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UNITED NATIONS
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HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

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**Statement of the UN Secretary-General's Special Representative on
Business and Human Rights, Professor John Ruggie**

To the

**UNCITRAL Working Group II (Arbitration and Conciliation),
48th session, New York, USA**

February 4-8, 2008

Mr Chairman, esteemed delegates,

I would like to thank the Secretary of UNCITRAL, Mr Jernej Sekolec, for inviting me to participate in this important meeting of the Working Group. I regret that I am unable to attend in person due to my teaching obligations at Harvard University, but am pleased to be able to make this statement through my representative, Caroline Rees.

The growing recognition that the rules governing global business may have significant effects on human rights practices led the United Nations to appoint me the first ever special representative for business and human rights—and I understand that I am the first ever representative of the UN human rights system to address this body. The results of my initial work under the mandate were submitted in a report to the Human Rights Council in 2007. They were well-received both by Governments in the Council and by the 2007 G8 Summit. The report surveyed a range of significant legal and policy innovations in the field of business and human rights by states, business and civil society. Yet it concluded that imbalances remain between the scope of markets and business organisations on the one hand, and the capacity of societies to protect and promote the core values of social community on the other: imbalances that can only be corrected by embedding global markets with shared values and institutional practices.

As I look ahead to making specific recommendations to the Human Rights Council in June of this year, I shall base my report on three core principles that have gathered broad support in the course of my consultations: first, the 'state duty to protect' with respect to preventing and punishing corporate abuse of human rights; second, the corporate

responsibility to respect human rights in the course of their operations; and third, grievance and accountability mechanisms for addressing and redressing abuses.

Let me focus on one part of my work that may be of particular relevance to this Working Group. Together with the International Finance Corporation (the private lending arm of the World Bank Group), we are conducting an empirical study exploring some aspects of private investment agreements between investors and host states. We are also exploring some issues relative to bilateral and regional investment treaties.

There are two dimensions of our research that I would like to bring to your attention.

First, we are assessing whether and to what extent various stabilisation provisions in those agreements may constrain a state's ability to fulfil its international human rights obligations, and, if they do, how the legitimate needs of investors and governments can better be balanced.

Second, we are looking at the transparency or the lack thereof in arbitration processes with regard to disputes that raise human rights and other public policy issues.

I am therefore greatly interested by your own review of the UNCITRAL Arbitration Rules and the place that transparency of process and outcomes might have in cases of investor-state disputes. 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.

It is for the members of this Working Group to decide how to take these issues forward. I am grateful for this opportunity to bring to your attention my own work and reflections, and hope that they may be useful to you in your deliberations. I am firmly convinced of the benefits of this kind of cross-UN discussion of how shared values, including human rights, can be embedded into institutional practices in the context of economic globalisation. I wish you well in your work.

Thank you.



DECLARATION

THE UNDERSIGNED, MEMBERS OF THE MILAN CLUB OF ARBITRATORS, FURTHER TO THE XVIII COLLOQUIUM OF ARBITRATORS HELD IN MILAN ON 12 OCTOBER 2007,

- 1) REAFFIRM THEIR SUPPORT FOR THE GENERAL PRINCIPLE OF CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATIONS AND, IN PARTICULAR, IN ARBITRATIONS TAKING PLACE UNDER THE UNCITRAL ARBITRATION RULES;
- 2) SUPPORT THE CURRENT PROPOSALS IN THE UNCITRAL WORKING GROUP II TO EXCLUDE FROM THE NEW UNCITRAL ARBITRATION RULES ANY SPECIFIC PROVISION FOR INVESTOR-STATE ARBITRATIONS;
- 3) RECOMMEND THAT ONE OR MORE OPTIONAL CLAUSES BE FORMULATED BY UNCITRAL TO ADDRESS SPECIFIC FACTORS FOR INVESTOR-STATE ARBITRATIONS TAKING PLACE UNDER INVESTMENT TREATIES, CONSISTENT WITH THE NEW UNCITRAL ARBITRATION RULES;
- 4) PROPOSE THAT SUCH UNCITRAL OPTIONAL CLAUSES, WHILST NOT FORMING PART OF THE NEW UNCITRAL ARBITRATION RULES, BE MADE AVAILABLE TO STATES AND INVESTORS IN PARTICULAR FOR USE IN NEGOTIATING DISPUTE RESOLUTION PROVISIONS IN FUTURE INVESTMENT TREATIES;
- 5) WOULD WELCOME A FURTHER DEBATE AND A WIDER EXAMINATION OF THE OVERALL TOPIC OPEN TO THE BROADER INTERNATIONAL ARBITRATION COMMUNITY BEFORE CLOSING THIS DEBATE WITHIN THE UNCITRAL WORKING GROUP II.

MILAN, 12 OCTOBER 2007



List of Declaration's Signers

BEECHEY John	BERNARDINI Piero
BERNINI Giorgio	BLESSING Mar
BONZANIGO Rocco	BRINER Robert
BROWN-BERSET Dominique	CLAY Thomas
COMAIR-OBEID Nayla	CRAIG William Laurence
CRESPI REGHIZZI Gabriele	CRIVELLARO Antonio
DE BOISSESON Matthieu	DELVOLVÉ Jean-Louis
DERAINS Yves	DIMOLITSA Antonias
DRAETTA Ugo	GIOVANNINI Teresa
GIOVANNUCCI ORLANDI Chiara	GRAY Whitmore
HANOTIAU Bernard	HUNTER Martin
JARROSSON Charles	KARRER Pierre
KAUFMANN-KOHLER Gabrielle	LALIVE Pierre
LAZAREFF Serge	LEAVER Peter
MAYER Pierre	MORERA Renzo
MOURRE Alexis	PATOCCHI Paolo Michele
POCAR Fausto	POINTON Gerald
REDFERN Alan	REYMOND Claude
RICCI Edoardo	SACERDOTI Giorgio
SANDERS Pieter	SCHIAVONI Giorgio
SCHILLER Jonathan	VAN HOUTTE Hans
VEEDER V.V.	VERDERA Y TUELLS Evelio
AZZALI Stefano	

PROPOSED REVISIONS TO THE UNCITRAL RULES FOR INVESTOR-STATE ARBITRATIONS

CIEL and IISD seek a very limited number of additions to the UNCITRAL Arbitration Rules in order to take account of the important public interest aspects of investor-State arbitrations, while at the same time leaving untouched the Rules' application to other types of arbitrations and avoiding undue delay, disruption or cost. The principles underlying our suggestions, and how they might be handled, are described below.

The public interest aspects of investor-State arbitrations can be accommodated in the UNCITRAL Arbitration Rules without affecting the Rules' application to other types of arbitrations.

- This can be done by introducing language to just four provisions.
- These amendments would apply only to investor-State arbitrations and leave other types of arbitrations completely unaffected.
- Investor-State arbitrations can be simply defined as arbitrations brought by an investor against a State under the terms of a treaty.

The fact that an investor-State arbitration has been initiated should be public, so that citizens know that their State is involved in a binding dispute settlement proceeding.

- This can be accomplished by providing that the investor-State tribunal once constituted dispatch a copy of the notice of arbitration and the composition of the tribunal to the UNCITRAL secretariat.
- The UNCITRAL secretariat would then post this information on its website.

The issues in an investor-State arbitration should be public, so that citizens know what is at stake.

- This can be accomplished by requiring the disclosure of pleadings received by the tribunal, and by providing that hearings in investor-State arbitrations will be open to the public, e.g., in person, via closed-circuit TV or web casting.
- Proprietary or privileged information deserving confidential treatment can be redacted.

The results of an investor-State arbitration should be public, so that citizens and other States can be informed about the outcome.

- This can be accomplished by providing that the investor-State tribunal dispatch copies of its decisions to the UNCITRAL secretariat.
- The UNCITRAL secretariat would then post these decisions on its website.

The public should have the opportunity to provide input to an investor-State tribunal.

- The public should have the right 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.

Suggested texts for the above proposals, demonstrating how the public interest aspects of investor-State arbitrations can be simply accommodated without affecting the Rules' application to other arbitrations, are set out below.

Article	Existing Rule	Proposed Changes
3(5)	[new]	<u>3(5) Following the appointment of an arbitral tribunal in an arbitration brought by an investor against a State under the terms of a treaty, the tribunal shall forthwith dispatch a copy of the notice of arbitration and communicate the composition of the tribunal to the UNCITRAL secretariat, which shall post this information on its website without delay.</u>
15(3)	15(3) All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.	<u>15(3) All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party. In an arbitration brought by an investor against a State under the terms of a treaty, the tribunal shall forthwith dispatch a copy of all pleadings received by the tribunal to the UNCITRAL secretariat, subject to redaction of confidential business information and information which is privileged or otherwise protected from disclosure under a party's domestic law. The UNCITRAL secretariat shall post all such documents on its website without delay.</u>

15(4)	[new]	<p>15(4) <u>In an arbitration brought by an investor against a State under the terms of a treaty, the arbitral tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the tribunal. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:</u></p> <p>(a) <u>the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a particular perspective, knowledge or insight; and</u></p> <p>(b) <u>the non-disputing party submission would address a matter within the scope of the dispute.</u></p> <p><u>The tribunal shall ensure that the non-disputing submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.</u></p>
25(4)	Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.	25(4) <u>Except in an arbitration brought by an investor against a State under the terms of a treaty, hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.</u>
25(4) bis	[new]	25(4) bis <u>In an arbitration brought by an investor against a State under the terms of a treaty, hearings shall be open to the public. The arbitral tribunal shall establish appropriate logistical arrangements, including procedures for the protection of confidential business information or information which is privileged or otherwise protected from disclosure under a party's domestic law.</u>
32(5)	The award may be made public only with the consent of both parties.	32(5) <u>Except in an arbitration brought by an investor against a State under the terms of a treaty, the award may be made public only with the consent of both parties.</u>
32(5) bis	[new]	32(5) bis <u>In an arbitration brought by an investor against a State under the terms of a treaty, any award, order or decision of the arbitral tribunal may be made public by either of the parties without the consent of the other party; and the tribunal shall forthwith dispatch a copy of all awards, orders and decisions to the UNCITRAL secretariat, which shall without delay post them on its website.</u>

IF YOU WOULD LIKE TO DISCUSS ANY OF THE ABOVE, PLEASE CONTACT:

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