

# Columbia Center on Sustainable Investment

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CCSI Policy Paper

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## Key Points

- 1 UNCITRAL has adopted a treaty to ensure transparency in investor-State arbitration
- 2 This new treaty can increase openness of arbitrations under thousands of existing treaties and under any set of arbitration rules
- 3 If widely adopted, the treaty has the potential to significantly reform the way investor-State arbitrations are conducted, and address concerns that important matters of public interest are being resolved behind closed doors



<http://www.vote29.com/newmyblog/wp-content/uploads/2011/03/Disclosure.jpg>

## The Mauritius Convention on Transparency: Comments on the treaty and its role in increasing transparency of investor-State arbitration

### 1. Introduction

Since 2008, the United Nations Commission on International Trade Law (UNCITRAL) has officially recognized the “importance of ensuring transparency in investor-State dispute resolution.”<sup>1</sup> In July 2013, it reached an important milestone in turning that principle into law. Recognizing “the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,” UNCITRAL adopted the Rules on Transparency in Treaty-Based Investor-State Arbitration (“Transparency Rules” or “Rules”).<sup>2</sup> Those Rules, which require disclosure of a wide range of information submitted to and issued by tribunals, and facilitate participation by amicus curiae and non-disputing State parties, will do much to transform – and open up – investor-State disputes, *when the rules apply*.

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## Introduction (cont).

Notably, however, Article 1(2) of the Transparency Rules requires certain conditions to be satisfied before the Transparency Rules can apply to any arbitration arising under any of the approximately 3000 treaties that were concluded *before* the Rules entered into force on April 1, 2014. Namely, for the Rules to apply under those “existing treaties,” either (1) the investor’s home State and the respondent have to expressly agree, *after April 1, 2014*, to apply the Rules to their treaty (and all disputes arising under it); or (2) the investor and respondent State must agree to apply the Rules in the context of a particular dispute.

This provision requires States and/or investors to expressly “opt in” to the Transparency Rules for disputes arising under existing treaties. Given that it is this vast mass of existing treaties that is likely to give rise to the bulk of investment arbitrations for the foreseeable future, the hurdle imposed by Article 1(2) risks undermining UNCITRAL’s overarching goal of ensuring transparency in investor-State arbitration. To address that issue, UNCITRAL decided to create another instrument that States could use to require application of the Transparency Rules to any investment arbitration arising under their existing treaties.<sup>3</sup>

In July 2014, UNCITRAL finalized and adopted the “Mauritius Convention on Transparency” (“Transparency Convention”).<sup>4</sup> This treaty establishes a mechanism through which all parties to existing investment treaties can efficiently and effectively update the procedural rules governing investor-State arbitrations under those treaties so as to effectively implement the Transparency Rules and better take into account the public interest nature of these disputes.

In order to promote greater awareness and understanding of the Convention, this paper reproduces its text and, after each article, provides additional comments on the provisions. The commentary is based on attendance at UNCITRAL’s sessions, as well as written public records of the negotiations.<sup>5</sup>

## 2. Convention Text and Commentary

### Preamble

*The Parties to this Convention,*

*Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the extensive and wide-ranging use of arbitration for the settlement of investor-State disputes,*

*Also recognizing the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,*

*Believing that the Rules on Transparency in Treaty-based Investor-State Arbitration adopted by the United Nations Commission on International Trade Law on 11 July 2013 (“UNCITRAL Rules on Transparency”), effective as of 1 April 2014, would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes,*

*Noting the great number of treaties providing for the protection of investments or investors already in force, and the practical importance of promoting the application of the UNCITRAL Rules on Transparency to arbitration under those already concluded investment treaties,*

*Noting also article 1(2) and (9) of the UNCITRAL Rules on Transparency,*

*Have agreed as follows:*

### Article 1 – Scope of Application

#### Text

*1. This Convention applies to arbitration between an investor and a State or a regional economic integration organization conducted on the basis of an investment treaty concluded before 1 April 2014 (‘investor-State arbitration’).*

*2. The term ‘investment treaty’ means 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.*

#### Comments

Article 1 governs the scope of the Convention, stating that it applies to arbitrations between

- an investor and a State, or
- an investor and a regional economic integration organization (e.g., the European Union)

under an “investment treaty” that was concluded before the Transparency Rules came into effect on April 1, 2014 (referred to herein as “existing treaties”). The Transparency Convention’s temporal coverage (i.e., covering treaties concluded before April 1, 2014) is the same as the treaties *excluded* from coverage under Article 1(2) of the Transparency Rules. This is because the aim of the Transparency Convention is to create a mechanism through which States can ensure that disputes under those existing treaties will be subject to the Transparency Rules.

The term “investment treaty” in Article 1(2) of the Convention has the same meaning and scope as the term “treaty” under the Transparency Rules. The Convention only applies to arbitrations arising under investment treaties, not investor-State arbitrations under contracts. Disputing parties to a given contract-based investor-State arbitration, however, could still agree to apply all or some of the Transparency Rules to their dispute.

In the Convention, the term “State” is used to refer to individual States; the term “Party” is used to refer to individual States and to regional economic integration organizations, both of which may be signatories to an investment treaty. “Investor-State” arbitration refers to arbitration initiated by an investor against a treaty party, which may be a State or a regional economic integration organization.

## **Article 2 – Application of the UNCITRAL Rules on Transparency**

### **Text**

*1. The UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a relevant reservation under article 3(1)(a) or (b), and the claimant is of a State that is a Party that has not made a relevant reservation under article 3(1)(a).*

### **Unilateral offer of application**

*2. Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), and the claimant agrees to the application of the UNCITRAL Rules on Transparency.*

### **Applicable version of the UNCITRAL Rules on Transparency**

*3. Where the UNCITRAL Rules on Transparency apply pursuant to paragraph 1 or 2, the most recent version of those Rules as to which the respondent has not made a reservation pursuant to article 3(2) shall apply.*

## **Article 1(7) of the UNCITRAL Rules on Transparency**

4. *The final sentence of article 1(7) of the UNCITRAL Rules on Transparency shall not apply to investor-State arbitrations under paragraph 1.*

## **Most favored nation provision in an investment treaty**

5. *The Parties to this Convention agree that a claimant may not invoke a most favored nation provision to apply, or avoid the application of, the UNCITRAL Rules on Transparency under this Convention.*

## Comments

### **Article 2(1) – Mandatory "reciprocal" application**

Article 2(1) is a core article providing for mandatory application of the Transparency Rules to investment treaty arbitrations when both the respondent and the investor's home State are parties to the Transparency Convention. It creates new mandatory obligations that, in accordance with Article 30 of the Vienna Convention on the Law of Treaties (VCLT), explained further below, can supplement or supplant those under existing investment treaties. Article 2(1), however, also signals that States can take reservations narrowing this rule of mandatory application.

There are two main types of reservations that will prevent the Transparency Rules from applying under Article 2(1) even in cases when both the respondent and the investor's home State are parties to the Transparency Convention:

- A reservation by **either** the investor's home State **or** the respondent State **carving out the relevant treaty** from the scope of the Transparency Convention. (See Article 3(1)(a)). This reflects the notion of "reciprocity" – i.e., that the Rules will only apply under Article 2(1) to a dispute under a particular treaty if *both* States are party to the Transparency Convention and *neither* has indicated that it wants to remove that specific treaty from the Convention's scope.<sup>6</sup>
- A reservation by the **respondent State carving out disputes under arbitration rules other than the UNCITRAL arbitration** rules from the scope of the Transparency Convention. (See Article 3(1)(b)). Here, "reciprocity" is not strictly required. Whether or not the investor's home State has taken a reservation carving out non-UNCITRAL arbitrations from application of the Transparency Rules will not affect whether the respondent State is bound to apply the Rules.

The effect of these reservations means that under a bilateral or multilateral treaty, mandatory application occurs if the following three conditions are satisfied:

- the respondent and the investor's home State are parties to the Transparency Convention;
- neither the respondent State nor the investor's home State has carved out the relevant investment treaty from the scope of the Convention; and
- the respondent State has not taken a reservation for disputes under the set of arbitration rules (other than the UNCITRAL arbitration rules) governing the arbitration.

The following examples illustrate the effect of Article 2(1) (and the reservations it refers to) on application of the Transparency Rules:



### Mandatory application under Article 2(1)

- The respondent and the investor's home State are parties to the Transparency Convention, and neither has taken any reservations for the relevant investment treaty or for arbitrations conducted under arbitration rules other than UNCITRAL arbitration rules.
- The respondent and the investor's home State are parties to the Transparency Convention. The investor's home State has issued a reservation stating that the Transparency Rules do not apply when rules other than the UNCITRAL arbitration rules govern the dispute. The respondent has not taken a similar reservation. Irrespective of the home State's reservation, the Transparency Rules will still apply under Article 2(1) to arbitrations under any set of arbitration rules.

### No mandatory application under Article 2(1)

- The respondent and the investor's home State are parties to the Transparency Convention, but the investor's home State has taken a reservation for the particular treaty. The Transparency Convention would not apply in arbitration under that treaty.
- The respondent and the investor's home State are parties to the Transparency Convention, but the respondent has taken a reservation for the particular treaty. The Transparency Convention would not apply in arbitration under that treaty.
- The respondent and the investor's home State are parties to the Transparency Convention, but the respondent has taken a reservation stating that the Transparency Convention only requires application of the Transparency Rules when it is the UNCITRAL arbitration rules that govern the dispute, and the investor has chosen to arbitrate the dispute under the ICSID arbitration rules.

For multilateral investment treaties, not all parties to the investment treaty need to be parties to the Transparency Convention in order for the Transparency Rules to apply under Article 2(1). It is sufficient for the home State of the investor and the respondent to be parties.

Notably, the drafting of Article 2(1) emphasizes the need for the claimant to be of a "State" that is party to the Convention and that has not taken a relevant reservation for the underlying treaty. This was done in order to limit the effect of commitments and reservations entered into by regional economic integration organizations, and to address the specific issue that arises when a regional economic integration organization and its Member States are both party to a particular existing investment treaty (i.e., as occurs due to the EU's status as a party to the Energy Charter Treaty ("ECT")).

Pursuant to Article 2(1), when an investor brings a claim against a State under the ECT, the relevant question for determining whether there is "reciprocity" under Article 2(1) is whether the investor's home State is a party to the Convention and has not taken a reservation for the ECT, not whether the EU is a party to the Convention or has taken a reservation for the ECT. If the claimant's home State is a member of the EU and a party to the ECT, but has carved out the ECT from the scope of the Transparency Convention, then there can be no mandatory application of the Transparency Rules under Article 2(1) to disputes brought by that investor against other parties to the ECT. This remains the case even if the European Union (a "home" regional economic integration organization) is a party to the Transparency Convention and has not taken a reservation for the ECT. Whether the European Union has signed onto the Transparency Convention or taken any reservations are issues that are only relevant in cases when the European Union is a respondent in an investment arbitration.

## ***Article 2(2) – Unilateral offers by respondent States open to acceptance by investors***

If the conditions of Article 2(1) are not satisfied, Article 2(2) provides a second mechanism for mandatory application of the Transparency Rules. Pursuant to this provision (and subject to certain reservations, discussed further below), parties to the Convention effectively make standing unilateral offers to arbitrate disputes under the Transparency Rules when they are respondents. If these offers are accepted by investors in the context of a particular dispute, then that dispute will be governed by the Transparency Rules. The respondent is bound under the Convention's terms to its offer (subject to the State's rights to issue reservations and denounce the treaty, discussed further below).

Under Article 2(2), it is irrelevant whether the investor's home State is a party to the Convention *or*, if so, has made a reservation. Nothing in the Transparency Convention permits the investor's home State to limit the scope of a respondent's unilateral offer, or to prevent the investor from accepting that offer.

Like Article 2(1), Article 2(2) permits States to take certain reservations. In particular, Article 2(2) gives States three options for narrowing and even entirely opting out of the unilateral offer. A State may:

- issue a reservation entirely carving out a particular treaty from the Transparency Convention (see Article 3(1)(a));
- issue a reservation carving out disputes governed by arbitration rules other than the UNCITRAL arbitration rules (see Article 3(1)(b)); and
- issue a reservation stating that Article 2(2) shall not apply to disputes in which it is a respondent, thereby declining to bind itself to any unilateral offer (see Article 3(1)(c)).

The Transparency Convention does not require the investor to agree to apply the Rules through any specific form. One delegation proposed requiring the claimant's agreement to be explicit and in writing, but that proposal did not receive the support necessary for it to be adopted.<sup>7</sup> A claimant could, for instance, indicate in its notice of arbitration that it accepts the offer, or could orally agree during a procedural conference.

## ***Article 2(3) – Proper version of the Rules***

The Working Group foresaw that the Transparency Rules might be updated in the future. This article clarifies that if the Transparency Rules are amended, the most recent version of the Rules will apply. (As described below, however, States can take a reservation under Article 3(2) to modify that rule).

## ***Article 2(4) – Hierarchy of the Rules***

This provision addresses the relationship between the Transparency Rules and the underlying investment treaty.

Article 1(7) of the Transparency Rules, which addresses the hierarchy of the Rules in relation to the underlying investment treaty, states that where there is a conflict between the Transparency Rules and the investment treaty, the "provisions of the [investment] treaty shall prevail." Article 2(4) of the Convention effectively deletes that provision for situations when the Transparency Rules apply pursuant to the Transparency Convention.

This provision in the Convention that modifies the Transparency Rules helps to increase transparency in disputes arising under treaties that were concluded before the Rules' effective date. There was a

concern that, if Article 1(7) of the Transparency Rules were to apply, it would allow an investment treaty with a lower standard of transparency to prevail over the Transparency Rules, undermining the effectiveness of the Transparency Convention as a tool for making arbitrations under those treaties more open.

One issue that is not expressly addressed in the Convention is the relationship between the Transparency Rules and mandatory domestic law, and whether that relationship is affected when the Transparency Rules are applied pursuant to the Transparency Convention. Generally, arbitration rules that apply in contract disputes are subject to and cannot override contrary mandatory provisions of domestic law at the seat of the arbitration. When arbitration rules apply pursuant to a treaty, however, there are different ways of viewing the resulting legal hierarchy:

- One interpretation is that the treaty merely states that application under certain procedural rules is permissible or required, but does not intend to alter the default status of procedural rules by elevating them to the treaty level where they could trump contrary domestic law.
- A second interpretation is that the treaty incorporates the procedural rules by reference in its text, and by doing so makes the rules an integral part of the treaty, elevating those rules to treaty status where they can override inconsistent domestic law.

Each interpretation has different implications for transparency.

Under the first interpretation, for instance, States could enact domestic law that greatly restricts transparency of investor-State arbitration. In such a case, even if the Transparency Rules applied pursuant to the Transparency Convention, then domestic law could potentially trump and defeat the aim of the Transparency Rules and Transparency Convention. The Transparency Rules speak to this issue, and try to prevent an outcome in which domestic law can eviscerate the impact of the Rules. In Article 1(7), the Rules set forth the basic principle that, in case of conflict, mandatory rules of domestic law will prevail over the Transparency Rules. In Article 1(6), however, the Rules state that when a State takes any measure or action “having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.”

Based on Article 1(6) of the Rules, which was adopted by unanimous agreement of the Working Group,<sup>6</sup> and which evidences the Working Group’s concern about States using their own laws to avoid disclosure required under the Transparency Rules, it would seem unreasonable for the Working Group to have intended the Convention to be easily undermined by domestic law. On that basis, the second interpretation – under which the Transparency Rules attain treaty status prevailing over domestic law – seems more plausible than the first.

In cases when the Convention’s application of the Transparency Rules trumps domestic law there is also the chance that the result will be a reduction, rather than expansion, of transparency. If, for instance, in the application of the Rules, a tribunal determines material to be confidential and orders that it not be made publicly available, there is a possibility that domestic courts that are later faced with requests seeking disclosure of such “confidential” information will consider the tribunal’s determination of “confidentiality” to prevail over contrary domestic law, preventing citizens from accessing information that their government otherwise had a duty to disclose.

In some investment treaties, provisions on investor-State arbitration indicate that States have anticipated and specifically avoided such an outcome. A number of treaties requiring transparency (and providing for determinations of confidentiality) make clear that no application of the rules can prevent States from



disclosing information that they are required to disclose under applicable domestic law. These provisions safeguard the role of domestic law in ensuring access to information held by the government. (Notably, in these treaties, provisions on transparency and confidentiality are included directly in the text of the agreements. There is therefore no question about whether those provisions have the status of general arbitration rules or international law. Their status as international law is clear).

The Transparency Convention does not have a similar “safeguard” provision ensuring that tribunals’ determinations of “confidentiality” do not prevent disclosures required under domestic law. Consequently, assuming that the second interpretation applies (under which the Rules are elevated to treaty status), there is a potential risk that a determination of “confidentiality” by an arbitral tribunal could be considered to override domestic disclosure requirements.

Yet, given the negotiation history of the Rules and the Convention, that risk should be minimal. The record of the negotiations contains no suggestion that such a “safeguard” provision was suggested, much less defeated. Moreover, given UNCITRAL’s concern about preventing government actions that would undermine the Rules’ transparency objectives,<sup>7</sup> the omission of a “safeguard” clause does not seem to suggest rejection of the principle that such a clause represents.

### ***Article 2(5) – Impact of most-favoured nation provisions***

The drafters significantly debated the desirability of this provision that prevents investors from invoking a most-favoured nation (MFN) provision in an underlying investment treaty to attempt to either avoid or secure application of the Transparency Rules. One main argument raised against inclusion of that provision in the Convention was that, by including it, UNCITRAL might appear to be taking a position on whether an MFN provision could apply to require the same or better treatment to investors on not only substantive matters, but also procedural matters, such as transparency in dispute settlement proceedings.

Nevertheless, the negotiators ultimately opted to include the language in the Convention. Delegations emphasized that the *travaux préparatoires* for the Convention would reflect UNCITRAL’s understanding that it was not taking any position on whether and how the MFN provision could apply to dispute settlement proceedings. Based on the availability and clarity of that negotiating history, UNCITRAL concluded that the certainty that could be provided to tribunals by a provision barring claimants from seeking to use MFN provisions to expand or narrow the scope of the Transparency Convention outweighed the risk that such an MFN-bar might unintentionally send a signal regarding application of MFN provisions more generally.<sup>8</sup>

Despite that MFN-bar, a claimant might still try to present the tribunal with an argument that the Transparency Rules should or should not apply pursuant to the MFN article of the underlying investment treaty. In such a case, the tribunal will have to interpret the investment treaty’s MFN provision.

As noted above, Article 30 of the Vienna Convention on the Law of Treaties (VCLT) on application of successive treaties to the same subject matter will govern whether and how the Transparency Convention impacts MFN provisions in investment treaties. According to that article:

...

*3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.*

4. *When the parties to the later treaty do not include all the parties to the earlier one:*
- (a) *As between States parties to both treaties the same rule applies as in paragraph 3;*
  - (b) *As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.*

...

Pursuant to Article 30(3) and 30(4)(a) of the VCLT, when the respondent and the investor's home State are both party to the investment treaty and to the Transparency Convention, and have not reserved the investment treaty from the Convention, the Convention will operate as a "procedural bar" preventing investors from seeking to use the investment treaty's MFN provision to secure or avoid application of the Transparency Rules under the Transparency Convention.<sup>9</sup> When, however, the situation is instead governed by Article 30(4)(b) (e.g., when only the investor's home State is party to the Transparency Convention or there is a reservation for the relevant treaty), the effect of the MFN bar is less clear.

### **Article 3 – Reservations**

#### **Text**

1. *A Party may declare that:*

- (a) *It shall not apply this Convention to investor-State arbitration under a specific investment treaty, identified by title and name of the contracting parties to that investment treaty;*
- (b) *Article 2(1) and (2) shall not apply to investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules, and in which it is a respondent;*
- (c) *Article 2(2) shall not apply in investor-State arbitration in which it is a respondent.*

2. *In the event of a revision of the UNCITRAL Rules on Transparency, a Party may, within six months of the adoption of such revision, declare that it shall not apply that revised version of the Rules.*

3. *Parties may make multiple reservations in a single instrument. In such an instrument, each declaration made:*

- (a) *In respect of a specific investment treaty under paragraph (1)(a);*
- (b) *In respect of a specific set of arbitration rules or procedures under paragraph (1)(b);*
- (c) *Under paragraph (1)(c); or*
- (d) *Under paragraph (2);*

*shall constitute a separate reservation capable of separate withdrawal under article 4(6).*

4. *No reservations are permitted except those expressly authorised in this article.*

#### **Comments**

Article 3 sets forth the reservations that State parties to the Convention may take.

### **Article 3(1) – Three core reservations limiting application of the Convention and Rules**

Paragraph 1 includes the core reservations that can be used to limit application of the Convention and the Rules. As referred to in the text and comments on Article 2, there are three main types:

- a reservation carving out arbitrations under a particular treaty from the Transparency Convention (Article 3(1)(a));
- a reservation carving out disputes under certain non-UNCITRAL arbitration rules from Articles 2(1) (reciprocal application) and 2(2) (unilateral offers) (Article 3(1)(b)); and
- a reservation under which the State opts out from Article 2(2) (unilateral offers) (Article 3(1)(c)).

Each of these reservations adopts a “negative list” approach: all treaties and all disputes under those treaties are covered unless a State party specifically declares otherwise. Moreover, delegations unanimously agreed “that it would be unacceptable” for a State to accede to the Transparency Convention and then carve out its entire content by use of reservations under Article 3.<sup>10</sup>

Article 3(1)(a) allows parties to exclude arbitrations under specific investment treaties from the Convention, whether doing because they believe the Transparency Rules set a disclosure standard for their treaties that is too high, or, for States that already require transparency in some of their existing treaties, one that may be too low. For the Article 3(1)(a) reservation to apply, a party will have to list the title of the investment treaty it wishes to exclude from the Transparency Convention and name the contracting parties to that investment treaty.

When a respondent has timely taken an Article 3(1)(a) reservation for an investment treaty underlying a given dispute, there can be no application of the Transparency Rules in that dispute under either Article 2(1) (reciprocal application) or 2(2) (unilateral offers).

Article 3(1)(a) reservations by the investor’s home State can also affect application of the Rules. If an investor’s home State has taken a reservation for a particular investment treaty, and the investor later brings an investment arbitration under that treaty against its host State, then the respondent will not be required under Article 2(1) to arbitrate under the Transparency Rules even if it is a party to the Transparency Convention and has not similarly taken a reservation for that investment treaty. (Nevertheless, if the respondent has not taken a relevant reservation, and the investor accepts its unilateral offer to arbitrate under the Transparency Rules, those Rules will still apply pursuant to Article 2(2) of the Convention).

The second type of reservation, set forth in Article 3(1)(b), permits States to allow arbitration under the Transparency Rules to be an option that is electable by investors. To illustrate,

- if a State takes a reservation for arbitrations conducted under the ICSID arbitration rules,
- the State's investment treaties allow the investor to choose whether to arbitrate disputes under the ICSID or UNCITRAL arbitration rules, and
- an investor selects the ICSID rules to govern the arbitration when bringing an investment treaty dispute against that State,

then the Transparency Convention will not require application of the Transparency Rules to that arbitration.

If a State takes an Article 3(1)(b) reservation for disputes under certain sets of arbitration rules, then that reservation will only affect its obligations as a respondent State. The reservation will have no effect on the obligations of the other party or parties to the underlying investment treaties. Thus,

- if States A and B are both parties to a bilateral investment treaty and parties to the Transparency Convention (and have not taken a specific reservation for the A-B BIT),
- State A has taken a reservation for all ICSID arbitrations, but State B has not, and
- an investor of State A brings an investment arbitration against State B under the ICSID arbitration rules,

then the Transparency Convention will require application of the Transparency Rules. If, however, an investor of State B were to bring a claim against State A under the ICSID arbitration rules, then the Transparency Convention would not require application of the Transparency Rules.

The third reservation, which is set forth in Article 3(1)(c) permits States to opt out of the unilateral offer to arbitrate under the Transparency Rules provided in Article 2(2). If a State does this, the Transparency Convention will only require application of the Transparency Rules when the conditions of Article 2(1) are satisfied.

#### ***Article 3(2) – Reservation to control application of amendments***

Paragraph 2 sets out an additional permissible reservation. It allows States to depart from Article 2(3), which provides that the most recent version of the Rules in force at the time of the dispute will govern the arbitration. Thus, if the Transparency Rules are revised in the future to provide for more or less transparency, this reservation allows States to avoid having those new amendments apply.

#### ***Article 3(3) – Option for gradual withdrawal of reservations***

This provision clarifies that all reservations limiting application of the Transparency Convention or Transparency Rules may be contained in one instrument, but will be treated as separate reservations that can be individually withdrawn. This option for individual withdrawal of specific reservations was designed to make it easier for States to gradually remove those reservations and broaden situations in which the Convention and Rules will apply.

#### ***Article 3(4) – No additional reservations***

Paragraph 4 makes clear that the list of reservations in Article 3 is exhaustive. No additional reservations from the Transparency Convention may be taken.

#### **Article 4 – Formulation of Reservations**

##### **Text**

1. *Reservations may be made by a Party at any time, save for a reservation under article 3(2).*
2. *Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.*

3. *Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.*
4. *Except for a reservation made by a Party under article 3(2), which shall take effect immediately upon deposit, a reservation deposited after the entry into force of the Convention for that Party shall take effect twelve months after the date of its deposit.*
5. *Reservations and their confirmations shall be deposited with the depositary.*
6. *Any Party that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect upon deposit.*

## Comments

This article governs the process and timing for the making, entry into force, and withdrawal of reservations.

The general rule set forth in Article 4(1) is that States may make reservations to the Convention at any time. There is one exception: A reservation taken under Article 3(2) to prevent application of amendments to the Transparency Rules must be deposited within six months of those amendments being adopted.

A reservation will take effect immediately upon deposit if:

- it is a reservation that the party took when ratifying, accepting, approving or acceding to the Convention; or
- it is the Article 3(2) reservation excepting parties from having to apply the most recent version of the Rules.

Any other reservation – namely, any *Article 3(1)* reservation a party makes *after* it has ratified, accepted, approved or acceded to the Convention – only takes effect twelve months after it is deposited with the depositary. This rule, which is set forth in Article 4(4), reflects UNCITRAL’s agreement that parties to the Convention should not have unrestricted freedom to unwind the substantive commitments they made when entering into that treaty. Once a State has ratified the Convention and is bound by it, any new reservation that a State makes under Article 3(1) (i.e., a reservation for a particular treaty or particular arbitration rules, or a reservation from the unilateral offer) will not come into effect for a year. The one-year waiting period was chosen based on the view that the period would need to be of a sufficient length in order to prevent the abuse which could result if States, upon learning of potential disputes, could simply narrow their commitments under the Convention to avoid application of the Transparency Rules. Delegations reasoned that the waiting period should be at least as long as cooling off periods in investment treaties, as those cooling off periods should represent the minimum span of time between when a respondent learns of a pending dispute and when the arbitration is commenced. Based on input during the negotiations that cooling off periods normally range from six to nine months in investment treaties, UNCITRAL settled on the one-year hold.



In contrast to new reservations, all withdrawals of reservations come into effect immediately upon deposit. Similar to Article 3(3) on separate withdrawals, this provision was designed to facilitate expanded coverage of the Transparency Convention and Rules over time.

Reservations and withdrawals are to be deposited with the depositary. Article 6 specifies that the depositary is the Secretary-General of the United Nations.

## **Article 5 – Application to Investor-State Arbitrations**

### Text

*This Convention and any reservation, or withdrawal of a reservation, shall apply only to investor-State arbitrations that are commenced after the date when the Convention, reservation, or withdrawal of a reservation, enters into force or takes effect in respect of each Party concerned.*

### Comments

This article provides a special rule for application of the Convention, reservations, and withdrawal of reservations to ongoing treaty arbitrations. The Transparency Convention as in force (or not) at the commencement of the dispute will govern the proceedings.

According to this article, if a State has deposited a reservation for a particular treaty less than twelve months before the commencement of the dispute, that reservation will not apply to the dispute as it will not yet have come into force. In contrast, if the State has deposited a withdrawal of a reservation any time before commencement of the arbitration (e.g., one day before commencement), the withdrawal will be operative for that investment dispute.

## **Article 6 – Depositary**

### Text

*The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.*

### Comments

The depositary is where States are to deposit their reservations and reservation withdrawals (Article 4), and their instruments of ratification, acceptance, approval or accession to the Transparency Convention (Article 7(4)).

## **Article 7 – Signature, Ratification, Acceptance, Approval, Accession**

### Text

1. *This Convention is open for signature in Port Louis, Mauritius, on 17 March 2015, and thereafter at the United Nations Headquarters in New York by any (a) State; or (b) regional economic*

*integration organization that is constituted by States and is a contracting party to an investment treaty.*

2. *This Convention is subject to ratification, acceptance or approval by the signatories to this Convention.*
3. *This Convention is open for accession by all States or regional economic integration organizations referred to in paragraph 1 which are not signatories as from the date it is open for signature.*
4. *Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.*

## Comments

Article 7 is a basic provision addressing signature and ratification, acceptance or approval of the Convention by parties. After opening for signature on March 17, 2015, it will remain open for signature indefinitely at the UN Headquarters in New York for any States or eligible regional economic integration organizations that want to sign onto the Convention after March 17, 2015. This allows for progressive expansion of the Convention's coverage.

## Article 8 – Participation by Regional Economic Integration Organizations

### Text

1. *When depositing an instrument of ratification, acceptance, approval or accession, a regional economic integration organization shall inform the depositary of a specific investment treaty to which it is a contracting party, identified by title and name of the contracting parties to that investment treaty.*
2. *When the number of Parties is relevant in this Convention, a regional economic integration organization does not count as a Party in addition to its member States which are Parties.*

### Comments

The Convention makes clear throughout that it envisions and allows regional economic integration organizations to be party to the Convention. The specific regional economic integration organization that motivated this approach was the European Union.

For the European Union or any other similar organizations to be a party, it must have actually concluded an investment treaty. When it deposits its instrument of ratification, acceptance, approval or accession of the Convention, it will have to supply evidence to the depositary that it is also party to an investment treaty by providing the title of the treaty and the name of the parties to that agreement.

## Article 9 – Entry into Force

### Text

1. *This Convention shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.*
2. *When a State or a regional economic integration organization ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State or regional economic integration organization six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.*

### Comments

Under Article 9(2), only three parties are required to ratify, accept, approve or accede to the Convention for it to come into force. This was done in order to ensure that those wanting to use the Convention as an efficient mechanism to secure application of the Transparency Rules to their existing treaties were able to do so. To require a larger number of parties to have ratified, accepted, approved or acceded to the Convention before it could come into force would frustrate that objective.

This article, together with Article 7, confirms that States are only bound on an international level after ratification, acceptance, approval or accession. Signature alone will not have that effect. The six-month delay for the Convention to come into force with respect to parties ratifying, accepting or acceding to the Convention is relatively standard treaty practice, giving parties to the treaty time to anticipate and be ready for the Convention's effects.

## Article 10 – Amendment

### Text

1. *Any Party may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to this Convention with a request that they indicate whether they favour a conference of Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.*
2. *The conference of Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties present and voting at the conference.*
3. *An adopted amendment shall be submitted by the Secretary-General of the United Nations to all the Parties for ratification, acceptance or approval.*

4. *An adopted amendment enters into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties which have expressed consent to be bound by it.*
5. *When a State or a regional economic integration organization ratifies, accepts or approves an amendment that has already entered into force, the amendment enters into force in respect of that State or that regional economic integration organization six months after the date of the deposit of its instrument of ratification, acceptance or approval.*
6. *Any State or regional economic integration organization which becomes a Party to the Convention after the entry into force of the amendment shall be considered as a Party to the Convention as amended.*

## Comments

This article was inserted to provide a clear and detailed procedure for proposal, adoption, and entry into force of amendments, which may be proposed by any party to the Convention. The drafters indicated that the VCLT would continue to govern issues not specifically addressed in the Convention, but inserted additional provisions to fill in gaps and develop a more tailored approach. For instance, the rule in Article 10(2) that an amendment should be adopted by consensus of the parties reflects the practice within UNCITRAL, which, to the extent possible, likewise makes decisions by consensus.<sup>11</sup>

After an amendment is adopted (by consensus or, if consensus is not possible, by vote of two-thirds of the parties present and voting at the conference), it does not automatically enter into force. It will only come into force after three parties to the Convention have deposited formal instruments of acceptance of the amendment.

Once in force, the amendment will not necessarily apply to any particular party. For those States or regional economic integration organizations that are already party to the Convention when an amendment is adopted, the amendment can only apply to them if they express consent to be bound by it. The Secretary-General of the United Nations is responsible for notifying the parties to the Convention of the adopted amendment, as it is likely that not all parties will have been involved in the conference during which the amendment was adopted. The parties will then be able to accept, approve, or ratify the amendment. Any party that does not take such action will not be bound by the amendment.

For States or regional economic integration organizations that accede to the Convention after the amendment has entered into force, they will be bound by the Convention as amended. There is no “opt in” or “opt out” mechanism allowing them to select a particular version of the Convention to accede to.

## Article 11 – Denunciation of this Convention

### Text

1. *A Party may denounce this Convention at any time by means of a formal notification addressed to the depositary. The denunciation shall take effect twelve months after the notification is received by the depositary.*

2. *This Convention shall continue to apply to investor-State arbitrations commenced before the denunciation takes effect.*

## Comments

Parties may denounce the Convention at any time, with the denunciation coming into effect one year after it has been deposited. If an investor-State arbitration is commenced at any time before or within that one-year window, the Convention will continue to apply to that dispute.

This waiting period for any denunciation is the same as it is for any new reservation taken by a party to the Convention. Like the waiting provision for new reservations, this waiting period for denunciation was designed to prevent abuse, avoiding situations in which parties could denounce the Convention in order to avoid application of the Transparency Convention and Transparency Rules to particular disputes that were foreseen or pending.



### **3. Conclusion**

The Convention provides various routes through which the Transparency Rules will or can apply, and gives parties significant flexibility to craft their commitments to transparency. Overall, the Convention is a landmark instrument and, if widely adopted, will do much to reform investor-State arbitration under existing treaties and address concerns that, under the status quo, and even with the adoption of the Transparency Rules, important issues of public interest are too easily and too frequently being decided behind closed doors.

<sup>1</sup> Report of the United Nations Commission on International Trade Law, forty-first session (June 16 – July 3 2008), Gen. Assem. A/63/17, supp. no. 17, para. 314.

<sup>2</sup> Report of the United Nations Commission on International Trade Law, forty-sixth session (July 8-26, 2013), Gen. Assem., supp. no. 17, para. 128. The Transparency Rules are available on UNCITRAL’s website, <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>. For more information on the Transparency Rules, see Lise Johnson and Nathalie Bernasconi-Osterwalder, “New UNCITRAL arbitration rules on transparency: Application, content and next steps,” August 2013, pp. 23-25, available at [http://ccsi.columbia.edu/files/2014/04/UNCITRAL\\_Rules\\_on\\_Transparency\\_commentary\\_FINAL.pdf](http://ccsi.columbia.edu/files/2014/04/UNCITRAL_Rules_on_Transparency_commentary_FINAL.pdf).

<sup>3</sup> Report of the United Nations Commission on International Trade Law, forty-sixth session (July 8-26, 2013), Gen. Assem., supp. no. 17, paras. 117-127.

<sup>4</sup> UNCITRAL decided to title the Convention the “Mauritius Convention on Transparency” after it accepted the Government of Mauritius’s offer to host an event celebrating the adoption of the Convention, and to officially open the Convention for signature at that ceremony in Mauritius. The connection between Mauritius, the Transparency Rules and the Convention was close throughout the multi-year negotiations of the two instruments as Salim Moollan, a barrister at Essex Court Chambers in London, was Mauritius’s delegate to the working group responsible for drafting the texts and served as Chairman of those working group sessions. As Chairman, he had an important role in the shaping and adoption of both the Transparency Rules and Transparency Convention.

<sup>5</sup> Official reports of each negotiation session can be found on UNCITRAL’s website, <http://www.uncitral.org/uncitral/en/index.html>. UNCITRAL tasked Working Group II (Arbitration and Conciliation) with the job of drafting the Transparency Rules and Transparency Convention.

<sup>6</sup> For a summary of some of the discussions on this issue of reciprocity, see Report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth session (New York, 3-7 February 2014), A/CN.9/799, paras. 29-38, 97-128.

<sup>7</sup> Draft Report of the United Nations Commission on International Trade Law, forty-seventh session (July 7-18, 2014), A/CN.9/XLVII/CRP.1/Add.1, paras. 17-19.

<sup>8</sup> Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session (New York, 4-8 February 2013), A/CN.9/765, para. 62

<sup>9</sup> See, e.g., Article 1(6) of the Transparency Rules.

<sup>10</sup> Report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth session (New York, 3-7 February 2014), A/CN.9/799, paras. 40-46, 88-96.

<sup>11</sup> Report of Working Group II (Arbitration and Conciliation) on the work of its sixtieth session

<sup>12</sup> Draft Report of the United Nations Commission on International Trade Law, forty-seventh session (July 7-18, 2014), A/CN.9/XLVII/CRP.1/Add.1, para. 35.

<sup>13</sup> “Consensus” for the purpose of UNCITRAL proceedings is understood to follow United Nations practice and is described as follows:

*11. There is no established United Nations definition of consensus. However, in United Nations practice, consensus is generally understood to mean adoption of a decision without formal objection and vote; this being possible only when no delegation formally objects to a consensus being recorded, though some delegations may have reservations to the substantive matter at issue or to a part of it. The fact that consensus is recorded does not necessarily mean that there is unanimity of opinion, namely, complete agreement as to substance and a consequent absence of reservations. ‘Consensus’ should therefore be distinguished from ‘unanimity’, i.e., the decision-taking by a vote wherein no negative votes are cast, albeit with abstentions. There are numerous occasions in United Nations practice where States make declarations or reservations to a matter at issue while not objecting to a decision being recorded as taken by consensus, which includes a decision taken ‘without a vote’.*

Report of the United Nations Commission on International Trade Law, forty-second session (June 29-July 17, 2009), A/64/17, Gen. Assem. sixty-fourth session, supp. no. 17, para. 385 (internal citations omitted); see also *id.*, paras. 386-397. See also, Report of the United Nations Commission on International Trade Law, forty-third session (June 21-July 9, 2010), A/65/17, Gen. Assem. sixty-fifth session, supp. no. 17, paras. 299-306, and Annex III.

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