

Mauritius Convention ushers in new era



The Mauritius Convention on Transparency has entered into force today after being ratified by Mauritius, Canada and Switzerland – meaning a commitment to transparency will become part of the treaty-based investor-state dispute settlement regime of these three states.

Approved by UNCITRAL in July 2014 and adopted by the UN General Assembly five months later, the Mauritius Convention aims to ensure transparent investor-state arbitration proceedings with open hearings, publicly accessible documents and scope for amicus curiae submissions.

It provides a mechanism whereby the 2014 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration will apply to all disputes arising from treaties entered by signatory states before 2014 (as well as after), whether or not they are under UNCITRAL rules.

Under article 2(2), once a state becomes a party to the convention it is deemed to have consented to the application of the transparency rules in *any* investment treaty arbitration in which it is a respondent, provided that the claimant agrees and the state hasn't made a specific reservation excluding its application in certain circumstances.

Three states had to ratify the convention before it would take effect, with the third ratification by Switzerland in April guaranteeing it would take effect today after a lapse of six months. Another 19 signatories have still to ratify it.

Speaking to *GAR*, **James Castello** of King & Spalding in Paris, a private sector member of the US's delegation to UNCITRAL's working group on arbitration who has been an enthusiastic advocate of the convention, says its entry into force "marks a significant turning point in the evolution of investor-state dispute settlement."

"Among all the reforms now being discussed for ISDS, many of us believe that transparency can have the greatest impact in bolstering confidence in and improving the functioning of the current system," he says. "By applying the Mauritius Convention, we can end the criticism of decisions being made behind closed doors. Because the public will have access to all pleadings, all hearings and all tribunal decisions in investment arbitrations that fall under the convention, it will increasingly be able to assess for itself the quality of the adjudicatory process and the nature of the determinations made."

"The number and geographical reach of countries that have now signed the convention - 22 in total - is impressive for such a relatively young treaty and I would expect the number to accelerate now that it has come into effect," he says.

At the UNCITRAL Asia-Pacific Judicial Summit in Hong Kong today, **Corinne Montineri**, legal officer at the International Trade Law Division of the United Nations Office of Legal Affairs and secretary of UNCITRAL's arbitration working group, said the convention is the most successful recent attempt to reform investor-state arbitration on a multilateral basis. "When multilateralism works, it's really worth mentioning it," she said.

"The transparency rules are not for disputing parties – they are for all citizens of the world so we can have access to information about cases with public interest," she added.

Montineri also noted that while signatories have the option of excluding certain treaties from the coverage of the conventions, none have done so.

The convention first opened to signature in March 2015, in a ceremony in Mauritius's capital, Port Louis. A wave of eight states that signed immediately included Canada, Finland, France, Germany, Sweden, the UK and the US, as well as Mauritius, which lent its name to the treaty as the home state of **Salim Moollan QC**, head of the working group at the time.

Somewhat surprisingly given its civil turmoil, the next signatory a week later was Syria – the first from the Middle East.

Other European states followed suit fairly quickly in 2015, including Italy, Belgium and Luxembourg. So too did Gabon, the Republic of the Congo and Mauritius's neighbour state in the Indian Ocean, Madagascar, bringing the number of African signatories to four.

In 2016, there was only one signatory, the Netherlands. However, this year has seen a spate of new signatories, including Iraq in February, Cameroon in May, Benin in July, Australia in July and Gambia in September.

Sometimes it seems confronting an investment treaty claim has been the catalyst for states to sign the convention. For example, Iraq's signature in February came as it was [hit with its first ICSID claim](#) brought by Kuwaiti logistics group Agility.

Benin's signature came soon after a [claim was brought against it by Puma Energy](#), a subsidiary of commodities trader Trafigura, on the basis of its 2007 bilateral investment treaty with Belgium and Luxembourg.

Cameroon's signature, meanwhile, came as the state was preparing to host [a conference in Yaounde to mark the 50th anniversary of UNCITRAL](#). The body's president at the time was from Cameroon, arbitration specialist **Gaston Kenfack Douajni**, and plans were underway for the state to play host to its African regional headquarters.

Australia's signature of the convention in September in July was regarded as exciting because of its significance in international trade and because it was the first signatory in the Asia-Pacific. That too came as it prepared to play host to high-profile legal conferences, including the IBA annual meeting and next year's ICCA conference.

In the past, the state has expressed doubts about maintaining arbitration provisions in investment treaties but evidently was persuaded that a more transparent form of ISID had a future.

In [an article](#), **Alex Baykitch** and **Daisy Mallett** of King & Wood Mallesons in Sydney, who participated in the negotiation of the convention as part of an Australian government delegation, argued that increasing transparency is key as investor-state arbitration comes under increasing "scrutiny" by governments and civil society around the world.

Australia knows this only too well having been respondent to one of the most scrutinised and controversial investor-state arbitrations to date, brought by tobacco giant Phillip Morris over state legislation mandating the plain packaging of cigarettes in the interest of public health.

Finally, Gambia's signature on 20 September came as the state faced a [threatened claim](#) by an Australian oil and gas company over offshore oil blocks (which in fact was filed at ICSID today). Despite the queue of signatories, it is notable that only three countries have ratified the convention. Former US president Barack Obama [recommended](#) that the US ratify it in the last months of his presidency but it did not happen and his successor Donald Trump seems unlikely to make it a priority.

So far, the signature and ratification that could really make the convention "fly" has also eluded it – that of the European Union.

The EU expressed its intention to sign in [early 2015](#) and has already started to use the UNCITRAL transparency rules as a basis for the provisions on transparency in its trade agreements and their ISDS chapters. However, it has yet to deliver on its pledge to sign, possibly because of resistance among its 28 member states, some of which are facing hefty treaty claims and are sensitive about publicity.

EU accession would not have much effect on trade agreements entered by the bloc as a whole (none were signed before April 2014) but would send a strong message of support for transparency in investment arbitration. It would also influence the 19 EU member states that

have not signed the convention in an individual capacity, which would be likely to tow the line by applying the transparency rules in their own disputes.

One factor that perhaps hold countries back from signing or ratifying the convention is that, so long as they are not parties to it, they can still choose to apply the UNCITRAL transparency rules on an ad hoc basis – while retaining the flexibility to disregard them in the event of a sensitive or reputationally damaging dispute they do not want publicised.

Or they may simply want to observe the ramifications of accession for other states before they take the plunge themselves.

What is clear, though, is that there is an inexorable movement towards greater transparency in treaty-based investor arbitration and ([as discussed in Hong Kong today](#)) an accompanying decline in emphasis on confidentiality among parties.

The convention remains open for signature by states or regional economic blocs at the UN in New York. In a paper in 2016, Swiss arbitrator **Gabrielle Kaufmann-Kohler** and one of her colleagues at Levy Kaufmann-Kohler in Geneva, **Michele Potestà**, looked to the convention for inspiration when [examining possibilities for a reformed investor-state arbitration framework](#) which states would participate in on an "opt-in" basis.