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Possible reform of investor-State dispute settlement (ISDS)

Submissions from International Intergovernmental Organizations

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Submissions from International Intergovernmental Organizations

This note reproduces submissions received by the International Centre for Settlement of Investment Disputes (ISCID) and the Permanent Court of Arbitration (PCA) in preparation for the thirty-fourth session of Working Group III. These submissions are reproduced in this note in the form in which they were received by the Secretariat.

I. International Centre for Settlement of Investment Disputes (ICSID)

[Original: English]
[Date: 4 October 2017]

Update on the ICSID Rules Amendment Process

1. Introduction

1. ICSID has administered more than 70 per cent of all known ISDS cases. It is the only institution which can administer cases under the ICSID Convention and the Additional Facility Rules. In addition, ICSID also administers UNCITRAL and ad hoc cases brought under investment treaties. ICSID also offers its services as a secretariat under investment treaties. For example, ICSID is the Secretariat of the first instance tribunal under the CETA. As of September 30, 2017, ICSID had registered 638 cases under the ICSID Convention and Additional Facility Rules and has administered 54 UNCITRAL cases.[1]

2. ICSID is in the process of amending its Rules and Regulations. The launch of this process was announced in October 2016. Amendments to the ICSID Rules are ultimately adopted by the ICSID Administrative Council and must be approved by two thirds of the members of the Administrative Council. The preparation of the amendments for adoption by the Administrative Council is done in consultation with all ICSID Member States. There are currently 153 Contracting States, hence rule amendments (currently) must be approved by 102 or more members.

3. The ICSID Convention Rules and Regulations were adopted in 1967, and the Additional Facility Rules were adopted in 1978. To date, the rules have been amended three times: in 1984, 2003 and 2006. The first two amendment processes made relatively modest changes. The third amendment process took place from 2004 to 2006, and brought about some innovative changes that came into effect on April 10, 2006. Further background on these amendments can be found on the ICSID website at https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx.

4. ICSID launched the current amendment process in October 2016 and invited Member States to suggest topics that merited consideration. In January 2017, ICSID issued a similar invitation to the public inviting suggestions for rule amendments. Submissions received from the public have been posted to the ICSID web page on amendment. The Secretariat has reviewed all comments received and is preparing working papers to inform further discussions.

[1] For more information about ICSID cases and statistics, please visit the ICSID website at https://icsid.worldbank.org/en/pages/default.aspx and consult its statistics at https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx.

2. Objectives

5. There are multiple objectives for this amendment process. These include:

- Continued modernization of ICSID procedure — the accretion of case experience and current discussion among States and the public have suggested some new provisions that might further improve the investor-State arbitration process. For example, there have been suggestions for greater elaboration of ethical obligations, consolidation of cases, criteria for bifurcation of cases, transparency, and security for awards. These types of issues will be reflected in the proposals for discussion.
- Reduce time and cost — a predominant concern is the cost of arbitration, which is directly affected by the length of proceedings. ICSID has received suggestions to add a general duty to act expeditiously and several specific rule changes to reduce the duration of cases.
- Simplification of the rules — numerous drafting changes have been proposed to streamline the rules and adopt gender-neutral language. The proposals also seek to correct any discrepancies between the English, French and Spanish versions of the rules, as they are equally authentic in the three official languages of the Centre.
- Go green — reducing the paper burden of proceedings will reduce time and cost and respect environmental concerns. Proposals for increased use of electronic transmission, fewer copies, and the like promote these goals.

6. An overarching objective for these proposals is to retain the equilibrium between disputing parties so that they are equally effective for all participants.

3. List of topics for potential ICSID Rules amendment

7. There are multiple topics that were raised by Member States and the Secretariat. These include:

- Review procedure for appointment and disqualification of arbitrators;
- Explore feasibility of code of conduct for arbitrators;
- Clarify rules on preliminary objections and bifurcation;
- Explore possible provisions on consolidation of proceedings and parallel proceedings;
- Modernize institution rules, means of communication and filing of briefs and supporting documentation, and general functions of the secretariat;
- Modernize and simplify rules concerning the first session, procedural consultation and pre-hearing conference;
- Modernize rules on witnesses and experts and other evidence;
- Explore possible provisions for suspension of proceedings and clarify rules on discontinuance when parties fail to act;
- Reflect best practices for preparation of award, separate and dissenting opinions;
- Explore presumption in favour of allocating costs to the prevailing party, possible provisions on security for costs and security for stay of enforcement of awards;
- Review provisions on provisional measures;
- Clarify and streamline procedure in annulment proceedings;
- Review and modernize provisions on costs, fees and payment of advances, and discontinuance for failure to pay advances;

- Explore possible provisions on transparency, clarify rules on non-disputing party participation;
- Improve time and cost efficiency and explore feasibility of guide for efficient conduct of process;
- Explore possible provisions on third-party funding;
- Streamline Additional Facility Rules for non-ICSID Convention cases.

4. Next steps

8. ICSID will distribute the working papers to Member States and will overview these in a meeting of State experts in Washington, D.C., on 26-27 September 2018. Thereafter, the working papers will be published on the website and ICSID will invite written comment from Member States, the legal profession and any persons interested in the topic. Feedback from the public should be submitted to icsidideas@worldbank.org by December 1, 2018. Between September and December 2018, ICSID will also undertake consultations in each region of its membership to discuss the proposals. The feedback received will be collated in early 2019 and a revised set of proposals will be released. Depending on the extent and nature of the feedback received, ICSID will propose amendments for further consideration and potential adoption by the Administrative Council in 2019 or 2020.

5. Application of the Rules

9. The rules applicable to each case are those in effect on the date on which the parties consented to the conciliation or arbitration, except as the parties otherwise agree (articles 33 and 44 of the ICSID Convention). This means that for cases based on BITs or FTAS where consent is usually given at the time of the request for arbitration, the new version of the Rules would likely apply to cases filed after the amendments are adopted. Hence, the old generation of BITs might lead to the application of the new Rules and could be subject to any new legal mechanism adopted by the Administrative Council.

II. Permanent Court of Arbitration (PCA)

[Original: English]
[Date: 10 October 2017]

1. The Permanent Court of Arbitration (PCA) is an independent intergovernmental organization established in 1899 to facilitate arbitration and other forms of dispute resolution. Having acted as registry in over 170 treaty-based investment arbitrations and numerous arbitrations under public international law, the PCA is pleased to support the discussion of Working Group III at a technical level.

1. The PCA's Docket and Hearing Venues

2. The PCA's recent experience extends to a variety of proceedings with an essential public character, including various types of arbitral proceedings between States and investor-State arbitrations.

3. Currently, the PCA's International Bureau provides registry support in 126 pending international arbitration and conciliation proceedings, involving over 50 different governments or State-controlled entities. Parties to disputes administered by the PCA consist of various combinations of States, State entities, intergovernmental organizations, and private parties. These disputes range from maritime and boundary disputes under the United Nations Convention on the Law of the Sea and disputes under other bilateral or multilateral treaties, to investor-State disputes under investment treaties, to contract cases involving State entities or intergovernmental organizations. Moreover, the PCA's functions include registry

support for alternative forms of dispute resolution (ADR), including mediation and conciliation.

4. In the past year, hearings and tribunal deliberations in PCA proceedings were held at the Peace Palace in the Netherlands and in various other locations, specifically in Canada, Colombia, Denmark, France, Malaysia, Mauritius, Nepal, Poland, New Zealand, Singapore, Switzerland, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The majority of all cases today are in fact heard outside The Hague.

5. To facilitate hearings and meetings outside The Hague, the PCA has put in place a network of host country agreements with Member States in Africa, Asia, Europe and Latin America. Such host country agreements allow the PCA to hold hearings in similar conditions as in The Hague, including in respect of privileges and immunities. In the past year, new host country agreements were concluded with Brazil, Djibouti, Malaysia and Portugal, bringing the total number of such agreements to 15.[2]

6. The PCA provides registry support in all official languages of the United Nations (and other languages agreed by the parties). In the past year, proceedings were conducted in Arabic, Chinese, English, French, Portuguese, Russian and Spanish.

2. Continuity and Change in Investment Dispute Settlement at the PCA

7. The PCA's docket of cases between the early twentieth century and today exemplifies various elements of historical continuity and change in the system of international dispute settlement.

(a) Precursors to Modern Investment Arbitration

8. Member States ratifying or acceding to one of the PCA's founding conventions — the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907 — have thereby expressed a commitment "to use their best efforts to ensure the pacific settlement of international differences", "with a view to obviating as far as possible recourse to force in the relations between States".

9. From the beginning, this commitment extended to inter-State cases relating to the treatment of foreign investors. The Japanese House Tax case of 1902,[3] for example, involved facts that bear a striking resemblance to modern investment disputes.

10. Early PCA cases also show the potential for arbitration to assist diplomatic relations where investment disputes might otherwise hinder them. In the Orinoco Steamship Corporation case between the United States and Venezuela,[4] the two States had severed diplomatic relations. The arbitration provided not only for a resolution of the legal dispute but also allowed the re-establishment of normal political relations.

11. Finally, in the 1930s, the PCA administered for the first time an arbitration opposing a private entity and a State. This case was Radio Corporation of America v. China[5], which set a precedent for the PCA's involvement in disputes between private parties and States, including modern-day investment proceedings.

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[2] The PCA has signed Headquarters or Host Country Agreements with the Argentine Republic, the Federative Republic of Brazil (not yet in force), the Republic of Chile, the People's Republic of China, the Republic of Costa Rica, the Republic of Djibouti, the Republic of India, the Lebanese Republic (not yet in force), the Republic of Malaysia, the Republic of Mauritius, the Kingdom of the Netherlands, the Portuguese Republic (not yet in force), the Republic of Singapore, the Republic of South Africa, and the Socialist Republic of Viet Nam.

[3] Japanese House Tax (Germany, France, and Great Britain/Japan) (PCA Case No. 1902-02).

[4] The Orinoco Steamship Company case (United States of America/Venezuela) (PCA Case No. 1909-02).

[5] Radio Corporation of America v. China (PCA Case No. 1934-01).

(b) Investment Arbitration under the UNCITRAL Rules

12. More recently, the PCA acquired particular expertise in the administration of investor-State arbitration proceedings under the UNCITRAL Arbitration Rules, although it continues to act as registry in a considerable number of inter-State arbitrations and conciliations, many of which are instituted under "bespoke" rules of procedure. In the past years, the PCA has consistently registered around 40 new cases per year. Around 60 per cent of these have concerned treaty-based investment arbitrations. This brings the total number of treaty-based UNCITRAL investment arbitrations administered by the PCA to over 170.

13. Moreover, the UNCITRAL Rules entrust the Secretary-General of the PCA with the role of designating the appointing authority in the event that the parties have not done so. Following the revision in 2010, the Rules also clarify that parties may request the PCA Secretary-General to act directly as appointing authority and establish a role for the PCA in the review of arbitrator fees. The PCA Secretary-General has acted on over 680 requests to designate the appointing authority or to serve as appointing authority. Almost 40 per cent of the appointing authority requests received by the PCA have concerned treaty-based investment proceedings. Such requests have typically related to the appointment of arbitrators or decisions on challenges to arbitrators.

14. The PCA would be pleased to brief the Working Group in further detail on its experience with the appointment of arbitrators or the resolution of challenges, should this be of interest to delegates.

(c) Standing and Quasi-permanent Arbitral Bodies

15. The PCA also has unique experience as registry to arbitral tribunals with a permanent or long-term character. For example, the PCA acts as secretariat for the standing arbitral tribunal of the Bank for International Settlements, which was first constituted in the 1930s. The PCA also acted as registry for the Eritrea-Ethiopia Claims Commission, which, over a period of almost a decade, issued a series of 15 awards addressing 40 different claims for loss, damage or injury by one Government against the other, and by nationals of one party against the Government of the other party, as well as two awards on damages.

16. Finally, one may mention the Iran-United States Claims Tribunal, which has been in existence for over 30 years. Although the Tribunal now disposes of its own standing registry, the PCA has supported the work of the Tribunal in various ways, including its initial organization, hosting certain hearings at PCA facilities, and acting as secretariat to the appointing authority in relation to, so far, 21 appointments and 12 challenges.

17. It may be of interest to the Commission that all three bodies — the BIS Tribunal, the EECC and the IUSCT — have adopted procedural rules inspired by the UNCITRAL Rules, proving the potential for these Rules to serve as a procedural framework for standing tribunals or hybrid mechanisms.

3. The PCA's Position regarding ISDS Reform

18. The PCA's experience suggests that "permanence" and "institutionalization" of courts and tribunals are matters of degree, falling within a spectrum of possibilities, which may provide helpful inspiration to the Working Group's discussion on ISDS reform. The PCA notes in this regard that the Commission has been mandated to "(i) first identify and consider concerns regarding ISDS; (ii) secondly consider whether reform was desirable in light of any identified concerns; and (iii) thirdly if the working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission."

19. The PCA takes no view as to the desirability of particular reforms in this area, given the differences of positions espoused by the PCA's membership. The PCA considers that it is the prerogative of governments to select the dispute settlement

mechanism that they regard as most appropriate, taking account of their policy preferences and interests.

20. To the extent that States wish to consider new approaches to the present system of investment arbitration, however, the PCA stands ready to support any such initiatives at the technical level, including by assisting States in designing and implementing efficient and fair mechanisms for the resolution of disputes with foreign investors. While this may include targeted modifications of the present arbitration system, the PCA would also be prepared to work with the Commission in designing and implementing a permanent investment court or a permanent appeals facility, should this be the Commission's choice.