

National Interest Analysis
With attachment on consultation

**United Nations Convention on Transparency in
Treaty-based Investor-State Arbitration**

(New York, 10 December 2014)

[2019] ATNIF 13

[2019] ATNIA 11

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

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Nature and timing of proposed treaty action

1. The proposed treaty action is ratification of the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (the Convention).
2. The Convention was developed under the auspices of the United Nations Commission on International Trade Law (UNCITRAL) and was adopted by the 69th Session of the United Nations General Assembly in New York on 10 December 2014, and opened for signature in March 2015. On 18 July 2017, Australia became the 21st signatory to the Convention. The Convention entered into force on 18 October 2017 after three signatories, Canada, Mauritius and Switzerland, deposited instruments of ratification.
3. In accordance with Article 9(2), the Convention will enter into force for Australia six months after the date of deposit of its instrument of ratification.
4. Australia does not intend to make any reservations to the Convention.

Overview and national interest summary

5. The *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (Rules on Transparency) came into effect on 1 April 2014 (Attachment B). The Rules on Transparency provide for increased transparency in respect of investor-State arbitration and accessibility to the public of treaty-based investor-State arbitration while still protecting sensitive information. These rules reflect the transparency arrangements included in Australia's more recent free trade agreements.
6. The Rules on Transparency provide for:
 - publication of the following information at the commencement of arbitral proceedings (Article 2):
 - the name of the disputing parties;
 - the economic sector involved; and
 - the treaty under which the claim is being made;
 - documents, submissions and awards to be publicly available, as a matter of course (Article 3);

- following consultations with the disputing parties, the tribunal may allow third persons and non-disputing treaty parties to make submissions on investor-State arbitrations (Articles 4 and 5); and
 - arbitration tribunal hearings to be made public (Article 6).
7. This increased transparency provided for in the Rules on Transparency is subject to exceptions for confidential or protected information. Article 7(2) defines confidential or protected information as:
 - confidential business information;
 - information that is protected against being made available to the public under the investment treaty;
 - 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
 - information which if disclosed, would impede law enforcement.
 8. The Rules on Transparency apply to investor-State arbitrations initiated under investment treaties concluded on or after 1 April 2014 which are conducted in accordance with the UNCITRAL Arbitration Rules, unless the parties to the treaty have agreed otherwise.
 9. The Convention was developed to extend the application of the Rules on Transparency to investor-State arbitrations initiated under investment treaties concluded prior to 1 April 2014. Accordingly, the Convention adds transparency requirements to investor-State arbitrations conducted under those investment treaties.
 10. Under the Convention, the Rules on Transparency apply to any investor-State arbitration where both the investor's State and the host State of the investment are parties to the Convention or where the host State is a party to the Convention and the investor agrees to the application of the Rules on Transparency.
 11. Investor-State dispute settlement (ISDS) arbitrations conducted under a range of Australia's international investment agreements may be affected by the Convention (Attachment C). Currently, none of the other parties to the international investment agreements listed in Attachment C are parties to the Convention.
 12. Ratification of the Convention provides an opportunity for Australia to demonstrate its support for further transparency in ISDS proceedings and lead the way in the Asia-Pacific region as a modern, competitive, arbitral jurisdiction.

Reasons for Australia to take the proposed treaty action

13. The Government considers the inclusion of ISDS provisions in free trade agreements on a case-by-case basis in light of the national interest. Australia has ISDS provisions in 18 bilateral investment treaties and seven free trade agreements in force.
14. Australia has included ISDS provisions in treaties over the past three decades to protect Australian investors investing abroad. ISDS allows such investors to directly enforce investment protections, including the obligation not to discriminate compared to other foreign investors, and receiving compensation if investments are expropriated or nationalised.
15. As a result of ISDS, foreign investors, including Australian investors overseas, have the right to have their claim determined by an independent arbitral tribunal.
16. Australia's ratification of the Convention will provide for greater transparency in ISDS arbitration proceedings commenced under investment treaties that were concluded prior to 1 April 2014, bringing them into line with transparency arrangements included in Australia's more recent free trade agreements.
17. Greater transparency is important for the ongoing legitimacy of ISDS proceedings as it improves public understanding of and engagement with them.
18. In addition, ratification of the Convention is an efficient way to update our network of 18 older-style bilateral investment treaties (and certain FTAs) to be in line with Australia's more recent free trade agreements.
19. Ratification will also ensure greater certainty for investors and governments with respect to their rights and obligations under investment treaties. It will enable Australia to participate in relevant ISDS cases as a non-disputing treaty party; providing an opportunity to express Australia's views on the interpretation of particular treaty provisions.
20. Furthermore, it will enhance the opportunity for Australians to be directly involved in the arbitral process by making submissions as an affected or interested third person.
21. Ratification of the Convention will also address some of the criticisms of ISDS, as it will ensure that the public has greater visibility of investor-State arbitrations. This is particularly important given public interest in investor-State arbitrations.
22. Ratification of the Convention further demonstrates that the Government is committed to ISDS reform.

Obligations

23. The Convention imposes a number of obligations on Australia and applies to Australian investors overseas as well as foreign investors in Australia.

Article 2 – Application of the UNCITRAL Rules on Transparency

Bilateral or multilateral application

24. Article 2(1) of the Convention applies the Rules on Transparency to investor-State arbitrations where both the respondent and the investor's home State are parties to the Convention, unless there is a relevant reservation narrowing the scope of this Article.
25. Accordingly, where an investor-State arbitration is commenced under an investment treaty concluded before 1 April 2014:
- a. For foreign investors in Australia, the Rules on Transparency will apply where the investor's home state is also a party to the Convention, subject to the scope of any reservation made by the investor's home State.
 - b. For Australian investors, the Rules on Transparency will apply where the respondent State is a party to the Convention, subject to the scope of any reservation made by that State.

Unilateral offer of application

26. Article 2(2) of the Convention provides for a second mechanism for mandatory application of the Rules on Transparency should conditions imposed under Article 2(1) not be satisfied. Under this provision (and subject to certain reservations), parties to the Convention are required to make a standing offer to arbitrate disputes under the Rules on Transparency. If these offers are accepted by investors in relation to a particular dispute, the Rules on Transparency will govern that dispute.
27. Australia does not intend to make any reservation in relation to this provision. Accordingly, where Australia is a party to an investor-State arbitration commenced under an investment treaty concluded before 1 April 2014, it will be obligated to apply the Rules of Transparency to the arbitration if the investor chooses to accept the offer.

Applicable version of the UNCITRAL Rules on Transparency

28. Article 2(3) of the Convention provides that should the Rules on Transparency, applicable pursuant to Article 2(1) or 2(2), be amended in the future, the most recent version of those Rules will apply. Australia is obliged to apply the most recent version of the Rules on Transparency and does not intend to make any declaration in relation to this provision.

Hierarchy of the Rules

29. Article 2(4) of the Convention provides that the final sentence of Article 1(7) of the Rules on Transparency (which provides that the provisions of an underlying investment treaty prevail when there is a conflict with the Rules on Transparency) shall not apply to investor-State arbitrations where Article 2(1) of the Convention applies.
30. Where Article 2(1) applies and there is a conflict between the investment treaty and the Rules on Transparency, the Rules on Transparency will prevail.

Most favoured nation provision in an investment treaty

31. Article 2(5) of the Convention prevents investors from invoking a most favoured nation provision in an underlying investment treaty to attempt to either avoid or seek to apply the Transparency Rules. Australian investors are required to abide by this provision.

Article 5 – Application to investor-State arbitrations

32. Article 5 of the Convention confirms that the Convention will only apply to investor-State arbitrations commenced after the Convention enters into force for Australia and the investor's home State, unless the investor agrees to unilateral application as per Article 2(2).

Implementation

33. No legislative amendments are required to implement the Convention.

Costs

34. The requirements to publish documents and permit third persons and non-disputing treaty parties to be involved in hearings has the potential to cause a small increase in costs where Australia is a party to an investor-State Arbitration.
35. The Office of Best Practice Regulation has been consulted and advised that a Regulation Impact Statement is not required.

Future treaty action

36. The Convention sets out procedures for proposal, adoption and entry into force of amendments to the Convention (Article 10). It provides for State parties to propose amendments to the Convention through submissions to the Secretary-General of the United Nations for potential consideration by State parties at a conference. Any proposed amendments to the Convention should be adopted by consensus or if consensus is not possible, by vote of two-thirds of the State parties present and voting at the conference. An adopted amendment is subject to ratification by State parties.

37. The Convention provides that any adopted amendments will only come into force after three parties to the Convention have deposited instruments of ratification.
38. When an amendment enters into force, the amendment only applies to State parties that have ratified it.
39. Any decision to become party to a future amendment (once Australia ratifies the Convention) will be subject to Australia's domestic treaty-making requirements.

Withdrawal or denunciation

40. Article 11 provides that the Convention may be denounced by notification to the depository and that the denunciation will take effect 12 months after the notification is received by the depository. However, the Convention shall continue to apply to investor-State arbitrations commenced before the denunciation takes effect.
41. A decision by Australia to withdraw from the Convention would be subject to Australia's domestic treaty-making requirements.

Contact details

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Legal System Branch
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ATTACHMENT A: ATTACHMENT ON CONSULTATION

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

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CONSULTATION

42. The State and Territory governments were consulted through the Commonwealth-State-Territory Standing Committee on Treaties. No concerns were raised by the States and Territories.
43. The Attorney-General's Department has also consulted with the Australian Centre for International Commercial Arbitration, the Australian chapter of the International Chamber of Commerce and the Minerals Council of Australia. These organisations supported Australia ratifying the Convention.

ATTACHMENT B

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

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”)* concluded on or after 1 April 2014 unless the Parties 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.

*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.

**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.

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 2. Publication of information at the commencement of arbitral proceedings

Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 8. Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made.

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 4. Submission by a third person

1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty (“third person(s)”), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.
2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:
 - a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);
 - b) Disclose any connection, direct or indirect, which the third person has with any disputing party;
 - c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually);
 - d) Describe the nature of the interest that the third person has in the arbitration; and
 - e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.
3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:
 - a) Whether the third person has a significant interest in the arbitral proceedings; and
 - b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.
4. The submission filed by the third person shall:
 - a) Be dated and signed by the person filing the submission on behalf of the third person;
 - b) Be concise, and in no case longer than as authorized by the arbitral tribunal;
 - c) Set out a precise statement of the third person’s position on issues; and
 - d) Address only matters within the scope of the dispute.

5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.
6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.

Article 5. Submission by a non-disputing Party to the treaty

1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.
2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the 10 scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.
3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.
4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.
5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.

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.

ATTACHMENT C

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

**Investor-State dispute settlement arbitrations conducted under the following
international investment agreements may be affected:**

Free Trade Agreements:

1. Australia-Chile Free Trade Agreement
2. Singapore-Australia Free Trade Agreement
3. Thailand-Australia Free Trade Agreement
4. ASEAN-Australia-New Zealand Free Trade Agreement

Investment Protection and Promotion Agreements (IPPAs):

1. Argentina
2. China
3. Czech Republic
4. Egypt
5. Hong Kong, China
6. Hungary
7. India (terminated however subject to transitional arrangements)
8. Indonesia
9. Laos
10. Lithuania
11. Mexico (terminated however subject to transitional arrangements)
12. Pakistan
13. Papua New Guinea
14. Peru
15. Philippines
16. Poland
17. Romania
18. Sri Lanka
19. Turkey
20. Uruguay
21. Vietnam (terminated however subject to transitional arrangements)