UNCITRAL
Rules on Transparency in investor-State disputes

UNCITRAL Secretariat
Topics for discussion

• Brief overview of UNCITRAL
• Origins of the Rules on Transparency
• Content of the Rules on Transparency
  • Scope of Application
    • Next steps
• UNCITRAL resources
UNCITRAL: the role

- Setting trade rules applicable between States
- Private disputes between private parties
- Providing legal advice to private parties

UNCITRAL: the role

- Promoting the unification & harmonization of the law of international trade and assisting in domestic law reform (legislative work)
- Strengthening uniform application & interpretation of the instruments adopted (technical assistance)
- Coordinating the work of other similar organizations (cooperation with UN and not UN bodies/organisations)

Brief overview of UNCITRAL
UNCITRAL

NOT INVOLVED IN

• Setting trade rules applicable between States

• Private disputes between private parties

• Providing legal advice to private parties

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• Strengthening uniform application & interpretation of the instruments adopted (*technical assistance*)

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The Structure of UNCITRAL

**The Commission**
- UNCITRAL governing body: considers & adopts texts prepared by the Working Groups.
- Representatives of States and of International Organizations
- An organ of the General Assembly of the United Nations

**Working Groups**
- Technical expertise: prepare legislative & other texts
- Also composed of representatives of States and of International Organizations

**The Secretariat**
- Division of UN/OLA (ITLD)
- Various tasks: prepares studies, services the sessions of the Commission and Working Groups, provides technical assistance to law reforms
Working Group visual
UNCITRAL Dispute Settlement Texts

- **1958** • Convention on the Recognition and Enforcement of Foreign Arbitral Awards → the "New York" Convention
- **1976** • UNCITRAL Arbitration Rules
- **1980** • UNCITRAL Conciliation Rules
- **2002** • UNCITRAL Model Law on International Commercial Conciliation
- **2010** • Revised UNCITRAL Arbitration Rules
Origins of the Rules on Transparency
UNCITRAL: a Legal Standard on Transparency

2008

• Commission identifies transparency work to take place as “matter of priority” after finalisation of the Arbitration Rules

2010

• Adoption of UNCITRAL Arbitration Rules and commencement of work on transparency
UNCITRAL Working Group II - Current Work

1973
- Commission gives mandate to WG II to establish UNCITRAL Arbitration Rules
  - Arbitration Rules adopted
  - General Assembly Resolution 31/98

1976

2006
- Commission gives mandate to WG II to revise UNCITRAL Arbitration Rules

2010
- Revised UNCITRAL Arbitration Rules 2010 adopted

2010-2013
- Rules on Transparency
International Investment Agreements

Source: UNCTAD
Investor-State disputes

- 46 new cases in 2011
- 58 new cases in 2012
- 514 known treaty-based arbitrations in total by end of 2012

Source: UNCTAD
Use in investor-State disputes

- Of 46 new treaty-based investor-State dispute cases filed in 2011, at least 6 were filed under the UNCITRAL Arb. Rules
- Of 58 new disputes in 2012, at least 7 were under UNCITRAL Arb. Rules
- Total 131/514 known treaty-based cases under UNCITRAL Arb. Rules

- UNCTAD IIA Issues Note, No.1., April 2012 and No.1, May 2013
# Relevant provisions in UNCITRAL Arbitration Rules 2010

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<th>Access to documents and arbitral awards</th>
<th>UNCITRAL Arbitration Rules</th>
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<td>Do not directly address public access to procedural documents</td>
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| | Article 34 (5) of the Arbitration Rules (2010):
| | “An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty….” |
| Open hearings | Article 28 (3) of the Arbitration Rules (2010) |
| | “Hearings shall be held in camera unless the parties agree otherwise…” |
| | Cf recent procedural orders in NAFTA case DIBC v Canada |
Legal Standard on Transparency:
Policy context (i)

• Good governance
  – Presence of a State in arbitration = public potentially affected
  – Interpretation of treaty obligations
• Predictable regulatory framework
• Investment treaty arbitration and public issues (health, public procurement)
• Right of access to information
  – Claude Reyes v Chile (2006) (Inter-American Ct HR); Társaság V Hungary (2009) (ECtHR)
  – Access to information recognised in these cases as fundamental human right
Legal Standard on Transparency: Policy context (ii)

- FDI as a tool for the long-term sustainable growth of developing countries
- Promotion of rule of law, good governance, due process, rights to access information
- Increasing challenges regarding the legitimacy of international investment law (private arbitration in the regulatory sphere conflicting with principles of judicial accountability)
- Promotion of judicial economy – early dismissal of frivolous claims; prevention of same claims in multiple fora
Transparency in investor-State disputes: Trends

- **ICSID**: Revised Rules 2006
  - Transparency
  - *Biwater Gauff*
- **NAFTA**
  - Signatory countries tend to publish the constitutive pleadings, subject to each Tribunal’s procedural orders, and redactions of confidential business information
  - *Methanex*: open hearings; amicus submissions permitted

- **AANZFTA**
- **European Commission** draft text on Investor-State Dispute Settlement for EU Agreements (first draft May 2012)
- Certain **Model BITs**
- **New generation BITs**
- **Legislation** at the place of arbitration

**Historically**: confidentiality (many BITs concluded in the 1990s); mechanisms inspired by international commercial law
Biwater Gauff Ltd v United Republic of Tanzania
ICSID Case No ARB/05/22, Award, 24 July 2008

• Parties: UK/German company, Biwater Gauff, and Republic of Tanzania
• BIT did not contain any provision on confidentiality
• Unilateral disclosure by Tanzania
• 5 NGOs, 1 written brief
• Tribunal: transparency vs integrity of proceedings

Procedural Order No.3 (para.122):

“The position of ICSID with respect to transparency has evolved from the old Rules to the new [2006] Rules... The changes mainly concern briefs amicus curiae and the attendance of third parties at the hearing (e.g. the new Rule 37(2)). However, as noted above, they clearly reflect an overall trend in this field towards transparency.”

- 29 Sept 2006
Methanex Corporation v United States of America

- UNCITRAL Arbitration Rules 1976
- Certain third parties petitioned the arbitral tribunal for:
  - Permission to make written submissions
  - An order for hearings to be made open to the public
  - An order for disclosure of all documents for purposes of making the submissions
  - An order allowing oral arguments to be made
Methanex Corporation v United States of America

• The Tribunal held (Decision on petitions from third persons)

“There is undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State... The public interest in this arbitration arises from its subject matter...

There is also a broader argument, as suggested by [the US] and Canada: the arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the tribunal’s willingness to receive amicus submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm”
Practical considerations

Confidentiality
Transparency

Procedural
(public interest)

Core issues:
• Public access to procedural documents and arbitral awards
• Open hearings
• Amicus Curiae
Content of the Rules on Transparency
Content of Rules on Transparency

Article 1: Scope of Application
Article 2: Publication of information at the commencement of arbitral proceedings
Article 3: Publication of documents
Article 4: Submission by a third person
Article 5: Submission by a non-disputing Party to the treaty.
Article 6: Hearings
Article 7: Exceptions to transparency
Article 8: Repository of published information
Art.2: Publication at commencement

Notice of Arbitration

• Obligation on both parties to provide notice to repository

• “Promptly make available to the public”
  – Name of disputing parties
  – Economic sector involved
  – Treaty under which claim is made
Publication – Article 3

Subject to exceptions in Art. 7

- Documents to be made available to public:
  - Notice and response
  - Statement of claim, statement of defence (and any further written subs)
  - List of exhibits …
  - Submissions by third parties and non-disputing Party(ies) to treaty
  - Transcripts of hearings, where available
  - Orders, decisions and awards
Publication (cont’d)

• Expert statements and witness statements, *upon request* (exclusive of exhibits)

• Requests / sua sponte -- other documents
Art.4: Submissions by a third person

- **Tribunal’s discretion:** after consultation with the disputing parties, the tribunal may allow a third person to file written submissions

- **Application by third person:** connection with disputing party; connections with disputing parties; financial / other assistance; issues of law or fact

**Safeguards**

- No disruption / undue burden / unfair prejudice
- Disputing parties have reasonable opportunity to present observations
Art. 5: Submissions by non-disputing Party to treaty

Issues of treaty interpretation

- **Shall** accept (subject to safeguards)
- After consultation, may invite

Further matters within the scope of the dispute

- After consultation, **may** allow

Safeguards

- No disruption / undue burden / unfair prejudice
- Disputing parties can respond
Art. 6: Hearings

• Public, subject to confidentiality and logistics
Art. 7: Exceptions

- Confidential or protected information shall not be made available to the public.
- Information shall not be made available to the public where it would jeopardise the integrity of the arbitral process.
Art. 7: Exceptions

Confidential or protected information

(a) Confidential business information;

(b) Information that is protected against being made available to the public under the treaty;

(c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or

(d) Information the disclosure of which would impede law enforcement
Art. 7: Exceptions cont’d

Arrangements
AT, in consultation with disputing parties, shall make arrangements to prevent publication by putting in place:

- time limits for seeking protection
- procedures for prompt designation and redaction of confidential/protected info
- procedures for holding hearings in private
Art.8: Repository of published information

- Neutrality in the administration of a legal standard on transparency.

The repository of published information under the Rules shall be the Secretariat of UNCITRAL
Scope of application
Art.1: Scope of application

• **Opt-out for future treaties**
  The Rules shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant a treaty concluded after 01.04.2014 unless the Parties to the treaty have agreed otherwise.

• **Opt-in for existing treaties**
  In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 01.04.2014 these Rules shall apply only when:
Scope of application
(Existing treaties: opt-in)

• The parties to an arbitration ("disputing parties") agree to their application in respect of that arbitration; or

• the Parties to the treaty, or, in the case of a multilateral treaty, the home State of the investor and the respondent State, have agreed after 01.04.2014 to their application.
“Creative solutions” for existing treaties

Working group tasked:

• with the drafting of a convention.

Possible actions by Parties to investment treaties

• Consent
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UNCITRAL Resources

www.uncitral.org
Work of WG II on transparency in treaty-based investor-State arbitration

Working Group II
2000 to present: Arbitration and Conciliation

57th session, 1-5 October 2012, Vienna
A/CN.9/769 - DRAFT Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-seventh session
A/CN.9/AWG.II/1/WP.171 - Annotated Provisional Agenda
A/CN.9/AWG.II/1/WP.172 - Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration
A/CN.9/AWG.II/1/WP.173 - Settlement of commercial disputes - Preparation of a legal standard on transparency in treaty-based investor-State arbitration - Comments of arbitral institutions on the interplay between the draft rules on transparency and their institutional rules
A/CN.9/AWG.II/1/WP.174 - Settlement of commercial disputes - Preparation of a legal standard on transparency in treaty-based investor-State arbitration - Proposal by Governments of Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States of America

56th session, 6-10 February 2012, New York
A/CN.9/741 - Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-sixth session
A/CN.9/AWG.II/1/WP.168 - Annotated Provisional Agenda
A/CN.9/AWG.II/1/WP.169 - Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration
A/CN.9/AWG.II/1/WP.169/Add.1 - Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration - Comments by arbitral institutions regarding the establishment of a repository of published information ("registry")
A/CN.9/AWG.II/1/WP.170 - Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration - Comments by arbitral institutions regarding the establishment of a repository of published information ("registry")

55th session, 3-7 October 2011, Vienna
CLOUT

• A collection of court decisions & arbitral awards interpreting UNCITRAL texts

• Case abstracts in the 6 UN languages
The Digest on the Model Law

- Launched on 9 June 2012
- Summary of case law for each Article, highlighting common views and reporting divergent approaches
- Footnotes with live links to cases
- 725 cases from 37 States
www.newyorkconvention1958.org
Any questions?
Thank You!

For more information on UNCITRAL’s work in the area of arbitration and transparency in treaty-based investor-State arbitration, please visit our web site:

http://www.uncitral.org