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Countries Continue to Pursue Efforts to Increase Transparency in Investor-state Dispute Settlement

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In New York last week, a large number of countries, both developed and developing, strongly supported concrete options to ensure transparency in investor-state arbitrations. However, some delegations continue to actively block progress on these important efforts to improve UN arbitration rules.

In 2008, a United Nations body, the United Nations Commission on International Trade Law (UNCITRAL), agreed on the importance of ensuring transparency in investor-state dispute arbitrations. It then directed a working group to draft a legal standard implementing that decision. Roughly four years later, the UNCITRAL working group has made progress on crafting arbitration rules that, if used in investor-state disputes, would do much to open those cases up to the public.

Prior to last week's meeting, which took place February 6–10, some had thought the UNCITRAL working group was going to complete its task and produce new rules on transparency. Instead, the meeting stalled after some countries who are members of the working group insisted on trying to block the new rules on transparency from applying to disputes arising under existing treaties. This issue of application to existing treaties is crucial because there are currently some 3,000 investment treaties. New treaties are continuing to trickle out, but countries are concluding them at a much slower pace than before. This means that for a long time to come investor-state disputes will arise under investment treaties that currently exist. If these disputes are carved out from the transparency rules, the rules will have been crafted in vain.

Several countries have expressed the desire and need to at least leave open the possibility that new rules on transparency could apply to disputes arising under their existing treaties if the treaty parties had so intended. As those countries have pointed out, leaving open the possibility of application to existing treaties is an approach that is legally feasible and would further the aim of ensuring transparency in investor-state dispute settlement.

When the working group meets again, in Vienna in October 2012, countries will revisit these issues of application. When doing so, they should stay firm to their mandate to ensure transparency in investor-state arbitration, and adopt an approach that enables, rather than hinders, the use of the new rules in disputes under existing treaties.

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