Topics for discussion

• Brief overview of UNCITRAL
• Transparency Rules
• Draft transparency convention
UNCITRAL: Brief overview

- A Commission comprised of 60 Member States (plus observer states) representing all economic, political and legal cultures, the mandate of which is to harmonize and modernize the law of international trade

- Legislative work: *drafting and negotiating legal texts* such as Model Laws, conventions, and contractual rules.

- Technical assistance for the implementation and harmonized application of those texts
UNCITRAL: Brief overview (ii)

- **Commission**
  - Governing body
  - Organ of the General Assembly
  - Representatives of States and international orgs

- **Working Groups**
  - Working Group II (Arbitration and Conciliation)

- **Secretariat**
  - Services the Commission and Working Group sessions
  - Technical assistance to law reform
Working Group visual
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 United Nations Commission on International Trade Law

**UNCITRAL Arbitration Rules (WG II)**

- **1976**
  - Commission gives mandate to WG II to establish UNCITRAL Arbitration Rules
  - Arbitration Rules adopted
  - General Assembly Resolution 31/98

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

- **2010**
  - Revised UNCITRAL Arbitration Rules 2010 adopted

- **2010-2013**
  - Rules on Transparency
  - Revised Arbitration Rules (2013)
UNCITRAL Rules on Transparency

Background
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
UNCITRAL Arbitration Rules

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

<table>
<thead>
<tr>
<th>Access to documents and arbitral awards</th>
<th>UNCITRAL Arbitration Rules</th>
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<tbody>
<tr>
<td><strong>Do not directly address public access to procedural documents</strong></td>
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<td>Article 34 (5) of the Arbitration Rules (2010):</td>
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<td>“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....”</td>
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<td>Open hearings</td>
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<td>Article 28 (3) of the Arbitration Rules (2010)</td>
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<td>“Hearings shall be held in camera unless the parties agree otherwise...”</td>
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Legal Standard on Transparency: Policy context

- Good governance and rule of law
  - Presence of a State in arbitration = public potentially affected
  - Interpretation of treaty obligations
- Predictable regulatory framework
  - Increasing challenges regarding the legitimacy of international investment law (private arbitration in the regulatory sphere conflicting with principles of judicial accountability)
- Investment treaty arbitration and public issues (health, public procurement)
- Right of access to information
  - Access to information recognised in these cases as fundamental human right
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
Practical considerations

Confidentiality

Transparency

Procedural (public interest)

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

- Content

- Scope of application
Content
(a summary)

• Publication of information

• Submissions by amicus curiae and treaty parties

• Open hearings

• Exceptions

• Repository
Scope
(a summary)

• In relation to disputes arising under “future” treaties:
  – A reference to the UNCITRAL Arbitration Rules will incorporate the Rules on Transparency unless the treaty Parties agree otherwise

• In relation to disputes arising under “existing” treaties:
  – Disputing parties must agree; or
  – Treaty Parties must agree
Draft UNCITRAL Convention on Transparency
Convention on transparency

• Working Group was mandated to prepare a Convention
  – *to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention.*

• First reading completed in September; second reading at WG.II session in February
ISSUES UNDER CONSIDERATION

• Relation between the transparency convention and existing treaties

• Application:
  – to existing [and future] investment treaties
  – to any investor-State arbitration under the UNCITRAL Arbitration Rules or any other arbitration rules or in ad hoc proceedings
  – on a bi-lateral and unilateral basis

• Scope of declarations and reservations
UNCITRAL: the role

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

INVOLVED IN

• 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)

New York Convention

• www.newyorkconvention.1958.org
New York Convention Guide
www.newyorkconvention1958.org

• **Goal:** to limit legal disharmony regarding interpretation and application of New York Convention

• **Online platform:** case law from many common law and civil law jurisdictions

• **Provides:** Information on judicial interpretation to the public (judges, arbitrators, practitioners, academics, Governments)
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 website:

http://www.uncitral.org