe that including the Rules on Transparency as an appendix would significantly affect the availability or use of those Rules under other arbitration rules or in an ad hoc context. However, to the extent those concerns exist, this could be addressed by publishing the Rules on Transparency in two forms: as an appendix to the 2013 UNCITRAL Arbitration Rules, and also in stand-alone form.

19. *Paragraph 36*: It seems unnecessary to duplicate the footnote, as the new Article 1(4) would point one directly to the Rules on Transparency. Not duplicating the footnote would help minimize the changes that are being made to Article 1 of the UNCITRAL Arbitration Rules.

20. *Paragraph 39*: We suggest, in keeping with the title used for the 2010 Rules — "UNCITRAL Arbitration Rules (as revised in 2010)" — that the 2013 Rules be identified as "UNCITRAL Arbitration Rules (as revised in 2013)". Perhaps the booklet containing the 2013 Rules might explain how the 2013 Rules differ from the 2010 Rules, i.e., the addition of Article 1(4) and the Appendix.