



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

**UNCITRAL Arbitrations Involving State as a Party --
Transparency, Public Participation and Accountability**

Arbitrations involving a State as a party (“State arbitrations”) differ significantly from commercial arbitrations involving only private parties. For example, State arbitrations frequently raise profoundly important issues of public policy that penetrate deeply into domestic decision-making processes¹; they often involve large potential monetary liability for public treasuries;² and they involve, by definition, the conduct of a national or sub-national government. State arbitrations thus have a different need for transparency, public participation, and accountability. This is now widely recognized by the international community; the question is how UNCITRAL arbitration rules should incorporate effective transparency and participation in State arbitrations.

The existing UNCITRAL rules do not take account of the transparency, public participation and accountability dimensions involved in State arbitrations. This is not surprising, because the existing rules were drafted primarily, if not exclusively, with commercial arbitrations in mind. In addition, they were adopted before the proliferation of bilateral investment treaties (more than 2000 now exist), many of which allow private investors to bring arbitral claims against host States, and investor-State arbitrations. The report commissioned for the current session of the Working Group II, which was written by two distinguished members of the arbitration bar, also does not adequately reflect these concerns as they apply to State arbitrations.

Arbitrations under the existing UNCITRAL rules typically lack fundamental elements of transparency and public participation that characterize democratic legal systems governed by the rule of law, although that may vary depending on whether arbitrations are ad hoc or take place under an arbitral institution (e.g., ICC, ICSID, LCIA, Stockholm). For example, it is often impossible for the public or other States to know even that an arbitration has been filed, what is at issue in an arbitration, what written and oral arguments are being advanced in a dispute, what the arbitrators’ jurisdictional procedural rulings are, and what the ultimate decision is. Moreover, it is usually impossible to file *amicus curiae* briefs or otherwise to provide information to arbitral panels. This deficit of transparency and public participation not only undermines democratic values generally, but also has severe practical implications for the accuracy, efficacy and legitimacy of arbitrations using the UNCITRAL rules, as well as for the

¹ Examples of important public-policy challenges in recent investor-State arbitrations include challenges involving: the drinking water supply system in Cochabamba, Bolivia (the riots in connection with this project resulted in many injuries and at least one death); the judicial system in Mississippi, USA; California’s ban on a polluting gasoline additive; Argentina’s response to its fiscal crisis (37 cases in ICSID dealing, for example, with the water and sanitation system in Buenos Aires); Mexico’s refusal to grant a permit to a hazardous waste site; Canada’s ban on the export of a hazardous waste; a Mexican tax on high fructose corn syrup; Chile’s system of allocating fishing permits.

² For example, the 37 arbitrations in ICSID against Argentina, the first of which found Argentina liable, allege billions of dollars in damages.

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international law the UNCITRAL arbitrations are seeking to enforce and ultimately for systemic reform. It would not suffice to leave remedying this deficit to contending parties on a case-by-case basis because too often one or more of them will desire secrecy, which would frustrate the critical principles of democratic governance.

The democracy deficit in the existing UNCITRAL rules can be eliminated without either causing undue costs, delay or disruption to arbitrations or jeopardizing the substantive and procedural rights of the parties, if reform is undertaken carefully and if the reforms are carefully designed and take into account the by-now considerable experience gained in investment and trade disputes. A failure to do so would put UNCITRAL out-of-step with developments in other analogous arbitral systems and with the UN system as a whole.

A key to success will be distinguishing between commercial arbitration involving only private parties and arbitration in which a State is a disputing party. By recognizing State arbitrations as requiring special rules on public disclosure and participation, UNCITRAL can properly address and accommodate other interests, such as State secrets and confidential business information. Another key to success will be including other inter-governmental institutions and civil society in the discussion over changes to UNCITRAL's arbitral rules. It is particularly important that UNCITRAL, as a UN body, respect and promote transparency and public participation, both in the substance and process of its work, in light of the UN Charter's commitment to human rights and to transparency and public participation generally.

RECOMMENDATIONS

- The issues of transparency, public participation and accountability regarding arbitrations with a State as a party ("State arbitrations") should be considered separately from commercial arbitrations involving only private parties.
- UNCITRAL's review should be conducted in a balanced, transparent, and participatory manner.
- UNCITRAL should conduct outreach to other parts of the broad UN system (including ICSID, ILO, UNCTAD, UNEP and WHO), the World Trade Organization (WTO) and to civil society to get input on the need for, and mechanisms of, increasing transparency, public participation and accountability in State arbitrations.
- UNCITRAL should commission a new report focusing on State arbitrations, to complement the already-prepared report, with participation from a broad spectrum of interested persons in order to ensure that the issues are fully considered and presented.
- Ultimately, UNCITRAL should adopt rules regarding State arbitrations that allow full transparency (with appropriate procedures for protecting confidential business information and State secrets) and meaningful opportunities for public participation.

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