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Draft provisions on expedited arbitration

Compilation of comments on the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to expedited arbitration

Note by the Secretariat

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I. Introduction

1. At the seventy-second session of the Working Group (Vienna, 21–25 September 2020), delegations indicated that they would make submissions to clarify their position on the question of whether the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the “Transparency Rules”) would apply in the context of expedited arbitration ([A/CN.9/1043](#), para. 59).

2. The Secretariat received the following comments from the Ministry of Justice of Israel on 1 February 2021 and the Government of Singapore on 3 February 2021. The texts received by the Secretariat are reproduced in this note in the form in which it was received.

II. Compilation of comments

1. Israel

The Relationship between the Expedited Arbitration Provisions (EAPs) and the Transparency Rules

In its work on expedited arbitration, the Working Group identified the issue of the relationship between the EAPs and the UNCITRAL Arbitration Rules (UARs). Although a final decision has not yet been made whether to have the EAPs as an appendix to the UARs or as a stand-alone text, some issues concerning the application of the EAPs in each scenario have already been discussed at previous Working Group meetings. Among these issues was the question of whether parties to a dispute should be allowed to apply the EAPs while excluding the application of the Transparency Rules (if they choose to apply the modified UARs (UARs and the EAPs Appendix) to their dispute or include a reference to the modified UARs in the arbitration agreement).

The notes prepared by the Secretariat for the seventy-second and seventy-third sessions touch upon this issue (respectively [A/CN.9/WG.II/WP.214](#), paras. 35–41 and [A/CN.9/WG.II/WP.216](#), paras. 84 and 85).

It should be recalled that article 1(1) of the Transparency Rules was meant to reflect a compromise where the rules would not apply to investor-state disputes conducted in accordance with a treaty providing for the protection of investments or investors (“treaty”) concluded on or after 1 April 2014, if the parties to the treaty so agree (see for example the discussion reflected in [A/CN.9/WG.II/WP.176](#), paras. 8–15).

Article 1(1) to the Transparency Rules reads as follows:

“The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”) shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”)* concluded on or after 1 April 2014 unless the Parties to the treaty** have agreed otherwise.”

Article 1(4) of the UARs incorporates the separate set of Transparency Rules to the UARs. As a result, the Transparency Rules de-facto form a part of 2013 version of the UARs. Whenever Parties to a treaty agree that the Transparency Rules would not apply, they usually refer to the 2010 version of the UARs. There are also treaties signed prior to 2014 which include a specific reference to the 1976 or 2010 UARs (for reasons of certainty unrelated to the Transparency Rules). There could of course also be cases where Parties to a treaty concluded on or after 2014 explicitly agree to exclude the application of the Transparency Rules, in which case the problem of the relationship between the EAPs and the Transparency Rules would not arise. However, it seems that the more likely case is that States Parties refer to a specific version of the UAR, as explained in the 2013 Commission Report as follows ([A/68/17](#), para. 104):

“The Commission took note of the fact that the establishment of the amended version of the UNCITRAL Arbitration Rules, which would create a link to the rules on transparency, would necessarily have an implication for references to the UNCITRAL Arbitration Rules in treaties concluded after the coming into force of the rules on transparency. Specifically, it was clarified that a reference to the UNCITRAL Arbitration Rules as adopted in 1976, or as revised in 2010, in a treaty concluded after the coming into force of the rules on transparency would have the effect of precluding the application of the rules on transparency (A/CN.9/783, para. 31).”

In cases where a treaty would refer to the 2010 or the 1976 version of the UARs, parties to a dispute under these agreements might not be able to apply the EAPs to their disputes if the text of the modified version of the UARs (or UARs 2021) would be strictly interpreted by arbitral tribunals. This is because if the EAPs were to be incorporated to the UARs as an appendix, they would be an integral part of the UAR 2021 and thus it could be argued that they could not be referred to separately from the Transparency Rules.

There should be no reason why Parties to a treaty concluded either before or after the entry into force of the Transparency Rules that have not taken commitments to the Transparency Rules, or parties to a dispute under such treaties, could be deprived of the possibility to agree to the application of the EAPs without being mandated to accept the application of the Transparency Rules.

These concerns, which are inherent to the appendix option, should preferably be addressed in the text of the UARs to allow maximum flexibility. Accordingly, the following text (underlined) is suggested for consideration by the Working Group as an addition to draft provision 1 of the EAPs in document A/CN.9/WG.II/WP.216, para. 8:

“Draft provision 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Expedited Arbitration Provisions, then such dispute s shall be settled in accordance with the UNCITRAL Arbitration Rules as modified by these Provisions and subject to such modification as the parties may agree.
2. Notwithstanding paragraph 1, Parties to a treaty, and parties to a dispute under such treaty, that agree to refer a dispute to arbitration under the UNCITRAL Expedited Arbitration Provisions may agree to exclude the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, in case of investor-state disputes that are subject to a treaty which is not subject to these latter Rules.”

The explanatory note can make clear the above flexibility.

2. Singapore

1. In paragraphs 84 and 85 of the document A/CN.9/WG.II/WP.216 (the “Working Paper”), the Working Group is invited to consider the matter of the application of the Transparency Rules to expedited arbitration proceedings conducted under the UNCITRAL Arbitration Rules (“UARs”) incorporating the expedited arbitration provisions (“EAPs”).

2. Paragraph 84 of the Working Paper states that if the EAPs are presented as an appendix to the UARs and an investor-State arbitration is initiated under the EAPs, it would be considered as being initiated under the UARs and the Transparency Rules could apply. The method of their application is dependent on the date of conclusion of the investment treaty (before, or on or after, 1 April 2014) based on which the investor-State arbitration is initiated.

3. Singapore has in previous Working Group sessions expressed a preference for the EAPs to be presented as an appendix to the UARs for user-friendliness. In this regard, Singapore has also similarly maintained the position that if the EAPs are presented as an appendix to the UARs, disputing parties should retain the flexibility to apply the EAPs without also applying the Transparency Rules, depending on the needs of the particular case. With reference to the Secretariat's comments at paragraph 85 of the Working Paper, we take the view that this flexibility can be mentioned expressly to users of the EAPs in an accompanying explanatory note.

Proposed addition to the explanatory note

4. In this regard, Singapore suggests for the Working Group's consideration the following text that could be included in the explanatory note accompanying the EAPs:

For the avoidance of doubt, parties that have agreed to refer an investor-State dispute to arbitration under the UNCITRAL Expedited Arbitration Provisions may agree that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall not apply to the arbitration.

5. This proposed wording would clarify that the Transparency Rules would apply by default to expedited arbitration unless the parties agree for them not to apply. This is in line with the wording in draft provision 1 at paragraph 8 of the Working Paper, where parties may agree to the application of the UARs as modified by the EAPs and any other such modification.
