

# UNCTAD Expert Meeting on Taking Stock of IIA Reform

Geneva, 16 March 2016

## UNCITRAL

It is my pleasure to address the reforms undertaken by the United Nations Commission on International Trade Law (UNCITRAL) in the field of investor-State dispute settlement (ISDS).

I will briefly introduce three main aspects:

- The recent reform undertaken by UNCITRAL in the field of transparency in treaty-based ISDS;
- The extent to which the mechanism put in place to reform existing IIAs with respect to transparency could be possibly used as a model for further reforms; and
- The possible forthcoming topics for reforming specific aspects of ISDS as considered by UNCITRAL.

*First*, the recent reform undertaken by UNCITRAL in the field of transparency in relation to arbitration between a State and an investor arising under an IIA: two instruments have been adopted by the United Nations to improve the framework of investor-State dispute settlement:

- The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which are procedural rules defining the framework for transparent arbitration; the Rules have been in force since April 2014, and the vast majority of IIAs concluded since then have made these Rules applicable, either by reference or by making them treaty provisions (see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency\\_Rules\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html)); and
- The Convention on Transparency in Treaty-based Investor-State Arbitration, adopted by the United Nations in December 2014, also known as the Mauritius Convention, which purpose is to provide a global mechanism to make the Rules on Transparency applicable to existing IIAs (i.e., IIAs concluded before April 2014 ); the Convention has been signed to date by 16 States, comprising 2 countries in North America, 9 European countries, 4 African countries and 1 in the Middle East, and ratified by 1 State so far. Three ratifications are required for its coming into force. Enclosed is an annex on the content of the Rules on Transparency and the Mauritius Convention, and how to become party to the Convention.

Publications on arbitration cases under the Rules on Transparency can be found on the UNCITRAL Transparency Registry, hosted by UNCITRAL with the financial contribution of the European Union and the Opec Fund for International Development (OFID) (see <http://www.uncitral.org/transparency-registry/registry/index.jsp>).

Adoption of these instruments followed a unanimous call by States that more transparency was needed as a matter of priority for the settlement of treaty-based investor-State disputes. There is now in place a comprehensive framework for transparency, which will bring a number of

benefits once in use, such as improving the legitimacy of the process, predictability, and consistency of case law.

*Second*, as the Mauritius Convention is a mechanism to make transparency applicable to disputes arising under the existing IIAs - the 3000 IIAs currently in force - then the question is whether a similar mechanism could be used for further reforms in the field. For instance, could a global investment court or appeal mechanism be made applicable through an opt-in treaty like the Mauritius Convention? With the current debates on ISDS, this is a question worth looking into, and a research paper on the matter is scheduled for presentation during the annual session of UNCITRAL in July this year.

*As a last point*, two topics have been mentioned at UNCITRAL sessions in the recent years for consideration as possible future work in the field of ISDS. One topic is the question of multiple, concurrent proceedings. UNCITRAL decided to explore the matter in the context of commercial and investment arbitration. In investment arbitration, we are concerned by two main scenarios: the first situation is where different entities within the same corporate structure have a right of action against a State or state-owned entity in relation to the same investment, with regard to the same State measure and for the benefit of substantially the same interests, as long as all entities qualify as investors under an applicable IIA, or have a right of action under a contract or under domestic investment law. The second situation is where a measure by a State has an impact on a number of investors which are not related. When a State takes a measure which potentially affects a number of investors, it may be faced with multiple claims from those unrelated investors in relation to that measure.

The second topic for possible future work relate to the question of ethics. UNCITRAL received a proposal during its session in 2015 that the preparation of a code of ethics for arbitrators should be explored.

To end, let me thank UNCTAD and its Secretariat for the close working relationship with UNCITRAL and its very useful contributions in relation to the various topics mentioned in this short intervention.

## **Annex**

### Short note on the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

#### *Introduction*

Adopted by the General Assembly on 10 December 2014, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the “Convention”) provides States and regional economic integration organizations that wish to make the [UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration \(the “Rules on Transparency”\)](#) applicable to their investment treaties concluded before 1 April 2014 an efficient mechanism for doing so. In adopting the Convention, the General Assembly recommended that the Convention be known as the “Mauritius Convention on Transparency”. Together with the Rules on Transparency, the Convention takes into the account both the public interest in such arbitration and the interest of the parties to resolve disputes in a fair and efficient manner. They further contribute to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes.

This note provides basic information about the Convention and the Rules on Transparency. Further, it describes how States or regional economic integration organizations may become Parties to the Convention.

#### *The Rules on Transparency*

Adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 2013, the Rules on Transparency constitute an innovative set of procedural rules that ensures transparency and public accessibility to treaty-based investor-State arbitration, the proceedings of which have traditionally been conducted behind closed doors. Comprised of eight articles, the Rules on Transparency aim at: (i) creating public knowledge of the initiation of an investor-state arbitration; (ii) making documents including the decisions and awards of arbitral tribunals public; (iii) allowing third parties to make submissions to arbitral tribunals where such submissions would be helpful and relevant and would not unduly delay, interfere with, or increase the costs of, the proceedings; allowing submissions by non-disputing Party (a State or a regional economic

integration organization) to the investment treaty; (iv) allowing open hearings; and (v) preserving the existing power of arbitral tribunals to allow closed proceedings and restrict access to documents, or portions thereof, when necessary to protect confidential and sensitive information and the integrity of the arbitral process.

The Rules on Transparency apply to disputes under the UNCITRAL Arbitration Rules arising under investment treaties concluded on or after 1 April 2014, unless otherwise agreed by the Parties to the treaty (article 1(1) of the Rules on Transparency). The Rules on Transparency may also apply to disputes under investment treaties concluded before that date (“existing investment treaties”) where there is an express consent for their application between the disputing parties or between the Parties to the investment treaty (article 1(2) of the Rules on Transparency). In addition, the Rules on Transparency may also apply to arbitrations under sets of rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings when the disputing parties or the Parties to the investment treaty agree to such application.

#### *The Transparency Registry*

The Rules on Transparency foresee the Secretary-General of the United Nations to perform the repository function of published information (article 8 of the Rules on Transparency). Accordingly, information will be published via the UNCITRAL website (the [Transparency Registry](#)).

#### *The Mauritius Convention on Transparency*

Upon adoption of the Rules on Transparency, work began to prepare a convention which would provide States and economic integration organizations that wished to make the Rules on Transparency applicable to their existing investment treaties an efficient mechanism to do so. As a result, the Convention supplements existing investment treaties with respect to transparency-related obligations. By becoming a Party to the Convention, a State or a regional economic integration organization expresses its consent to apply the Rules on Transparency to investor-State arbitration initiated pursuant to an existing investment treaty.

Article 2, a key provision of the Convention, determines when and how the Rules on Transparency shall apply to investor-State arbitration within the scope of the Convention. In contrast to the Rules on Transparency, whether the arbitration is initiated under the UNCITRAL

Arbitration Rules or not does not have any impact on the application of the Convention. The general rule of application is stipulated in paragraph 1 (bilateral or multilateral application) and paragraph 2 refers to the application of the Rules on Transparency when only the respondent State (and not the State of the investor-claimant) is a party to the Convention (unilateral offer of application). The Convention applies prospectively, that is to arbitral proceedings commenced after the entry into force of the Convention for the Party concerned (article 5 of the Convention).

A Party to the Convention has the flexibility to formulate reservations, thereby excluding from the application of the Convention a specific investment treaty or a specific set of arbitration rules other than the UNCITRAL Arbitration Rules (negative-list approach). A Party may also declare that it would not provide unilateral offer of application under article 2, paragraph 2 of the Convention. Lastly, in the event the Rules on Transparency would be revised, it may also declare, within a limited period of time after such revision, that it would not apply that revised version.

#### *UNCITRAL standards on transparency*

The UNCITRAL standards on transparency - the Rules on Transparency, the Convention and the Transparency Registry - are the most recent results of a multilateral endeavor to reform investment arbitration. Overall, it is expected that the UNCITRAL standards on transparency will significantly contribute to enhancing transparency in investor-State dispute resolution regime.

The UNCITRAL standards on transparency should be understood in the context of foreign direct investment as a tool for the sustainable growth. By making public information on disputes arising from such investments, they contribute to building confidence in the existing international investment framework. Further, they constitute an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such. The UNCITRAL standards on transparency aim at enhancing the public understanding of the investment arbitration process and its overall credibility.

### ***Becoming a Party to the Convention***

The Secretary-General of the United Nations is designated as the depositary of the Convention (article 6 of the Convention) and the depositary functions of the Secretary-General are discharged by the Treaty Section of the United Nations Office of Legal Affairs.

Contact information:

Treaty Section, Office of Legal Affairs, United Nations

2 UN Plaza - 323E 44th St., Room DC2-051

New York, NY 10017

United States of America

Tel.: + 1-212-963-5047. Fax: + 1-212-963-3693

E-mail: villalpando@un.org, [mutirende@un.org](mailto:mutirende@un.org)

### ***Signature***

The Convention opened for signature in Port Louis, Mauritius, on 17 March 2015, and is open for signature indefinitely at the United Nations Headquarters in New York (article 7(1) of the Convention). A State or regional economic integration organization may sign the Convention at any time and arrangements should be made with the Treaty Section of the United Nations Office of Legal Affairs.

By signing the Convention, a State or a regional economic integration organization signals its intention to become a Party to the Convention in the future. Once it has signed the Convention, a State or regional economic integration organization must not act in a manner that would defeat the object and purpose of the Convention prior to its entry into force (see article 18, Vienna Convention on the Law of Treaties, 1969).

Under established international practice, the Head of State, Head of Government or Minister for Foreign Affairs may sign the Convention on behalf of the State without an instrument of full powers. Any other person (other than the Head of State, Head of Government or Minister for Foreign Affairs) intending to sign the Convention must possess a valid instrument of full powers,

signed by one of the above-mentioned authorities, which expressly authorizes signing the Convention by the named representative. The Treaty Section of the United Nations Office of Legal Affairs verifies all full powers prior to signature, and thus States or regional economic integration organizations that wish to sign the Convention should submit a copy of the instrument of full powers in advance of the signature for verification. The original instrument should be presented at the time of signature.

*Ratification, acceptance, approval, accession*

The Convention is subject to ratification, acceptance or approval by the signatories to the Convention (article 7(2) of the Convention) and is also open for accession by States or regional economic integration organizations which are not signatories to the Convention (article 7(3) of the Convention).

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 of the investment treaty and name of the contracting parties to that investment treaty (article 8(1) of the Convention).

When a State wishes to ratify, accept, approve or accede to the Convention, it should execute an instrument of ratification, acceptance, approval or accession signed by the Head of State, Head of Government or Minister for Foreign Affairs which should contain certain information. If not signed by one of the above-mentioned authorities, it should be accompanied by full powers. Instruments of ratification, acceptance, approval or accession shall be deposited directly with Treaty Section of the United Nations Office of Legal Affairs. When feasible, instruments that are in languages other than English and French should be translated into English or French to ensure prompt processing of the instrument.

*Entry into force*

The Convention will enter into force six months after the deposit of the third instrument of ratification, acceptance, approval or accession (article 9 (1) of the Convention). For up-to-date information about the Parties to the Convention as well as signatories, see the [status page](#).

For the first three States or regional economic integration organizations that deposit their instruments, the Convention will enter into force six months after the third instrument of

ratification, acceptance, approval or accession is deposited. For all other States or regional economic integration organizations, the Convention will enter into force six months after the date on which that State or regional economic integration organization deposited its instrument of ratification, acceptance, approval or accession (article 9 (2) of the Convention).

### *Reservations*

As mentioned above, a State or a regional economic organization that becomes a Party to the Convention has the flexibility to formulate certain reservations pursuant to articles 3 and 4. In accordance with article 3(3) of the Convention, a Party may make multiple reservations in a single instrument.

Reservations other than those specified in article 3 are explicitly not permitted (article 3(4) of the Convention). Therefore, a Party to the Convention may exclude from the application of the Convention a specific investment treaty or a specific set of arbitration rules other than the UNCITRAL Arbitration Rules (article 3 (1)(a) and (b) of the Convention). It must explicitly list such investment treaties and/or set of arbitration rules to that effect in the reservation. A Party may also declare that it would not provide unilateral offer of application in investment arbitration in which it is a respondent (article 3 (1)(c) of the Convention). Finally, in the event the Rules on Transparency would be revised, a Party may declare, within six months after the adoption of such revision, that it would not apply that revised version (article 3 (2) of the Convention).

By defining specific timings for formulation and withdrawal of reservations, the Convention provides the necessary level of flexibility, while ensuring that reservations cannot be used to defeat the purpose of the Convention. Reservations may be made at any time, except for a reservation under article 3(2) of the Convention, which must be formulated within six months of the adoption of a revised version of the Rules on Transparency.

Reservations made at the time of signature are subject to confirmation upon ratification, acceptance or approval and take effect simultaneously with the entry into force of the Convention in respect of the Party concerned (article 4(2) of the Convention). Reservations made at the time of ratification, acceptance or approval of the Convention or accession thereto take effect simultaneously with the entry into force of the Convention in respect of the Party concerned (article 4(3) of the Convention, which would normally be six months after the date of



deposit of its instrument). In contrast, a reservation to not apply the revised version of the Rules on Transparency (under article 3(2) of the Convention) takes effect immediately upon deposit.

As noted, reservations do not need to be made at the time of signature, ratification, acceptance, approval or accession and can be made separately. In case a reservation is deposited after the entry into force of the Convention for the Party concerned, such reservations take effect twelve months after the date of its deposit (article 4(4) of the Convention).

A Party may withdraw its reservation(s) at any time. If a party has made multiple reservations in a single instrument, each declaration constitutes a separate reservation capable of separate withdrawal. Unlike reservations, withdrawals take effect immediately upon deposit (article 4(6) of the Convention).

The Convention and any reservation or withdrawal of a reservation, apply prospectively, that is to arbitral proceedings commenced after the Convention, reservation or withdrawal of a reservation enters into force or takes effect in respect of each Party concerned (article 5 of the Convention).

Reservations and their confirmations as well as withdrawal of reservations shall also be deposited with the Treaty Section of the United Nations Office of Legal Affairs (article 4(5) and (6) of the Convention).

*For further information relating to the legal requirements for signature, ratification, acceptance, approval or accession, entry into force, reservations and their withdrawal, please refer to the Treaty Handbook, prepared by the Treaty Section of the United Nations Office of Legal Affairs, available online in the United Nations Treaty Collection (<https://treaties.un.org>):*

[https://treaties.un.org/Pages/Publications.aspx?pathpub=Publication/TH/Page1\\_en.xml](https://treaties.un.org/Pages/Publications.aspx?pathpub=Publication/TH/Page1_en.xml)

Information about the Treaty Event 2015 is available at

[https://treaties.un.org/Pages/TreatyEvents.aspx?pathtreaty=Treaty/Focus/Page1\\_en.xml](https://treaties.un.org/Pages/TreatyEvents.aspx?pathtreaty=Treaty/Focus/Page1_en.xml)