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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

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II. Comments received from Governments

Dominican Republic

[Original: Spanish]

[Date: 6 June 2013]

I. Paragraph 4 relating to draft article 1 — Scope of application

1.1. The provisions of article 1, paragraph 2, regarding the scope of application should differentiate, in the case of agreements concluded before the entry into force of the Rules on Transparency, of the application of other arbitration rules or of ad hoc arbitrations, between:

- (i) Cases in which the States signatories to the treaty or agreement have agreed on the application of the Rules with respect to this treaty; and
- (ii) Cases in which the parties in an arbitration (whether it be the disputing parties or the State whose protection the investor has sought in order to initiate the arbitration) have agreed to their application for purposes of the arbitration in question.

With regard to the concept of citizenship in paragraph 2 (b), we consider that the term “citizen” should not be used as it could lead to confusion and would not be applicable to investors that are artificial persons. The appropriate criterion would be that of nationality, and the Rules should explain that nationality is to be determined in conformity with the treaty or agreement under which the arbitration is initiated.

For the above reasons, the Export and Investment Centre of the Dominican Republic wishes to suggest the following wording:

“Article 1 (...) (2) (...): (a) the parties to the treaty have agreed after the entry into force of the Rules on Transparency to their application; (b) the parties to an arbitration (“the disputing parties”) agree to their application in respect of that arbitration; or (c) in the case of a multilateral treaty, the State of nationality*** of the investor and the respondent State have agreed to their application in respect of the arbitration in question.

*** The nationality of the investor shall be determined in conformity with the provisions of the treaty or agreement applicable to the arbitration.”

1.2. With regard to the provisions of paragraph 3 (b), we feel that the discretionary authority given to the arbitral tribunal to adapt the requirements of the Rules is too broad and would impair the predictability of the process. It is suggested that the subparagraph should be redrafted in order clearly to establish which provisions could be adapted and which not, always bearing in mind the transparency objective of the Rules.

II. Draft article 3 — Publication of documents

2.1. We agree with the comments in paragraph 15 of the document concerning the last sentence of article 3, paragraph 3. We therefore propose the deletion of the sentence “This may include, for example, making such documents available at a specified site.”

2.2. We likewise agree with what is said in paragraph 16 of the document about article 3, paragraph 5, and the expression “administrative costs ancillary to ...”. In our view, if the present wording is retained, it could be understood to mean that third parties will bear the costs of publication of the arbitration documents.

We propose that the wording should be reviewed accordingly.

III. Draft article 5 — Submission by a non-disputing Party to the treaty

3.1. We are of the opinion that the participation of non-disputing Parties to the treaty should be limited solely to issues of treaty interpretation. Submissions on other matters within the scope of the dispute should not be allowed in the absence of an express provision in the treaty in question or a relevant agreement between the disputing parties.

We therefore propose that article 5, paragraph 2, should be amended to read as follows:

“Article 5 (...) (2) The arbitral tribunal shall not accept submissions on other matters within the scope of the dispute unless this is expressly provided for in the treaty in question or there is an agreement by the disputing parties to this effect. In exercising its discretion to accept such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3.”

IV. Draft article 7 — Exceptions to transparency

4.1. In relation to the provisions of paragraph 7, we consider that the phrase “comparably exceptional circumstances” may give rise to multiple interpretations and that the meaning of “comparably” is unclear. We propose that what is meant by “comparably exceptional circumstances” should be explained in a footnote.

In the Spanish version, in the fifth line of paragraph 7, the text should read “...*dar lugar a la intimidación de testigos...*”.

In conclusion, as a general observation, we note that the UNCITRAL draft has taken into consideration relevant aspects of the free trade agreements concluded by the Dominican Republic, such as those relating to the participation of non-disputing Parties.