



**EXPERT MEETING ON
THE DEVELOPMENT DIMENSION OF INTERNATIONAL INVESTMENT
AGREEMENTS**

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**REVISION OF UNCITRAL RULES AND INVESTMENT ARBITRATION: AN UPDATE ON THE
ONGOING PROCESS TO INCREASE TRANSPARENCY IN INVESTMENT ARBITRATION**

Background

The United Nations Commission on International Trade Law (UNCITRAL) is currently revising its Arbitration Rules for the first time since 1976 in its Working Group II on Arbitration (WG II). UNCITRAL rules are primarily used for arbitrating commercial disputes between private parties, but they are also used for investment arbitration, including in disputes initiated by foreign investors against host States. These disputes are based on an investment treaty or a contract between the investor and the government (host-government agreement). UNCITRAL arbitration rules are now thought to be the second most commonly employed set of arbitration rules in investment disputes, after those of the International Centre for Settlement of Investment Disputes (ICSID).

Investment disputes brought by private investors against States have become increasingly frequent and with more than 2500 international investment treaties now in existence the number of disputes will likely continue to increase. These disputes typically involve significant public interest issues because investors allege wrongdoing by a government or governmental agency. In addition, they frequently involve important domestic issues such as environmental and health protection, exploitation of minerals, forests, water and other natural resources, and the delivery of public services. Moreover, the disputes can result in large awards affecting the public purse. Several recent cases have resulted in awards against host States for over US\$100 million.

Despite the public interests involved, arbitration proceedings under UNCITRAL rules can remain secret, and often do. This is due to the fact that the rules were crafted 30 years ago with commercial disputes between private parties in mind. They were not crafted for disputes involving States and public interests. As a result, investment disputes, including their initiation and the final and interim awards, can remain confidential if one party so requests, even against the will of the other party (who may be a government, wishing to inform its citizens about the case).

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Revision of UNCITRAL Arbitration Rules

In September 2006 UNCITRAL's WG II initiated the revision of its 1976 rules, providing an opportunity to redress the shortcomings of the 1976 Rules regarding the lack of transparency for investment disputes under the UNCITRAL Rules. A few months earlier, ICSID had reformed its Arbitration Rules, to, *inter alia*, ensure greater transparency.

At the outset of WG II's work, a number of delegations (in many instances represented by private counsel and specialists in private commercial arbitration) opposed the idea of discussing the introduction of transparency rules for investment disputes. Gradually, however, governments began to recognize the importance of incorporating transparency into the UNCITRAL Rules and added to their delegations officials with knowledge about investment arbitration.

In February 2008 the UN Special Representative of the Secretary General on Business and Human Rights, Professor John Ruggie, made a statement to WG II, stressing the importance of transparency in investment proceedings. A number of members of WG II, both developing and industrialized countries, spoke strongly in favor of addressing transparency rules in the revision process, but others remained opposed. As a consequence, WG II sent the issue to be decided by its governing body, the Commission itself.

The decision of the United Nations Commission on International Trade Law at its forty-first session in New York, 16 June-3 July, 2008

On June 27, 2008, the Commission "agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution" (A/63/17, para. 314). It directed WG II to begin discussions on transparency immediately after it finishes its work revising the "generic" arbitration rules. The Commission hopes that the final review and adoption of the revised Rules in their generic form will take place at the forty-second session of the Commission, in June 2009.

Where to from here?

The Commission gave a clear mandate to WG II to deal with transparency in investor-State arbitration. Therefore, WG II will take up this work as early September 2009. Today, we urge experts to engage and give strong support to the ongoing UNCITRAL process to increase transparency in investment arbitration. A coherent package of revised UNCITRAL Rules could ensure transparency and opportunities for public input. Only a very limited number of additions to the UNCITRAL Arbitration Rules are necessary to take account of the important public interest aspects of investor-State arbitrations, building on widely recognized mechanisms.

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