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Settlement of commercial disputes

Transparency in treaty-based investor-State arbitration

Compilation of comments by Governments

Note by the Secretariat

Contents

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I. Introduction

1. At its forty-first session (New York, 16 June-3 July 2008), the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with by Working Group II (Arbitration and Conciliation) as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution. The Commission was of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency as a desirable objective in investor-State arbitration should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group (ibid., para. 69) in the field of treaty-based arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based arbitration and that broad discretion should be left to the Working Group in that respect. With a view to facilitating consideration of the issues of transparency in treaty-based arbitration by the Working Group at a future session, the Commission requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in investor-State arbitration.[1]

2. At its forty-third session (New York, 21 June–9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission entrusted the Working Group with the task of preparing a legal standard on the topic of transparency in treaty-based investor-State arbitration. The Commission was informed that, pursuant to the request received from the Commission at the forty-first session, the Secretariat had circulated a questionnaire to States with regard to their practice on transparency in investor-State arbitration and that replies thereto would be made available to the Working Group. The questionnaire as circulated to States is reproduced in part II of this note. The present document and its addenda contain in part III replies received by the Secretariat from States.[2]

II. Questionnaire

A. Questions regarding current practices with respect to transparency in treaty-based investor-State arbitration

(1) Could you provide examples of treaty-based investor-State arbitration cases in your country involving instances of publicity or transparency of the arbitral

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

[2] Report of the Commission on the work of its forty-third session (in preparation).

proceedings (for example, cases where information regarding the existence of the arbitral proceedings would be made publicly available, or where the possibility would exist for the public or specific interest groups to obtain access to documents used in the arbitral proceedings, or to be present at hearings)?

(2) Are there any examples in your country of cases where third parties have presented statements in the course of treaty-based investment arbitration (such as amicus curiae briefs) or have otherwise intervened in the proceedings?

(3) Is there any provision concerning transparency or publicity regarding treaty-based investment arbitration in bilateral or multilateral treaties or agreements entered into by your country? If so, could you please provide us with the texts of such treaties or agreements, or any information relating thereto?

(4) Is there any provision for third parties to become involved in treaty-based investment arbitration in bilateral or multilateral treaties or agreements entered into by your country? If so, could you please provide us with the texts of such treaties or agreements, or any information relating thereto?

(5) Do you have any comments regarding current practices with respect to publicity or transparency in treaty-based investor-State arbitration involving your country?

B. Reference to the questionnaire

3. In the remainder of this note and in the addenda, the above questions are referred as follows:

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

Question 2: Amicus curiae briefs or other interventions

Question 3: Provision in treaties on transparency or publicity

Question 4: Provision in treaties on third parties' involvement

Question 5: Any other comment

III. Comments received from Governments on transparency in treaty-based investor-State arbitration

1. Algeria

[Original: French]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

The answer to this question lies with the Algerian Chamber of Commerce and Industry. Article 6 of Executive Decree No. 64-96 of 3 March 1996, establishing the Statute of the Algerian Chamber of Commerce and Industry, states that the Chamber may establish a conciliation and arbitration committee

at the request of contracting parties for the settlement of their commercial disputes. In this regard, the Algerian Chamber of Commerce and Industry may engage in arbitration at both the national and the international level.

Question 2: Amicus curiae briefs or other interventions

There is no provision in bilateral agreements for intervention by third parties in arbitral proceedings between States and investors. Algeria has thus not mentioned or referred to such a procedure in the bilateral or multilateral agreements that it has concluded, nor in settlement mechanisms or processes. This position applies also to dispute settlement mechanisms in order to ensure that the State is not forced to deal with multiple parties in the same case.

Question 3: Provision in treaties on transparency or publicity

Bilateral investment protection treaties concluded by Algeria contain a provision referring in a general way to transparency. The provision requires the contracting parties to ensure that investors are provided with any legislation, regulations, procedures, administrative decisions and international conventions that may benefit any of the investors or any of the contracting parties in the territory of the other party.

Algeria model agreements on the promotion and protection of investments do not, however, spell out these stages of arbitration. They simply mention the arbitration regime concerned — the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL) or the International Chamber of Commerce (ICC) — but do not go into detail as to the procedures to be followed.

Question 4: Provision in treaties on third parties' involvement

The reply to this question is the same as that given for question 2.

Question 5: Any other comment

With regard to publicizing arbitral decisions, they are generally available on the websites of the arbitration bodies mentioned above. As for the conduct of arbitral hearings, only the advisers representing the parties to the conflict can comment on their transparency, in view of the fact that the hearings are not open to the public.

2. Argentina

[Original: Spanish]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

The bilateral treaties on the promotion and reciprocal protection of investments to which the Argentine Republic is a party generally contain — with regard to the settlement of disputes — an option whereby the investor may have recourse to (1) local courts, (2) the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) and (3) arbitration under the UNCITRAL Rules.

Most investors have opted for the jurisdiction of ICSID. Pursuant to the ICSID Convention, the arbitration rules of ICSID and the practices developed by ICSID officials, after a dispute has been registered ICSID makes known, on its website and in its written publications, the existence of the dispute, the parties involved, the number of the arbitration case and the composition of the arbitral tribunal. Recently, it has begun publishing also certain procedural provisions and its decisions relating to jurisdiction and to the merits of the dispute, thereby ensuring transparency with regard to (1) the existence of the dispute and (2) the publication of decisions on matters of jurisdiction and merits. An example of such publications can be found on the website http://icsid.worldbank.org/ICSID.

As regards the latter, even before the revision of the arbitration rules that entered into force on 10 April 2006, ICSID used to request from both parties to a dispute their agreement to publication of its decision. Following the aforementioned revision, when the parties do not agree to publication of the decision, ICSID shall then publish a summary of the legal arguments contained in the decision.

Question 2: Amicus curiae briefs or other interventions

Two arbitration cases involving the Argentine Republic are essential links in the evolution of amicus curiae participation in arbitration proceedings. In both cases, Argentina supported the participation of the amici. The cases are AASA, Suez, Aguas de Barcelona y Vivendi v. Argentine Republic, ICSID case No. ARB/3/19 and APSF, Suez, Aguas de Barcelona e Interagua v. Argentine Republic, ICSID case No. ARB/3/17.

In the case APSF, Suez, Aguas de Barcelona e Interagua v. Argentine Republic, ICSID case No. ARB/3/17, the arbitration tribunal rejected participation of the amici.

In the case AASA, Suez, Aguas de Barcelona y Vivendi v. Argentine Republic, ICSID case No. ARB/3/19, the arbitration tribunal allowed the participation of third parties, although it limited such participation to the presentation of documents setting forth the position of the amicus. The tribunal ruled out the possibility of the third party having access to the documents of the dispute and/or participating in the hearings of the case. Also, it established a number of procedural requirements that are now reflected in Rule 37 of ICSID's arbitration rules of 2006.

This was the first case where — despite the gap in the law that existed at the time when the request for amici participation was submitted — an arbitration tribunal agreed to the participation of third parties in ICSID proceedings. As indicated earlier, this case permitted the participation of third parties and preceded a revision of ICSID's procedural rules.

Question 3: Provision in treaties on transparency or publicity

There are no specific provisions regarding transparency in the bilateral treaties entered into by the Argentine Republic.

Question 4: Provision in treaties on third parties' involvement

There are no specific provisions regarding the participation of third parties in arbitration proceedings relating to investments in the bilateral treaties entered into by the Argentine Republic.

Question 5: Any other comment

In the Argentine Republic, there are no particular rules about transparency and publication in investor-State arbitration cases. By Decree No. 1172/2003, however, the Executive has provided for the fullest possible public access to governmental papers through clear, specific mechanisms such as: public hearings involving the Executive (Art. 1); publicity with regard to the representation of interests (Art. 2); the participatory elaboration of rules (Art. 3); access to public information regarding organizations, entities, enterprises, companies, departments and any other body operating under the jurisdiction of the Executive, and also private organizations that are receiving subsidies or other financial support from the public sector, foundations or other institutions for whose administration, maintenance or preservation the State (through its judicial authorities or other entities) is responsible and private enterprises to which has been granted — by permit, licence or concession or in some other contractual form — the right to provide a public service or exploit some property in the public domain (Art. 4).

In all cases, brief formalities have to be completed before public hearings are arranged or access is granted to governmental papers. The only exceptions as regards access are those specifically stated in the Decree, which are limited — inter alia — to information expressly classified as confidential, especially information relating to security, defence or foreign policy, information that could jeopardize the correct functioning of the financial or banking system, information that compromises the legitimate rights of a third party and was obtained through confidential sources, data protected by professional secrecy or that would endanger the life or safety of a person, etc.

In addition, the same Decree provides for access free of charge to the daily edition of all sections of the Official Gazette of the Argentine Republic. Lastly, it provides for the repeal of all rules running counter to the directives arising out of it.

For their part, all official organizations have announced measures for adapting their structures in order to ensure free access to public information in accordance with the Decree.

3. Armenia

[Original: English]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

The public was informed about arbitral proceedings by mass media. There is no example of treaty-based investor-State cases where it was possible for the public or specific interest groups to obtain access to documents used in the arbitral proceedings, or to be present at hearings.

Question 2: Amicus curiae briefs or other interventions

No.

Question 3: Provision in treaties on transparency or publicity

No.

Question 4: Provision in treaties on third parties' involvement

No.

Question 5: Any other comment

No.

4. Australia

[Original: English]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

Australia has not been a party to an investor-State arbitration.

Question 2: Amicus curiae briefs or other interventions

Australia has not been a party to an investor-State arbitration.

Question 3: Provision in treaties on transparency or publicity

The Chile-Australia FTA contains investor-State dispute settlement provisions ("ISDS"), which provide for a significant degree of transparency in investor-State arbitration (see article 10.22). The Chile-Australia FTA has been signed by the parties but has not yet entered into force. The text of the Chile FTA is publicly available through the website of the Department of Foreign Affairs and Trade: http:www.dfat.gov.au/geo/chile/fta/FTA_Text_10.html.[3]

Question 4: Provision in treaties on third parties' involvement

The ISDS provisions in the Chile-Australia FTA allow the arbitral tribunal to accept written submissions from third parties that may assist the tribunal in evaluating the submissions and arguments of the disputing parties (see article 10.20.2).

Question 5: Any other comment

Australia supports transparency in treaty-based investor-State arbitration and welcomes the Commission's decision to undertake work on the issue as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules.

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[3] Note by the Secretariat: A copy of the Chile-Australia Free Trade Agreement was attached to the reply by the Government of Australia. Relevant excerpts can be found in part II of document A/CN.9/WG.II/WP.160 and its addendum.

5. Bahrain

[Original: English]

Question 1: Examples of publicity or transparency of arbitral proceedings; Access to documents or hearings

Bahrain has to date had no treaty-based investor-State arbitration cases involving instances of publicity or transparency of the arbitral proceedings.

Question 2: Amicus curiae briefs or other interventions

There are no examples of cases in Bahrain where third parties have presented statements in the course of treaty-based investment arbitration or have otherwise intervened in the proceedings.

Question 3: Provision in treaties on transparency or publicity

There is no provision concerning transparency or publicity regarding treaty-based investment arbitration in bilateral or multilateral treaties or agreements entered into by Bahrain.

Question 4: Provision in treaties on third parties' involvement

There is no provision for third parties to become involved in treaty-based investment arbitration in bilateral or multilateral treaties or agreements entered into by Bahrain.

Question 5: Any other comment

Bahrain is a party to a number of important bilateral investment treaties which are expressions of national economic policy to encourage international investment. These treaties are negotiated carefully, one by one, in light of the nature and development of our relations with individual States. Some of them open the possibility of arbitration under the UNCITRAL Rules.

Bahrain also pursues a strong policy of promoting international commercial arbitration, and the UNCITRAL Rules in particular.

If the UNCITRAL Rules were to incorporate provisions concerning transparency, publicity, and third party interventions, or to include them in a generic annex, this would be a departure from the nature of the Rules, which have never purported to establish matters of national policy. This would be prejudicial both to Bahrain's treaty practice and to our policy of promoting UNCITRAL arbitration arising generally from contracts:

(A) Our bilateral treaties are negotiated individually with regard to relations with individual States. If the UNCITRAL Rules contained provisions on such sensitive matters, Bahrain would be unlikely to refer to them. It would regret the loss of that valuable option.

(B) Contract-based arbitrations may also involve investor-State relations and indeed treaty-based arbitrations often involve contracts. This raises definitional issues of some complexity before one can even determine the scope of any proposed rules, depending on how individual States have chosen to organize the public sector. If the UNCITRAL Rules

were to depart from their established framework and purport to legislate such a definition for worldwide use, the consequences would be:

(i) possible conflict with national law,

(ii) unpredictability, and

(iii) a regrettable disinclination to refer to the UNCITRAL Rules.

Accordingly, in order to prevent the gradual irrelevance and desuetude of the UNCITRAL Rules, Bahrain would resist any attempt to incorporate transparency provisions into the UNCITRAL Rules, or in a generic annex to them, but would welcome the opportunity (but only after the new Rules have been finally adopted) to consider model clauses for possible use in individual instruments.

6. Belarus

[Original: Russian]

Courts of arbitration in the Republic of Belarus have heard no investor-State arbitration cases, whether arising out of an investment agreement (article 45 of the Investment Code) or a concession agreement (article 50 of the Investment Code) or having some other basis.

It may, however, be noted that disputes involving foreign investors, which are heard in accordance with the procedure laid down in international agreements and national legislation, generally relate to cases arising out of normal economic investment activity under actions brought against supervisory bodies or against persons engaged in commercial activity.

In bilateral international investment protection agreements, the parties generally agree to settle disputes by conciliation or arbitration through the International Centre for Settlement of Investment Disputes, in accordance with the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Under international treaties, such disputes may be referred to any arbitration tribunal, including ad hoc tribunals set up to deal with a specific dispute. This is the position as regards agreements with Austria, the United Kingdom, Latvia, the Republic of Korea, Israel, Finland, Viet Nam, the United States, Turkey, Romania and other countries. Other arbitration centres may also be designated as having jurisdiction. Thus the agreement with Turkey designates the Court of Arbitration of the International Chamber of Commerce (ICC) as also having jurisdiction in investment disputes. In addition, where disputes arise, the parties may engage in the conciliation procedure laid down in the UNCITRAL Arbitration Rules or the ICC Rules of Arbitration.

An investment dispute may be heard in a commercial court in Belarus on the basis of an action by an investor who prefers such a court to an international arbitration body.

With regard to the procedural rules governing the procedure for hearings in arbitration and commercial courts in Belarus involving investment and other disputes, it should be noted that the legal procedure is based on the principles of openness and transparency. The legal rules governing the activities of foreign investors are freely available, while bilateral international treaties on investment

protection containing provisions on the arbitral settlement of investor-State disputes are published as official documents and are available to interested parties.