“ENSURING TRANSPARENCY”* IN INVESTOR-STATE DISPUTE RESOLUTION
UNDER THE UNCITRAL ARBITRATION RULES

UNCITRAL Working Group II, Vienna, October 4–8, 2010

*At its 41st session, the UNCITRAL Commission “agreed by consensus on the
importance of ensuring transparency in investor-State dispute resolution.”

Why transparency is needed

Investor-State arbitrations have a different need for transparency than purely commercial arbitrations. They differ in that investor-State arbitrations involve the public interest in ways that commercial arbitrations do not. Several strong and somewhat overlapping public interest concerns exist. First, the mere presence of a State as a party to the arbitration raises a public interest because each investor-State case involves an allegation that the State acted wrongfully. Second, investor-State disputes often arise in relation to critical national economic sectors and social services, such as water, electricity, oil and gas, mining, waste disposal, transport and telecommunications. Third, investor-State arbitrations can involve challenges to regulatory measures to protect public welfare, including environmental and public health measures, as well as multiple types of taxation measures. Fourth, investor-State arbitration has implications for the public purse, irrespective of the sector or regulatory measure involved. And finally, international investment law is now an important part of the international law on globalization, and tribunals interpreting the provisions of investment treaties have a pivotal role in how the law is developed. All of these factors support the decision “by consensus on the importance of ensuring transparency in investor-State dispute resolution” taken by the UNCITRAL Commission at its 41st session. This Working Group is now charged with implementing this Commission decision.

The benefits of transparency

All stakeholders in the investor-State process have an interest in greater transparency, including:

- **States**, including other non-disputing parties to the treaty in question or similar treaties, so that they can make more informed decisions knowing how obligations similar to their own have been interpreted by tribunals;

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• **Members of the public**, so that they are aware of disputes whose outcomes may potentially affect them and have the necessary information to hold their governments accountable for their actions;
• **Investors**, so that they can make better business decisions with more knowledge of what treaty protections mean for them;
• **Lawyers**, so that they can better advise their clients, whether host State or investor; and
• **Arbitrators**, so that they are not making decisions either in a vacuum or attaching unmerited weight to a small number of precedents in the public domain.

Moreover, it has been widely recognized that greater transparency will enhance the arbitration process overall, as well as its public legitimacy. It will promote the independence and impartiality of arbitrators, and improve the quality and credibility of tribunals’ decisions. This, in turn, should increase the coherence of tribunals’ interpretations of investment treaty provisions and thereby support the development of the international law that UNCITRAL arbitrations seek to enforce.

**Implementing transparency in investor-State processes**

In the age of the Internet, transparent investor-State processes can be easily operationalized, without major costs or delays. As noted by Canada in its recent comments submitted to the UNCITRAL Secretariat:

*Canada’s experience makes it clear that increased openness and transparency is a significant benefit and, if effectively managed, imposes little cost or burden on either the process or the parties.*

Adequate and efficient implementation of transparency in investor-State disputes conducted under UNCITRAL Arbitration Rules would require the establishment of an official website where all relevant information would be posted. Experience-sharing with the ICSID secretariat or governments, which already host such websites, can provide useful guidance.

**Need for transparency widely recognized**

The need for transparency in investor-State processes is now widely recognized by the international community generally, and is reflected in an increasing number of arbitral decisions and awards as well as in international investment treaties. In 2006, the World

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Bank’s International Centre for Settlement of Investment Disputes (ICSID) reformed its arbitration rules to incorporate greater transparency and opportunity for public participation in investor-State arbitrations. In accordance with this trend, the UN Commission on International Trade Law, at its 43rd session (New York, June 21–July 9, 2010), entrusted Working Group II with “the task of preparing a legal standard on the topic of transparency in treaty-based arbitration.” The form to be used for ensuring transparency in investor-State arbitration was left for the Working Group to decide.

This move to ensure transparency is also consistent with the principles emerging across the UN system. As stated by the UN Secretary General’s Special Representative on Business and Human Rights in his February 2008 statement to this Working Group,

*From the perspective of my mandate, adequate transparency where human rights and other state responsibilities are concerned is essential if publics are to be aware of proceedings that may affect the public interest. Indeed, such transparency lies at the very foundation of what the United Nations and other authoritative entities have been promulgating as the precepts of good governance.*

**Ways forward**

We are of the view that the best way to “ensure transparency” is through express rules contained in an annex to the generic UNCITRAL Arbitration Rules. The annex would be an integral part of the UNCITRAL Arbitration Rules, but would be applicable to investor-State disputes only. Optional guidelines or model clauses could also be developed but, alone, are insufficient to meet the goal set by the Commission mandate to “ensure transparency.”

We propose the following key elements of transparency for inclusion in such an annex. Draft legal text incorporating these elements is set out at the end of this paper for ease of reference:

1. **Public access to information**, subject to the redaction of privileged or protected information:
   - *The fact that an investor-State arbitration under UNCITRAL Rules has been initiated:* Since this phase precedes the constitution of the tribunal, the claimant and respondent would be responsible for sending a copy of the notice of arbitration and the subsequent response to the dedicated contact point for posting.
   - *Any information relating to the composition of the arbitral tribunal, including challenge decisions:* The tribunal, once constituted, would inform the dedicated
contact point of its constitution and composition, and dispatch to the same any document relating to a challenge to one or more of its members.

- **Documents issued by and submitted to the tribunal, including awards, decisions and orders, as well as pleadings, memorials, briefs, minutes and transcripts**: The tribunal would dispatch copies of all documents issued by or submitted to it to the dedicated contact point for posting. This would be done as the documents are received or issued, as opposed to at the end of the proceedings. Information posted should include orders or other communications setting the schedule of the arbitration.

2. **Hearings in investor-State arbitrations should be open to the public**:  
   - This can be in person, via closed-circuit broadcast or web casting.
   - Proprietary or privileged information deserving confidential treatment can be excluded from public observation.

3. **Amicus curiae submissions**:  
   - Non-disputing States, members of the public, and other entities with a significant interest in the arbitration should have the opportunity to provide input to an investor-State tribunal.
   - They should have the opportunity to petition the investor-State tribunal for permission to file an amicus curiae brief. If it grants such a petition, the tribunal may impose conditions to reduce delay or cost, such as with respect to timing and length.

**Proposed Legal Annex for UNCITRAL Rules**

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<th>Annex I³</th>
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<td><strong>1. Scope</strong></td>
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<td>Notwithstanding any provision in the UNCITRAL Arbitration Rules, for an arbitration commenced against a State pursuant to the terms of a treaty, the provisions of this Annex shall apply.</td>
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<td><strong>2. Public notice of arbitration</strong></td>
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<td>Promptly upon communicating a notice of arbitration to the respondent, the claimant shall forward a copy of the notice of arbitration to the UNCITRAL secretariat (or other designated institution), which shall post the notice of arbitration on its website without delay. Promptly upon communicating a response to the notice of arbitration, the respondent shall forward a copy of the response to the UNCITRAL Secretariat (or other designated institution), which shall post the response on its website without delay.</td>
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³ The text included in this annex is drawn from language in existing investment agreements, including the US-CAFTA-DR, United States-Korea FTA, and the Investment Agreement for the COMESA Common Investment Area.
3. Publication of arbitral documents

The arbitral tribunal shall promptly dispatch a copy of the documents received or issued by the tribunal to the UNCITRAL Secretariat (or other designated institution), subject to redaction of confidential business information and information that is privileged or otherwise protected from disclosure under applicable law. The UNCITRAL Secretariat (or other designated institution) shall post all such documents on its website without delay, including:

a. documents confirming the composition of the arbitral tribunal or seeking to challenge any of its members;

b. orders, awards and decisions of the arbitral tribunal or appointing authority;

c. notices of any settlement agreement entered after the notice of arbitration has been issued;

d. pleadings, memorials and briefs submitted to the arbitral tribunal by a disputing party and any written submissions submitted pursuant to the treaty or the UNCITRAL Arbitration Rules; and

e. minutes, transcripts or webcasts of hearings of the arbitral tribunal, where available.

4. Public hearings

Hearings shall be open to the public. The arbitral tribunal shall determine, in consultation with the disputing parties, appropriate logistical arrangements. Any disputing party that intends to use information that is privileged or otherwise protected from disclosure under applicable law shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

5. Amicus curiae

a. The arbitral tribunal may allow a natural or legal person that is not a party to the dispute (a “non-party”) to file a written amicus curiae submission with the tribunal. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:

   i. the non-party submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the proceeding by bringing a particular perspective, knowledge or insight;

   ii. the non-party submission would address matters within the scope of the dispute;

   iii. the non-party has a significant interest in the arbitration; and

   iv. there is a public interest in the subject matter of the arbitration.

b. The arbitral tribunal shall ensure that the non-party submission does not disrupt the proceeding or unduly burden or unfairly prejudice the disputing parties, and that the disputing parties are given an opportunity to present their observations on the non-party submission.

c. The non-party’s submission shall be provided in the language of the arbitration, and shall identify the non-party and any government, person, entity or organization that has provided, or will provide, any financial or other assistance in preparing the submission.