

The Mauritius Convention

Boosting transparency in Treaty-based
Investor-State Arbitration



A DISCUSSION PAPER

In the second half of the 20th century, Investor-to-State Dispute Settlement (ISDS) took hold in international investment law. Through this mechanism, foreign investors can sue the government of a State if they feel the rights associated with their investments in this country are being violated. Over the years, Both ENDS and other civil society organisations have strongly criticised ISDS, not least because of the mechanism's complete lack of transparency. The Mauritius Convention adopted in 2014 is a little known instrument to strengthen transparency and inclusiveness. It has the potential to achieve a standard of transparency in investor-State arbitration. The purpose of this paper is to spark a discussion on the usefulness and importance of the Mauritius Convention for civil society organisations.

DISPUTE SETTLEMENT IN INTERNATIONAL INVESTMENTS

At present, there are more than 3000 international investment agreements (IIAs) in force worldwide. Most of these are treaties between two or more countries for the promotion and protection of investments made by investors from the involved countries in each other's territory. It is often suggested that IIAs are instrumental in attracting foreign direct investment, but this suggestion is increasingly questioned by civil society¹ and academics.² Most IIAs adopt international arbitration as a mechanism to settle disputes between foreign investors and States. International investment agreements often offer transnational companies an exclusive forum to initiate procedures against States they invest in, additional to domestic remedies. That forum is ISDS. Domestic investors cannot use this mechanism, and States can only be sued, they cannot bring a claim themselves. In brief, the balance of rights and duties between foreign investors and States is heavily tipped

in favour of the investors. As of December 2018, ISDS has been used 942 times. The total sum claimed by investors in those cases amounts to hundreds of billions of dollars, payable out of taxpayer money. However, the real numbers might well be much higher: most IIAs allow for fully confidential arbitration, which means that the arbitration procedure, the companies and countries involved, as well as the actual awards are kept secret. This is highly problematic for several reasons: it denies public oversight, coherence in verdicts is impossible, as is predictability, and treaty language cannot be improved based on reliable information about disputes.³

UNCITRAL RULES ON TRANSPARENCY

Each individual treaty containing ISDS can provide instructions on which tribunal and which procedural rules should be used. The International Centre for Settlement of Investment Disputes (ICSID) at the World Bank is - as far as we know - the most used

institution for investor-State arbitral procedures. The ICSID publishes information on the registration of requests for arbitration and maintains registers of all proceedings. However, for awards to be published, all parties need to give their consent.⁴ When no such consent is given, the Centre will only publish excerpts of the legal reasoning.⁵ There are other arbitral institutions that disclose no information at all - not even about the existence of disputes.⁶ That is why civil society organisations (CSOs) have been pushing for more transparency in ISDS for more than a decade.⁷

It is in this context that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration⁸ came into effect on 1 April 2014 (see box 1). The Rules on Transparency provide for mandatory disclosure of information, open hearings⁹ and the possibility of *amicus curiae* or third party participation (see box 2). The UNCITRAL Rules on Transparency enhance transparency and inclusiveness. All information that is to be made available to the public

under these Rules can be found in a central repository.¹⁰ As a result, the parties involved in an ISDS-case can be held accountable: media, CSOs and the public are enabled to follow the procedures, attend hearings and access the submitted documents. Unfortunately, these rules apply only to arbitrations which: (i) follow from treaties to which the UNCITRAL Arbitration rules apply and (ii) are initiated pursuant to the UNCITRAL Arbitration Rules. For treaties concluded on or after 1 April 2014, the UNCITRAL Rules on Transparency apply *unless* the parties agree otherwise; for treaties concluded before 1 April 2014, these Rules *do not* apply unless the parties agree that they do. The Mauritius Convention is an instrument through which States can agree to apply the Rules on Transparency to treaties concluded before 1 April 2014.

**BOX
1**

WHAT IS UNCITRAL?

The United Nations Commission on International Trade Law was established in 1966 and is the core legal body of the United Nations in the field of international trade law. Its mandate is to further the progressive harmonisation and unification of the law of international trade.

The first version of the UNCITRAL Arbitration Rules was published in 1976. They are a set of procedural rules that parties can agree to for the conduct of arbitral proceedings. The UNCITRAL Arbitration Rules govern all UNCITRAL disputes initiated under international investment agreements. The Rules were updated in 2010 and 2013.¹¹ The version of the Arbitration Rules that was adopted in 2013 incorporates the UNCITRAL Rules on Transparency which came into effect on 1 April 2014.¹²

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration apply to disputes arising out of IIAs concluded on or after 1 April 2014 if those disputes are governed under UNCITRAL Arbitration Rules.

UN Convention and UNCITRAL Rules

The UN Convention on Transparency in Treaty-based Investor-State Arbitration, or 'Mauritius Convention', is automatically applicable to agreements concluded before 1 April 2014 by its Contracting Parties. Should a dispute occur on the basis of one of those agreements, the UNCITRAL Rules on Transparency apply to that dispute, regardless of the arbitration rules (for instance UNCITRAL, ICSID, ICC) that govern it.

**BOX
2**

AMICUS CURIAE

Amicus curiae [plural: *amici curiae*] means "friend of the court". The term is used to refer to non-disputing parties that, due to their special interest or knowledge, provide submissions to the court on the matter at issue. Under the ICSID and the UNCITRAL Arbitration Rules, those submissions can address questions of fact or law.¹³ NGOs and communities affected by foreign investors, for instance, are thus enabled to submit arguments, information and perspectives different from that presented by the parties to the dispute.

Although *amici curiae* can play a helpful third party role by providing new or different insights to tribunals, their influence remains rather limited: *amici* are not considered witnesses, a tribunal can choose not to accept (all or part of) their submissions, and decide how to use the information provided. In a recent ICSID case for example, *amici* were found unable to prove that: (i) they had particular expertise on legal matters they wished to address or they would offer expertise that was not already available to the respondent State, and (ii) the testimonies relied on in their submissions could not be considered, since there was no possibility for cross-examination.¹⁴

THE MAURITIUS CONVENTION

The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, better known as 'The Mauritius Convention', was adopted in December 2014 to supplement the UNCITRAL Rules on Transparency. It entered into force in October 2017. The most important feature of the Mauritius Convention is that it can effectively establish transparency as a general principle of international investment law¹⁵, thus addressing one of the critical flaws in dispute settlement between foreign investors and host States.

Article 1 states that the Convention "applies to arbitration between an investor and a State [...] conducted on the basis of an investment treaty concluded before 1 April 2014". Article 2(1) states that "[t]he UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules" where both the respondent State and the home-state of the investor are Party to the Convention and neither has made a relevant reservation. Interestingly, paragraph 2 goes one step further: when only the respondent State is a Party to the Mauritius Convention, it offers the claimant (investor) the option of agreeing to the application of the UNCITRAL Rules on Transparency also when their home-state is not a Party to the Convention and regardless of the arbitration rules that apply under the relevant IIA. This offer can only be withheld if the respondent State has made a reservation following article 3(1)(c).

Both ENDS strongly supports the role that the Mauritius Convention can play in increasing transparency in investor-State dispute settlement *given the current state of affairs* in international investment law and practice. However, we argue that in the long run ISDS should

be eliminated from international investment law altogether. This is a matter of principle: we are opposed to the creation of separate courts for investors and to the primacy of investment law over human rights law and environmental law.

THE IMPORTANCE OF THE MAURITIUS CONVENTION

The Mauritius Convention has a broad scope: it covers bilateral and multilateral investment agreements that contain ISDS, as well as trade agreements that include protection of investments or investors and ISDS. Linked to its potential to make transparency a default rule in international investment law, the Convention has several important advantages.

First, the Convention can give a major boost to harmonising the practice of different investment arbitral proceedings at different fora globally. For instance, the International Chamber of Commerce and the Stockholm Chamber of Commerce will have to use the UNCITRAL Rules on Transparency whenever the disputants are bound by the Mauritius Convention.

Second, the Mauritius Convention allows States to immediately and unilaterally incorporate transparency rules without having to negotiate amendments to each of their existing pre-1 April 2014 IIAs. Before the Mauritius Convention entered into force, if countries wanted to add or change transparency clauses in their IIAs, they had to renegotiate each and every IIA signed with other States separately. That is not only very time consuming, it also opens up the possibility of further (unwanted) alterations. The 'opt-in' nature of the Convention resolves this issue and helps to circumvent countless negotiations for each individual treaty.

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When a State ratifies the Convention, the UNCITRAL Rules on Transparency apply to all subsequent investor-State arbitration that may be initiated under its pre-1 April 2014 IIAs with all the other Parties to the Convention. With the agreement of claimant investors, the Rules on Transparency even apply when their home-state is not a Party to the Convention.¹⁶

Third, many IIAs have a survival clause, which is a provision that allows for investment claims to be brought against a State even after the treaty has been terminated. Often such clauses remain in force for at least ten or fifteen years after the termination of the relevant IIA. In such instances, the Mauritius Convention can be applied to immediately provide for more transparency in case of a dispute between an investor and a State.

Finally, by advancing transparency, the Mauritius Convention contributes not only to better informed decision-making, but also to good governance, accountability, predictability and the rule of law.¹⁷ It is after all in the public interest of citizens to be informed about investment arbitrations against their governments. This transparency and information will support individuals or organisations that wish to act as *amici curiae*. Even though current arbitration rules may allow for *amici curiae* on paper, the transparency that is a condition for efficient and well-informed *amicus curiae* interventions is often lacking in the first place. This is remedied by the Mauritius Convention for IIAs that are not subject to the UNCITRAL Rules by default (i.e. pre-1 April 2014 IIAs).

Limitations of the Mauritius Convention

Even though the Mauritius Convention advances transparency in international investment law, it does have its limitations. First, the Convention only applies to treaty-based Investor-State arbitration, meaning that arbitration arising out of contracts or through domestic legislation falls outside of its scope. Second, because it is only automatically applicable to IIAs between Contracting Parties, in order to be effective it needs to be ratified by a critical mass of States including major trading nations. Currently only five States are Parties to the Convention.¹⁸ As a result, although it can potentially apply to *all* pre-1 April 2014 IIAs, the Convention currently applies to only two treaties: the Mauritius – Switzerland IIA and the Gambia – Switzerland IIA, since both IIAs were established pre-1 April 2014 and these countries have all ratified the Mauritius Convention. This means that the Mauritius Convention

does not apply to the Cameroon – Canada IIA: although both States are Contracting Parties to the Mauritius Convention, the investment agreement between them was concluded after 1 April 2014. This means that the transparency rules as incorporated in that IIA will apply to any dispute that may arise between the two countries. It is therefore imperative for civil society to always advocate for strong transparency rules in any new investment agreement, including those to be concluded between Contracting Parties of the Mauritius Convention. Thirdly, the Convention itself allows States to make certain reservations at or after ratification. Under article 3 a State can exclude certain IIAs from application¹⁹ or exclude all disputes that are governed by other specified arbitration rules.²⁰ In cases where only the respondent State is a party to the Convention, it may choose not to offer foreign investors the possibility to use the UNCITRAL Rules on Transparency.²¹ A State may also choose to declare that any revision to the UNICTRAL Rules on Transparency will not apply to said State.²²

CONCLUSION

Debates about the urgent reform of the international investment regime are ongoing. Both ENDS, for one thing, will continue to argue for the elimination of ISDS. In the meantime, States need to take measures to protect themselves against the flaws of current IIAs, key among which is their lack of transparency. Even though there remain limitations to the effectiveness of the Mauritius Convention, its potential is clear. The Mauritius Convention is capable of transforming transparency into a default rule in investor-State dispute settlements, and consequently can enhance accountability and public control over these disputes. It is time for the Convention to be pushed into the limelight. And that is exactly what this paper aspires to contribute to. Together with other civil society organisations worldwide, we urge governments to consider the importance of the Mauritius Convention and to help establish a default standard of transparency in investor-State arbitration.

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- 1 See: Seattle to Brussels Network, 2010. *EU Investment Agreements in the Lisbon Treaty Era: A Reader*. Amsterdam: the Transnational Institute on behalf of the Investment Working Group of the Seattle to Brussels Network, p. 25 or Hehanussa, S. and Ilge, B., 2018. *Why Tanzania should send the Dutch government a letter in two days*. [online] Available at: <https://www.bothends.org/en/Whats-new/Blogs/Why-Tanzania-should-send-the-Dutch-government-a-letter-in-the-next-two-days/> [Accessed 21 March 2019].
- 2 See for instance: Aisbett, E. (2007), *Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation*. [pdf] Available at: https://mpr.ub.uni-muenchen.de/2255/1/MPRA_paper_2255.pdf [Accessed 21 March 2019] or Skovgaard Poulsen, L., 2010. *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*. [pdf] Available at: http://discovery.ucl.ac.uk/1471858/1/Poulsen_bits%20pri%20yearbook.pdf [Accessed 21 March 2019].
- 3 For more information, see: <http://www.bothends.org/en/Our-work/Themes/Trade-and-investments/>.
- 4 Article 48 ICSID Convention.
- 5 Rule 48 ICSID Convention.
- 6 International Chamber of Commerce (ICC), 2016. *ICC Dispute Resolution Services*. [pdf] Available at: <https://iccwbo.org/content/uploads/sites/3/2016/11/ICC-Dispute-Resolution-Services-Brochure.pdf> [Accessed 21 March 2019], p. 2 under 'Ten good reasons to choose ICC dispute resolution' and article 3 of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)'s 2017 Arbitration Rules states that "[u]nless otherwise agreed by the parties, the SCC, the Arbitral Tribunal and any administrative secretary of the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award". Arbitration Institute of the Stockholm Chamber of Commerce, 2017. *2017 Arbitration Rules*. [pdf] Available at: https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf [Accessed 21 March 2019].
- 7 See for instance: CIEL, 2003. *From the investment tent at the Americas Trade and Sustainable Development Forum in Miami: CIEL contributes to a synthesis of major concerns about investment and the FTAA*. [online] Available at: [https://www.ciel.org/news/from-the-investment-tent-at-the-americas-trade-and-sustainable-](https://www.ciel.org/news/from-the-investment-tent-at-the-americas-trade-and-sustainable-development-forum-in-miami-ciel-contributes-to-a-synthesis-of-major-concerns-about-investment-and-the-ftaa/)
- [development-forum-in-miami-ciel-contributes-to-a-synthesis-of-major-concerns-about-investment-and-the-ftaa/](https://www.ciel.org/news/from-the-investment-tent-at-the-americas-trade-and-sustainable-development-forum-in-miami-ciel-contributes-to-a-synthesis-of-major-concerns-about-investment-and-the-ftaa/) [Accessed 21 March 2019].
- 8 UNCITRAL, 2014. *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*. [pdf] Available at: <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> [Accessed 21 March 2019].
- 9 Unless confidential information or the arbitral process needs to be protected, or there are logistical reasons to not hold open hearings.
- 10 The repository can be found at: <http://www.uncitral.org/transparency-registry/registry/index.jsp> [Accessed 21 March 2019].
- 11 UNCITRAL, 2019. <http://www.uncitral.org> [Accessed 21 March 2019].
- 12 UNCITRAL, 2014. *UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*. [pdf] Available at: <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> [Accessed 21 March 2019].
- 13 Article 37(2) ICSID Convention and article 4 UNCITRAL Arbitration Rules.
- 14 Gabriel Resources Ltd. And Gabriel Resources (Jersey) Ltd. v. Romania (ICSID Case No. ARB/15/31), procedural order No 19, para. 60.
- 15 Schill, S. (2015), Editorial: The Mauritius Convention on Transparency. [pdf] Available at: https://brill.com/view/journals/jwit/16/2/article-p201_1.xml [Accessed 1 April 2019].
- 16 Provided the respondent State has not made a reservation following article 3 of the UNCITRAL Rules on Transparency.
- 17 CIEL and IISD, 2017. *Toward Widespread Ratification of the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration*. [pdf] Available at: <http://www.ciel.org/wp-content/uploads/2017/02/Mauritius-Briefing-Paper-Final-7FEB17.pdf> [Accessed 21 March 2019].
- 18 The five States that have ratified the convention are – in order of ratification – Mauritius, Canada, Switzerland, Cameroon and Gambia. It is signed by 18 other countries: Australia, Belgium, Benin, Bolivia, Congo, Finland, France, Gabon, Germany, Iraq, Italy, Luxembourg, Madagascar, Netherlands, Sweden, Syria, UK and USA. For the latest information see: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.
- 19 Article 3(1)(a) of the Mauritius Convention.
- 20 Article 3(1)(b) of the Mauritius Convention.
- 21 Article 3(1)(c) of the Mauritius Convention.
- 22 Article 3(2) of the Mauritius Convention.



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