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Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration

Note by the Secretariat regarding the establishment of a repository of published information ("registry")

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I. Introduction

1. In preparation for the fifty-eighth session of the Working Group, and further to the mandate given by the Working Group to the Secretariat to liaise with arbitral institutions to assess better the cost and other implications of the establishment of a registry under the UNCITRAL draft rules on transparency in treaty-based investor-State arbitration (the "Rules") (A/CN.9/760, para. 122), the Secretariat consulted with the following arbitral institutions:[1] the International Centre for the Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration at the Hague (PCA), the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Stockholm Chamber of Commerce (SCC) (the "arbitral institutions"). This note sets out the main conclusions of those consultations for the consideration of the Working Group in relation to (i) the various institutional options in relation to a registry; (ii) the proposed nature and scope of a registry and related cost implications; and (iii) possible implications in respect of the draft Rules.

2. The arbitral institutions observed that the function of the registry would be critical to ensuring that the aims of transparency will be met in practice. The Working Group may wish to consider that the determination of the nature, function, scope and costs of a registry will necessarily affect the level of transparency ultimately achieved by the Rules in practice.

II. Establishment of a registry under the UNCITRAL draft rules on transparency in treaty-based investor-State arbitration

A. Institutional options for a registry

1. Options

3. Two options are proposed for consideration under the Rules (see A/CN.9/WG.II/WP/176/Add.1, para. 9) regarding the possible institutional management of a registry (see also A/CN.9/736, paras. 131-133; and A/CN.9/WG.II/WP.170, paras.7 et seq).

4. The first option ("option 1") consists of a single registry for the publication of information under treaty-based investor-State disputes where the Rules apply, to be maintained by a single organization, with other arbitral institutions providing visibility and advice for that registry where requested but not performing any registry functions.

5. The second option ("option 2") is a system whereby various arbitral institutions would maintain their own registry system. This option could have two variants: under the first variant, all institutions would operate under a common umbrella website with a single interface for external users. In a second variant of that option, various arbitral institutions would maintain their own registry system,

[1] The Cairo Regional Centre for International Commercial Arbitration (CRCICA) was invited to attend but was unable to do so.

no common interface would exist to link all registries, as in the first variant, but one organization would host a website with links to each arbitral proceeding for which information is published on the various institutions' online registries.

2. Remarks by arbitral institutions regarding the options

6. Option 1, set out in paragraph 4 above, was the strongly preferred option, for a number of reasons.

7. First, from a technical perspective, option 1 was perceived by the institutions to be the most attractive. Under that option, only one technical system would need to be created, a single set of technical guidelines could be easily implemented and consistently maintained, and there would be no need for technical integration and management by an "oversight" institution or organization should, in the event of multiple registries, one system fail. One system would safeguard a uniform standard for document search, as well as for the presentation of search results. Managing and safeguarding security of information held by the registry would be more simple under that option

8. Under option 2 spreading publication across a number of institutional document systems would not be conducive to global searches, and may consequently dilute transparency in practice. Variant 1 of option 2 was perceived as being technically the most complex option, and indeed possibly not viable from a technical perspective. Variant 2 of option 2 was deemed to be technically feasible in principle; however, a registry comprising a single web portal linking to a number of different underlying systems would require an additional layer of substantive oversight and management by a single organization, hence increasing cost and complexity.

9. From a cost perspective, the arbitral institutions outlined that, apart from the PCA and ICSID (whose differing capabilities are outlined in para. 11 below), other arbitral institutions do not have the requisite technical systems or servers in place, and that start-up costs in addition to maintenance and staffing costs (for any institution, including the PCA and ICSID) could be disproportionately high should an institution receive only a fraction of the global case load per year. Moreover, as different institutions would necessarily need to charge different fees to cover their respective costs, adopting a consistent fee structure amongst institutions would mean adopting the highest common denominator; alternatively, a non-consistent fee structure might lead to disagreement among parties to a dispute as to which institutional registry to use.

10. Option 2 was said to require a much clearer defined scope of registry functions before arbitral institutions would be willing to commit to such a role, in order for each institution to be able to assess the costs of performing a registry function in light of their current or future capabilities, and reconcile the same within their budgetary frameworks.[2]

11. The current capabilities of the arbitral institutions consulted are varied. ICSID, for example, uses a sophisticated case management system which is integrated with

[2] Document A/CN.9/WG.II/WP.170 and its addendum set out arbitral institutions' cost estimates and staffing requirements, subject to the more precise definition of the proposed functions of the registry.

the World Bank's institutional document management system. It inserts a select number of meta-data for searchability, and the process involves a multi-tiered review of each document before it is posted. The PCA posts case information and documents with the agreement of the parties, but does not add meta-data to those documents and does not currently have a search mechanism integrating information across all public cases (nor is the posting of documents linked to its document management system). The SCC, LCIA and ICC do not publish information and would need to create and manage new technical systems or servers to do so. It was foreseen that at least some, and possibly all institutions, would require additional staff to maintain a registry function. At the PCA and ICSID, the institutions which currently publish case-related information in some form, the associated staff includes a legal officer (performing a review function), administrative support staff, and some IT staff time.

B. Nature and scope of registry

Level of transparency and cost

12. The arbitral institutions were unable to provide any global cost estimates without guidance from the Working Group as to the desired functionality and sophistication of the registry, because both start-up and maintenance costs are inextricably related to the nature of the systems being built and maintained.

13. A single database, with a uniformity of format, free text search functionality and filtering function (requiring insertion by the registry of limited meta-data; see para. 14 below) would lead to a higher level of transparency (allowing some research and analysis) as well as a higher cost than if documents were to be simply uploaded on the web.

C. Matters for consideration by the Working Group

1. Scope of registry functions

14. The Working Group may wish to consider what degree of searchability function would be desirable for a registry. In order to make information most accessible to the public, searchability features, in addition to a full "free text" search, might include: insertion of meta-data identifying type of document (possibly corresponding to the types of document set out in draft article 3 of the Rules); economic sector (possibly consistent with World Bank sector tags); parties; counsel; arbitrators; the treaty under which the claim is filed; dates.

15. The Working Group may also wish to consider the desirability of including the possibility for the provision of hard copy documents by an arbitral tribunal to the registry. Hard copy documents raise specific issues to be considered, such as resources required for filing, storing and archiving, as well as the possible requirement that the registry upload or scan hard copy documents in order to make such documents available electronically and to a wider audience, as well as related issues such as the costs and legal issues related to archiving. In particular, the Working Group may wish to consider to what extent the storage of hard copy documents by the registry would advance the aim of transparency if the documents

were only available in hard copy at a fixed physical location. The arbitral institutions pointed out that it is increasingly the norm that all documents are provided to tribunals in electronic format (even where they might be also provided in hard copy). The Working Group may wish to consider whether the Rules (or, if deemed appropriate, guidelines accompanying the Rules, see below, para. 17) could specify that the registry should receive documents and information only in electronic form, to avoid the costly and resource-intensive work of storing and archiving.

16. Translation, except in very limited contexts (name of the treaty, for example), would not be feasible in the context of an international registry system. The extent of translation and responsibility for translation would have to be factored into the Rules or any guidelines for arbitral tribunals (see para. 17 below).

Guidelines

17. The Working Group may wish to consider whether guidelines for tribunals — including format requirements for documents to be submitted to the registry — and guidelines for a registry — including publishing guidelines and issues relating to, for example, digital preservation, security, language of website, and level of discretion of the registry in various contexts, would be required for such a registry system to function properly.

2. Matters for consideration in relation to the draft Rules

Draft article 1(4) and draft article 7(3)

18. The Working Group may wish to consider whether the registry should or must withhold publication of information, or remove already published information in case of recourse before national courts in circumstances where documents or information provided to it by the arbitral tribunal under the Rules is deemed by national courts to be confidential under the mandatory applicable domestic law.

Draft article 2

19. Draft article 2 requires publication of certain information (name of parties, economic sector, treaty) before the arbitral tribunal has been constituted. Arbitral institutions suggested that, to reduce scope for the provision of false information or frivolous claims at that stage of proceedings, and consequently to reduce the liability of the publishing institution, draft article 2 should be amended to include:

(a) A requirement that information sent to the registry be copied to the other party to a dispute; and

(b) A procedure for objection by the other party (for example, an objection regarding whether the Rules on Transparency applied) within a certain time limit, in which case the registry would wait to publish that information until after the arbitral tribunal was constituted and made a decision in relation to any objection.

20. It was furthermore suggested that the Rules should include, at this initial, pre-constitution stage, a provision for payment “up front” (the specifics of which to be included in a separate document, in order to facilitate updates or amendments from time to time). One proposal was that the arbitral tribunal could be instructed to add a percentage amount to its advance on costs. More generally, the Working

Group may wish to consider whether provisions concerning payment to the registry should be addressed in the Rules.

Draft article 3

21. The Working Group may wish to consider how the registry would deal with requests for documents after the arbitral tribunal has discharged its function and its mandate is terminated. Issues arising from a post-proceeding request include but are not limited to access to documents, decisions regarding redactions, and determination of confidentiality under draft article 7.

Draft article 3(1)

22. The Working Group may wish to determine whether publication of "written statements or written submissions" includes publication of documents such as procedural orders, letters or e-mail correspondence.

Draft article 3(2)

23. Under draft article 3(2), expert reports and witness statements are provided to the registry by the tribunal and published, upon request, and are not subject to a discretionary decision regarding their publication by the arbitral tribunal (unlike the documents in draft article 3(3)). This provision thus raises the following questions:

(a) How should the registry deal with a request made after the tribunal has discharged its function and its mandate is terminated (see para. 21 above)?

(b) Because such documents may require redaction, which redaction may be contentious and subject to a final determination by a tribunal, what would happen if the tribunal is still acting but the request is made, for example, at a late stage in proceedings (such as just before the rendering of a final award) where the parties or tribunal are unable to spend time redacting, in the case of the former, or to make a determination regarding redactions, in the case of the latter?

(c) In light of the above, is the intention that the parties be required to provide expert reports and witness statements to the tribunal (and consequently the tribunal to the registry) in redacted form, in order that they are available upon request pursuant to draft article 3(2), such that the parties and tribunal bear the cost of publicizing these documents even if these documents might never be requested or publicized?

Draft article 3(5)

24. Further to the suggestion that any storage and archiving of hard copy documents might not be an acceptable burden for a registry of published information in investor-State disputes (see para. 15 above), that the Working Group may wish to consider whether the words "photocopying or shipping" should be amended or deleted from draft article 3(5), perhaps replaced with the words "incurred by the registry" to maintain the current meaning.

Draft article 8, option 2

25. In the event option 2 is retained, the Working Group may wish to consider including language to indicate how an institution must be selected, and in particular in the event that a respondent fails to designate an institution listed in the annex.

Inclusion of a waiver of liability clause

26. The Working Group may wish to consider whether a waiver of liability clause, in respect of both the arbitral tribunal, through which the documents will be sent to the registry under article 3, and for the registry itself, should be added to the Rules. The question of how to address liability claims brought by third parties (e.g., in case of violation of data privacy) might also need to be considered by the Working Group.