

Toward Widespread Ratification of the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration

*A briefing paper by:
Center for International Environmental Law (CIEL) and
International Institute for Sustainable Development (IISD)*

January 2017

Introduction

The *Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration* (Mauritius Convention on Transparency), negotiated under the United Nations Commission on International Trade Law (UNCITRAL), aims to secure transparency in the settlement of treaty-based investor-State disputes. Transparency in these arbitrations contributes to effective democratic participation, good governance, accountability, predictability and the rule of law.

Adopted by the UN General Assembly on 10 December 2014 and now open for signature, the Mauritius Convention on Transparency acknowledges that the very presence of a State as a party to the arbitration raises a public interest. Nationals and residents of that State have an interest in how the arbitration is conducted and its outcome, which can involve large monetary liability for public treasuries. Further, the public has an interest in the underlying dispute, which often involve direct allegations by the foreign investor of governmental misconduct. An increasing number of investor-State arbitrations also center on profoundly important public policies, ranging from nuclear or alternative energy policies to tobacco control, mining in natural reserves, and the protection of drinking water.

Arbitrations conducted under pre-2014 investment treaties typically lack many of the attributes that characterize open legal systems governed by the rule of law. 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 the dispute, what written and oral arguments are being advanced, what the arbitrators' jurisdictional or procedural rulings are, and what the ultimate decision is. This is problematic not only for the public but also for policymakers and negotiators, as they lack insights into how treaty provisions are interpreted by tribunals. As a consequence, governance cannot be improved, and treaty implementation at the domestic level is difficult. Moreover, governments are deprived of information needed to properly deal with the flaws of the arbitration system as well as improve the substantive treaty law. Finally, governments will not be able to adequately address future risks of being sued by foreign investors, since they cannot predict the types of cases and the underlying issues addressed in previous arbitrations. The case in favor of transparency is therefore pressing, with the Mauritius Convention on Transparency an important step forward.

At a time when investor-State arbitration is under intense scrutiny, the widespread application of the Mauritius Convention will ensure that governments gain a better insight and understanding of how investment treaties are applied and interpreted. Only with this understanding can investment treaties—and related dispute settlement systems—be improved and adapted to the needs of the different stakeholders that are impacted by trans-boundary investments.

Ensuring Transparency in UNCITRAL-based Arbitrations

The Mauritius Convention on Transparency ensures the application of the UNCITRAL *Rules on Transparency in Treaty-based Investor-State Arbitration* (Rules on Transparency). Adopted in July 2013, the UNCITRAL Rules on Transparency is a package of rules aiming to ensure transparency in investor-State arbitration. They are the result of nearly three years of negotiations of representatives from 55 Member States, observer States and observer organizations. They came into effect on 1st April 2014, and—in contrast to the previous versions of the UNCITRAL Arbitration Rules—establish openness and opportunity for public participation throughout the arbitral proceedings. They reflect official recognition by the United Nations of the value of transparency in treaty-based investor-State dispute resolution.¹

The UNCITRAL Rules on Transparency apply by default to arbitrations brought under treaties concluded *after* the Rules came into force in April 2014. However, the less transparent standards remain applicable in disputes brought under treaties concluded *before* April 2014, unless States decide to ‘opt-in’ to the new Rules. The Mauritius Convention on Transparency has been adopted to facilitate that ‘opt-in’ process and hence offers States an ‘efficient mechanism’ for applying the Rules on Transparency to arbitrations brought under *existing* treaties.²

Key Elements of the UNCITRAL Transparency Rules

The Rules on Transparency are the first arbitration rules that mandate transparency throughout the investor-State arbitration. Article 1 of the Rules on Transparency defines the scope of application. Articles 2, 3 and 6 mandate disclosure and openness. Articles 4 and 5 govern the participation of non-disputing parties. Article 7 contemplates exceptions from the disclosure requirements and Article 8 governs disclosure through a repository.³

The Rules on Transparency are an integral part of the UNCITRAL Arbitration Rules, as Article 1(1) explicitly mentions. Thus, the Rules on Transparency are applicable to: (a) investor-State disputes (b) that arise under investment treaties (c) concluded after the Rules on Transparency come into effect and (d) that are being resolved under the UNCITRAL Arbitration Rules. These four conditions must be fulfilled to ensure the applicability of the Rules.⁴ As noted above, the Mauritius Convention on Transparency also enables the application of the UNCITRAL Rules on Transparency to arbitrations brought under treaties existing prior to April 2014.

The publication of information shall be made available, as stated under Article 2. Article 3 ensures three categories of disclosure of documents: (1) mandatory and automatically disclosed documents including all statements and submissions by the disputing parties and non-disputing parties or third parties; (2) mandatory documents disclosed after any person requests their disclosure from the tribunal including witness statements and expert reports; and, (3) documents for which the tribunal has discretion to order or not their disclosure.⁵

Amicus curiae participation is explicitly allowed in the arbitrations, under the discretion of the arbitral tribunal. Submissions from non-disputing State parties are also addressed.⁶

¹ CIEL, IISD and Vale Columbia Center ‘New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps’ (2013), pg. 3-4.

² *Id.*

³ *Id.* at pg. 6, 8.

⁴ *Id.* at pg. 10.

⁵ *Id.* at pg. 14-15.

⁶ *Id.* at pg. 16-19.

The Rules on Transparency further provide that hearings must be open, unless there is a need to protect confidential information or the integrity of the arbitral process or for logistical reasons.⁷

The Rules on Transparency also contemplate exceptions to disclosure of information. Four categories of information are confidential or protected under Article 7(2): (i) confidential business information; (ii) information protected under the treaty; (iii) information protected under the law of the respondent or information protected under the law of the arbitral tribunal; and (iv) information that would impede law enforcement.⁸

Finally, Article 8 provides that the Secretary-General of the United Nations, or an institution named by UNCITRAL, is the repository of published information under the Rules on Transparency.⁹

Structure and Provisions of the Mauritius Convention on Transparency

The Mauritius Convention on Transparency is a concise legal document containing a Preamble and eleven provisions. The Preamble of the Convention recognizes *"the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of public interest involved in such arbitrations"*.¹⁰

Investment treaty is defined under Article 1(2) as *"any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against contracting parties to that investment treaty."*¹¹

Article 2 is the pivotal provision of the Mauritius Convention because it governs the application of the UNCITRAL Rules on Transparency. Article 2(1) provides that the Rules on Transparency shall apply to any investor-State arbitration where both the respondent State and the State of the claimant are parties, unless either of them has made a relevant reservation.¹² Article 2(2) provides that the Rules on Transparency shall apply where only the respondent is a party and the claimant agrees to the application of said rules, unless the respondent has made a relevant reservation.¹³ Importantly, this provision makes the Rules on Transparency applicable to investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules.

Reservations are addressed in detail in the Mauritius Convention on Transparency. Under Article 3, Parties can make reservation for a *"specific investment treaty"*, for a *"specific set of arbitration rules or procedures"* or if it is *"a respondent."*¹⁴ Parties can lodge a reservation *"in the event of a revision of the UNCITRAL Rules on Transparency."*¹⁵ Article 4 governs the formulation of reservations.¹⁶

⁷ CIEL, IISD and Vale Columbia Center 'New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps' (2013), pg. 19-20.

⁸ Id. at pg. 20-21.

⁹ Id. at pg. 23.

¹⁰ Mauritius Convention on Transparency, Preamble.

¹¹ Id. Art 1(2).

¹² Id. Art 2(1).

¹³ Id. Art. 2(2).

¹⁴ Id. Art 3(1)(a), 3(1)(b), 3(1)(c).

¹⁵ Id. Art 3(2), 3(3).

¹⁶ Id. Art 4.

Any State or '*regional economic integration organization that is constituted by States and is a contracting party to an investment treaty*' can sign, ratify, accept, approve and access to the Mauritius Convention on Transparency.¹⁷ The Convention shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.¹⁸

In effect, the Mauritius Convention on Transparency provides transparency in investor-State arbitrations by establishing an efficient mechanism for States to 'opt-in' the application of the UNCITRAL Rules on Transparency in investor-State arbitrations.

Recommendation: Ratification of the Mauritius Convention on Transparency

The Mauritius Convention on Transparency was adopted by UN General Assembly on 10 December 2014 and it was opened for signature at a ceremony held in Port Louis, Mauritius, on 17 March 2015. The Convention will enter into force six months after the deposit of the third instrument of ratification, acceptance, approval or accession. To date, Mauritius and Canada have ratified the Convention. Fifteen other States signed the document at the ceremony held in Port Louis: Canada, Finland, France, Germany, Mauritius, Sweden, United Kingdom and United States. Nine States signed it later: Belgium, Congo, Gabon, Italy, Luxembourg, Madagascar, Netherlands, Switzerland and Syria.¹⁹

Because existing investment treaties refer to arbitration rules that reflect old standards lacking in transparency, the entry into force of the Mauritius Convention on Transparency would provide a common legal framework focused on transparency for future disputes brought under those existing treaties. Hence, widespread ratification of the Convention would give effect to the paradigm shift toward transparency reflected in the UNCITRAL Rules on Transparency and thereby advance democratic governance, the human right of access to information, and the public interest involved in investment arbitrations. Importantly, transparency is needed for governments to embark in a well-informed reform process on the international law on economic governance.

¹⁷ Id. Art 7.

¹⁸ Id. Art 9, 10, 11.

¹⁹ UNCITRAL, 'Status of the Mauritius Convention on Transparency', available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html accessed on 26 January 2017.