Block of countries refuses to discuss transparency in investor-State arbitrations

A Working Group of the United Nations charged with revising key international arbitration rules has rebuffed calls by many States and non-governmental organizations (NGOs) to discuss introducing transparency requirements into arbitrations brought by private foreign investors against States.

Under most international investment treaties, foreign investors have the right to bring disputes with the host state to international arbitration in what is known as the investor-State arbitration process. These arbitrations involve the State in its sovereign capacity and often involve important public interest issues, such as the impacts of failed water privatizations, financial crises in developing countries, and environmental and health regulations. In recent years, these arbitrations have resulted in a number of awards against governments, mainly against developing countries, and several of the awards are in excess of 100 million USD.

One of the key sets of rules that govern these arbitrations was prepared by the United Nations Commission on International Trade Law, or UNCITRAL. Despite the public interests at stake, investor-State arbitrations conducted under the UNCITRAL Rules are frequently veiled in secrecy. In particular, it is often impossible for the public or other States to find out that an arbitration has been filed, what is at issue in an arbitration, what the investors and States have argued in the case, and in some cases even what the tribunal’s ultimate decision is. Tribunals may go as far as imposing full bans prohibiting revealing information in the case to the public.

This secrecy precludes interested citizens, NGOs, and other governments from knowing about investment arbitrations affecting them or keeping tabs on the evolution of this very important area of the international law on globalization. These cases often have a particular bearing on critical balances between investor rights and the public interest in the State where the investment is made, and replace more transparent domestic judicial proceedings with private and closed international processes, often run by arbitrators from major law firms and chambers in London, New York, Paris and Washington.

UNCITRAL is currently revising these Arbitration Rules for the first time since they were adopted in 1976. Following the Working Group’s session on 4-8 February 2008 in New York, the Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD) express their deep disappointment at the efforts of some governments to block the inclusion of transparency provisions in the revised Rules. Fortunately, these governments were not completely successful!
Further discussion has been delayed, but not ended. The Working Group has now asked its parent body, the UNCITRAL Commission to give it specific guidance on how to proceed. The UNCITRAL Commission will meet in June of this year to discuss this issue, at the United Nations headquarters in New York. CIEL and IISD urge Commission Members to speak out strongly in favor of transparency when they meet in June, and to clearly mandate the Working Group to return to this issue during the current revision process.

Many governments, particularly developing and other countries facing investor claims, spoke strongly in favor of transparency and expressed their desire that the issue be addressed immediately. But a number of governments, including governments that proclaim to be “strong supporters” of transparency, spoke against including transparency in the current revision process. They claim that the issue is too complex and will hold up the revision process. However, those countries that already have experience in incorporating transparency into investor-State arbitrations claim that the complexity is greatly exaggerated. They say that there is no reason why discussion on this important issue should be postponed.

The issues at stake were well-summarized by the UN Special Representative to the Secretary General on Business and Human Rights in his statement to the Working Group last week:

“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.”

CIEL and IISD look forward to a clear decision by the UNCITRAL Commission at its June 2008 meeting to mandate the Working Group to include clear rules supporting transparent investor-State arbitrations as part of the current revision process.

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