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A Critical Opportunity for Transparency in Investor–State Disputes as Government Delegations and Arbitration Experts Meet in New York

Country delegations to the United Nations have a critical opportunity to bring much-needed transparency to international arbitrations between foreign investors and host governments in discussions to be held on February 6–10 2012 in New York.

There currently exists a vast network of close to 3,000 treaties that allow investors to sue sovereign governments, often successfully and for staggering sums. Developed and developing countries in every continent have been challenged for a wide variety of reasons, including environmental and health regulations, judicial decisions and measures taken in response to the global financial crisis.

Although the public interest and the stakes of these treaty disputes are high, many of the proceedings are conducted behind closed doors. One reason for the secrecy is the arbitration rules that apply to these disputes. Most arbitration rules have been conceived for commercial disputes between private parties—not disputes involving sovereign states and issues of public interest. This is true for the arbitration rules developed in 1976 by a United Nations body, the United Nations Commission on International Trade Law (UNCITRAL), which today are one of the most popular sets of rules for arbitrating disputes between investors and governments

In 2008, however, it looked as though UNCITRAL's arbitration rules might be revised to address the deficiency inherent to traditional commercial arbitration rules. Many developing (and several developed) states stressed the importance of increasing transparency, which led to a decision by UNCITRAL member governments to prepare a legal standard to ensure transparency in investor–State arbitrations. The Working Group on International Arbitration and Conciliation of country delegations was mandated to create the new rules.

Four years later, the Working Group is close to finalizing its work on a set of new arbitration rules on transparency. Unfortunately, there is a great risk that some delegations will try to impede true progress by adopting superficially improved rules on transparency but ensuring that they will not be applied in practice. For example, some European and a few other states have proposed the insertion of provisions into the new rules on transparency that would hinder their application to disputes under future treaties. Additionally, the countries seeking to sideline the new rules on transparency have proposed language that would prevent the rules from applying to disputes arising under any of the roughly 3,000 treaties that currently exist. If the new provisions on transparency are precluded from applying to these disputes, the new rules would simply end up being irrelevant.

If the limitations put forward by some delegations become part of the package that will be discussed in the UNCITRAL Working Group from February 6–10, the outcome of the entire undertaking would be futile. To go down that path would be a political move against transparency, rather than a legal or technical one. It would be an outcome that would be hard to reconcile with the political decision taken by the Commission in 2008 on the importance of ensuring transparency in investor–State arbitrations. The task of the delegations now should be to stick to the job of crafting a legal standard to implement—not undermine—UNCITRAL's political decision.

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