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States sign Mauritius Convention on Transparency

Alison Ross • Tuesday, 17 March 2015 (6 days ago)

Eight states today signed the Mauritius Convention on Transparency in Treaty-based Investor State Arbitration, marked by a major conference in the African country.



Mauritius: transparent waters and transparency

Canada, Finland, France, Germany, Sweden, the UK, the US and Mauritius itself all signed the convention, agreeing that investor-state disputes to which they or an investor of their state are party will be subject to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration that came into force on 1 April last year.

The transparency rules represent a break from past practice whereby treaty arbitrations under the auspices of UNCITRAL could be conducted in secret. They ensure that the primary documents in cases will be made available to the public via an online registry, subject to redaction where required to protect confidential or protected information.

However, the rules apply only to arbitrations under treaties signed on or after 1 April last year or to treaties entered before that date where the parties have specifically agreed to their application.

At the conference today, James Castello, a partner at King & Spalding in Paris and member of the US delegation to UNCITRAL's arbitration working group, explained that it was not possible simply "to wave a magic wand" and get states that had agreed to investor-state arbitration in their past treaties to submit to transparency rules that were not envisioned at the time.

The convention was the answer, providing a mechanism whereby the rules can apply to the 3,000 or so bilateral and multinational investment treaties that were in existence before 1 April last year. It enables states to commit to applying the rules to disputes under all their treaties, provided of course that the other state party to the treaty has also ratified the convention without reservations.

If only one of the states has ratified the convention, it will provide an investor from the non-signatory state with an additional offer to arbitrate on transparent terms, which they can choose to accept.



UNCITRAL approved the convention in July 2014, with Mauritius offering to host the signing event. It was adopted by the UN General Assembly in December.

Castello highlighted how UNCITRAL's work on transparency is particularly important given the current public concern about investor-state dispute settlement or ISDS in the context of "the convergence of three major multinational trade deals": the CETA (between Canada and the EU), the TPP (between the US and various Asia-Pacific states) and the TTIP (between the EU and the US). Each of the draft agreements contains international arbitration provisions, which have triggered a broad debate about the value and benefit of ISDS.

While not taking any position on the validity of the debate, Castello said that many of the criticisms levelled at the process are based on "exaggerated fear and suspicion of the unknown" and what it is speculated may be taking place "behind closed doors" – citing articles from *The Economist* and *Financial Times* and US senator Elizabeth Warren's recent *op-ed* denouncing the TPP in the *Washington Post* to illustrate his point.

He also noted the attention paid to claims filed against states rather than the outcomes of those claims.

"If all of the pleadings, hearings and decisions in these cases were public then we would be having a different, and in my submission, better debate," he argued.

"The transparency bug is catching," Castello continued. It has now extended to the debate over the trade deals as a whole, not just their ISDS provisions, leading the EU to take the unprecedented step of publishing eight of its negotiating proposals for the TTIP to counter the accusation that talks are being held in secret.

Asked about other reforms to the ISDS system that should be contemplated by the UNCITRAL arbitration group, Castello said that he would be content for it to focus for now on maximising the number of state signatories to the convention to give the transparency rules widespread effect in investor-state arbitration.

He said the working group had wondered whether similar transparency rules should apply to arbitrations involving state entities but chose to confine them to treaty arbitrations since the public interest element in such cases is clear. Disputes involving state entities, by contrast, may be merely commercial.

In passing, Castello addressed Elizabeth Warren's complaint in her article that the resolving of investor state disputes by members of the corporate law world is inappropriate. While he said he had the highest regard for the federal judiciary in the US, many do not have the grounding in international law to adjudicate such disputes.

The same session of the event saw a prominent arbitrator in investor-state cases, Switzerland's Gabrielle Kaufmann Kohler, stress the importance of transparency, accountability and access to information in the arbitral process.

In addition to providing all these, the Mauritius Convention allows interest groups access to proceedings as *amicus curiae* to make submissions on matters of concern to them, she explained.

A recent example is the granting of amicus curiae status to the UN's World Health Organization in the UNCITRAL arbitration brought by Phillip Morris against Uruguay over measures the state has taken to protect public health by requiring 80 per cent of cigarette packaging to be taken up by health warnings. Kaufmann Kohler is on the tribunal hearing a similar claim brought by Phillip Morris against Australia.

Michael Addo, chair of UNCITRAL's working group on business and human rights, raised the fact that openness, transparency and accessibility are traditional features of the rule of law. To expect them in investor-state arbitration along with other forms of dispute resolution is "not necessarily that radical", he argued.

Other sessions of the event looked at the development of arbitration on a regional and on an international level. They included presentations by Duncan Bagshaw, registrar of Mauritius's international arbitration centre, LCIA-MIAC; Dirk Pulkowski, representative of the Permanent Court of Arbitration in Mauritius; Mauritian salim Moollan, a barrister at Essex Court Chambers in London and the driving force behind much of UNCITRAL's work on transparency; Shane Spelliscy of the Trade Law Bureau of the government of Canada; and Danel Magraw of the Foreign Policy Institute at John Hopkins School of Advanced International Studies and the Center for International Environmental Law in Washington, DC.

Delegates also heard from a host of dignitaries, including the current chair of UNCITRAL Chong-hee Hahn; the under-secretary general for legal affairs and legal counsel of the UN, Miguel de Serpa Soares, Mauritius's Attorney General Ravi Yerrigadoo and various government ministers.

For the ministers, it was a chance to show the new Mauritian government's commitment to developing the state as an international arbitration platform for Africa, a project that was spearheaded by the former government under Prime Minister Navin Ramgoolam, which lost power in December. This they did, with the new minister for financial services, good governance and institutional reform Sudarshan Bhadain even announcing the opening of an international arbitration hearing centre in Mauritius by January 2016.

The minister of foreign affairs, regional integration and international trade Etienne Sinatambou, meanwhile, was articulate on the need for the transparency convention. "Disputes involving an investor and a state implicate the public interest and often human rights," he told delegates. "Providing for transparency in investor-state dispute settlement promotes the accountability of a state not only to international law obligations pursuant to an investment treaty but also to the broader public interest or human rights concerns of its citizens."

The signing of the convention in Mauritius, reflecting the state's growing prominence as an arbitral jurisdiction, is a matter of pride for the government and all Mauritians, said Sinatambou.

The under-secretary-general for legal affairs and legal counsel of the UN, de Serpa Sores, congratulated Mauritius on its embracing of international arbitration to date and called the conclusion of the convention "a momentous occasion in the field of investment arbitration". UNCITRAL recently received a GAR Award for all its work on transparency, including the rules and the convention.

The signing event took place at the InterContinental Hotel in BalACLava, Mauritius, with 200 guests in attendance. The convention will come into force as soon as three signatory states have ratified it.

In the meantime, the UNCITRAL working group on arbitration is understood to be considering a US proposal for a new convention on mediated settlements.

An online stream of the conference is available [here](#). Mauritius's next major international arbitration conference will be the ICCA Congress in 2016.



Left to right: James Castello of King & Spalding; Daniel Magraw of John Hopkins School of Advanced International Studies; Shane Spelliscy of Canada's Trade Law Bureau; Salim Moollan of Essex Court Chambers; Mauritius's minister of financial services, good governance and institutional reforms Sudarshan Bhadain; UNCITRAL chair Choong-hee Hahn; Mauritius's minister of foreign affairs, regional integration and international trade Etienne Sinatambou; under-secretary-general for legal affairs and legal counsel of the UN Miguel de Serpa Soares; Mauritius's Attorney General Ravi Yerrigadoo; Mauritian minister Fazila Daureeawoo; Swiss arbitrator Gabrielle Kaufmann-Kohler; chief of the treaty section at the UN Santiago Villalpando; legal officer in the International Trade Law Division of the UN Office of Legal Affairs Corinne Montineri.

The signatories of the convention

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| Mauritius | The Honourable Étienne Sinatambou , Minister of Foreign Affairs, Regional Integration and International Trade of Mauritius |
| Canada | His Excellency Gaston Barban , High Commissioner of Canada to South Africa |
| Finland | His Excellency Petri Salo , Ambassador of Finland to South Africa, Botswana, Lesotho and Mauritius. |
| France | His Excellency Laurent Garnier , Ambassador of France to Mauritius |
| Germany | His Excellency Konrad Max Scharinger , Permanent Representative of the Federal Republic of Germany to the Office of the United Nations and to the other International Organizations in Vienna |
| Sweden | His Excellency Lars Ronnäs , Ambassador of Sweden to Mauritius. |
| United Kingdom | His Excellency Jonathan Drew , High Commissioner of the United Kingdom to Mauritius |
| United States | Her Excellency Shari Villarosa , US Ambassador to Mauritius and the Seychelles |