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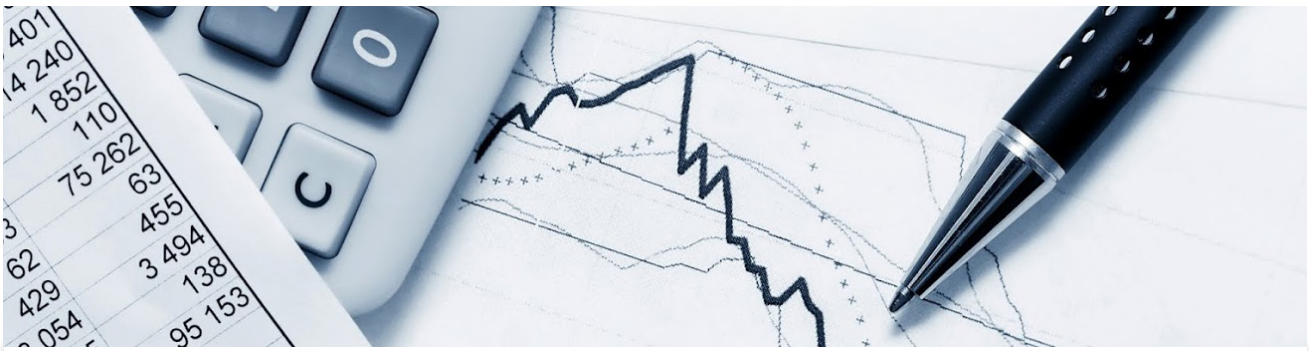

The Mauritius Convention on Transparency — A Model for Further Reforms of Investor-State Dispute Settlement

UNCITRAL Secretariat

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ABSTRACT

This article addresses the question of whether the Mauritius Convention on Transparency should be taken as a model for further reforms to modernise investor-state dispute settlement. It argues that there is a need to take into account the relationship between an instrument/mechanism like the Convention and the procedural and substantive issues at stake as well as the relationship between such an instrument and the investment treaties to which it is meant to apply.

CONTENTS

INTRODUCTION

The United Nations Commission on International Trade Law (UNCITRAL) is a commission established by the United Nations General Assembly with a mandate to harmonise and modernise international trade law. As such, UNCITRAL is known worldwide for establishing modern commercial legal standards in a neutral and balanced manner and for assisting States and other relevant stakeholders with the understanding, enactment, implementation, and interpretation of those standards.

On 10 December 2014, the General Assembly of the United Nations adopted the Convention on Transparency in Treaty-based Investor-State Arbitration, also known as the Mauritius Convention on Transparency (the "Transparency Convention" or the "Convention"). The purpose of the Convention is to provide a mechanism for the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Transparency Rules" or the "Rules") to arbitrations arising under investment treaties concluded before 1 April 2014.

The Transparency Rules are a set of procedural rules that provides for transparent arbitral proceedings and addresses in that context procedural issues, such as the information to be published at an early stage of arbitral proceedings, the documents to be published once the arbitral tribunal is constituted, and — during the proceedings — the public access to hearings and the submissions by third parties and non-disputing Parties to the investment treaty under which the dispute arises. The Rules also establish exceptions to public access to information. The Rules were adopted by consensus by UNCITRAL in July 2013 and entered into effect on 1 April 2014. At that time, UNCITRAL also adopted an amendment to the UNCITRAL Arbitration Rules to clarify that, for investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, the Arbitration Rules include the Transparency Rules (article 1(4) of the UNCITRAL Arbitration Rules, 2013). UNCITRAL developed the Transparency Rules on the understanding that a very high standard of transparency is required to apply when there is clear consent of the treaty parties, failing which, disputing parties could also agree to their application.

According to article 1(1) of the Rules, transparency applies to investor-state arbitration initiated under the UNCITRAL Arbitration Rules pursuant to an investment treaty concluded on or after 1 April 2014 unless the Parties to the treaty have agreed otherwise. Annex I to this note contains a list of treaties that have been concluded since 1 April 2014 and under which the Transparency Rules will apply. In such treaties, the Transparency Rules are made applicable either by a mere reference to the UNCITRAL Arbitration Rules or by a specific reference to the Transparency Rules. Also noteworthy is the trend to include in the investment treaty itself provisions modelled on the text of the Transparency Rules. Those treaty provisions on transparency modelled on the Transparency Rules apply to investor-state arbitrations, irrespective of the applicable set of arbitration rules.

According to article 1(2) of the Transparency Rules, in investor-state arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, the Rules apply only when (a) the parties to an arbitration (the "disputing parties") agree to their application; or (b) the Parties to the investment treaty have agreed after 1 April 2014 to their application. The Rules are also available for use in investor-state arbitrations initiated under arbitration rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings (article 1(9) of the Transparency Rules).

In relation to the application of the Transparency Rules under article 1(2)(a), i.e., when the disputing parties agree to their application, it is hoped that, as parties will become more familiar with the practice of transparent arbitration and the use of the UNCITRAL transparency standards, they may consider using those standards in relation to disputes arising under existing treaties, even without a treaty obligation to do so.[1]

The purpose of the Transparency Convention is to provide the necessary framework for parties to a treaty (i.e., a state or a regional economic integration organisation) to make the Transparency Rules applicable as contemplated in article 1(2)(b) and 1(9) of the Rules. Annex II to this note contains the list of countries that have signed and/or ratified the Transparency Convention to date.

The Transparency Convention does not incorporate the content of the Transparency Rules, but reflects the agreement of the Contracting Parties to apply the Rules to arbitrations under their investment treaties concluded before 1 April 2014. The Convention contains provisions addressing possible future revision or amendment of the Transparency Rules.

A question often raised is whether the Transparency Convention, which is considered an efficient mechanism for the application of a modern transparency regime to investor-state dispute settlement under existing investment treaties, could constitute a model to further reform and modernise investment treaties.

Various issues must be taken into consideration, such as the relationship between an instrument/mechanism like the Convention and the issues at stake and the relationship between such an instrument and the investment treaties to which it is meant to apply.

1 As of 30 November 2015, there are two known cases where the Rules on Transparency have been applied by agreement between the disputing parties without a treaty obligation to do so: *Iberdrola, S.A. and Iberdrola Energia. S.A.U. v. Bolivia (PCA Case No. 2015-05) and BSG Resources Limited v. Republic of Guinea (ICSID Case No. ARB/14/22).*

RELATIONSHIP BETWEEN A MECHANISM LIKE THE TRANSPARENCY CONVENTION AND THE ISSUES AT STAKE

The question of the substantive issues to be addressed is the key for determining whether a mechanism similar to that of he Transparency Convention could be used for further reforms.

The question of transparency in treaty-based investor-state arbitration is a procedural nature and very clearly defined. In addition, very few treaties have provisions on the topic, as the trend in favour of transparency in arbitral proceedings is relatively recent. Those characteristics have made it easier to embark on the preparation of the Convention. If issues to be addressed are wider, substantive in nature, and already addressed at length and with variations in existing treaties, the task of preparing a convention along the pattern followed by the Transparency Convention may be more delicate. In particular, the risk of creating discrepancies by adding a new possibly "more modern" regime to those already in existence should not be underestimated.

Therefore, identifying suitable topics to be addressed through such a mechanism is obviously the first aspect to consider. Various questions would need to be considered, such as whether:

- the matter is already addressed under existing investment treaties, or is the result of a new trend (in which case consensus and harmonisation may be easier to achieve);
- it is possible to reach consensus on the substance;
- the substance requires a high level of harmonisation, or on the contrary the coexistence of various options should remain;
- the matter is a self-contained issue, or it could have an impact on other aspects of investment protection under treaties (a matter that is closely connected to other questions and cannot be addressed as a self-contained issue will be more difficult to tackle through a process such as the one that led to the adoption of the Transparency Convention).

It seems that those questions are important, irrespective of whether the matter to be addressed is a matter of procedure or substance.

Two matters in the field of treaty-based investor-state arbitration were added to the agenda of UNCITRAL at its annual session in July 2015.

First, since its session in 2013, the Commission has been considering whether to undertake work in the field of concurrent proceedings in investment arbitration. The situation where two or more investment-related claims against a State are, or can be, filed before different forums, and where such claims involve substantially related parties, irrespective of their location, in relation to substantially identical measures taken by that State can be addressed through various means. Those means include a toolkit for States and arbitral tribunals (focusing on waiver, stay of proceedings, exchange of information, potential limits on recovery of reflective loss and consolidation), comprising model clauses to be included in future investment treaties, best practices, and guidelines.[2] It may be more complex to consider the preparation of a convention as the potential solutions are manifold, and States may wish to retain their ability to choose the most appropriate means to address that matter. The Commission will consider that matter further at its next session, based on further analysis of possible work.

The second item on the agenda of UNCITRAL is a proposal for a code of ethics for arbitrators in investment arbitration, following a proposal by the government of Algeria.[3] UNCITRAL considered that item for the first time at its last session. That matter is a self-contained area of work, on which consensus could be found; it is addressed under recently concluded treaties but was not addressed under existing treaties. Therefore, it would more easily lend itself to harmonisation. However, for such a topic, it may be questioned whether a convention would be the most appropriate instrument for application to arbitrations arising under existing treaties. A code of ethics would probably become the norm through usage by arbitral institutions, disputing parties, and arbitrators.

There are currently calls for reforms not only in investor-state dispute settlement (ISDS), but also more widely regarding the investment regime created by investment treaties. There are, for instance, proposals for establishing an appeal mechanism or an investment court. There are indeed many different ways to set up such mechanisms. Depending on the manner in which an appeal mechanism or an investment court would be set up, a convention could indeed be an appropriate solution. That is the reason, when the time comes, it will be important to carefully consider at

2 *See* UNCITRAL, Forty-eighth Session, Concurrent proceedings in investment arbitration, Note by the Secretariat, A/CN.9/848.

3 *See* UNCITRAL, Forty-eighth Session, Proposal by the Government of Algeria.

a multilateral level the issues that are sought to be addressed by the calls for reform and the solutions that could be the most efficient and realistic.

In the sequence of work on transparency, States made efforts to find consensus on both the substance and the applicability, starting with the substance. A number of issues raised during the debate on applicability of the Transparency Rules contained in the *travaux préparatoires* of the instruments on transparency will certainly be useful in the consideration of future reforms and their impact on existing treaties.

RELATION BETWEEN AN INSTRUMENT LIKE THE CONVENTION AND THE INVESTMENT TREATIES

EFFECT OF THE CONVENTION IN RELATION TO TREATIES

A question considered by UNCITRAL during the preparation of the Transparency Convention was whether the Convention constitutes a new obligation between Parties to that Convention in relation to existing investment treaties, or whether it constitutes an amendment or modification to such existing investment treaties. That determination itself might be different depending on whether an existing investment treaty contains transparency obligations (which would be modified by the Transparency Rules).

So, UNCITRAL considered in broad terms the effect of the Transparency Convention in relation to investment treaties and specifically whether the Transparency Convention, upon coming into force, would constitute a successive treaty, creating new obligations pursuant to article 30 of the Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention"), or whether it would constitute an amendment or modification to such investment treaties pursuant to provisions of existing investment treaties and Chapter IV of the Vienna Convention. The general view was that transparency in ISDS constituted a new obligation between the Contracting Parties, and logically one could not refer to an amendment or modification to investment treaties in the context of a subsequent treaty creating new obligations between Contracting Parties; rather, the Transparency Convention would amount to a successive agreement between contracting parties pursuant to article 30 of the Vienna Convention.

The Convention supplements existing investment treaties with respect to transparency-related obligations. By becoming a Party to the Convention, a State or regional economic integration organisation expresses its consent to apply the Rules on Transparency to investor-state arbitration initiated pursuant to an existing investment treaty. It also provides flexibility to Parties 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.

In the event any instrument similar to the Transparency Convention would be designed, and address new topics, it could then indeed be considered as merely constituting a new obligation between the parties in relation to investment treaties covered by the scope of that instrument. Otherwise, the instrument would serve to modify or amend existing investment treaties, and then the procedures for amending or modifying treaties contained in Chapter IV of the Vienna Convention would need to be taken into consideration. This includes Article 39, which provides as a general rule that "[a] treaty may be amended by agreement between the Parties," and Article 41 in relation to the procedures for two or more parties to a multilateral treaty to modify the treaty as between themselves alone. Any modification or amendment provisions within existing investment treaties (to which Chapter IV of the Vienna Convention applies as a secondary source of law) are also to be taken into account.

The outcome of the determination of whether a convention is a successive one or an amending one may affect the drafting of the convention. In case of the latter, and concerning multilateral investment treaties, notification provisions (to other Parties to investment treaties to which the transparency convention would apply) might need to be included in the instrument; but, in the case of the former, no additional provisions would be required. Further, there may be more lengthy procedures to be followed at the domestic level regarding the adoption of an amending instrument.

SUBSTANTIVE ISSUES

- The Transparency Convention provides for reservations that States can formulate, for instance, to take into consideration investment treaties that would contain extensive transparency provisions and to avoid complications related to which transparency regime would apply.

- So, here also, depending on the focus of the reform, a convention may or may not constitute a workable solution. The Secretariat of UNCITRAL has undertaken to further study that matter in close cooperation with relevant institutions.

ANNEX I

Investment Treaties Concluded after 1/4/2014 under which the Uncitral Rules on Transparency Are Applicable

Japan - Ukraine BIT / Agreement between Japan and Ukraine for the Promotion and Protection of Investment	05/02/2015
Japan - Uruguay BIT / Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment	26/01/2015
Canada - Côte d'Ivoire BIT / Canada-Côte d'Ivoire Foreign Investment Promotion and Protection Agreement	30/11/2014
Canada - Mali BIT / Agreement between Canada and Mali for the Promotion and Protection of Investments	28/11/2014
Canada - Senegal BIT / Agreement between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments	27/11/2014
Japan - Kazakhstan BIT / Agreement between Japan and the Republic of Kazakhstan for the Promotion and Protection of Investment	23/10/2014
Canada - Republic of Korea FTA / Free Trade Agreement between Canada and the Republic of Korea	22/09/2014
Canada - Serbia BIT / Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments	01/09/2014
Colombia - Turkey BIT / Agreement between the Government of the Republic of Colombia and the Government of the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments	28/07/2014
Colombia-France BIT / Acuerdo entre el Gobierno de la República de Colombia y el Gobierno de la República Francesa sobre el fomento y protección recíprocos de inversiones	10/07/2014
Egypt - Mauritius BIT / Agreement between the Government of the Republic of Mauritius and the Government of the Arab Republic of Egypt on the Reciprocal Promotion and Protection of Investments	25/06/2014
Canada-Nigeria BIT / Agreement between Canada and the Federal Republic of Nigeria for the Promotion and Protection of Investments	06/05/2014
Korea - Australia Free Trade Agreement	08/04/2014

ANNEX II

List of Countries that Have Signed/Ratified the Transparency Convention

Belgium	15/09/2015
Canada	17/03/2015
Congo	30/09/2015
Finland	17/03/2015
France	17/03/2015
Gabon	29/09/2015
Germany	17/03/2015
Italy	19/05/2015
Luxembourg	15/09/2015
Madagascar	01/10/2015
Mauritius	17/03/2015 (Ratified on 5/6/2015)
Sweden	17/03/2015
Switzerland	27/03/2015
Syrian Arab Republic	24/03/2015
United Kingdom of Great Britain and Northern Ireland	17/03/2015
United States of America	17/03/2015

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