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Settlement of commercial disputes: draft UNCITRAL rules on transparency in treaty-based investor-State arbitration

Compilation of comments by Governments

Addendum

Contents

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II. Comments received from Governments

Canada

[Original: English]
[Date: 16 May 2013]

1. The Government of Canada presents its compliments to the Secretariat of the United Nations and takes the opportunity to commend the Secretariat for its work in preparing a final draft of the UNCITRAL rules on transparency in treaty-based investor-State arbitration. In response to the Secretariat's request, the Government of Canada is pleased to offer some further observations and comments on this text in advance of the 46th Session of the Commission, which will be held in Vienna from July 8 to 26, 2013.

2. *Draft Article 1(2)*: Canada suggests the deletion of the text "[i]" and "or (ii) in treaty-based investor-State arbitrations initiated under other arbitration rules or ad hoc". Article 1(1) and 1(2) reflect the compromise struck specifically with respect to references to the UNCITRAL Arbitration Rules in future and existing treaties. UNCITRAL should not presume to decide how the proposed Rules will apply in situations which are not governed by the UNCITRAL Arbitration Rules. If the intent is to highlight the fact that the Rules on Transparency are available for use by parties outside of the context of the UNCITRAL Arbitration Rules, this could be done through the addition of a separate paragraph which does not use the restrictive language found in Article 1(2).

3. *Draft Article 1(3)(b)*: At the last session of the Working Group, it was agreed that the Secretariat should draft language for this paragraph to clarify that the power being granted to the Tribunal under this paragraph did not amount to an additional exception to the Rules (see A/CN.9/765, para. 35). In this context, Canada suggests that the language "whilst not undermining" establishes too weak a test for the exercise of this power and suggests that it be replaced with "but only insofar as such adaption is consistent with achieving".

4. *Second Footnote to Draft Article 1*: Canada notes that for clarity of drafting, an "a" should be added before the word "State" and the phrase "regional economic integration organization".

5. *Draft Article 3(3)*: While Canada agrees that the bracketed text is merely an example, and thus, not essential, it does provide some helpful guidance for tribunals as to the alternate arrangements that are possible under this paragraph. In this regard, Canada notes that similar examples are used in other places in the Rules on Transparency and in the UNCITRAL Arbitration Rules.

6. *Draft Article 3(5)*: In response to the note of the Secretariat, Canada suggests that this paragraph be reworded to say "A person who is not a disputing party and is granted access to documents under paragraph 3, shall bear any administrative costs related to making those documents available to that person (such as the cost of photocopying or shipping documents to that person), unless the arbitral tribunal decides to make such documents available to the public through the registry pursuant to paragraph 4."

7. *Draft Articles 5(1) and 5(2)*: Canada suggests that the word "accept" in these two paragraphs be replaced with "allow" in order to be consistent with the terminology used in Draft Article 4.

8. *Draft Articles 7(1), (3), (5)*: Canada suggests deleting the phrase "or to non-disputing Parties to the treaty" in each of these paragraphs. In the preceding Articles, no distinction is made between the public and the "non-disputing Parties to the treaty." For example, in Article 3, the Rules provide that documents "shall be made available to the public." Adding the identified language in Article 7 may lead to the impression that the language in Article 3 does not include making the documents available to "non-disputing Parties to the treaty". This is not the intention. The intention in the preceding Articles is that the term "public" encompass the "non-disputing Parties to the treaty" and, in Canada's view, adopting a different approach in Article 7 could lead to confusion and should be avoided.

9. *Draft Amendment to Article 1 of the UNCITRAL Arbitration Rules*: Canada suggests that the first square bracketed text read instead "(appended hereto)" or some similar variation, and that the second bracketed text should be maintained.

10. *Attachment of the Rules on Transparency to the UNCITRAL Arbitration Rules as an Appendix*: Canada supports the attachment of the UNICTRAL Rules on Transparency to the UNCITRAL Arbitration Rules as an appendix both for reasons of drafting and policy. First, in Canada's opinion, it would be unusual and problematic for the UNCITRAL Arbitration Rules to incorporate the Rules on Transparency without somehow physically attaching them to the Arbitration Rules. Canada believes that best practice is to have all the operative provisions of the UNCITRAL Arbitration Rules together in one place, especially since some of the Rules on Transparency will override contrary provisions in the general Arbitration Rules in the disputes to which the Rules on Transparency apply. Attaching the Rules on Transparency will thus facilitate the understanding and knowledge of the Rules as they may be applied in a particular dispute, and eliminate potential disputes. Second, Canada believes that as a matter of policy, it is important for UNCITRAL to ensure the broadest possible review and distribution of the Rules on Transparency and that this is most likely to occur when they are attached to the UNCITRAL Arbitration Rules. In fact, Canada is concerned that a decision not to attach the UNCITRAL Rules on Transparency to the general Arbitration Rules could be perceived as sending a signal that they are of a more marginal value than the general Rules. Third, Canada does not share any of the concerns expressed in paragraph 33 of A/CN.9/783 with respect to attaching the Rules on Transparency to the general UNCITRAL Arbitration Rules. In particular, Canada is not concerned that the attachment of the Rules on Transparency will create difficulties for parties involved in other types of disputes or will somehow make the UNCITRAL Arbitration Rules less attractive to commercial parties. The Rules on Transparency will not prejudice commercial parties in non-treaty-based arbitrations from choosing to proceed confidentially under the general provisions in the UNCITRAL Arbitration Rules. Canada sees no reason to be concerned that commercial parties will somehow misunderstand the express provisions on applicability in the Rules on Transparency merely because they are attached as an appendix to the UNCITRAL Arbitration Rules. Finally, Canada does not share the view that attaching the Rules on Transparency as an appendix to the UNCITRAL Arbitration Rules will somehow make them less susceptible to use by other institutions in conjunction with their

arbitration rules. Certainly, as a matter of drafting, those other institutions could just as easily refer to and incorporate the Appendix as they could a separate document.

11. *Addition of a footnote to Article 1(4)*: Canada does not believe that a duplicative footnote to define the identified term is required since the paragraph already expressly refers to the Rules on Transparency where such a definition is present.

12. *Titling of the UNCITRAL Arbitration Rules*: In keeping with UNCITRAL practice, Canada suggests that the Arbitration Rules, with new article 1(4) and the Appendix containing the Rules on Transparency, be entitled "UNCITRAL Arbitration Rules (as revised in 2013)".

Colombia

[Original: Spanish]
[Date: 30 April 2013]

1. With regard to the decisions taken by the Working Group, the Colombian delegation, consisting of a delegate from the Ministry of Trade, Industry and Tourism and a delegate from the Directorate of International Legal Affairs of the Ministry of Foreign Affairs, who took part in the session, agreed with the content of the draft rules that was decided on, since they considered that the Colombian position, previously expressed to members of the UNCITRAL inter-agency committee, had been respected and defended.

2. However, the Government of Colombia has a doubt concerning draft article 1, paragraph 6, which was not discussed in the context of this article but is described as "approved" in the report. Be that as it may, this new formulation does not present any problems for our country, since the topic was discussed in another article of the draft regulations and may more usefully, from the organizational point of view, appear in draft article 1, since its purpose is that the courts should give precedence to the objectives of the regulations over any action or event that might be detrimental to such objectives.

3. The draft rules discussed and supported during the fifty-eighth session of Working Group II may therefore be approved in their present form when they are discussed again at the forty-sixth session of the Commission, to be held in Vienna in July 2013, when the Colombian delegation will hope to participate actively.

4. It is also important to point out that there is an outstanding topic of great interest to Colombia to be discussed at the fifty-eighth session. That is the discussion about the legal form that the draft rules will take, whether as stand-alone rules or as an appendix to the UNCITRAL Arbitration Regulations of 2010.

5. In line with the discussions held at previous sessions, the position of the Colombian delegation will be that the rules on transparency should stand alone. They should therefore not make any explicit reference to non-application of the UNCITRAL Regulations in an international investment agreement and should allow the parties to a dispute to decide whether they want to apply them or not.

6. The argument is not clear, since, beginning with draft article 1 on the scope of application, the compromise proposal accepted by the Working Group at the last

session was the "opt-out" option, which implies that the rules on transparency should apply as a part of or an appendix to the UNCITRAL Arbitration Rules of 2010, unless the parties to a treaty agreed otherwise. The rules would thus be an appendix to the UNCITRAL Arbitration Rules. However, draft article 1, paragraph 7, provides that the rules on transparency may be applied to other arbitration rules, different from those of UNCITRAL, and document A/CN.9/783 ultimately reaffirms that the question should be considered at the next session of the Commission in July 2013.

7. This topic, and the question discussed above, will be discussed at the forty-sixth session of the Commission. Both elements are crucial to the question of whether the debate that gave rise to the establishment of the Working Group can be concluded at the session.

El Salvador

[Original: Spanish]
[Date: 30 April 2013]

Having analysed document A/CN.9/783, the Directorate-General is agreeable to the draft articles and, although the position of El Salvador with respect to articles 1 and 2 differed, in order to facilitate consensus, it is not submitting any objections to those provisions.

The comments on the draft rules are as follows:

1. In draft article 1 — Scope of application, under "Applicability of the Rules", paragraph (2), El Salvador agrees with the text in brackets and therefore suggests that those brackets be deleted.

2. In the section with the heading "Remarks" followed by footnote 6, in paragraphs 7 and 8 under the subheading "Drafting suggestions", El Salvador concurs that the words in brackets should be added to the chapeau of paragraph (2) and that references to "Party to the treaty" and "State" should be clarified in a footnote to article 1.

3. With regard to paragraph 10 under the same "Remarks" section, El Salvador considers that the date of coming into effect of the rules on transparency should be the date of their adoption by the Commission.

4. With regard to paragraph 15 under the subheading "Paragraph (3)" of the "Remarks" section to which footnote 8 corresponds, El Salvador agrees with the Secretariat's comment that it is not appropriate to retain the proposed example in article 3, paragraph 3; however, that example could be given in a footnote.

5. As concerns paragraph 16 under the subheading "Paragraph (5)" of the same "Remarks" section, El Salvador considers that it is not sufficiently clear that third parties will not have to pay for the administrative costs relating to publication. It is therefore suggested that the following words be added to the end of paragraph (5): "[…], such as the cost of photocopying or shipping documents, but not administrative costs relating to publication, such as uploading documents onto the registry website."

6. The Directorate-General concurs with the remarks of the Secretariat in the remainder of the document.

Japan

[Original: English]
[Date: 3 May 2013]

1. Draft article 1: Japan supports the inclusion of the part in brackets which reads "or (ii) in treaty-based investor-State arbitrations initiated under other arbitration rules or ad hoc" in draft paragraph 2.

2. Footnote under draft article 2: Limiting the qualification of the parties to the treaties that these Rules will apply to would exclude the treaties to which such territories as Hong Kong and Macao are parties from the scope of these Rules. In order to clarify the scope of the treaties that these Rules will apply to, it is sufficient to mention "international agreement" with a reference to examples of its forms and the nature of its provisions. Japan understands the following revised footnote is clear enough to include any international agreements to which non-State parties such as regional economic integration organizations, Hong Kong or Macao.

"* For the purpose of the Rules on Transparency, a 'treaty providing for the protection of investments or investors' shall be understood broadly as encompassing any international agreement concluded between or among States or regional economic integration organizations, including free trade agreements, economic integration agreements, trade and investment framework or cooperation agreements, and bilateral and multilateral investment treaties, so long as it contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty."

3. Draft Article 2: The current draft does not deal with the situation where either of disputing parties (normally the respondent) contests the applicability of the Transparency Rules. Is this issue going to be dealt with in practice guidelines for the repository?

4. Draft Article 3: The sentence in brackets under paragraph 3 is not necessary and should be deleted.

Russian Federation

[Original: Russian]
[Date: 30 April 2013]

1. Article 6, paragraph 1, of the draft rules provides that "hearings for the presentation of evidence or for oral agreement ('hearings') shall be public". According to paragraphs 54, 56 and 57 of the report of the Working Group on the work of its fifty-eighth session, a number of delegations drew attention to the need for further consideration of the possibility that hearings be closed where both disputing parties so agree; however, no relevant provisions are contained in the draft rules as proposed by the UNCITRAL Secretariat.

2. In that regard, the Russian Federation recommends that the Secretariat submit to the Commission (or to the Working Group) for its consideration a compromise solution providing for the right of the parties to agree to hold closed hearings.

3. Article 7, paragraph 5, of the draft rules provides for the possibility for the respondent State to refuse access to information if the disclosure of that information would be contrary to its essential security interests. We assume that in such cases the arbitral tribunal itself would determine the extent to which security interests were "essential", which would pose problems, as the disclosure of such information concerns the public interests of the respondent State.

4. The phrase "essential security interests" therefore requires further clarification.

5. According to paragraph 84 of the report of the Working Group on the work of its fifty-eighth session, the Working Group expressed the unanimous view that the best institution to serve as a registry under article 8 of the draft rules would be UNCITRAL.

6. The issue of establishment of a registry of published information was discussed at length during previous sessions of the Working Group; however, article 8 of the draft rules as submitted by the Secretariat contains no specific proposals for the regulation of that issue.

7. With regard to the form in which the draft rules should be adopted, we consider that the best option would be to adopt the rules as a stand-alone document, which, in the view of the Russian Federation, would ensure wider application of the rules.

8. Furthermore, we should like to point out that the draft rules as translated into Russian require further fine-tuning, taking into account the specific legal implications of the terms used.

9. Additional comments on the draft rules may be submitted by the Russian Federation at the forthcoming session of the Commission (in July 2013).