



# General Assembly

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**United Nations Commission  
on International Trade Law**  
**Working Group II (Arbitration and Conciliation)**  
**Fifty-fourth session**  
New York, 7-11 February 2011

## **Settlement of commercial disputes**

### **Transparency in treaty-based investor-State arbitration**

#### **Proposals by Governments and International Organizations**

##### **Note by the Secretariat**

In preparation for the fifty-fourth session of Working Group II (Arbitration and Conciliation), during which the Working Group is expected to work on the preparation of a legal standard on transparency in treaty-based investor-State arbitration, delegations were encouraged at the fifty-third session of the Working Group to provide information, including written proposals, to the secretariat (A/CN.9/712, para. 101). The texts of the proposals are reproduced as an annex to this note in the form in which they were received by the secretariat.

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\* Submission of this document was delayed because of its late receipt.



## Proposal by the Government of Germany

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[Date: 14 December 2010]

In the opinion of the German delegation to the UNCITRAL Working Group II (Arbitration and Conciliation), the session held by the Working Group from 4 to 8 October 2010 in Vienna was successful in laying down important foundations, first towards better understanding of the transparency requirement in investor-State arbitration and second, towards arbitration practices that comply with the transparency requirement. An analysis of the legal options available to create transparency in investor-State arbitration, which was advocated by many delegations, and by the chairperson in particular, helped to clarify a number of questions on the subject. In this light, the German delegation wishes to submit the following proposals to the chairperson and the other delegations before the next session of the Working Group. The proposals concern the next steps to be taken in preparing new rules on increased transparency in investor-State arbitration.

### **The German delegation considers that the rules should be drafted as non-binding guidelines.**

Compared to the alternatives, non-binding guidelines most closely comply with the principle of a party-dominated process that underpins arbitration. Non-binding guidelines are also the best means of achieving the desired objective of all delegations: that is, to establish the widest possible acceptance of transparency rules. Such guidelines could have a significant bearing on both existing investment protection treaties and investment protection treaties that will be negotiated or revised in the future. They should apply to international treaties at intergovernmental level and to private contracts between States and investors which provide for the settlement of disputes through arbitration. In contrast to mandatory transparency rules, non-binding guidelines would allow sufficient flexibility to meet with broad agreement and thus achieve a large measure of practical relevance, in the German view.

Parties to future arbitration proceedings executed on the basis of existing investment protection treaties under the UNCITRAL Arbitration Rules could reach an agreement in the event of a dispute through ad hoc application of the new transparency guidelines. They could also agree, at a later stage, to a general application of the guidelines by means of a treaty amendment or addition.

It would be possible to incorporate the guidelines directly in new investment protection treaties. In this regard, the German delegation proposes the drafting of an additional model clause, which would allow the treaty parties to agree on the applicability of the UNCITRAL transparency guidelines.

In the German delegation's opinion, the alternative to transparency guidelines — agreement on mandatory transparency rules for investor-State disputes — would be a far inferior solution, and barely acceptable for Germany:

- It is unlikely that binding rules would take account, to the same extent as guidelines, of the generally desired goal to achieve the widest possible acceptance of the transparency rules. In contrast to a mandatory legal

standard, drafting of non-binding guidelines would be more likely to favour rapid and successful reform within UNCITRAL.

- Incorporating the mandatory regulations in existing treaties would be considerably more difficult. Only investment protection treaties containing a dynamic reference to the latest applicable version of the UNCITRAL Arbitration Rules could be assumed, ipso jure, to include the new transparency rules.
  - In arbitrations, the question of incorporating the rules would be contentious, possibly leading to additional expense and delays. This would impede the legitimate desire to create uniform transparency rules for investor-State arbitration.
  - The UNCITRAL transparency rules should not be structured or formulated in such a way that could restrict national rights concerning access to information. There is a much higher risk of imposing such a restriction through mandatory regulations than through non-binding guidelines.
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