TRANSPARENCY IN INVESTOR-STATE ARBITRATION:

THE WAY FORWARD

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A. INTRODUCTION

The push for transparency in investor-State arbitration is gaining momentum. In July 2013 the United Nations Commission on International Trade Law (UNCITRAL) adopted the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.* In December 2014 the General Assembly adopted the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency),* providing a streamlined mechanism for States to adopt the *Rules on Transparency.* These developments are part of a welcomed trend towards transparency in investor-State arbitration. This article explains why transparency of

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investor-State arbitration is so important, why the Rules on Transparency should be widely adopted, and how the Mauritius Convention on Transparency can make that happen.

B. IDENTIFYING TRANSPARENCY IN INVESTOR-STATE ARBITRATION

Arbitrations are generally conducted in private, but may be strictly confidential by agreement.\(^4\) The general position is that arbitration hearings are private;\(^5\) evidence is presented privately and the deliberations and awards of arbitrators are private. As arbitration is the creation of agreement, the parties may agree that it should be confidential – and consequently, not transparent. Confidentiality may be the very reason the parties agreed to dispute resolution by arbitration in the first place,\(^6\) to protect information such as trade secrets, business plans and financial results.\(^7\)

The notion of confidential arbitration literally expresses the norm whereby the parties are free to agree to its confidentiality. This is an application of freedom of contract. This rationale does not transpose well to investor-State arbitration, which arises from treaties that protect investments or investors (‘investment treaties’), reflecting agreement between Member States.\(^8\) Unlike other forms of arbitration, investor-State arbitration

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has an unquestionably public character – the United Nations General Assembly resolution that adopted the *Mauritius Convention on Transparency* ‘[r]ecognizes 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’.9

Transparency has long been an important part of investment treaties. The term can be used to refer to the proper conduct of a government. A lack of transparency might be challenged in investor-State arbitration10 as a violation of the right to fair and equitable treatment provided for under an investment treaty.11 This article is primarily concerned with transparency of process: transparency of the conduct of the investor-State arbitration itself.

In this context, transparency has a meaning corresponding to the common law principle of open justice.12 The principle applies so that proceedings are heard in an open court to which any member of the public has admission.13 Evidence is presented publicly.14 Arguments are made in open court and sometimes even published on the Internet.15 When a judge decides the case, the reasons are made public.16 Open justice makes

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13 *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).


courts better. It creates confidence in the administration of justice, and confidence in the judiciary as a facilitator of dispute resolution.

Like open justice, transparency is recognisable in terms of several characteristics. These could include registration of disputes (making the public aware that the arbitration exists), public access to key documents, access to arbitral awards, public access to the proceedings themselves, and allowing the proceedings to be reported on.

Generally, investor-State arbitration is not transparent. Magraw and Amerasinghe recognise that ‘[t]here are many deficits in the availability of information regarding investor-state arbitrations’. They argue that the public might be ignorant of the following:

1) That a case or arbitration even exists;
2) What the allegations of wrongdoing are;
3) What the schedule of the arbitration is;
4) Who the arbitrators are likely to be, or are;
5) What legal issues are at stake;

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22 Ronald Bernstein, Handbook of Arbitration Practice (Sweet & Maxwell, 1987) [13.6.3].
6) What legal arguments and factual assertions are being made;

7) What oral presentations are being made;

8) What procedural or interim orders are issued; and

9) What the final award is.  

Although this may be the general position, it is not absolute. Even before the advent of the Rules on Transparency some investment treaties provided for the transparent conduct of investor-State arbitration. For example, Chapter 11 article 26 of the ASEAN–Australia-New Zealand Free Trade Agreement provides that ‘the disputing Party may make publicly available all awards and decisions produced by the tribunal’. The permissive ‘may’ is distinguishable from the position in respect of open courts, but it is a step in that direction.

The North American Free Trade Agreement contains some minimal transparency measures. Article 1126(13) provides that the NAFTA Secretariat ‘shall maintain a public register’ of the request for arbitration or notice of arbitration and receipts for that request or notice. At the very least, the public will know that an investor-State arbitration initiated under NAFTA exists.

At the time of writing, a leaked draft of the Investment Chapter of the Trans-Pacific Partnership Agreement (TPP) includes transparency provisions. A draft ‘Article II.23’

25 VanDuzer, above n 3, 687.
28 VanDuzer, above n 3, 697-708.
provides that, amongst other things, hearings of arbitral tribunals established under the TPP shall be generally open to the public.\textsuperscript{29}

There are numerous other examples of transparency measures in modern investment treaties, providing varying levels of transparency.\textsuperscript{30} If the Rules on Transparency are adopted by parties to investment treaties, it will take transparency to another level. The next section explains that there is a strong public interest in transparent investor-State arbitration.

\textbf{C. THE CASE FOR TRANSPARENCY}

The recent increase in the number of International Investment Agreements (IIAs) being concluded highlights the need for transparency in investor-State Arbitration. In February 2015, the United Nations Conference on Trade and Development (UNCTAD) published its annual IIA Issue Note,\textsuperscript{31} which observes that the year 2014 saw the conclusion of 27 IIAs (14 bilateral investment treaties (BITs) and 13 ‘other IIAs’), bringing the total number of agreements to 3,268 (2,923 BITs and 345 ‘other IIAs’). The Note also highlights that, in 2014, claimants initiated 42 known treaty-based investor-State dispute settlement (ISDS) cases, with 40 per cent of new cases initiated against developed countries, which means that the relative share of cases against developed countries has been on the rise (the historical average is 28 per cent). By UNCTAD’s count, the total number of ISDS cases has reached 608, the number of


\textsuperscript{31} UNCTAD IIA Team, \textit{IIA Issue Note No 1 – Recent Trends in IIAs and ISDS} (February 2015).
concluded cases reached 356: approximately 37 per cent (132 cases) were decided in favour of the State, and 25 per cent (87 cases) ended in favour of the investor. Approximately 28 per cent of cases (101) were settled and eight per cent of claims (29) were discontinued for reasons other than settlement. In the remaining two per cent (seven cases), a treaty breach was found but no monetary compensation was awarded to the investor. In light of these figures, the importance of transparency in investor-State arbitration will now be explored in detail.

1. **Public Values**

The public nature of investor-State arbitrations should not be ignored. The disputing entity’s grievance will concern an action by a government: investor-State arbitrations consider foreign challenges to government measures intended to achieve public policy goals.32

The values that underlie the democracies of State parties to investment treaties favour transparency of investor-State arbitrations. In a democracy individuals *should* have access to information that concerns matters of public interest,33 as a well-informed electorate is essential to the success of a responsible and accountable government. The Center for International Environmental Law and International Institute for Sustainable Development identify this as key to the public interest which distinguishes investor-State arbitration from commercial arbitration:

the very presence of a State as a party to the arbitration raises a public interest because the nationals and residents of that State have an interest in how the government acts during the

32 See VanDuzer, above n 3, 684.
33 Magraw and Amerasinghe, above n 23, 348-9.
arbitration and in the outcome of the arbitration. Moreover, the existence of this public interest has implications for the conduct of the arbitration: according to principles of human rights law and good governance, government activities should be subject to basic requirements of transparency and public participation.34

For example, as Australian citizens have an interest in the success of the tobacco plain packaging laws,35 they also have an interest in Philip Morris’ challenge to the laws.36 Transparency of investor-State arbitration allows individuals to be informed of the true cost of domestic laws and, conversely, of their governments’ commitments under investment treaties.

Even in non-democratic societies, the principle of transparency is fundamentally important. Any society that espouses the rule of law ought to be open in matters that affect the public interest.37 Citizens cannot determine that there is a ‘rule of law’ without seeing it in operation. In the investment arbitration sphere, transparency allows the people to see that investor-State arbitration is conducted according to law. The transparent conduct of investor-State arbitration is a simple application of principles of good governance and the rule of law.

The case for transparency is enhanced by the fact that the decisions challenged in investment-State arbitrations often touch on very important issues of public policy

35 Tobacco Plain Packaging Act 2011 (Cth).
driven by social justice considerations. In particular, investor-State arbitration could challenge laws protecting human rights, environmental protection or public health. For example, recent investor-State arbitrations have related to the drinking water supply system in Bolivia and Tanzania, the ban of an additive to gasoline in California, the rescission of fishing permits in Chile due to environmental concerns, and racially-focused affirmative action measures in South Africa. The public interest in social policy translates to a public interest in the transparency of arbitrations challenging social policy.

40 See, eg, Permanent Court Of Arbitration, Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (2009).
42 See Center For International Environmental Law and International Institute for Sustainable Development, ‘Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations’ (December 2007) 4-5 cited in Lee, above n 34, 446.
46 Sociedad Anónima Eduardo Vieira v República de Chile (Award) (ICSID Case No ARB/04/7, 21 August 2007); see also Jonathan C Hamilton, ‘A Decade of Latin American Investment Arbitration’ in Mary Helen Mourra and Thomas Carboneau (eds), Latin American Investment Treaty Arbitration: The Controversies and Conflicts (Wolters Kluwer, 2008) 69, 75.
However, it should be noted that many investment treaties provide exceptions specifically for matters such as ‘the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources’. For example, the United Nations Conference on Trade and Development’s *World Investment Report 2014* indicates that of the 18 investment agreements concluded in 2013, all but three contained provisions protecting these matters, providing ‘that parties should not relax health, safety or environmental standards in order to attract investment’. Similarly, the recently concluded *Korea-Australia Free Trade Agreement* provides that ‘nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures … necessary to protect human, animal or plant life or health’. The ascendancy of measures such as these strengthens the need for transparency of investor-State arbitration to ensure that these provisions are given their full force.

2. **Fairness to Locals**

The case for transparency is made stronger by the point that the parties initiating investor-State arbitrations are foreign entities. Investment treaties imbue foreign investors with rights not afforded to domestic citizens and investors. Respondent States owe it to their citizens to be transparent, to fully communicate how the costs of defending investor-State arbitration weigh up against the benefits flowing from investment treaties.

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49 Ibid 118.  
As members of the public could be affected by the outcome of investor-State arbitration, they ought to have an opportunity, in appropriate cases, to put forward arguments that would otherwise not be presented. Thus the right of non-parties to make submissions as *amici curiae* is an important aspect of transparency.

3. **For the Foreign Investors**

Transparency advantages investors. When material about investor-State arbitration is made public, other investors with interests in the respondent country will be in a better position to understand their rights under the investment treaty. In this way transparency measures can allow investors to more accurately assess the real risk to their investment in different States.

4. **For the Institution Itself**

Another important advantage of transparency is that it improves the quality of decision-making. This point is also the foundation of the principle of open justice. In the leading case of *Scott v Scott*, Lord Shaw quoted the philosopher, Jeremy Bentham, ‘Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.’ If an investor-State arbitration is subject to international scrutiny, the arbitrators would be motivated to conduct the arbitration impeccably out of pure self-interest. Similarly, if the award is to be published online, they would be motivated to ensure it is free of error.

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52 See also Bastin, above n 45.
54 Magraw and Amerasinghe, above n 23, 345-8.
55 *Scott v Scott* [1913] AC 417, 477 (Lord Shaw).
Publicity translates to accountability. Given the important public nature of investor-State arbitrations, it is important that the proceedings are conducted properly and that arbitrators are accountable.

In the longer term, the publication of arbitral decisions will create a *de facto* body of case law.\(^5^6\) This has already happened to an extent, with the regular publication of decisions and other important documents by the International Centre for Settlement of Investment Disputes (ICSID).\(^5^7\) Although there is no doctrine of *stare decisis* for international investment law,\(^5^8\) tribunals do not make their decisions in a vacuum. The same pressures that encourage an arbitrator to decide fairly in a single arbitration will encourage the arbitrator to behave fairly across multiple arbitrations. Transparency could encourage the development of consistent decision-making across investor-State arbitrations conducted under the *UNCITRAL Arbitration Rules*. By promoting consistency, transparency will also promote relative equality in the treatment of parties to investor-State arbitration. Thus transparency can serve the principle of equality at the foundation of the rule of law: that we ought to treat like cases alike and different cases differently.\(^5^9\)

By improving the quality of decision-making, transparency also assists in promoting investor-State arbitration as a means of effective dispute resolution. If the public

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\(^5^7\) See *Cases* <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>.

\(^5^8\) Only the parties are bound by the award: Kyla Tienhaara, Submission No 86 to Department of Foreign Affairs and Trade, *Australia’s Participation in the Trans-Pacific Partnership Negotiations*, 19 May 2010, 5.

believes that arbitrations are conducted fairly and effectively, individuals may be less likely to complain about the grant of arbitration rights to private entities under future investment treaties. Transparency could legitimise investor-State arbitration itself. 60 On this reasoning, transparency promotes future investment treaties and so indirectly promotes trade and foreign investment.

5. Disadvantages?

Despite the advantages identified by this article, transparency of investor-State arbitrations does have some disadvantages. 61 Chief among them is that transparency can result in delays and higher costs. For example, allowing the involvement of non-parties as amici curiae would require the debate of more material, 62 requiring more time and, consequently, higher legal fees. On the side of the State-respondent, those costs would ultimately be borne by taxpayers. These disadvantages may be minimised by limiting the length of non-party submissions and by mandating that a non-party must have a sufficient interest as a prerequisite to involvement.

In the authors’ view, the disadvantages of transparency in investor-State arbitration are vastly outweighed by the advantages of transparency. Recently, UNCITRAL affirmed that view.

60 See Magraw and Amerasinghe, above n 23, 351.
62 If amici submissions are accepted the parties should have a right to respond: see, eg, Australia-Chile Free Trade Agreement, signed 30 July 2008 [2009] ATS 6 (entered into force 6 March 2009) art 10.20(2).
D. RECENT DEVELOPMENTS AT UNCITRAL:

THE RULES ON TRANSPARENCY

The Rules on Transparency mark a departure from the position that arbitrations are generally private or confidential. In many respects, the rules transpose aspects of the principle of open justice to the conduct of investor-State arbitration.

The public will gain access to basic information regarding investment-State arbitrations conducted under the UNCITRAL Arbitration Rules by the publication of key documents on the Internet. These documents will be available on a ‘Transparency Registry’ maintained by the UN Secretary-General through the UNCITRAL secretariat. A number of matters will be published, including the following:

- information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made (upon commencement of the arbitration);*
- the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written submissions by any disputing party;
- a table listing all exhibits, expert reports and witness statements (if prepared for the proceedings);

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66 Rules on Transparency art 2.
• any written submissions by the non-disputing party (or parties) to the treaty and by third persons;
• transcripts of hearings, where available; and
• orders, decisions and awards of the arbitral tribunal.\(^{67}\)

Hearings of arbitrations will be public to the extent that an open hearing will not undermine the integrity of the arbitral process or divulge confidential information.\(^{68}\) This is directly analogous to the application of the principle of open justice:\(^{69}\) courts may be closed if necessary to secure the proper administration of justice,\(^{70}\) and publication of proceedings can be restricted to protect confidential information.\(^{71}\)

A third party can make submissions in the arbitration if it has a ‘significant interest’ in the matter and will assist the tribunal in a determination of fact or law.\(^{72}\) This position is directly analogous to the common law principles relevant to amici curiae: in a court’s discretion, an amicus curiae (or ‘friend of the court’) can make submissions if those submissions would be of assistance.\(^{73}\) Similar rights are afforded to non-disputing State parties to the investment treaty, who may be invited to make submissions on interpretation of the treaty.\(^{74}\)

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\(^{67}\) *Rules on Transparency* art 3(1).

\(^{68}\) *Rules on Transparency* art 6; see also art 7.

\(^{69}\) David Syme & Co Ltd v General Motor-Holden’s Ltd [1984] 2 NSWLR 294, 299-300 (Street CJ); Scott v Scott [1913] AC 417, 437-438 (Lord Haldane); John Fairfax Publications Pty Ltd v District Court of New South Wales (2004) 61 NSWLR, 353 (Spigelman CJ).


\(^{71}\) Rinehart v Welker [2011] NSWCA 403 [113] (Young JA).

\(^{72}\) *Rules on Transparency* art 4(3).


\(^{74}\) *Rules on Transparency* art 5(1); see also Delaney, above n 63, 34.
These principles of transparency – like the principle of open justice75 – are not absolute. Article 7 of the Rules on Transparency provides for exceptions. Confidential information (including confidential business information) is protected, as is the ‘integrity of the arbitral process’.76 A respondent State need not make information publicly available if it would be contrary to its security interests.77

E. FUTURE APPLICATION OF THE RULES ON TRANSPARENCY:

THE MAURITIUS CONVENTION ON TRANSPARENCY

It is likely that the Rules on Transparency will be widely adopted for investor-State arbitration conducted under the UNCITRAL Arbitration Rules. Arbitration conducted under the UNCITRAL Arbitration Rules and initiated under treaties concluded after 1 April 2014 will be covered as a matter of course.78

At the time of writing, at least nine new investment treaties have been concluded that provide for investor-State arbitration under the UNCITRAL Arbitration Rules. Accordingly, arbitration conducted under these investment treaties that are also subject to the UNCITRAL Arbitration Rules79 will be subject to the Rules on Transparency. These new investment treaties include the following:80

76 Rules on Transparency arts 7(1)-7(7).
77 Rules on Transparency art 7(5).
78 Rules on Transparency art 1(1).
79 Note that some investment treaties provide for investor-State arbitration under alternative arbitration rules; that is, even if investor-State arbitration is initiated under such an investment treaty, the application of the UNCITRAL Arbitration Rules is not guaranteed. See eg Japan – Uruguay BIT, signed 26 January 2015, art 31(3).
80 The following information was sourced from: UNCTAD, Investment Policy Hub (2015) <http://investmentpolicyhub.unctad.org/>
- Japan – Uruguay BIT, signed on 26 January 2015;\textsuperscript{81}
- Canada – Côte d’Ivoire BIT, signed on 30 November 2014;\textsuperscript{82}
- Canada – Mali BIT, signed on 28 November 2014;\textsuperscript{83}
- Canada – Senegal BIT, signed on 21 November 2014;\textsuperscript{84}
- Japan – Kazakhstan BIT, signed on 23 October 2014;\textsuperscript{85}
- Canada – Republic of Korea FTA, signed on 22 September 2014;\textsuperscript{86}
- Canada – Serbia BIT, signed on 1 September 2014;\textsuperscript{87}
- Canada – Nigeria BIT, signed on 6 May 2014;\textsuperscript{88} and
- Australia – Republic of Korea FTA, signed on 8 April 2014.\textsuperscript{89}

However, even when the \textit{UNCITRAL Arbitration Rules} are selected, the application of the \textit{Rules on Transparency} is not guaranteed. Parties to an investment treaty may agree

\textsuperscript{82} Canada - Côte d’Ivoire Foreign Investment Promotion and Protection Agreement, signed 30 November 2014 <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3539>.
\textsuperscript{83} Canada - Mali Foreign Investment Promotion and Protection Agreement, signed 28 November 2014 <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3540>.
\textsuperscript{84} Canada - Senegal Foreign Investment Promotion and Protection Agreement, signed 27 November 2014 <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3541>.
\textsuperscript{87} Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, signed 1 September 2014 <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3502>.
\textsuperscript{88} Canada-Nigeria Foreign Investment Promotion and Protection Agreement (FIPA), signed 6 May 2014 <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3531>.
that the *Rules on Transparency* will not apply.\textsuperscript{90} That is, State parties may opt out of transparent investor-State arbitration.

Arbitration initiated subject to treaties concluded before 1 April 2014 will be covered if the State parties to the treaty agree, or if the parties to the arbitration agree.\textsuperscript{91} Further, the *Rules on Transparency* are ‘available for use’ in arbitrations not conducted under the *UNCITRAL Arbitration Rules*\textsuperscript{92} and so might apply if State parties to a relevant treaty agree, or if the parties to an investor-State arbitration agree. Loken recognises that this ‘opt-in’ approach means that ‘absent further affirmative steps, the *Rules on Transparency* will not apply when the *UNCITRAL Arbitration Rules* are selected under any of the approximately 3,000 investment treaties currently in force globally.’\textsuperscript{93}

UNCITRAL has recognised that the need to opt-in is an issue. At its forty-fourth session, it:

confirmed that the question of applicability of the legal standard on transparency to ... [pre-April 2014] investment treaties ... was part of the mandate of the Working Group and a question of great practical interest, taking account of the high number of investment treaties currently in existence.\textsuperscript{94}

In response to the issue UNCITRAL’s Working Group II has developed the *Mauritius Convention on Transparency*, which provides for the application of the *Rules on Transparency*.

\textsuperscript{90} *Rules on Transparency* art 1(1).
\textsuperscript{91} *Rules on Transparency* art 1(2).
\textsuperscript{92} *Rules on Transparency* art 1(9).
\textsuperscript{93} Loken, above n 64, 1301.
\textsuperscript{94} *Settlement of Commercial Disputes: Applicability of the UNCITRAL Rules on Transparency to the Settlement of Disputes Arising Under Existing Investment Treaties – Note by the Secretariat*, UN GAOR, 46th sess, UN Doc A/CONF.9/784 (6 March 2013) 2 [2] (‘Note by the Secretariat’).
Transparency to arbitrations arising out of investment treaties concluded before April 2014.95

The Mauritius Convention on Transparency provides a streamlined basis for States to opt into the Rules on Transparency in respect of their pre-April 2014 investment treaties. The Mauritius Convention on Transparency allows the Rules on Transparency to apply to arbitrations arising under almost 3,000 investment treaties concluded before that date. The convention gives those States that wish to make the Rules on Transparency applicable to their treaties, an efficient and flexible mechanism to do so, without creating any expectation that other States would necessarily have to use the mechanism offered by the convention. In short, the Mauritius Convention on Transparency provides States that so wish a powerful instrument to enhance transparency in investor-State dispute settlement.

The Mauritius Convention on Transparency was opened for signature on 17 March 2015. At the time of writing, ten countries have signed on: Canada, Finland, France, Germany, Mauritius, Sweden, Switzerland, Syria, the United Kingdom and the United States of America.96 The Convention is not yet in force: it will enter into force six months after the deposit of the third instrument of ratification.97

95 See Note by the Secretariat, UN Doc A/CN.9/784, 2.
It is important to emphasise that, once in force, the Convention could affect countries other than the current signatories. Article 2 provides that the Rules on Transparency shall generally apply to investor-State arbitration where the respondent State is a party to the Convention, if the claimant (i.e. the investor) is of a State that is a party to the Convention, or if the claimant agrees to the application of the Rules on Transparency. This is a continuation of the opt-in approach. Still, this is good for the cause of transparency. UNCITRAL’s transparency standards can potentially apply to investor-State arbitration initiated under any investment treaty of a State that is a party to the Mauritius Convention. This could impact dozens of investment treaties. In Asia and the Pacific, it could affect the following:

- Thailand’s BITs with Canada, Finland, Germany, Sweden and the United Kingdom;\(^98\)
- Kuwait’s BITs with Canada, Finland, France, Germany, Mauritius, Sweden, Syria and the United Kingdom;\(^99\)
- Iraq’s BITs with France, Germany and Syria;\(^100\)
- Hong Kong’s BITs with Finland, France, Germany, Sweden and the United Kingdom;\(^101\)
- Singapore’s BITs with Canada, France, Germany, Mauritius and the United Kingdom; and\(^102\)

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The Republic of Korea’s BITs with Finland, France, Germany, Mauritius, Sweden and the United Kingdom.\textsuperscript{103}

The future uptake of the *Mauritius Convention on Transparency* and the future application of the *Rules on Transparency* more broadly will be dependent on international attitudes towards the importance of transparency.

1. **Attitudes Towards Transparency**

In recent years the view that investor-State arbitration should be transparent has gained momentum.\textsuperscript{104} The very fact that the *Rules on Transparency* were adopted indicates at least some contemporaneous support for transparency among the international community. For example, UNCITRAL has 60 State members\textsuperscript{105} that contributed to adoption of the *Rules on Transparency*.\textsuperscript{106} Various non-governmental organisations (NGOs) from around the world were represented at the sessions that led to their formulation. Importantly, both the *Rules on Transparency* and the *Mauritius Convention on Transparency* were approved by consensus.\textsuperscript{107}


\textsuperscript{105} Structured to ensure that the various geographic regions and the principal economic and legal systems of the world are represented, the 60 member States include 14 African States, 14 Asian States, 8 Eastern European States, 10 Latin American and Caribbean States and 14 Western European and other States. Currently, the Asian States members are China, Indonesia, Japan, Republic of Korea, Thailand, Singapore, Pakistan, India, Iran, Malaysia, Philippines, Jordan, Kuwait and Fiji.


Explicit statements on State dispositions to transparency are not readily available. The European Union and Canada join together in a notable exception: they have publicly announced that their forthcoming Comprehensive Economic and Trade Agreement (‘CETA’)\(^{108}\) will be the first agreement to apply the *Rules on Transparency* ‘in substance’.\(^{109}\)

Important sections of the international community are embracing transparency. This article is another illustration of support within the academy.\(^{110}\) Further, there is support among legal practitioners working in this area. For example, Christian Leathley, partner at Herbert Smith Freehills in London, was involved in drafting the new rules as the International Bar Association’s representative to WGII. In July 2013 he described the *Rules on Transparency* as ‘a welcome development and the product of tremendous work on the part of many member states and observers and notably the secretariat of UNCITRAL.’\(^{111}\)

If support from the profession, the academy and NGOs is maintained, more and more States will join the transparency bandwagon. Failure to do so will come at a cost.

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The primary cost of opting out of transparency is the loss of an opportunity to legitimise a State’s commitments under investment treaties and the loss of an opportunity to legitimise investor-State arbitration itself.

This cost should not be underestimated. The rights of investors to initiate investor-State arbitration have attracted the ire of diverse voices within the international community. On the left, those rights are criticised for providing a means for multi-national corporations (MNCs) to challenge domestic public health, human rights and environmental protection measures. On the libertarian right, investor-State arbitration has been identified as undermining the broader agenda of trade liberalisation by being controversial, as an unnecessary ‘subsidy for MNCs and a tax on everyone else’.

From the centre, investor-State arbitration has been characterised as leading to regulatory chill. These critiques translate to a legitimacy problem, which could have real consequences for the future of the institution.

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115 For example, the Parliament of Australia is considering an anti-investor-State arbitration bill, which would return Australia to its hardline April 2011 position: Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 (Cth); see also Luke Nottage, ‘Throwing the Baby Out with the Bathwater: Australia’s New Policy on Treaty-Based Investor-State Arbitration and its Impact in Asia’ (2013) 37(2) Asian Studies Review 253.
Transparency is not a panacea for these critiques, or for the issues that they raise. However, transparency can ameliorate the sting of some criticism. Transparency is a necessary condition for any meaningful independent analysis of the benefits of investor-State arbitration. That analysis, and the public conversation surrounding it, will strengthen investor-State arbitration and so strengthen investment treaties.

F. CONCLUSION

UNCITRAL’s Rules on Transparency present an opportunity for States to improve investor-State arbitration. If that opportunity is realised it will advantage investors by reinforcing the benefits enjoyed under investment treaties. More broadly, investment treaties are a means for controlling risks associated with foreign investment.116 Their uptake can translate to increased foreign investment and a subsequent path towards economic development.117

UNCITRAL’s work on the Mauritius Convention on Transparency is a positive development. We urge States to opt-in to the Rules on Transparency and sign and ratify the Mauritius Convention on Transparency. Transparency in treaty-based investor-State arbitration can enhance international trade and development in the Asia-Pacific region and beyond. The choice before us is not between having or not having transparency in investor-State arbitration. The choice before us is having or not having investor-state-arbitration. Transparency is the only way forward for investor-State arbitration.

116 Mangan, above n 8, 191.