United Nations A/CN.9/WG.II/WP.160/Add.1

General Assembly

Distr.: Limited
5 August 2010

Original: English

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: Preparation of rules of uniform law on transparency in treaty-based investor-State dispute settlement

Note by the Secretariat

Contents

V.10-55626 (E)

II. Transparency in treaty-based investor-State dispute settlement (*continued*)

C. Legislation on international commercial arbitration

1. In addition to the chosen rules of arbitration, the arbitration procedure will be governed by the law on international commercial arbitration at the place of arbitration. Arbitration between two private parties is the main focus of legislation on international commercial arbitration, and the manner in which procedural transparency is addressed is not necessarily tailored to address the specific needs of investor-State arbitration.

1. The UNCITRAL Model Law on International Commercial Arbitration

2. The UNCITRAL Model Law on International Commercial Arbitration does not include provisions on confidentiality, nor disclosure, and therefore does not provide for a uniform solution on that matter.

2. Legislation favouring privacy and confidentiality

3. Where confidentiality is addressed in national laws on international commercial arbitration, there is no single approach to the scope of the obligation of confidentiality in terms of the information that is to be treated as confidential, the persons to whom the obligation attaches, or permissible exceptions to prohibitions on disclosure and communication. In terms of the material or information that is to be kept confidential, some provisions include a general description of facts or other information relating to the dispute or arbitral proceedings. Other provisions adopt a more particular description of the information to be kept confidential and include various categories of information, which are accorded different treatment. These categories include, for example, the fact that the arbitration is taking place; the identity of the arbitrators; written and oral arguments; reference to the evidence given by a party or a witness; communications between parties themselves or their advisors prior to, or in the course of, the arbitration; information that is inherently confidential, such as trade secrets and commercial-in-confidence information; and the contents of the award. As to the persons to whom the duty of confidentiality is to extend, a range of persons are covered such as the arbitrators; the staff of the arbitration institution (where the arbitration is institutional); parties and their agents; witnesses, including experts; and counsel and advisors.

3. Legislation favouring procedural transparency

4. Some of the circumstances covered by legislation where disclosure of information is permitted in arbitral proceedings include the following: where the parties consent to disclosure; where the information is in the public domain; where disclosure is required by law or a regulatory body; where there is a reasonable need for the protection of a party's legitimate interests; and where it is in the interest of justice or in the public interest. Some provisions also deal with special conditions that attach to the disclosure. Such conditions may vary with the time at which disclosure occurs. If information is to be disclosed, for example, during the arbitral proceedings, one approach is to require that notice of the disclosure be given to both

the arbitral tribunal and the other party. Where disclosure occurs once the arbitration has been concluded, only notice to the other party may be relevant.

D. Decisions of arbitral tribunals involving procedural transparency

5. Decisions of arbitral tribunals involving procedural transparency generally illustrate the ad hoc approach to that matter adopted by tribunals, in the absence of consistent guidelines in international investment agreements, applicable arbitration rules or applicable legislation.

1. Procedural documents and arbitral awards

6. In a case governed by the ICSID Additional Facility Rules,[1] the arbitral tribunal held that: "Neither the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties […]. Though, it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is free to speak publicly of the arbitration. […] It still appears to the Arbitral Tribunal that it would be of the advantage of the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the parties if during the proceedings they were both to limit public discussion of the case to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound."[2] In another case governed by the ICSID Arbitration Rules,[3] the claimant (the investor) complained about unilateral disclosure of the minutes of the first meeting of the arbitral tribunal and of a procedural order by the respondent (the State) who publicized those documents on the Internet. The claimant requested that the arbitral tribunal issue an order to ensure the confidentiality of those and other documents in the proceeding.[4] The Tribunal held that there was neither any general duty of confidentiality nor any general rule of transparency in ICSID arbitral proceedings. Consequently, the arbitral tribunal found that it was the responsibility of each arbitral tribunal to find the appropriate balance between confidentiality of the documents and transparency of the proceedings.[5] The Tribunal held that, due to the significant media coverage of that case, there was a sufficient risk of aggravation of exacerbation of the dispute. Therefore, it decided that both parties should refrain from disclosing minutes or records of hearings, documents produced by either party in disclosure procedures and pleadings and correspondence. However, to balance its decision, it held that the parties were free to engage in general discussion about the case in public, provided that "any such public discussion was restricted to what was necessary, and was not used as an instrument to antagonize the parties, exacerbate their differences, unduly

---

[1] *Metalclad Corp. v. Mexico*, Case No. ARB(AF)/97/, Award, 30 August 2000, 16 ICSID Review 168 (2001); 40 ILM 36 (2001), award available on 29 July 2010 at http://www.worldbank.org/icsid/cases/awards.htm.

[2] Ibid., para. 13.

[3] *Biwater GAUFF (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, award available on 29 July 2010 at http://www.worldbank.org/icsid/cases/awards.htm.

[4] Ibid., paras. 45-51.

[5] Ibid.

pressure one of them, or render the resolution of the dispute potentially more difficult or circumvent the terms of this procedural order."[6]

7. In a case governed by the 1976 UNCITRAL Arbitration Rules,[7] a NAFTA arbitral tribunal held, with respect to transparency, that "[…] whatever may be the position in private consensual arbitrations between commercial parties, it has not been established that any general principle of confidentiality exists in an arbitration such as that currently before this tribunal."[8] In a first order, the arbitral tribunal ordered that certain documents, including the notice of arbitration and the statements of claim and defence could be released into the public domain under the 1976 UNCITRAL Arbitration Rules. In a further temporary order, the arbitral tribunal ordered that all transcripts and other records of the hearings be kept confidential and only be disclosed according to the conditions required for "Protected Documents". In another NAFTA case also governed by the 1976 UNCITRAL Arbitration Rules,[9] certain third parties petitioned the arbitral tribunal to be permitted to intervene as amicus curiae and, as part of that claim, sought copies of all documents filed in the arbitration. The arbitral tribunal held that disclosure or confidentiality was to be determined by the agreement of the disputing parties as recorded in the order regarding disclosure and confidentiality. Pursuant to that order, "either party was at liberty to disclose the major pleadings, orders and awards of the Tribunal into the public domain" (subject to deletion of trade secret information).[10] In another case,[11] where third parties petitioned the arbitral tribunal requesting, inter alia, the disclosure of the statement of claim and defence, memorials, counter-memorials, pre-hearing memoranda, witness statements and expert reports, including appendices and exhibits to such submissions, and any applications or motions to the arbitral tribunal,[12] the arbitral tribunal held that under NAFTA Chapter 11 and the 1976 UNCITRAL Arbitration Rules, provision was made for the communication of pleadings, documents and evidence to the other disputing party, the other NAFTA Parties, the arbitral tribunal and the secretariat — and to no one else. The matter was also subject to any agreement between the parties or order in respect of confidentiality. The arbitral tribunal found that while principles of transparency might support the release of some of the documentation, that was not a matter which could be the subject of a general ruling. Some

---

[6] Ibid.

[7] *S.D. Myers Inc. v. Government of Canada*, available on 29 July 2010 at http://www.naftaclaims.com/disputes_canada_sdmyers.htm. See also the comments of Canada contained in document A/CN.9/WG.II/WP.159/Add.1.

[8] Ibid.

[9] *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to intervene as amici curiae, 15 January 2001. The petitions and all the documents relevant to this case were available on 29 July 2010 at http://www.state.gov/s/l/c5818.htm. See also the comments of the United States of America in document A/CN.9/159/Add.3.

[10] Ibid., para. 46.

[11] *United Parcel Service of America, Inc. v. Government of Canada*, Decision of the tribunal on petitions for intervention and participation as amici curiae, 17 October 2001, available on 29 July 2010 at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/IntVent_oct.pdf. See also the comments of Canada contained in document A/CN.9/WG.II/WP.159/Add.1.

[12] Ibid., para. 1.

documentation might be available in the public domain through any agreement or confidentiality order that might be made, or otherwise lawfully.[13]

2. Hearings

8. In an arbitration case under the 1976 UNCITRAL Arbitration Rules,[14] petitions submitted to the arbitral tribunal by different organizations contained requests for permission to, inter alia, have observer status at oral hearings. The arbitral tribunal came to the conclusion that because article 25, paragraph (4), of the 1976 UNCITRAL Arbitration Rules provided that hearings were to be held in camera, the petitioners could not be granted the right to attend oral hearings of the arbitration. The arbitral tribunal held that the phrase "in camera" was clearly intended to exclude members of the public, i.e., non-party third persons such as the petitioners.[15] However, at a later stage of the proceedings, the parties agreed to make the hearings open to the public and the hearings were broadcasted live. In addition, transcripts of hearings on the merits as well as the final award were published. Along the same lines, in another case,[16] while examining both Chapter 11 of NAFTA and the 1976 UNCITRAL Arbitration Rules, the arbitral tribunal considered whether those Rules allowed public access to hearings. It noted that article 25, paragraph (4), of 1976 UNCITRAL Arbitration Rules, under which hearings were held in camera unless otherwise agreed by the parties, prevented third parties or their representatives from attending the hearings in the absence of both parties agreeing thereto.[17] The parties agreed to make the proceedings open to the public and the hearings were broadcasted live. In addition, the final award and dissenting opinion were published. Similarly, in another case initiated under Chapter 11 of the NAFTA and governed by the 1976 UNCITRAL Arbitration Rules, the parties agreed to make the hearings open to the public. At the request of the parties and the arbitral tribunal, ICSID accepted to host the hearings. The hearings were broadcasted live and hearing transcripts were published.[18]

---

[13] Ibid., para. 68.

[14] *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to intervene as amici curiae, 15 January 2001, available on 29 July 2010 at http://www.state.gov/s/l/c5818.htm. See also the comments of the United States of America in document A/CN.9/159/Add.3.

[15] Ibid., para. 41.

[16] *United Parcel Service of America, Inc. v. Government of Canada*, Decision of the tribunal on petitions for intervention and participation as amici curiae, 17 October 2001, available on 29 July 2010 at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/IntVent_oct.pdf.

[17] Ibid., para. 67.

[18] ICSID Release News, "Canfor Corporation v. United States of America NAFTA/UNCITRAL Arbitration Rules Proceeding" (December 2, 2004), available on 29 July 2010 at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement13.

III. Concluding remarks and questions for possible consideration by the Working Group

A. Policy considerations on transparency

9. The question of transparency in treaty-based investor-State arbitration arises from the presence of a State in the arbitration, the subject-matter of the dispute, which often raises questions of public policy, public interest and the amount of potential liability. Transparency has been viewed as one of the central aspects of good governance claims directed against States and is also considered by private parties as an important characteristic of corporate social responsibility. The underlying functions fulfilled and values protected by transparency apply also to dispute settlement methods. However, confidentiality is generally regarded as an important feature of arbitration. The need to protect business or governmental secrets seems to be largely admitted, as is the need to protect proceedings from any outside pressures on the parties or on the arbitral tribunals. Confidentiality, at least during arbitral proceedings, may be seen as contributing to the de-politicization of investment disputes.

10. Taking into account that both transparency and confidentiality can be considered as legitimate interests of investor-State treaty-based arbitration, the Working Group may wish to consider whether a right balance should be found to protect both interests and whether it would be useful to formulate policy considerations on principles underlying transparency in treaty-based investor-State arbitration.

B. Matters for possible consideration regarding transparency

1. General remarks

11. The examples taken from international investment agreements, arbitration rules and case law regarding the question of transparency in treaty-based investor-State arbitration and reflected in part II of this note illustrate possible responses to the general question of how to achieve transparency, while balancing the public interest and the need to protect confidentiality.

12. It may be recalled that at the forty-first session of the Commission, a delegation made suggestions that work on transparency should seek to accomplish five objectives: “(1) creating public knowledge of the initiation of an investor-State arbitration; (2) allowing third parties to make submissions to the tribunal where such submissions would be helpful and relevant and would not unduly delay, interfere with, or increase the costs of, the proceeding; (3) allowing open hearings; (4) making the decisions and award of the tribunal public; and (5) preserving the existing power of an arbitral tribunal to allow closed proceedings and restrict access to documents, or portions thereof, when necessary to protect confidential business information and/or information that is privileged or otherwise protected from disclosure under the domestic law of the disputing State” (see document A/CN.9/662, para. 17). The Working Group may wish to consider the following questions in relation to the scope of work on procedural transparency.

2. Persons or institutions concerned

13. The Working Group may wish to consider how provisions on transparency should determine the rights and obligations of each of the persons involved in the arbitration proceedings, i.e., the States parties to international investment agreements, the parties to the dispute and their representatives, the arbitration institution, if any, and the arbitral tribunal. The rights and obligations of third parties are discussed in paragraphs 20 and 21 below.

14. In particular, it should be clarified whether it would be more appropriate that the parties to the dispute, the arbitral tribunal or an institution be in charge of conveying information to the public. The extent to which the parties may engage in general discussion about the case in public, or make disclosures, and the time at which this would be authorized may also need to be clarified. The Working Group may also wish to determine whether publication should be automatic, left to the parties' discretion or be subject to prior permission by the arbitral tribunal, taking into account the intent of the parties, or should be organized in any other manner.

3. Information subject to publicity

15. The Working Group may wish to consider whether there should be a general rule regarding public access to procedural documents and arbitral awards or the extent to which those matters should be left for individual decisions to be made by the parties or the arbitral tribunal. The Working Group may also wish to consider whether cost elements should be addressed and, in the affirmative, how.

16. Another matter for possible consideration is whether provisions on public access to procedural documents should be drafted in the form of a general statement or should instead contain a list of procedural documents to be made publicly available. In that latter case, the Working Group may wish to decide whether documents to be publicized should include some or all of the following: the notice of arbitration and the response thereto, the minutes or records of hearings; any of the documents produced in the arbitral proceedings by the parties, whether pursuant to a disclosure exercise or otherwise; any of the pleadings or written memorials (and any attached witness statements or expert reports); correspondence between the parties and/or the arbitral tribunal exchanged in respect of the arbitral proceedings, decisions, orders or directions of the arbitral tribunal; and awards.

17. In case the Working Group would consider that a provision on transparency should include publication of procedural documents, it may also wish to consider whether and to what extent documents revealing business secrets or other confidential information should be exempt from possible public disclosure and consider whether additional guidance should be provided.

4. Recipients of information

18. The Working Group may wish to consider the various possible approaches for the determination of recipients of disclosed information which could be limited to the non-disputing governments, or broadened so as to include the public at large.

5. Open hearings

19. The Working Group may wish to consider whether open hearings should be permitted, and in the affirmative, whether guidance to arbitral tribunals should be provided on the organization of open hearings, taking account of the possible need to protect, to the extent required, confidential information.

6. Submissions by third parties

20. Certain international investment agreements include in their dispute resolution clause the possibility for non-disputing individuals or organizations to make their views known on the matters at issue in the arbitration. Guidelines for the acceptance of such written amicus curiae submissions by an arbitral tribunal have been established, in certain instances, in legislation and case law and provided for an assessment by the arbitral tribunal of the relevance of the proposed submissions. The question of submissions by third parties is closely connected to the question of access to procedural documents so that third parties' submissions may adequately address matters within the scope of the dispute. The Working Group may wish to decide whether that matter should be included in its consideration of the issue of transparency.

21. In case the Working Group would decide that that matter should be dealt with, it may wish to consider formulating specific rules and guidelines applying to third parties' intervention addressing, inter alia, possible criteria for acceptance of third parties' submissions, such as assessing the legitimate interest of the third parties, ensuring that they are accountable, independent and not backed by any of the disputing parties. The extent of their possible intervention might need to be determined: for instance, existing rules on that matter allow third parties to submit amicus briefs but not necessarily to call witnesses, or to have the possibility to amend the claims or independently affect the process. The form and content of the third parties' submissions may also need to be determined (pages limitation, questions to be addressed (facts and/or law)). The Working Group may wish to consider whether the arbitral tribunal should be requested to provide grounds for refusal of third parties' submissions and arguments contained in the submissions. A question to be considered would also be the conditions for allowing publicity of the amicus curiae briefs.

C. Possible form of work on transparency

22. The Working Group may wish to consider the following possible options concerning the form of its work on transparency in treaty-based investor-State arbitration.

1. Model clause for inclusion in the dispute settlement provision of international investment agreements

23. The Working Group may wish to consider whether, with a view to encouraging and facilitating transparency, it would be useful to prepare a model clause on transparency for inclusion in dispute settlement provisions of international investment agreements. It may be noted that dispute settlement provisions in international investment agreements are often premised on the commercial

arbitration model and, in most cases, do not address such issues as the disclosure of the existence of the proceedings, the disclosure of any procedural document, and open hearings or interventions by non-arbitrating parties. The objective of preparing such a model clause would be to harmonize States' practices in that field, consistent with UNCITRAL's mandate.[19] By adopting such a clause in international investment agreements, States would demonstrate their willingness to promote transparency in arbitration.

24. If the option of providing a model clause for adoption in international investment agreements would be retained, the Working Group may wish to note that, as highlighted in a report by UNCTAD, a new generation of international investment agreements has tended to address in advance a series of specific matters related to the arbitral proceedings such as submission of the same dispute to local courts, the place of arbitration, appointment of experts and remedies available, including interim measures.[20] Under that option, the Working Group may wish to decide whether its work should be limited to offering a model clause on transparency or if it should also encompass other matters on which States might wish to receive guidance for drafting dispute settlement provision in their international investment treaties.

2. Specific arbitration rules

25. The Working Group may wish to consider the option of drafting specific arbitration rules addressing transparency in treaty-based investor-State arbitration, either in the form of separate arbitration rules or as an annex to the UNCITRAL Arbitration Rules. In either case, the existence of a specific set of distinct rules applying only to investment arbitration may raise difficult issues regarding the definition of investment arbitration (covered by those rules) as opposed to other types of arbitration (to which those specific rules would not apply).

Previous discussions of the Working Group

26. At the forty-sixth session of the Working Group (New York, 5-9 February 2007), a suggestion had been made to include specific provisions in the UNCITRAL Arbitration Rules to ensure transparency in the procedure for arbitration involving a State.[21] The Working Group had decided to follow a generic approach in the revision of the Rules that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference

---

[19] General Assembly resolution 2205 (XXI) [Yearbook 1968-1970, part one, chap. II, sect. E]. It may be recalled that the mandate is based on the consideration that "international trade cooperation among States is an important factor in the promotion of friendly relations, and consequently, in the maintenance of peace and security", that the "interests of all peoples, and particularly those of developing countries, demand the betterment of conditions favouring the extensive development of international trade", and "that divergences arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade."

[20] See *International Investment Arrangements: Trends and emerging issues*, UNCTAD Series on International Investment Policies for Development, Part II. Key Issues in New Generations IIAs, J. Investor States Dispute settlement (New York and Geneva 2006), pp. 49-50; available on 29 July 2010 at http://www.unctad.org/en/docs/iteiit200511_en.pdf.

[21] Report of the Working Group on International Arbitration and Conciliation on the work of its forty-sixth session, A/CN.9/619, para. 61.

to dealing with specific situations.[22] At that session, the Working Group had further considered whether it was appropriate to include a general provision regarding confidentiality of proceedings or of materials including pleadings before the arbitral tribunal.[23] After discussion, the Working Group agreed not to include a provision on confidentiality of proceedings.[24]

27. The Working Group may also wish to recall the discussions at its forty-eighth session (New York, 4-8 February 2008) regarding transparency in investor-State arbitration and may wish to note that annexes I to III of the report on the work of that session reproduce statements made by delegations on that matter.[25]

Separate rules for investment arbitration

28. In case the Working Group would decide to adopt separate rules on transparency in the context of treaty-based investor-State arbitration, it may wish to consider the extent to which that approach would preserve the general applicability of the UNCITRAL Arbitration Rules. Furthermore, the Working Group may wish to consider whether limiting the drafting of new rules for investment arbitration to issues of transparency would be appropriate, taking account of additional matters that would be expected to be addressed in arbitration rules on investment.

Annex to the UNCITRAL Arbitration Rules

29. In case the Working Group would decide that the UNCITRAL Arbitration Rules should be supplemented with an annex addressing procedural transparency for use in the context of investor-State arbitration, that annex could contain either specific rules on transparency or recommendations aimed at providing guidance to arbitral tribunals.

30. Under that option, the extent to which parties would be bound by such an annex (taking account of the consensual nature of arbitration) might need to be considered.

3. Guidelines

31. Another possible option to deal with transparency in treaty-based investor-State arbitration would consist in drafting guidelines to provide guidance to States when negotiating international investment treaties, to arbitral tribunals having to decide on such issues, to parties to arbitration and to other parties with a legitimate interest in the outcome of the arbitration.

---

[22] Ibid, para. 62.

[23] Ibid, para. 127.

[24] Ibid, paras. 128-133. Views in favour of including a provision on confidentiality referred to a number of existing international arbitral rules such as the LCIA Arbitration Rules and WIPO rules which contained specific provisions on confidentiality. Against inclusion, it was suggested that inclusion of such a general provision would run counter to the current trend toward greater transparency in international proceedings. It was also said that the underlying aim of the revision of the Rules was to provide flexibility so as to accommodate evolving law and practices. In that respect, it was noted that confidentiality was an area where law and practices were still developing.

[25] Report of the Working Group on International Arbitration and Conciliation on the work of its forty-eighth session, A/CN.9/646, paras. 54-69.