

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]	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.
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.	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>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]	<u>25(4) bis 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.	<u>32(5) 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]	<u>32(5) bis 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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