

REVISION OF THE UNCITRAL ARBITRATION RULES

**GOOD GOVERNANCE AND THE RULE OF LAW:
EXPRESS RULES FOR INVESTOR-STATE ARBITRATIONS REQUIRED**

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CONTENTS

1. Introduction	2
2. The public interest at stake	2
Legitimacy in peril	3
Transparency	4
Impartiality	4
Accountability	5
Consistency	5
3. Principles consistent with primary aims of investor-state arbitration	6
4. Article 15(1) no “one stop shop”	6
5. The specific revisions required	7
Article 1	7
Article 3	8
Articles 6-12	9
Article 15	9
Article 25(4)	12
Article 32(2)	12
Article 32(5)	13
Articles 38-39	14
6. Role of UNCITRAL Secretariat	14
7. A Final Word	14

1. Introduction

The UNCITRAL Arbitration Rules were adopted in 1976 to harmonize the rules of *ad hoc* arbitration for international commercial disputes.¹ During the drafting process, negotiators did not envisage the Rules' possible use in arbitrations by foreign investors against states under bilateral investment treaties.² Nor should they have been expected to. The first known treaty-based investor-state claim was not commenced until mid 1987, more than a decade later.³

Since 1987, however, the number of investor-state arbitrations has grown exponentially. As of November 2005, 219 treaty-based claims were known, with three-quarters of these filed since 2002. Of these, 65 had been arbitrated under the UNCITRAL Rules.⁴ This figure however likely underplays the true number of UNCITRAL investor-state arbitrations. Unlike the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), which maintains a public register of all arbitrations commenced using its rules, there is no record of arbitrations under the UNCITRAL Rules. Thus, the number of investor-state arbitrations under UNCITRAL Rules is not actually known.

What we do know is that, according to the UNCTAD, 2392 bilateral investment treaties were in place at the end of 2004, up from 1097 at the end of 1995.⁵ A number of regional trade agreements also contain investor protection provisions and recourse to arbitration to settle disputes. In addition, a large number of law firms are now active in this area, and many have increased their staffing on international investor-state arbitrations. On such fertile soil, the number of investor-state arbitrations can only continue to grow.

These facts together present a special challenge for UNCITRAL members as they embark on a revision of the Rules. As will be discussed in more detail below, the needs of investor-state arbitrations differ very significantly from those of commercial arbitrations. Most critically, the latter involve purely private interests, while the investor-state process inevitably involves weighing the private interest versus the public interest.

Whereas the UNCITRAL Rules were drafted thirty years ago, with only private commercial interests in mind, today it is much better understood that when private and public interests are involved, democratic principles of good governance and the rule of law must apply. IISD believes that the rules applicable to investor-state arbitrations must reflect these principles, and that express rules for investor-state arbitration are required.

2. The public interest at stake

IISD's interest in the UNCITRAL Rules revision process stems from the potential implications that investor-state arbitrations may have for the public interest. Five different, but frequently overlapping, public interest concerns can be identified. First, the disputes often arise in public service sectors such as water, oil and gas, electricity, transport, waste disposal and telecommunications. The public clearly

¹ United Nations General Assembly Resolution 31/98 adopted 15 December 1976.

² The *travaux préparatoires* make no reference to investor-state arbitration. The *travaux préparatoires* are available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules_travaux.html.

³ The first known treaty-based investor-state arbitration was *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/87/3) registered July 20, 1987, <http://www.worldbank.org/icsid/cases/conclude.htm>.

⁴ Investor-State Disputes Arising From Investment Treaties: A Review, February 2006, UNCTAD/ITE/IIT/2005/4, page 5, available at http://www.unctad.org/en/docs/iteit20054_en.pdf.

⁵ IIA Monitor No. 4 (2005) Latest Developments in Investor-State Dispute Settlement, UNCTAD/WEB/ITE/IIT/2005/2, UNCTAD page 3, available at http://www.unctad.org/en/docs/webiteit20052_en.pdf.

has an interest in seeing that disputes in these critical sectors are resolved in a way that ensures their rights to these public services are not impaired.

Second, investor-state arbitrations may challenge regulatory measures intended by states to protect the public welfare, if the measure directly or indirectly affects the value of the investment. Such measures might include legislation directed to human rights, health and safety, labour laws, or environmental protection. The arbitration may thus impact the rights and welfare of those individuals and communities where an investment is located.

Third, the threat of investor-state arbitration is now seen by many to have an informal “chilling effect” on states adopting public welfare regulations in the first place. Like the sword of Damocles, investors have been known to use the spectre of arbitration proceedings to discourage governments from pursuing regulations in their citizens’ interest. For example, the fact that in the mid 1990s the US tobacco lobby threatened to commence NAFTA arbitration proceedings against the Canadian government if it proceeded with planned restrictions on cigarette packaging is no secret. The regulations proposed were never adopted.

Fourth, every investor-state arbitration, regardless of sector or regulatory measure involved, has implications for the public purse. The costs involved in defending an international arbitration are considerable, and use funds that could otherwise be used for a public purpose.⁶ Furthermore, should a tribunal find against a state, the sums awarded may be significant. There has been an increasing number of awards over \$100 million in the last year or two.

Finally, there is a broader context at work. International investment law has now become an important part of the international law relating to globalization. The agreements that this law is based on - bilateral and regional investment agreements and free trade agreements with chapters on investment - are widely recognized as being often vague or general in their terms. This gives tribunals an enormously important role in how the law is developed. Investor-state case law is now central to the future direction of international investment law. While tribunal decisions are not binding on future tribunals, tribunals nevertheless refer to the decisions of their predecessors. This places a higher level of importance on the process of interpreting and applying the law in the investor-state context. As a result, the arbitration process may be as important to the development of international investment law as the negotiation of the investment agreements themselves.

Developing countries are particularly at risk because of their reliance on foreign investment in many critical sectors for economic growth. The landslide of investor arbitrations commenced against the Argentinian government following the country’s economic crisis show that developing countries recovering from such setbacks may face a further obstacle to getting back on their feet.⁷ Such crises are, in reality, still the norm for many developing countries, not an exceptional situation.

Legitimacy in peril

These kinds of public interest concerns place a much higher premium on the qualities of the investor-state process than that for strictly private commercial arbitration. A process is not legitimate simply because it is legally constituted or has roots in the practices of past decades. Legitimacy in

⁶ UNCTAD estimates that a state will incur US\$1-2M on average in legal costs alone defending an investor-state proceeding. This does not include arbitrators’ fees or the final award if the tribunal finds against the state. The Czech Republic is understood to have spent US\$10M defending the CME and Lauder arbitrations discussed below. See *supra*, note 4 page 10.

⁷ *Ibid*, pages 24-25.

international law is achieved through good governance practices that apply the rule of law and the best practices of democratic institutions today, not those of thirty years ago.

Ensuring the legitimacy of the rules governing investor-state relations is all the more imperative given the dependence of developing countries on foreign capital to help meet their development needs. However, the legitimacy of investor-state arbitration under the current UNCITRAL Rules is imperiled by the Rules' failure to bring the most basic democratic principles of good governance and the rule of law to bear in the investor-state process. That is, the UNCITRAL Rules fail to ensure transparency, impartiality, accountability, and consistency.

Transparency

In private commercial disputes the interests at stake are only those of the parties themselves. Money is usually the issue. Public goods are almost never involved. The need for transparency is thus confined to the needs of the parties for the substantive and procedural details of the proceedings.

By contrast, it is today understood that transparency is an essential component of democratic governance when private versus public interests are at stake. The lack of transparency in the investor-state arbitration process precludes the democratic checks and balances which good governance and the rule of law requires in any balancing of private and public welfare.

It also gives foreign investors a privileged position in an international legal process to negotiate with governments out of sight on issues of significant public interest. It is not credible to argue that such preferential access corresponds to the investor's special interest in the issue. By definition, public welfare regulation denotes that other stakeholders also have significant interests in the issue. This rationale was clearly expressed by the tribunal in the landmark decision on *amicus* briefs in the *Methanex Corp. v. United States* arbitration:

“There is also a broader argument,...[the] arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.”⁸

As recognized by that tribunal, ensuring transparency in investor-state arbitrations under the UNCITRAL Rules is vital to the legitimacy of the arbitration process.

Finally, transparency is fundamental to the broader role of international investment law as part of the international law on globalization. It is axiomatic that this part of international law, as with any other, should be based on justice and equity for all stakeholders. Yet, because of the secrecy imposed in many instances, there is no way to know if this basic goal is being met. Democratic countries have long held to the principle that for justice to be done it must be seen to be done. IISD believes it is long past due for this principle to be applied here.

Impartiality

The impartiality of a process flows from the independence of its decision-makers. Only a system fully and functionally independent of external pressures and relationships meets the requirements of legitimacy in a democratic context. Conflict of interest is not simply a matter of declarations by

⁸ *Methanex Corporation v. United States*, “Decision of the Tribunal on petitions from third persons to intervene as *amici curiae*”, 15 January 2001, page 22, paragraph 49.

arbitrators, but of ensuring that independence both is met and is perceived to be met at every stage of the process. Judge Thomas Buergenthal of the International Court of Justice, in a speech in April 2006 in Geneva entitled “The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law”, stated that there was still a long way to go to achieve the rule of law in the governance of investor-state dispute settlement processes.⁹ Chief among the issues he specifically identifies are:

- the conflict of interest inherent in lawyers acting as arbitrators in other cases, a frequent occurrence today;
- repeated designations by counsel of the same arbitrators; and
- counsel selecting an arbitrator who, the next time around when the arbitrator is counsel, selects the previous counsel as arbitrator.

To these, IISD would add the problem of arbitrators acting on investor-state cases when they come from law firms that represent foreign investors who might some day benefit from expanded interpretations of investor-protection rules.

Those with vested interests in the status quo may find these issues challenging, but that does not mean that in the context of investor-state arbitration they cannot and should not be addressed.

Accountability

In allowing investors to commence proceedings against states under the UNCITRAL Rules, international investment treaties have bestowed rights and remedies not available to domestic investors. Moreover, these rights accrue in an international process that is largely devoid of the safeguards that exist in domestic courts. Whereas proceedings in domestic courts are a matter of public record, the public can have access to the pleadings, judges are neutrally rostered and parties have the right to appeal, UNCITRAL investor-state arbitrations lack such basic accountability mechanisms. In any legitimate process making decisions that weigh private against public interest, tribunals must be accountable for what they do. IISD believes it is possible to ensure greater accountability in the context of investor-state arbitrations, for example through the appointment of arbitrators, open hearings and appeals from investor-state awards.

Consistency

Inconsistent arbitral awards, i.e. when tribunals make disparate findings on claims with similar facts, make it difficult for other investors and states to predict where their own rights or obligations lie. It is a basic principle of commerce to know what one is bargaining for. The better that investors and states understand their rights and obligations from the outset, the more efficient the outcome for all concerned. In particular, less time and expense would be wasted on arbitrations that either should never have been brought or never have been defended. Even at the entry and establishment phase, investors and governments should be appraised of their potential rights and liabilities should the relationship go awry. Moreover, governments considering regulations or policies that may impact on foreign investors have added need to know where they stand. Improving consistency should therefore be an important goal underlying the UNCITRAL Rules revision process in the investor-state context.

⁹ After-dinner speech delivered in conjunction with the “Colloquium on Consolidation of Proceedings in Investment Arbitration,” organized by the University of Geneva and PICT, April 21-22, 2006, page 8. Available at transnational-dispute-management.com, May 2006. .

3. Principles consistent with primary aims of investor-state arbitration

Cementing the rules for investor-state arbitrations in democratic principles of good governance and the rule of law in no way detracts from the initial aspirations for using arbitration to settle investor-state disputes.

The idea of resolving investor-state disputes through arbitration first arose in the 1960s. Its official birth was the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered force in October 1966. Investors had become increasingly dissatisfied with the other remedies available to them. They were often frustrated at the treatment afforded them by host state domestic legal systems. Their only recourse at the international level was to seek diplomatic protection from their home state, but its discretionary nature left it of dubious practical value.¹⁰

Investor-state arbitration was thus created as a means to avoid the pitfalls of domestic legal systems in developing countries in the 1960s, and the arbitrariness of diplomatic protection. There is nothing in IISD's call for the application of basic democratic principles of good governance and the rule of law that threatens these original objectives.

4. Article 15(1) no "one stop shop"

Some have said that Article 15(1) allows a tribunal sufficient flexibility to meet the needs of all types of arbitrations, including investor-State arbitrations.

Article 15(1) states:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

However, the view that Article 15(1) offers a "one-stop shop" is incorrect. To assume that a fourteen word subordinate phrase can somehow miraculously fix all of the UNCITRAL Rules' express deficiencies in ensuring the legitimacy of the investor-state arbitration process is naïve to say the least. Moreover, to rely on such a clause to address specific issues that have arisen through the application of the UNCITRAL Rules to situations not contemplated when they were developed – investor-state arbitrations – would seem an abdication of the responsibility of the member states to the tribunals.

Article 15(1) is also discretionary. IISD believes that the key issues associated with good governance and the rule of law, such as transparency of proceedings and precluding conflicts of interest by the arbitrators, should be mandatory, not discretionary. Indeed, this is the essence of the rule of law.

Furthermore, Article 15(1) is expressly subordinated to the other provisions in the Rules. Whilst this limitation may be completely appropriate in private commercial arbitration, it raises serious questions as to how far the specific needs of investor-state arbitrations can in fact be met. The requirement that hearings shall be held *in camera* unless the parties agree otherwise and Article 32(5), which provides that the award may be made public only with the consent of both parties, are two examples that illustrate IISD's concerns.

¹⁰ Muchlinski, Peter, *Multinational Enterprises and the Law* (2005) pages 534-536.

Finally, the *travaux préparatoires* in respect of the drafting of Article 15(1) demonstrate that the investor-state issue was never mentioned. Neither was it intended that it should have such a heavy responsibility as safeguarding the public interest resting on its shoulders. While to date it has at times been useful for this purpose, the revision process would seem the appropriate opportunity to correct reliance upon it as a catch-all for situations that are now as well known and appreciated as investor-state arbitrations. In the words of the United States member at the 1976 drafting process “[t]oo much reliance should not be placed on the very broad provisions of Article [15]”.¹¹

The legitimacy of the investor-state arbitration process requires that the revised UNCITRAL Rules contain express rules for investor-state arbitrations that reflect democratic principles of good governance and the rule of law. In particular, express rules directed to protecting the transparency, impartiality, accountability and consistency of the investor-state arbitration process are essential.

5. The specific revisions required

The current UNCITRAL rules that IISD submits most need revision in the investor-state context are specified below. The commentary follows the numerical order of the existing Rules in similar fashion to the note prepared by the UNCITRAL Secretariat dated 20 July 2006.¹² It is hoped that the use of this format will assist UNCITRAL member states to refer to the paper during the revision process.

Note that the revisions sought are for rules on investor-state arbitrations only. No comment is made on possible revisions to rules governing private commercial arbitrations. IISD understands that this may ultimately require either two sets of rules, or one set with a special section for investor-state arbitrations. The most appropriate option can best be chosen once the deliberations on the revisions are sufficiently advanced to see the final scope of the differences agreed upon. While this would be different from the existing format, the difference would increase the flexibility of the Rules, and actually prevent one type of arbitration from determining the proper rules for the other.

Article 1

Applicable version of the UNCITRAL Rules

An efficient process requires that all participants, including the tribunal, the parties, and any other stakeholders, are in no doubt as to which rules govern the process. The value of an express provision on this point is therefore unquestionable.

As to which version of the Rules should be expressed to apply, it should be the most recent version at the time the arbitration proceedings are commenced. The most recent version will reflect contemporary developments and practice. It is not worthwhile to expend time and expense to undertake a revision of the Rules, if participants in the process cannot use the fruits of the revision exercise and benefit from the practices that have evolved in the last thirty years.

The writing requirement for agreement to arbitrate

The right of foreign investors to commence proceedings against states gives them a unique privilege in both international and domestic law. No other private actor, including domestic investors, is so

¹¹ UNCITRAL Ninth Session, Committee of Whole, Summary Record of the Eighth Meeting, 16 April 1976, page 9, paragraph 76, available at <http://www.uncitral.org/pdf/english/travaux/arbitration/1976Arbitration/ACN99C2SR8.pdf>.

¹² A/CN.9/WG.II/WP.143 and A/CN.9/WG.II/WP.143/Add.1

privileged. Moreover, commencing an arbitration proceeding costs very little¹³, but defending it can be expensive for the government concerned, both financially and politically.

For these reasons, the need to ensure that there is in fact genuine agreement to arbitrate an investor-state dispute is essential and the requirement that the agreement to arbitrate be in writing should be strictly applied. The most efficient and certain way to do this is by retaining the writing requirement for the agreement to arbitrate in the current format. The more liberalized form contained in the revised Article 7 of the Arbitration Model Law would not be appropriate in the context of investor-state arbitrations.

The writing requirement for modification of the Rules

The original intention in requiring modification to the Rules to be in writing was to create certainty as to the ambit of the modification.¹⁴ The need for certainty in the arbitration process is as strong as it was when the Rules were first adopted. Indeed, the rapid increase in investor-state arbitrations in the last decade, with their public welfare implications, means that certainty and predictability is more important than ever.

Thus, the requirement for any modification to the UNCITRAL Rules be in writing should be retained in the context of investor-state arbitrations.

Article 3

Notice of arbitration and statement of claim

A legitimate investor-state process requires that the respondent state have full particulars of the claim against it, and be able to make informed decisions, including whether to defend or settle.¹⁵ Similarly, an obligation to provide full particulars at an early stage assists the investor claimant to more quickly appreciate the strengths and weaknesses of its own case. Ultimately, this will culminate in a more efficient and legitimate process.

Fully particularized pleadings could be achieved in either of two ways, both of which are referred to in the Secretariat's paper. First, delivery of the statement of claim could be required at the same time as the notice of arbitration. Alternately, the notice of arbitration could be required to set out all elements necessary to permit the respondent state to take a position on (a) the claim; (b) the validity and scope of the arbitration agreement invoked; (c) counter-claims, and (d) the constitution of the tribunal.

To aid the efficiency of the process, the notice of arbitration should indicate the document(s) or fact(s) out of or in relation to which the dispute arose, and where the investor-state dispute arises out of a contract, that a copy of the contract should be provided. The notice of arbitration should also contain the investor claimant's proposal on the legal seat and language of the arbitration, if these matters have not already been agreed upon.

¹³ There is no fee to file a notice of arbitration under the UNCITRAL Arbitration Rules and an investor stands to lose little politically by doing so.

¹⁴ Note by the UNCITRAL Secretariat dated 20 July 2006, A/CN.9/WG.II/WP.143, page 5, paragraph 20.

¹⁵ All known treaty-based investor-state arbitrations to date have involved an investor claimant and a respondent state, not the other way around. *Supra*, note 4, page 12.

The three NAFTA governments have set out a specific notice of arbitration form for this purpose. UNCITRAL may wish to review this approach and set out its own notice form as well. This would ensure consistency for investors as well as host states.

Articles 6-12

Appointment and challenge of arbitrators

The appointment of arbitrators for investor-state proceedings must, it is suggested, be revised *ab initio*. Practices common-place in commercial arbitration have no place where public welfare issues are at stake. For example, under the UNCITRAL Rules a lawyer may act as counsel in one investor-state case and as arbitrator in another case going forward at the same time. In no democratic country is a practicing lawyer permitted to be a member of the judiciary as well. Judges cannot create decisions that might in some way aid their firm's clients or partners in another case. There would be no legitimacy in their decisions if they did. However, arbitrators appointed under the UNCITRAL Rules currently suffer from no such constraints. It is precisely this that Judge Buergethal was referring to in his statement, noted above, that the rule of law is not well applied in some instances in the current investor-state processes.

The legitimacy of the investor-state arbitration process requires that practicing lawyers who act as counsel in investor-state cases, or have partners who do, be precluded from acting as arbitrators. Similarly, lawyers offering their services as arbitrators for investor-state cases, and their partners, must be precluded from acting as counsel in arbitration cases. All this can be done very simply by greater clarity in the text as to what constitutes a potential conflict of interest.

Neither is it appropriate in disputes involving private versus public interests that parties pick their own judges. It is well recognized today that parties to arbitrations choose arbitrators because of their known leanings. This is widely and openly discussed today in e-mail groups and other fora devoted to investor-state issues. The practice runs entirely counter to democratic principles of good governance and the rule of law when public welfare issues are at stake, and particularly the principle of impartiality.

The way out of this incestuous mire would be for the UNCITRAL Secretariat to maintain rosters of potential arbitrators (perhaps 25-35 people) who do not act as counsel, nor have partners that do. The legitimacy of the investor-state arbitration process depends not on disclosure requirements but on the genuine separation of the advocacy and judicial functions. There is no justification for applying a lesser standard to international dispute settlement than to domestic dispute settlement, particularly as arbitrators often rule on domestic measures in any event.

Article 15

General provisions

IISD has no concern with the existing text of Article 15, other than cautioning against an expansive reliance upon Article 15(1) as a catch-all for investor-state issues. However, we are concerned with the potential language being proposed to reflect the need for timely disposal of a case by a tribunal. The idea is sound, but some express language that this should not be at the expense of a full hearing of the case, including potential third party intervenors if appropriate, should also be included.

Consolidation of related disputes

IISD supports the proposal in the Secretariat's paper to allow for the consolidation of claims. However, we believe that in the context of investor-state arbitration the ambit for doing so needs to be wider than that proposed by the Secretariat.

The UNCITRAL Secretariat considers that consolidation might be appropriate in two situations: first, in the case of several disputes between the same parties under related contracts and second, when a party initiates a separate arbitration under the same contract in order to gain a tactical advantage.

In the specific context of investor-state cases, this approach is too narrow. Consolidation should be possible not only where there are related claims between the same parties. Rather, a tribunal should be able to consolidate investor-state claims if it considers that the substance of the claims are sufficiently related. The fact that claims may have only one common party and lack a common legal relationship should not bar consolidation. Nor is the limitation in the current proposal to the same underlying contract sufficient for the investor-state process. This is because investments leading to arbitrations may be authorized in any number of forms today, only one of which is a contract. Other forms that underpin the investment should not be ignored here.

To illustrate, the textbook cases for consolidation are the well-known UNCITRAL arbitrations, *CME v Czech Republic* and *Ronald Lauder v Czech Republic*.¹⁶ Mr. Lauder was the major shareholder of CME. CME brought investor-state proceedings against the Czech government under the Dutch-Czech investment treaty whilst Mr. Lauder used the US-Czech investment treaty for the same purpose. The tribunal in the latter proceeding found that the Czech Republic was almost wholly vindicated, while the other tribunal awarded US\$270M in damages plus substantial interest.¹⁷ Not only was the duplicated process inefficient and expensive (the Czech government is understood to have spent US\$10M in fees alone), the disparate results tarnish the legitimacy of both awards. Furthermore, such awards leave other investors and states uncertain as to where the rights and obligations truly fall. Consolidation of the claims, notwithstanding the different claimants, would clearly have been the appropriate course.

Another cautionary tale, still evolving, is the multiple claims against the Argentinian government by foreign investors who suffered losses during Argentina's financial crisis in the early 1990s. As at November 2005, 39 claims relating at least in part to the financial crisis had been registered with ICSID.¹⁸ This information is available because, unlike UNCITRAL, ICSID maintains a public register of all proceedings under its Rules. Argentina may be facing further claims brought under other sets of arbitration rules, but the lack of requirement to disclose means that this remains unknown. What is clear, however, is that the Argentinian government will be forced to expend considerable time and cost defending these separate proceedings. Notwithstanding that the claimants differ, and there is no common legal relationship between the claims, the substance of the proceedings in a number of them is sufficiently related that consolidation should be available.

¹⁶ The cases arose from CME's investment in the Czech Republic's first national private television station in the 1990s. Under Czech law CME was required to hold the TV license through a Czech affiliate. When the affiliate cut its relationship with CME, CME lost its right to provide programming. There are persistent stories that the two claimants were in favour of consolidation, but not the respondent. This may or may not be the case. In either event, the ability of tribunals to order consolidation is illustrated by this case.

¹⁷ *Supra*, note 4, page 9.

¹⁸ *Supra*, note 4, page 6.

It is also possible to envisage a case where an investor brings separate proceedings against two host states arising out of the same investment. For example, under a contract to build a road or a pipeline that crosses national borders. Consolidation could similarly be appropriate in such a case.

There is significant precedent today for promoting such consolidations. It is provided for in Chapter 11 of NAFTA, as well as a number of more recent investment agreements concluded by the United States with Singapore, Chile, Peru, the Central American countries, and others.

Participation of third parties, amicus curiae

The traditional assumption in international law is that states at the international level adequately represent all the interests of the citizens they represent. In recent years, however, there has been growing recognition of the compromise that must be made between the need for state representatives at the international level to speak with a single voice, and the need for different perspectives on the state of the law to be adequately represented in the international arena. As a result a number of international institutions have begun to allow civil society a voice at the international level.¹⁹ Indeed, the rights of investors to take advantage of an investor-state dispute settlement process is itself an early example of this.

The participation of *amicus curiae* in an investor-state arbitration proceeding can play a useful role in assisting the tribunal to gain a deeper understanding of the case and its wider context. By doing so, it enhances the quality of the tribunal's decision-making and the legitimacy of the arbitration process. *Methanex v. United States* and subsequent cases have made it clear that *amicus* briefs are consistent with Article 15(1). However, express provision for third party participation under the UNCITRAL investor-state arbitration rules would be useful.

In addition to an express rule allowing third party participation, the UNCITRAL Rules should include guidelines to assist the tribunal in deciding whether to grant *amicus* status in an investor-state case. These now exist under the NAFTA and some other recent agreements.²⁰

An end to confidentiality in investor-state proceedings

IISD submits that the time has come for separate UNCITRAL Rules for investor-state arbitrations in respect of confidentiality issues of all types. An exception for confidential business information is noted below.

It is a fundamental principle of democratic good governance and the rule of law that the public are entitled to know of the existence of legal proceedings whose outcome may affect them. Transparency in relation to the existence of an arbitration, the key arbitral documents, and all decisions is a *sine qua non* of this principle being met. Just as the public is entitled to know of the existence of legal proceedings that may affect them, they are entitled to know what issues are at stake, and the positions of the respective parties on those issues. As well, this is a logical requirement for effective *amicus* participation. A third party cannot apply for *amicus* status to an arbitration if it does not know the case exists or what the legal issues are about.

¹⁹ e.g. WTO Dispute Settlement Panels and World Bank Inspection Panel.

²⁰ The NAFTA Free Trade Commission Joint Statement, "Celebrating NAFTA at Ten" Statement of the Free Trade Commission on Non-disputing Party Participation, (NAFTA Free Trade Commission, October 7, 2003), available at <http://www.dfait-macci.gc.ca/nafta-alena/Nondisputing-en.pdf>, may be a useful starting point in this regard.

It has been incorporated in substance into the subsequent U.S. Free Trade Agreements with Singapore, Chile, Morocco and Central America and the Dominican Republic, and has been relied upon already by Tribunals sitting under UNCITRAL and ICSID Rules. The Guidelines were previously endorsed by IISD.

Current practice in these areas include ICSID's registry of arbitrations, available on its website, and the NAFTA parties own publicly accessible websites which now include all arbitral documents.

At the same time, IISD has no objection in principle or practice with the redaction of confidential business information. A tribunal can easily rule on any differences the parties may express on what is appropriately within this class.

Article 25(4)

Open hearings

Open hearings are now the hallmark of best practice in investor-state arbitration proceedings. Open hearings are now the norm under NAFTA, at least for cases involving Canada and the United States. They have also been included as a requirement under other recent United States free trade agreements.

Opponents of transparency may claim that open hearings will lead to disruption of proceedings or the dissemination of confidential commercial information. However, tribunals are in control of the proceedings. If sensitive commercial information is to be discussed, they can ask observers to briefly leave the room. Similarly, if an observer becomes disruptive, that observer can, and should, be excluded.

It has been said that so few members of the public attend open processes anyway that there is no genuine need for public hearings. This however is immaterial. Those with a direct interest should have the opportunity to attend, and it is often the case that one person will attend on behalf of several interested persons or groups, as happened in the case of *Methanex v. United States*, the first case to allow open hearings on the merits. What is key here is the right to be present and to hold parties accountable. Open hearings are a key component to ensuring the legitimacy of the investor-state arbitration process, and achieving the principle of justice being seen to be done.

Article 32(2)

Right of appeal

Yet another point where thinking on investor-state arbitration and private commercial arbitration is increasingly diverging in recent years is on the issue of a right to appeal tribunal awards.

The ICSID Secretariat has commented on the increasing interest from states in the availability of an appeal mechanism in respect of investor-state arbitrations arising under investment treaties.²¹ It has estimated that by mid-2005 as many as 20 countries would have signed investment treaties providing for an appeal mechanism in respect of investor-state arbitration awards. It has noted that the objectives of such a mechanism would be to foster coherence and consistency in investor-state arbitration proceedings.

²¹ ICSID Secretariat Discussion Paper, Possible Improvements of the Framework for ICSID Arbitration, October 22 2004, page 14, available at <http://www.worldbank.org/icsid/highlights/improve-arb.pdf>.

The WTO has allowed appeals from its dispute settlement panels on points of law since 1995.²² It thus seems that in respect of international legal regimes that decide cases with a public interest component, current thinking is moving firmly in the direction of a right of appeal.

In stark contrast, arbitration rules designed primarily to resolve private commercial disputes seem to be heading the other way. The UNCITRAL Secretariat's note of 20 July 2006 makes reference to the International Chamber of Commerce Rules and London Court of International Arbitration Rules that require parties to waive irrevocably their right to any form of appeal or review.²³ Like the UNCITRAL Rules, both bodies' rules are largely used in disputes between private parties.

The divergence is evident. Whilst the waiver of a right of appeal may be appropriate in arbitration rules applicable to private commercial disputes, such a waiver is not appropriate in arbitrations where public interests are at stake. Indeed, recent developments would indicate that rather than a waiver, an express right of appeal should be required where the investor state process is engaged. As noted by the ICSID Secretariat, this should foster the coherence and consistency of investor-state arbitration case law. It would also considerably enhance the accountability of the investor-state arbitration process.

Article 32(5)

All awards, both interim and final, to be publicly available

Investor-state arbitration stands alone in public international law as the only dispute settlement mechanism that prevents the publication of its decisions.

In practice, Article 32(5) results in a double standard. The international arbitration community is close-knit and largely dominated by practitioners and arbitrators from major law firms. Although Article 32(5) provides that awards may only be made *publicly* available with the consent of both parties, awards are often circulated informally within the community and/or internally within firms themselves. Even lacking a doctrine of precedent, awards are the best indication of the way investment protection provisions are being interpreted. That UNCITRAL awards are available to only a privileged few bestows an advantage upon the international arbitration bar and major law firms and their clients that those not so well-placed do not enjoy.

Such a double standard can only decrease the legitimacy of the UNCITRAL arbitration process. The failure to make awards publicly available causes uncertainty for investors and states operating in the dark, who must remain unaware of how standard investment protection provisions have most recently been interpreted. In the case of states, such uncertainty may have a chilling effect on regulation and policy that could be argued to have an impact on foreign investors' investments. It is inappropriate that UNCITRAL awards are more available to arbitration lawyers than to governments.

IISD believes that only the prompt, complete and accessible publication of all awards, interim and final, meets the basic principle of transparency.

²² WTO website, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm#appeals.

²³ Article 28(6) International Chamber of Commerce Arbitration Rules; Article 26.9 Rules of the London Court of International Arbitration.

Articles 38-39***All components of arbitrators' fees to be reasonable***

IISD supports the qualification of Article 38 (b)-(d) with the word “reasonable” as currently is found in Article 38(e). The public welfare implications of an investor-state arbitration includes the costs of defending the action, money which could otherwise have been spent for a public purpose, and such costs may include the arbitrators' fees. For this reason, it is valid to emphasize that all components of the arbitrators' fees be reasonable.

Mechanism for dealing with objections to fees

IISD supports the provision of further guidance in respect of arbitrators' fees. In particular, we believe that a schedule of arbitrators' fees, similar to that provided by ICSID would add certainty to the process. The *ad hoc* nature of the Rules does not preclude such a schedule, which could be updated periodically by Working Group II.

We also support the use of an independent appointing authority, or where none is agreed upon, the authority designated by the Secretary-General of the Permanent Court of Arbitration, to resolve any objection by a party to an arbitral tribunal's fees.

6. Role of UNCITRAL Secretariat

IISD realizes that some of the revisions to the UNCITRAL Rules that it seeks will require a slightly expanded role of the Secretariat with regard to investor-state arbitrations. However, the additional duties would truly be minimal. The Secretariat would need to maintain a page on its existing website listing all investor-state arbitrations with hyperlinks to the pleadings and key litigation documents, as the ICSID secretariat does now. It would also keep a list of independent arbitrators available for investor-state arbitrations. In all other respects, the Secretariat's role would remain as of now.

7. A Final Word

If, two decades after the first treaty-based investor-state claim, UNCITRAL can see its way to adopt rules expressly directed to the needs of investor-state arbitrations, it will not be a moment too soon. As the only dispute settlement mechanism in public international law to prevent the publication of its decisions, and for the most part the very existence of its cases, the legitimacy of the investor-state arbitration process is imperiled. The only recourse is to go back to first principles. In the context of investor-state arbitration, with its balancing of private versus public interests, this means the principles of democratic good governance and the rule of law: transparency, impartiality, accountability and consistency. IISD hopes that UNCITRAL members will take advantage of the UNCITRAL Rules revision process to incorporate these principles into the revised Rules.