CIEL and IISD call for an end to an era of secrecy in investor-State arbitration: UN body must support transparency in new arbitration rules

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On Friday, June 27 in New York, a UN body will make a critical decision about whether new arbitration rules will include transparency in investment arbitrations against States.

“While secrecy may be appropriate for arbitrations between private parties, the lack of transparency is unacceptable in arbitrations brought by foreign investors against States,” said Nathalie Bernasconi-Osterwalder of the Center for International Environmental Law.

Howard Mann of the International Institute for Sustainable Development said, “These investment arbitrations often involve important public interest issues and have resulted in individual awards against governments as much as US$100 million and higher.” Secret arbitrations make decisions about public interest issues that include the environment, public health, mineral exploitation, forests, water and other natural resources, and the delivery of public services. Such awards can have a considerable impact on public finances, especially for developing countries.

The United Nations Commission on International Trade Law (UNCITRAL) arbitration rules were originally designed for use in private commercial arbitration, allowing for a high degree of secrecy. For example, there is no requirement that even the existence of an arbitration proceeding or a decision of a tribunal be made public. UNCITRAL is currently revising its international arbitration rules for the first time in 30 years.

In February 2008 an UNCITRAL Working Group dealing with international arbitration rebuffed calls by many states and NGOs to introduce transparency requirements into investment arbitrations. The Working Group said it would need a clear mandate from its governing body, the UNCITRAL Commission, before it was prepared to further consider the issue.

Many governments are in favour of the Working Group addressing the transparency issues, including Canada, Switzerland, Norway and many developing countries. However, in October 2007, the Milan Club of International Arbitrators issued a declaration supporting “the general principle of confidentiality in international commercial arbitrations and, in
particular, in arbitrations taking place under the UNCITRAL arbitration rules.” The declaration pushes for the exclusion of “any specific provision for investor-state arbitrations” in the revised UNCITRAL rules. Several of the arbitrators who signed the declaration also speak on behalf of governments in the UNCITRAL Working Group.

The current secrecy in investor-State arbitrations under the UNCITRAL Rules is incompatible with the principles of good governance proclaimed by the United Nations. The UN Special Representative to the Secretary General on Business and Human Rights, Professor John Ruggie, made a special statement in the February 2008 Working Group session, stressing that “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.” He noted, “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 urge all governments taking part in UNCITRAL to support a clear mandate for the Working Group to draft rules ensuring the basic fundamentals of transparency in investor-State arbitration, as a part of the current revision process of the arbitration rules.

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