United Nations A/CN.9/WG.II/WP.159/Add.3

General Assembly

Distr.: Limited
4 August 2010
English
Original: English/French/
Russian/Spanish

United Nations Commission on International Trade Law
Working Group II (Arbitration and Conciliation)
Fifty-third session
Vienna, 4-8 October 2010

Settlement of commercial disputes

Transparency in treaty-based investor-State arbitration

Compilation of comments by Governments

Note by the Secretariat

Addendum

Contents

V.10-55601 (E)

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

1. Poland

[Original: English]

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

All current arbitration cases between private investors and the Republic of Poland are based on the UNCITRAL Arbitration Rules. In these cases the parties did not decide to hold the hearings publicly available (as possible according to art. 25.4 of the Rules). In the closed cases the hearings were held in camera and the exhaustive information or documents used in the arbitral proceedings were not made available to the public. The general information relating to the case, as the parties or the subject, is usually published by the press. Other information is confidential.

Question 2: Amicus curiae briefs or other intervention

There is one example where a third party wished to join the arbitration dispute as amicus curiae. The question of its participation in the proceedings has not been settled yet.

Question 3: Provision in treaties on transparency or publicity

The treaties and agreements entered into by the Republic of Poland do not include the provisions concerning transparency or publicity in the arbitration disputes. The majority of the treaties and agreements provide that all the cases will be settled by the arbitration tribunal ad hoc, established according to the UNCITRAL Arbitration Rules. Only in five treaties there are the provisions concerning the alternative or exclusive jurisdiction of the International Centre for Settlement of International Disputes (ICSID).

Question 4: Provision in treaties on third parties' involvement

There are no such provisions.

Question 5: Any other comment

The current UNCITRAL Arbitration Rules enable the parties (which wish so) to hold the hearings publicly available (art. 25.4) or/and to make public an award (art. 32.5). With the consent of both parties also the institution of amicus curiae can be used in the arbitral proceedings.

The possible change of the UNCITRAL Arbitration Rules can cause the risk that the parties will have to follow the revised Rules although the treaty has not been changed. The introduction of the new provisions to the Rules could mean the indirect revision of the treaty without the consent of its parties. It could cause the necessity of the quick renegotiation of the treaties if the parties do not agree with the transparency policy.

2. Russian Federation

[Original: Russian]

Under the Foreign Investments in the Russian Federation Act, matters relating to the settlement of disputes raised by foreign investors in connection with their investments and business activities in the Russian Federation may, in accordance with the international agreements entered into by the Russian Federation, be regulated and resolved in an ordinary court or arbitration tribunal or in an international arbitration tribunal.

The international agreements, setting out the conditions and various procedures for the settlement of investment disputes, consist mainly of bilateral intergovernmental agreements on the promotion and mutual protection of capital investments.

These agreements, concluded by the Government of the Russian Federation since June 1992, contain a number of standard provisions regarding the settlement of disputes between one Contracting Party and an investor of the other Contracting Party. The rules on the procedure for dealing with investment disputes in the agreements, also standard in nature, contain no provisions on transparency or publicity in arbitration proceedings or on the participation of third parties in such proceedings. The agreements do, however, contain a provision whereby, if a dispute cannot be settled by negotiation, the investor may opt for it to be referred for consideration to a competent court or arbitration tribunal of the Contracting Party within the territory of which the investments were made, to an ad hoc arbitration tribunal in accordance with the UNCITRAL Arbitration Rules, to the International Centre for Settlement of Investment Disputes, to the Arbitration Institute of the Stockholm Centre of Commerce, etc. Thus, the dispute is addressed in accordance with the legislation of a Contracting Party or under the rules of one of the aforementioned institutions.

According to the information available, in the Russian Federation there have been no investor-State arbitration proceedings involving publicity or transparency features and no cases of third-party participation in such proceedings.

This is largely due to the fact that the international agreements entered into by the Russian Federation do not contain provisions on transparency in investment dispute arbitration or on the participation of third parties in such arbitration.

The investment dispute arbitration practices in the Russian Federation show that the principle of confidentiality is observed.

The purpose of the principle of confidentiality, which is one of the basic procedural principles of arbitration, is to protect the parties' trade secrets and business reputations. This principle takes on particular significance in investor-State arbitration, since cases often involve matters of public order and national interests of the State in which the investment was made.

Accordingly, it may be argued that, when, within the UNCITRAL framework, a model law or some other instrument regulating questions relating to arbitration in connection with possible disputes between a State and a foreign investor is being developed, careful consideration should be given to the question of the advisability of replacing (or supplementing) the principle of confidentiality by the principle of

transparency in investment dispute arbitration, in view of the importance of maintaining a balance between public and private interests.

3. Spain

[Original: Spanish]

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

There is no case involving investors and the Spanish State covered by treaties entered into by Spain in which elements of publication or transparency of the proceedings are included.

According to the website of the International Centre for Settlement of Investment Disputes (ICSID), the Kingdom of Spain has been involved in only one case: Emilio Agustín Maffezini (claimant) v. Kingdom of Spain (respondent), Case No. ARB. 97/7, in which, in accordance with Article 48.5 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), the parties agreed to the publication of the decision.

Question 2: Amicus curiae briefs or other intervention

There has been no case in Spain where third parties have made statements during treaty-based arbitration with respect to investments.

Question 3: Provision in treaties on transparency or publicity

In none of the bilateral treaties entered into by Spain is there any provision relating to the transparency or publication of treaty-based arbitration procedures with respect to investments.

Question 4: Provision in treaties on third parties' involvement

In none of the bilateral treaties entered into by Spain is there any provision relating to the participation of third parties in treaty-based arbitration with respect to investments.

4. Tunisia

[Original: French]

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

In response to the questionnaire from the United Nations Commission on International Trade Law (UNCITRAL) on arbitration practices in the event of disputes between States and foreign investors, it should be recalled that Tunisia was the first State to sign the 18 March 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the Washington Convention"), which established the arbitration system of the International Centre for Settlement of Investment Disputes (ICSID). Also, it has signed a significant number of agreements, both regional (inter-Arab and covering the Maghreb region) and bilateral (almost 60). Foreign investors from every continent have invested in Tunisia, the traditional

ones being from European and Arab countries. Tunisia has, however, had very few disputes with foreign investors. Amicable settlements are preferred, differences of point of view generally being resolved thanks to the understanding attitude of the Tunisian party. The few disputes that have arisen and gone before ICSID or an ad hoc arbitration tribunal are as follows:

A. Ghaith R. Pharaon v. Tunisia and National Tourism Office. This case, which was initiated by a Saudi Arabian investor in 1986, was heard by ICSID, where it was registered as case No. ARB/86/1. An arbitration tribunal was set up, but the dispute was settled amicably. The case is mentioned on the ICSID website, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded. The case was heard on the basis of the provisions of the Washington Convention and the bilateral investment agreement between Tunisia and Saudi Arabia.

Outcome of Proceeding: Settlement agreed by the parties and proceeding discontinued at their request (Order taking note of the discontinuance issued by the Tribunal on November 21, 1988 pursuant to Arbitration Rule 43(1)).

B. Tanmiah for Management & Marketing Consultancy v. Tunisia and the Organizing Committee of the Tunis 2001 Mediterranean Games. The claimant instituted proceedings before an ad hoc arbitration board, but the suit was dismissed. The claimant instituted fresh proceedings before the Arab Investment Court, which operates under the auspices of the League of Arab States. The case, which was registered as case No. 1/1 Q, IIC 238 (2006), was dismissed on 12 October 2006. See http://www.investmentclaims.com/IIC_238_(2006).pdf. Decision: dismissal of the case. “The Court has decided: first: to reject the request of the First Defendant (the State of Tunisia represented in the person of its Government the Prime Minister) for it to be removed from the action; second: to reject the pleas advanced by the Second Defendant (the Organizing Committee of the Tunis 2001 Mediterranean Games); third: to reject in its entirety the action of the Claimant against the First and the Second Defendants, and to hold the Claimant liable for the costs of the action before the Arab Investment Court; fourth: to hold inadmissible the interlocutory request put forward by the Second Defendant (the Organizing Committee of the Tunis 2001 Mediterranean Games); fifth: each party to bear its own attorneys’ fees.”

It should, however, be pointed out that the Arab Investment Court is officially an inter-State court established by an international agreement and not an arbitration institution.

C. ABCI Investments N.V. v. Republic of Tunisia (ICSID No. ARB/04/12). Subject matter: acquisition of shares in a bank; registration date: 6 April 2004; date of constitution of the Tribunal: 5 October 2007. The case is still pending. On 2 July 2008, the Tribunal issued a procedural order concerning the respondent’s representation (right of the Head of a State’s Litigation Department to represent the State) and the validity of the respondent’s nomination of an arbitrator. On the same day, the Tribunal issued a procedural order concerning the parties’ requests for bank guarantees.

The suit is based on the provisions of the Arab League Convention on the Investment of Arab Capital in Arab Countries (1980).

Question 2: Amicus curiae briefs or other interventions

There have been no cases in which third parties have presented statements in the course of treaty-based investment arbitration as amicus curiae or intervened in the proceedings in any way.

Question 3: Provision in treaties on transparency or publicity

Tunisia was the first country to sign the Washington Convention, which established a transparent arbitration proceedings system, with the publication of information on proceedings as they moved forward and the posting online of all decisions by arbitral tribunals, including final awards.

At the bilateral and the regional level (Maghreb and inter-Arab), Tunisia has opted for a standard bilateral agreement on the protection and promotion of investments that does not contain special provisions for ensuring the publicity of proceedings.

Question 4: Provision in treaties on third parties' involvement

The Tunisian standard bilateral agreement on the protection and promotion of investments does not provide for third parties to become involved in investment arbitration.

Question 5: Any other comment

The publication of arbitral awards by institutions such as ICSID is important for enabling States to follow the development of a case and get to know the interpretations put on the provisions of treaties, including the Washington Convention (18 March 1965), by international arbitrators. States are able to foresee the results of litigation and, possibly, avoid engaging in useless litigation. On the other hand, the case law of ICSID is not entirely consistent, with the result that those who study its judgements in an attempt to gain a clear understanding of the state of positive law and ICSID's jurisprudential position on the issues submitted to it are unable to obtain sufficient guidance. This failing has nothing to do with publicity of arbitral proceedings, but arises out of the arbitral proceedings system itself.

5. Turkey

[Original: English]

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

As Turkey has recourse mainly to the International Centre for Settlement of Investment Disputes (ICSID) regarding treaty-based investor-State arbitration, publicity and transparency issues are considered within the framework of the aforementioned arbitration system. Public access to the information on the cases involving Turkey, through the website (http://icsid.worldbank.org/ICSID/Index.jsp) of the Centre is possible. On the other hand, in accordance with Law No. 4982 of 09.10.2003, on Obtaining Information, individuals can obtain information from relevant authorities on the cases involving Turkey, upon their written request.

Question 2: Amicus curiae briefs or other intervention

There are no examples in Turkey of cases 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

Bilateral or multilateral treaties or agreements to which Turkey is a Party, do not contain provisions concerning transparency or publicity, regarding treaty-based investment arbitration. However, as these agreements refer to the institutional arbitration such as ICSID or International Chamber of Commerce (ICC), Turkey is committed to the principle of confidentiality as foreseen by these systems.

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 and multilateral treaties or agreements to which Turkey is a Party. However, as these treaties generally refer to institutional arbitration such as ICSID or sometimes ICC, proceedings involving third parties are applied, as provided by these institutions.

Question 5: Any other comment

Even though we consider that the current practices of the Centre for Settlement of Investment Disputes constitute a good example of publicity and transparency in treaty-based investor-State arbitration, we are of the view that, since the party autonomy is a prevailing rule in arbitral proceedings, these issues (publicity and transparency) should be determined in accordance with the common consent of the parties.

6. United States of America

[Original: English]

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

The United States is committed to ensuring the transparency of its investor-State arbitrations. The United States makes available to the public all documents submitted in disputes against it under Chapter Eleven of the North American Free Trade Agreement ("NAFTA"), subject to the redaction of protected information. Information protected from disclosure under Chapter Eleven includes, as set out in the interpretation of the NAFTA Free Trade Commission ("FTC"), confidential business information as well as information otherwise protected from disclosure under a Party's domestic law or the relevant arbitral rules.[1] As a practical matter, the U.S. Department of State

[1] See Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions (July 31, 2001), available at http://www.state.gov/documents/organization/38790.pdf. See also NAFTA Article 2105 (protecting against the disclosure of information which would impede law enforcement or be contrary to a Party's law protecting personal privacy or certain financial information).

posts to its website submissions, orders, and decisions in disputes against the United States under Chapter Eleven.[2]

The United States also supports open hearings in its NAFTA Chapter Eleven disputes. As stated in 2003, the United States "will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven disputes to which it is a party be open to the public, except to ensure the protection of confidential information, including business confidential information."[3]

The United States participated in the first NAFTA Chapter Eleven merits hearing to be open to the public in the landmark case of Methanex v. United States. In Methanex and in two subsequent NAFTA Chapter Eleven cases brought against the United States, Glamis Gold Ltd. v. United States and the consolidated Cases Regarding the Border Closure due to BSE Concerns, proceedings were open to the public via closed-circuit television feed.[4] Transcripts of the Methanex, Glamis, and BSE hearings are available on the U.S. Department of State website.[5]

Question 2: Amicus curiae briefs or other intervention

Third parties have presented amicus curiae briefs in three cases against the United States under NAFTA Chapter Eleven. First, in Methanex v. United States, the International Institute for Sustainable Development and Earthjustice (on behalf of Bluewater Network, Communities for a Better Environment and the Center for International Environmental Law) were granted leave to file written submissions. The submissions are available at http://www.state.gov/s/l/c5818.htm.

In Glamis Gold, Ltd. v. United States, the Quechan Indian Nation, the National Mining Association, Friends of the Earth, Sierra Club and Earthworks were granted leave by the Tribunal in that arbitration to file amicus submissions. The submissions are available at http://www.state.gov/s/l/c10986.htm.

More recently, the Office of the National Chief of the Assembly of First Nations presented an amicus curiae submission, without an accompanying application for leave to file, in Grand River Enterprises v. United States, which is available at http://www.state.gov/documents/organization/117812.pdf. The Grand River Tribunal has not decided whether to accept the Assembly of First Nations submission, and has invited the parties to comment on the proposed submission in their respective reply and rejoinder briefs, which are due in the next few months.

---

[2] See http://www.state.gov/s/l/c3741.htm.

[3] See Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations (Oct. 7, 2003), available at http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf.

[4] Arrangements were made in the Glamis hearing to close the proceedings for brief periods to accommodate the presentation of confidential information.

[5] See http://www.state.gov/s/l/c5818.htm (Methanex), http://www.state.gov/s/l/c10986.htm (Glamis), and http://www.state.gov/s/l/c14683.htm (BSE).

Question 3: Provision in treaties on transparency or publicity

In Annex 1137.4 of the NAFTA, United States specified that where it "is the disputing Party, either the United States or a disputing investor that is a party to the arbitration may make an award public." Additionally, the NAFTA Free Trade Commission ("FTC") in 2003 adopted the following interpretation of Chapter Eleven of the NAFTA:

Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.[6]

The NAFTA Parties also have agreed "to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of: (1) confidential business information; (2) information which is privileged or otherwise protected from disclosure under the Party's domestic law; and (3) information which the Party must withhold pursuant to the relevant arbitral rules, as applied."[7]

Similarly, the 2004 U.S. Model Bilateral Investment Treaty ("U.S. Model BIT") requires a respondent to make available to the public "pleadings, memorials, and briefs submitted to the tribunal" by disputing or non-disputing parties, as well as amicus submissions.[8] A respondent is also required, under the U.S. Model BIT, to make available to the public "orders, awards, and decisions of the tribunal," as well as hearing transcripts "where available".[9] In addition, under the U.S. Model BIT, hearings must be "open to the public," subject to "appropriate arrangements" for the non-disclosure of protected information.[10]

Concerning the non-disclosure of protected information generally, Article 29(3) of the U.S. Model BIT provides that "[n]othing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article]."[11] Under the U.S. Model BIT, when a disputing party submits a

---

[6] Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions (July 31, 2001), available at http://www.state.gov/documents/organization/38790.pdf.

[7] Id.

[8] See U.S. Model BIT Art. 29(1), available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

[9] See U.S. Model BIT Art. 29(1).

[10] See U.S. Model BIT Art. 29(2).

[11] The U.S. Model BIT defines "protected information" as "confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law." See U.S. Model BIT Art. 1. Article 18 of the U.S. Model BIT provides, in relevant part, that nothing in the treaty shall be construed "to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests." Article 19 of the U.S. Model BIT protects against disclosure of information which would "impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private."

document containing (in the party's view) protected information, the disputing party must also submit a redacted version of the document.[12] Under such circumstances, only the redacted version of the document is made available to the public.[13] Also under the U.S. Model BIT, any objection concerning the designation of certain information as protected would be decided by the tribunal.[14]

The investment agreements negotiated by the United States since 2002 reflect the provisions of the U.S. Model BIT with respect to transparency.[15]

Question 4: Provision in treaties on third parties' involvement

Article 28 (3) of the U.S. Model BIT provides that "The tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party." Like the transparency provisions discussed in the response to Question 3 above, the investment agreements negotiated by the United States since 2002 reflect the provisions of the U.S. Model BIT with respect to amicus curiae submissions.[16]

In addition, the NAFTA FTC has stated, with respect to third-party participation in NAFTA Chapter Eleven arbitrations, that "[n]o provision of the [NAFTA] limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party."[17]

The FTC has recommended that specific guidelines be adopted by Chapter Eleven tribunals when considering proposed amicus submissions.[18] The FTC guidelines provide that any proposed amicus submission be accompanied by

---

[12] U.S. Model BIT Art. 29(4).

[13] U.S. Model BIT Art. 29(4).

[14] U.S. Model BIT Art. 29(4).

[15] See, e.g., U.S. – Uruguay Bilateral Investment Agreement, Art. 29; U.S – Rwanda Bilateral Investment Agreement, Art. 29 (both available at http://www.ustr.gov/Trade_Agreements /BIT/Section_Index.html). The investment chapters of the following free trade agreements, available at http://www.ustr.gov/Trade_Agreements/Section_Index.html, include similar transparency provisions: Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR), Article 10.21; United States – Chile Free Trade Agreement, Art. 10.20; United States – Colombia Trade Promotion Agreement, Art. 10.21; United States – Peru Trade Promotion Agreement, Art. 10.21; United States – Korea Free Trade Agreement (KORUS FTA), Art. 11.21; United States – Morocco Free Trade Agreement, Art. 10.20; U.S. – Oman Free Trade Agreement, Art. 10.20; United States – Panama Trade Promotion Agreement, Art. 10.21; United States – Singapore Free Trade Agreement, Art. 15.20.

[16] See, e.g., U.S. – Uruguay Bilateral Investment Agreement, Art. 28; U.S. – Rwanda Bilateral Investment Agreement, Art. 28. The investment chapters of the following free trade agreements include similar provisions on amicus curiae submissions: Dominican Republic – Central America-United States Free Trade Agreement (CAFTA-DR), Article 10.20; United States – Chile Free Trade Agreement, Art. 10.19; United States – Colombia Trade Promotion Agreement, Art. 10.20; United States – Peru Trade Promotion Agreement, Art. 10.20; United States – Korea Free Trade Agreement (KORUS FTA), Art. 11.20; United States – Morocco Free Trade Agreement, Art. 10.19; U.S. – Oman Free Trade Agreement, Art. 10.19; United States – Panama Trade Promotion Agreement, Art. 10.20; United States – Singapore Free Trade Agreement, Art. 15.19.

[17] Statement of the Free Trade Commission on Non-Disputing Party Participation (Oct.7, 2003), available at http://www.state.gov/documents/organization/38791.pdf.

[18] Id.

an application for leave to file, specify the information that is to be included in the application, impose limitations on the length and scope of amicus submissions, and set out various factors to be considered by Chapter Eleven tribunals when deciding whether to grant a third party leave to file. In addition, under the FTC guidelines, a tribunal should ensure that an amicus submission does not disrupt the proceedings and does not unduly burden or unfairly prejudice a disputing party.

Question 5: Any other comment

The United States favours the transparent conduct of investor-State arbitration, as reflected in U.S. practice. Such transparency includes timely publication of submissions and decisions in investor-State arbitration, as well as conducting hearings that are open to the public, subject to the non-disclosure of protected information. Such transparency also includes the participation of third parties, where such participation is appropriate and so long as it does not disrupt the proceedings or unduly burden or unfairly prejudice a disputing party.