



Remarks about public access to information and participation in UNCITRAL,  
Stakeholder Session on UNCITRAL ISDS Reform Process organized by CCSI, IIED,  
and IISD in New York, April 23, 2018

The rights to access information and to participate in decision-making processes are civil and political rights guaranteed by the International Covenant on Civil and Political Rights. These rights are also guaranteed in the context of decisions having an impact on the environment by international agreements binding nations in Latin America and the Caribbean (Escazu) and in Europe and Central Asia (Aarhus).

In international decision-making processes, these rights are acknowledged and implemented to varying degrees, as defined by how representatives of the public interest are granted access to the meetings and what the right of access entails.

UNCITRAL's practices fall short of international standards in some respects.

I. Criteria for granting NGOs observer status

Public participation at the international level takes place through the granting of observer status to certain groups; the criteria for granting this status is therefore a key aspect of whether the right to participate is fulfilled.

In UNCITRAL, the practices regarding observer status lead to a fair amount of uncertainty:

- No formal decisions by UNCITRAL identify the criteria for observers or what that status entails
- However, previous notes from the secretariat and the UNCITRAL's website outline the general requirements:
  - (a) Conformity of the aims and purpose of the organization with the spirit, purposes and principles of the Charter of the United Nations;
  - (b) Internationality in focus and membership
  - (c) Ability of the organization to contribute meaningfully to the deliberations
  - (d) Legal or commercial experience to be reported upon by the organization which is not represented by other organizations already participating in the session.

One question that has come up is how does an organization meet the definition of international? Although a previous notes by secretariat states that notion of international is interpreted broadly, some organizations seeking observer accreditation have been rejected for not being international. This is particularly hard to understand given that they do work extensively in the international arena and considering that there are many national arbitration associations who are accredited.

UNCITRAL should consider providing a more explicit explanation of how the criteria “international” is weighed and defined.

A second issue related to the criteria is whether they ensure that a sufficiently diverse segment of the public is represented among accredited observers. The diversity of perspectives is particularly important in endeavors such as this one, where we are trying to support the reform of ISDS. Yet diversity of viewpoints seems particularly challenging in this context, because UNCITRAL has a history of close cooperation with the arbitration industry and private commercial interests. However, the controversy of ISDS and the emergence of the SDGs make it clear that international trade generally, and ISDS specifically, cannot be addressed solely from a commercial perspective.

UNCITRAL should consider including diversity of views as part of the criteria for granting observer status. For example, ECOSOC general consultative status is granted to NGOs “which are broadly representative of major segments of society at the international level.”

## II. What does observer status entail?

As with the criteria for observer status, the Commission has no formal decision on what the observer status entails, including how observer can disseminate written information. According to notes by the Secretariat, the past practice seems to have been inconsistent, with observers sometimes having the opportunity to have their documents officially circulated by the Secretariat and sometimes precluded from doing so. When the ability to distribute information was provided to observers, it isn’t clear what the basis for this approval was.

A clear and consistently applied rule would be helpful. UNCITRAL could consider adopting the practice of other International Organizations, including ECOSOC, UNCTAD, and UNEP, which have policies explicitly allowing accredited NGOs to circulate written information.