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Settlement of commercial disputes

Transparency in treaty-based investor-State arbitration

Compilation of comments by Governments

Note by the Secretariat

Addendum

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V.10-55595 (E)

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

1. Dominican Republic

[Original: Spanish]

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

So far only the case between the Dominican Republic and TCW has been made public.

Question 2: Amicus curiae briefs or other interventions

No.

Question 3: Provision in treaties on transparency or publicity

Articles 10.14 and 10.21 of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) contain provisions relating to transparency. Also, Article IX of the free trade agreement between the Dominican Republic and the Caribbean Community (CARICOM); Article 9.12 of the free trade treaty between Central America and the Dominican Republic; Article XI of the bilateral agreement on investments between the Dominican Republic and the Netherlands; Article 15 of the bilateral agreement between the Dominican Republic and Finland; Article XIII of the bilateral agreement between Chile and the Dominican Republic; Article IX of the bilateral agreement between the Dominican Republic and Argentina; Article XI of the bilateral agreement between Switzerland and the Dominican Republic; Article XI of the bilateral agreement between the Dominican Republic and Panama; and Article 14 of the bilateral agreement between Ecuador and the Dominican Republic.

Question 4: Provision in treaties on third parties' involvement

Article 10.20, para. 3, of CAFTA-DR.

Question 5: Any other comment

All procedures relating to the resolution of investor-State disputes should be conducted in a transparent manner.

2. El Salvador

[Original: Spanish]

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

There was investor-State arbitration pursuant to a request that the Spanish company Inceysa Vallisoletana submitted to the International Centre for Settlement of Investment Disputes (ICSID) of the World Bank, Washington D.C., citing the treaty on reciprocal investment protection concluded between Spain and El Salvador (ICSID Case No. ARB/03/26). Ultimately, the tribunal concluded that an investment made in a manner

contrary to the laws of El Salvador was not protected by the treaty and therefore did not fall within the tribunal's competence. It stated that the activities of the investor had run counter to those general principles, concluding that an investment made illegally could not benefit from the protection afforded by the treaty concluded between Spain and El Salvador.

In El Salvador, this case was widely publicized in the press and on television.

Question 2: Amicus curiae briefs or other interventions

So far there have been no known cases of a third party presenting statements in the course of arbitral proceedings.

Question 3: Provision in treaties on transparency or publicity

There are transparency provisions in the free trade treaties concluded by our country. For example, Article 10.21 in Chapter Ten (Investment) of the Dominican Republic-Central America-United States Free Trade Agreement contains provisions relating to transparency in investment arbitration proceedings. In the other free trade treaties concluded by El Salvador there is a specific chapter regarding transparency that applies across the board to all other chapters, so that the question of transparency in relation to investment is covered.

As regards the request for treaty texts, they are very voluminous, but they can be consulted on the website of the Ministry for the Economy (www.minec.gob.sv).

In addition, there are reciprocal investment protection agreements (APRIs) concluded by El Salvador that, although not specifically regulating the arbitral proceedings, contain a clause providing that, in the event of arbitration, it shall be conducted in accordance with the UNCITRAL Model Law and/or the norms that it establishes.

Question 4: Provision in treaties on third parties' involvement

As regards the participation of third parties in investment arbitration, the issue of the involvement and rights of "a Party" that is not a disputing party is covered in the free trade treaties concluded by El Salvador except for the treaty concluded with Chile. In the case of the Dominican Republic-Central America-United States Free Trade Agreement, it is covered in Article 10.20, which provides for the acceptance and consideration of "amicus curiae submissions from a person or entity that is not a disputing party".

Question 5: Any other comment

Owing to our very limited experience in the matter, we have no additional comments to make.

3. Finland

[Original: English]

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

No. In fact, there are no such arbitration cases in Finland.

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. As already mentioned, treaty based investor-State arbitration does not, in practice, involve Finland.

4. France

[Original: French]

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

There has, to date, been no arbitration case against France based on investment protection treaties.

There have, however, been at least three cases against other States, where the plaintiffs were based in Paris and the decisions were published:

- Consortium RFCC v. Kingdom of Morocco (International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/00/6)
- Champion Trading Company and Ameritrade International, Inc., v. Arab Republic of Egypt (ICSID Case No. ARB/02/9)
- Parkerings-Campagniet AS v. Republic of Lithuania (ICSID Case No. ARB/05/8)

It has also frequently been the case that ICSID arbitration proceedings or at least the first sitting, and sometimes hearings also, have been held at the headquarters of the Word Bank in Paris.

Question 2: Amicus curiae briefs or other interventions

There have been no cases, to our knowledge, of third parties having presented statements in the course of arbitration or otherwise intervened in the proceedings. Such practices are, however, of very recent date.

Question 3: Provision in treaties on transparency or publicity —
Question 4: Provision in treaties on third parties' involvement

Bilateral agreements entered into by France do not themselves contain provisions concerning publicity or transparency but refer to ICSID Arbitration Rules. France is party to the Washington Convention, which established ICSID, and, where the other State party is not party to the Washington Convention, a bilateral treaty refers to the UNCITRAL Arbitration Rules. The ICSID Arbitration Rules, as amended in 2006, contain provisions relating to

transparency and publicity. The 2006 Rules also contain provisions relating to participation by third parties.

It should be noted that France expressed some reservations concerning the amendments to the ICSID Arbitration Rules made in 2006.

Question 5: Any other comment

The arbitration system established by the 1965 Washington Convention differs markedly from classic arbitration. Although it recognizes the authority of the traditional rules of international commercial arbitration, it also uses procedures that are of a more pronounced judicial nature. ICSID also gives the arbitrator powers of initiative and discretion, exceeding those available under ordinary arbitration law.

The justification given for this is the specific nature of investment arbitration. France nonetheless remains attached to the basic principles of arbitration, including the consensual approach. Unlike a national court, an arbitration tribunal owes its authority only to the common will of the parties to the case. Where there is no such will, no arbitration is possible.

It may therefore seem appropriate to establish rules for publicity or transparency in investment arbitration, but this should not be allowed to detract from the principle that the will of the parties is paramount. To be more precise:

1. With regard to access to hearings by third parties:

The parties should be able to reserve the right to object.

2. With regard to the use of amicus curiae:

This procedure can be useful for the parties and for the judge, if the intervention of the amicus curiae clarifies the subject under discussion and thus contributes to the quality of the arbitration process and the settlement of the case. The procedure is, however, alien to the French legal tradition. It may, moreover, give rise to abuse and inequalities. Its use should therefore be strictly limited. The intervention of amicus curiae may actually extend a dispute to people not parties to the case. Such an intervention will also entail additional costs, which may be borne by both parties, even though only one party will benefit from the submissions concerned.

It would thus be appropriate for the filing of written submissions to be restricted and not left to the sole discretion of the tribunal. Thus, for example:

- The conditions for admissibility should be spelt out;
- There should be an obligation on the tribunal to maintain the progress of proceedings and to protect the parties;
- Third parties should justify the reasons for the filing of their submissions, the relevance of the issues contained in their submissions and their interest in the case, in order to avoid overloading the proceedings with an excessive number of irrelevant written submissions;
- A time limit should be set for the filing of submissions;

- The scope of submissions should be set out in detail: third parties should in no circumstances submit evidence, since this would distort the proceedings and change the number of protagonists;
- Entitlement to interventions should be restricted to private individuals: a State should not be permitted to file written submissions, for fear of upsetting the balance of forces between the parties and putting the arbitration tribunal in the position of passing judgement on a dispute between States.

Lastly, the parties should, in all cases, be entitled to object to such submissions.

3. With regard to publicity:

It is in the interests of States and investors to have at their disposal information on the results of a case and to know the legal reasoning adopted by arbitration tribunals, if only to avoid subsequent litigation. The principle of agreement between the parties on the publication of decisions in full, however, should not be compromised.

5. Germany

[Original: English]

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

We are not aware of any such cases. To the best of our knowledge, to date the parties have published their written observations on the ICSID website in only one ICSID arbitral proceeding in Germany. The proceeding in question was an arbitral proceeding in Frankfurt am Main for distribution of proceeds from the sale of 18 tons of valuable antique Chinese porcelain recovered by a British company from the wreck of a ship ("Diana") which sank in the Strait of Malacca in 1817. However, the jurisdiction of the ICSID Arbitration Court was rejected in that case because the salvage work did not constitute an investment within the meaning of Article 25 of the ICSID Convention (decision of 17 May 2007).

Question 2: Amicus curiae briefs or other interventions

We are not aware of any examples of such cases.

Question 3: Provision in treaties on transparency or publicity

For investment protection treaties, Germany usually uses model contracts that do not contain any express provisions concerning transparency or publicity. However, the model contract does, inter alia, refer to the ICSID rules, which themselves contain relevant provisions (ICSID Arbitration Rule 32 in the version of 10 April 2006).

Question 4: Provision in treaties on third parties' involvement

The German model contract for investment protection treaties does not contain any provision for third parties to become involved in arbitration. However, the model contract does refer to the ICSID rules, which contain a provision on the

presence of third parties (ICSID Arbitration Rule 32 in the version of 10 April 2006).

Question 5: Any other comment

First of all, clarification would be needed as to what exactly is meant by the terms “transparency” and “publicity” in connection with investor-State arbitration.

The question then arises as to what interest exists in additional rules on transparency and publicity and for what reasons such rules could be necessary. Arbitral proceedings are primarily determined by agreement between the parties. This should also be the case for provisions regarding transparency and publicity. Arbitral proceedings in the field of investor-State arbitration also mainly deal with investors’ interests that are worthy of protection. In light of this, a provision on transparency and publicity should be made subject to the consent of the investor. The investor could, for example, be given a right to choose whether to apply or waive special provisions on transparency and publicity in an arbitral proceeding.

6. Greece

[Original: French]

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

We are not aware of any arbitration cases between the Greek State and an investor in which the proceedings and record were open or publicized. It has therefore not been possible for third parties not parties to the case or their legal counsel to observe arbitration proceedings or obtain access to the court record. Although the parties may adopt such measures, the provisions governing arbitration under Greek law (arts. 867 ff. of the Greek Code of Civil Procedure and Act No. 2735/1999 on international commercial arbitration, which is based on the UNCITRAL Model Law) are of a non-prescriptive nature. This means that it is open to the parties to agree otherwise; and such measures have never been requested by parties to a dispute, including investors, the main reason being that entrepreneurs do not like disclosing to the public the characteristics or secrets of their economic activities, for fear of helping their rivals.

The record of an arbitration case is therefore not available to third parties, without the consent of the parties, even after it has been deposited with the registry of the district court, according to article 893 of the Code of Civil Procedure; the contents of a file are considered to be personal information, protected under article 9a of the Greek and European Union Constitution (Act No. 2472/1997, which incorporated Directive 95/46/EC of the European Parliament and of the Council).

Question 2: Amicus curiae briefs or other interventions

This is not ruled out, but the consent of the parties must always be obtained. We know of no arbitration cases, for the reasons just given above.

Question 3: Provision in treaties on transparency or publicity

Greece has ratified (under Decree Law No. 608 of 1968, published in the Official Gazette No. 263/1968, Part A) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention), which provides for mediation and arbitration proceedings to be held by the International Centre for the Settlement of Investment Disputes (known under its English acronym as ICSID) as part of the International Bank for Reconstruction and Development. Under article 44 of the Convention, any arbitration proceeding heard by ICSID is conducted, except as the parties otherwise agree, in accordance with the Arbitration Rules currently in force. As far as we know, even the arbitration cases involving the Greek State and foreign investors heard at ICSID have not followed procedures that were open to third parties or transparent.

Question 4: Provision in treaties on third parties' involvement

No, there is no provision whereby third parties can interfere in an arbitration proceeding to which they are not party.

Question 5: Any other comment

In addition to the 1968 Washington Convention mentioned above, arbitration as a way of settling disputes between the State (Greece) and investors (national or foreign) is also provided for under domestic Greek law, and specifically by Decree Law No. 2687/1953 relating to the protection of foreign capital invested in Greece. This text has additional force — it cannot be repealed by a single law — owing to the fact that it was adopted in implementation of article 112 of the 1952 Greek Constitution and continues to be reinforced by article 107 of the current Constitution, which dates from 2007. Under this legislation, the parties may agree on any ad hoc or institutional arbitration proceeding, according to their preference. No arbitration proceeding relating to investments, however, has opted for publicity or transparency.

In conclusion, we can state that, in virtually every case, publicity and transparency in arbitration proceedings are not the current practice in Greece. The only possible way for a third party to gain knowledge of an arbitration record is to contest a decision by an action for annulment before the Court of Appeal, pleading a specific legal interest (Code of Civil Procedure, arts. 898 and 899).

7. Iraq

[Original: Arabic]

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

There are no treaty based arbitration cases between Iraq and investors.

Question 2: Amicus curiae briefs or other interventions

There are no examples of cases where third parties have presented statements in the course of treaty-based investment arbitration (such as amicus curiae briefs).

Question 3: Provision in treaties on transparency or publicity

The Law on Investment number 13/2006 stipulates that arbitration is exercised in the following cases:

(a) At the time a contract is concluded with an investor, agreement may be reached on a conflict resolution mechanism involving arbitration according to Iraqi law or any other internationally recognized entity (m/17/14);

(b) Any trade conflict arising between the Iraqi National Investment Organization or any non-governmental Iraqi entity and investors who are subject to the Law on Investment number 13/2006 is subject to arbitration if the contract regulating the relationship between the two parties so stipulates (m/27/5).

8. Lebanon

[Original: Arabic]

After perusal of the above-mentioned letter, we found out that it contained general questions relating to the transparency of arbitration between investors and States. We wish to refer in this regard to the fact that an inventory was carried out on arbitration agreements between the Lebanese State and other States, in order to find out if such treaties contained answers to the questions raised. We did not find any answers for those questions.

It is worth mentioning, however, that the Lebanese legislator had paid special attention to arbitration. It is provided for in the Lebanese Civil Procedure Law, which is in conformity with the applicable international agreements. The Lebanese law permits resorting to arbitration in matters concerning international trade; it permits, as well, internal arbitration according to article 762 and the subsequent articles.

In international arbitration, the legislator grants freedom in choosing the method of appointing arbitrators and freedom in choosing the law to be applied to settle the dispute. He also recognizes arbitration awards issued abroad or in international arbitration and established the bases for that.

9. Luxembourg

[Original: French]

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

No, there have been no such cases, to our knowledge.

Question 2: Amicus curiae briefs or other interventions

No, there have been no such cases, to our knowledge.

Question 3: Provision in treaties on transparency or publicity

There is no evidence that any such provision exists.

A reference list of publications since May 1944 in Le Mémorial, the official gazette of Luxembourg, containing the words “treaty” and “arbitration” may be consulted via the Internet on the site www.legilux.public.lu. In view of the number of publications involved (over 200), a detailed scrutiny of all the relevant provisions could not be made. It may be noted that Luxembourg has ratified the European Convention on International Commercial Arbitration, done at Geneva on 21 April 1961, the Agreement relating to Application of the European Convention on International Commercial Arbitration, done at Paris on 17 December 1962, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 10 June 1958.

Question 4: Provision in treaties on third parties’ involvement

See reply to question 3.

Question 5: Any other comment

We have no comments to make on this topic.

10. Mauritius

[Original: English]

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

There are no investor-state arbitration cases involving Mauritius as at present.

Question 2: Amicus curiae briefs or other interventions

In light of the answer to query 1 above, there have been no such cases to date.

Question 3: Provision in treaties on transparency or publicity

Mauritius has ratified several bilateral treaties in relation to this subject matter but none of these provide specifically for transparency or publicity of arbitral instances. Further article 25 (4) of the UNCITRAL Arbitration Rules ensures that hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses.

Question 4: Provision in treaties on third parties’ involvement

Mauritius has ratified numerous bilateral investment promotion and protection agreements (IPPA) these however do not specifically cater for the participation of third parties to arbitral proceedings.

These IPPA only make provisions for the designation and setting up of the arbitral tribunal. It is common to find, within the body of these IPPA to which Mauritius is a Party, reference to international arbitration bodies such as the ad hoc arbitration instances under the UNCITRAL (Arbitration Rules/Model Law) and the ICSID. The provisions in these respective texts cater to a certain extent for the Intervention of third parties and are therefore part of our law.

For instance in the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) we may find the following relevant provisions:

1. Rule 18 provides for the presence of persons other than the parties themselves. The latter may bring along different representatives or "assistants" namely agents, counsel or advocates. However their "... names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party,"

2. Rule 32 relates to the oral procedure before the tribunal which "shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts".

> Rule 32 (2) reads that "Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information."

3. Rule 37 (Submissions of Non-disputing Parties)

> (1) If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry.
>
> (2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute.

Question 5: Any other comment

It is common ground that confidentiality is one of the most appealing and advantageous traits of arbitral instances. This point of view is still very much present in relation to arbitration procedures although to date Mauritius has not been directly involved in treaty-based investor-state arbitration.

11. Norway

[Original: English]

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

There have been or are no pending cases involving the State of Norway which provide instances of publicity or transparency of the arbitral proceedings.

Question 2: Amicus curiae briefs or other interventions

There are no examples in Norway where third parties have presented statements in the course of treaty-based investment arbitration.

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 Norway.

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 Norway.

Question 5: Any other comment

Norway is positive to the introduction of elements of transparency and the possibility for third parties to become involved in treaty-based arbitration. A draft Model Investment Agreement that was sent to public review on 28 January 2008 contains two provisions in this respect.