

Class 2: Ever More Transparent? A History of International Arbitration

Professor Anne Peters, for Monday 5th February 2024

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Mauritius Convention (2014)

United Nations Convention on Transparency in Treaty-based Investor-State Arbitrations 10 December 2014, UNTS Reg. No. 54749.

<https://uncitral.un.org/en/texts/arbitration/conventions/transparency>

As of Jan 2024: only nine ratifications: Australia, Benin, Bolivia, Cameroon, Canada, Gambia, Iraq, Mauritius, Switzerland.

Article 2. Application of the UNCITRAL Rules on Transparency

“Bilateral or multilateral application

1. The UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a relevant reservation under article 3(1)(a) or (b), and the claimant is of a State that is a Party that has not made a relevant reservation under article 3(1)(a).

Unilateral offer of application

2. Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), and the claimant agrees to the application of the UNCITRAL Rules on Transparency.”

UNCITRAL Rules (2014) - excerpts

United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration, 1 April 2014, Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17), chap. III and annex I.

The UNCITRAL Transparency Register

<https://www.uncitral.org/transparency-registry/registry/index.aspx>

Article 1. Scope of application

Applicability of the Rules

1. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”) shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”)**(For the purposes of the Rules on Transparency, a “treaty” shall be understood broadly as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty)* concluded on or after 1 April 2014 unless the Parties to the treaty***(For the purposes of the Rules on Transparency, any reference to a “Party to the treaty” or a “State” includes, for example, a regional economic integration organization where it is a Party to the treaty.)* have agreed otherwise.

2. In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when:

- (a) The parties to an arbitration (the “disputing parties”) **agree** to their application in respect of that arbitration; or
- (b) The Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application.

Application of the Rules

3. In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty: (a) The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty; (b) The **arbitral tribunal shall have the power**, besides its discretionary authority under certain provisions of these Rules, to **adapt the requirements** of any specific provision of these Rules to the particular circumstances of the case, after consultation with the disputing parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.

Discretion and authority of the arbitral tribunal

4. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:

- (a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and (b) The disputing parties’ interest in a fair and efficient resolution of their dispute.

5. These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons.

6. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

Applicable instrument in case of conflict

7. Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in

these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.

8. Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.

Application in non-UNCITRAL arbitrations

9. These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings

Article 3. Publication of documents

1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; 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.

2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.

3. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified site.

4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under article 7. The documents to be made available pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in a redacted form in accordance with article 7. The repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.

5. A person granted access to documents under paragraph 3 shall bear any administrative costs of making those documents available to that person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the repository.

Article 6. Hearings

1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument (“hearings”) shall be public.

2. Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.

3. The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation

with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.

Article 7. Exceptions to transparency

Confidential or protected information

1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6.
2. Confidential or protected information consists of:
 - (a) Confidential business information;
 - (b) Information that is protected against being made available to the public under the treaty;
 - (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or
 - (d) Information the disclosure of which would impede law enforcement.
3. The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate:
 - (a) Time limits in which a disputing party, non-disputing Party to the treaty or third person shall give notice that it seeks protection for such information in documents;
 - (b) Procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and
 - (c) Procedures for holding hearings in private to the extent required by article 6, paragraph 2. Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.
4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.
5. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.

Integrity of the arbitral process

6. Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardize the integrity of the arbitral process as determined pursuant to paragraph 7.
7. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties or members of the arbitral tribunal, or in comparably exceptional circumstances.

Article 8. Repository of published information

The repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations or an institution named by UNCITRAL.

Art. 8.36 CETA 2016

(Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, entered into force provisionally on 21 September 2017, [2017] OJ L11/23).

Article 8.36 Transparency of Proceedings

- “1. **The UNCITRAL Transparency Rules**, as modified by this Chapter, shall apply in connection with proceedings under this Section.
2. The request for consultations, the notice requesting a determination of the respondent, the notice of determination of the respondent, the agreement to mediate, the notice of intent to challenge a Member of the Tribunal, the decision on challenge to a Member of the Tribunal and the request for consolidation shall be included in the list of documents to be made available to the public under Article 3(1) of the UNCITRAL Transparency Rules.
3. Exhibits shall be included in the list of documents to be made available to the public under Article 3(2) of the UNCITRAL Transparency Rules.
4. Notwithstanding Article 2 of the UNCITRAL Transparency Rules, prior to the constitution of the Tribunal, Canada or the European Union as the case may be shall make publicly available in a timely manner relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository.
5. Hearings shall be open to the public. The Tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings. If the Tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection.
6. Nothing in this Chapter requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should apply those laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information.

Art. 3.46 EU-Vietnam Investment Protection Agreement (2019)

EU-Vietnam Investment Protection Agreement 30 June 2019 (awaiting ratification by all EU Member States, currently ratified by Vietnam, the EU and 8 Members)

ARTICLE 3.46 Transparency of Proceedings

- “1. **The UNCITRAL Transparency Rules apply** to disputes under this Section, subject to paragraphs 2 to 8.
2. The request for consultations under Article 3.30 (Consultations), the notice of intent under paragraph 1 of Article 3.32 (Notice of Intent to Submit a Claim), the determination under paragraph 2 of Article 3.32 (Notice of Intent to Submit a Claim), the notice of challenge and the decision on this challenge under Article 3.40 (Ethics) and the request for consolidation under Article 3.59 (Consolidation) shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules.
3. Subject to Article 7 of the UNCITRAL Transparency Rules, the Tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available any other documents provided to, or issued by, the Tribunal not falling within Article 3(1) and 3(2) of the UNCITRAL Transparency Rules. This may include exhibits when the respondent so agrees.

4. Notwithstanding Article 2 of the UNCITRAL Transparency Rules, the Union or Viet Nam, as the case may be, shall, after receiving the relevant documents pursuant to paragraph 2 of this Article, promptly transmit those documents to the non-disputing Party and make them publicly available, subject to the redaction of confidential or protected information.
5. Documents referred to in paragraphs 2, 3 and 4 may be made publicly available by communication to the repository referred to in the UNCITRAL Transparency Rules or otherwise.
6. No later than three years after the date of entry into force of this Agreement, the Committee shall review the operation of paragraph 3. Upon request of either Party, the Committee may adopt a decision pursuant to subparagraph 5(c) of Article 4.1 (Committee) stipulating of Article 3(3) of the UNCITRAL Transparency Rules shall apply instead of paragraph 3 of this Article.
7. Subject to any decision by the Tribunal on an objection regarding the designation of information claimed to be confidential or protected information, neither the disputing parties nor the Tribunal shall disclose to any non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it as such.
8. A disputing party may disclose to other persons in connection with proceedings, including witnesses and experts, such unredacted documents as it considers necessary in the course of proceedings under this Section. However, the disputing party shall ensure that those persons protect the confidential or protected information in those document.'

ICSID Arbitration Rules (2006)

ICSID Rules of Procedure for Arbitration Proceedings (effective 10 April 2006).

Rule 6 Constitution of the Tribunal

(1) The Tribunal shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointment.

(2) Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form:

“To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____ and _____.

“I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.

“I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.

“Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.”

Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.”

Rule 32 The Oral Procedure

(1) The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts.

(2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

(3) The members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations.

Rule 37 Visits and Inquiries; Submissions of Non-disputing Parties

(1) If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry.

(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Rule 48 Rendering of the Award

- (1) Upon signature by the last arbitrator to sign, the Secretary-General shall promptly:
 - (a) authenticate the original text of the award and deposit it in the archives of the Centre, together with any individual opinions and statements of dissent; and
 - (b) dispatch a certified copy of the award (including individual opinions and statements of dissent) to each party, indicating the date of dispatch on the original text and on all copies.
- (2) The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.
- (3) The Secretary-General shall, upon request, make available to a party additional certified copies of the award.
- (4) The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.’

PCA Rules (2012)- - excerpts

Permanent Court of Arbitration, Arbitration Rules, 17 December 2012

Art. 34

- ‘1. The arbitral tribunal may make separate awards on different issues at different times.
- 2. All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.
- 3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
- 4. An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.
- 5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.
- 6. Copies of the award signed by the arbitrators shall be communicated to the parties by the International Bureau.
- 7. In cases involving only States, the parties shall communicate to the International Bureau the laws, regulations, or other documents evidencing the execution of the award.’

Art. 18 WTO DSU (1994): Communications with the Panel or Appellate Body

- ‘1. There shall be no ex parte communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.
- 2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public.

Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.’

Art. 10(5) Morocco–Nigeria BIT (2016)

Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (Morocco–Nigeria BIT), signed 3 Dec. 2016

Art. 10

“(5) The Parties agree that in the event of resort to arbitration, **the arbitral proceedings shall be transparent**. For greater clarity, the notice of arbitration, the pleadings memorials, brief submitted to the tribunal, written submissions, minutes of transcripts of hearings, orders, awards and decisions of the tribunal shall be available to the public. The tribunal shall conduct hearings open to the public provided that any protected information that is submitted to the tribunal shall be protected in accordance with the applicable law.”

China International Economic and Trade Arbitration Commission (CIETA) Investment Arbitration Rules (2017)

Adopted by the China Council for the Promotion of International Trade (China Chamber of International Commerce) on 12 September 2017. In force as from 1 October 2017

“Article 32 Hearing

1. Unless otherwise agreed by the parties or decided by the arbitral tribunal, the hearing shall be conducted in public. A party seeking to use classified or otherwise protected information in the hearing shall notify the arbitral tribunal in advance. The arbitral tribunal shall make appropriate arrangements accordingly to protect such information from being disclosed.

2. (...)”

“Article 55 Publication

1. Unless otherwise agreed by the parties, where the parties agree to arbitration in accordance with these Rules, the parties shall be deemed to have agreed that CIETAC may publish information on the arbitral proceedings conducted under these Rules.

2. Information that may be published pursuant to Paragraph 1 of Article 55 includes:

- (a) Request for Arbitration;
- (b) Response to the Request for Arbitration;
- (c) Statement of Claim;
- (d) Statement of Counterclaim;
- (e) Statement of Defense;
- (f) written statements by the parties;
- (g) written submissions by the Non-disputing Contracting Party or the Non-disputing Party;
- (h) minutes of hearing, if any; and
- (i) the orders, decisions, awards of the arbitral tribunal.

3. The provisions of Article 55 shall not be interpreted as requiring the parties to disclose any confidential information and any other protected information.”

Art. 9.24 CPTPP 2018

**Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),
signed 8 March 2018**

Article 9.24: Transparency of Arbitral Proceedings

“1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:

- (a) the notice of intent;
- (b) the notice of arbitration;
- (c) pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 9.23.2 (Conduct of the Arbitration) and Article 9.23.3 and Article 9.28 (Consolidation);
- (d) minutes or transcripts of hearings of the tribunal, if available; and
- (e) orders, awards and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. If a disputing party intends to use information in a hearing that is designated as protected information or otherwise subject to paragraph 3 it shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect such

information from disclosure which may include closing the hearing for the duration of the discussion of that information.

3. Nothing in this Section, including paragraph 4(d), requires a respondent to make available to the public or otherwise disclose during or after the arbitral proceedings, including the hearing, protected information, or to furnish or allow access to information that it may withhold in accordance with Article 29.2 (Security Exceptions) or Article 29.7 (Disclosure of Information).

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

- (a) subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to any non-disputing Party or to the public any protected information if the disputing party that provided the information clearly designates it in accordance with subparagraph (b);
- (b) any disputing party claiming that certain information constitutes protected information shall clearly designate the information according to any schedule set by the tribunal;
- (c) a disputing party shall, according to any schedule set by the tribunal, submit a redacted version of the document that does not contain the protected information. Only the redacted version shall be disclosed in accordance with paragraph 1; and
- (d) the tribunal, subject to paragraph 3, shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that the information was not properly designated, the disputing party that submitted the information may:
 - (i) withdraw all or part of its submission containing that information; or
 - (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal’s determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under subparagraph (d)(i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under subparagraph (d)(ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should endeavour to apply those laws in a manner sensitive to protecting from disclosure information that has been designated as protected information.”