



Australian Government
Attorney-General's Department

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Mr Dave Sharma MP
Chair
Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

Dear Chair

Hearing on the Mauritius Convention on Transparency – Answer to Question on Notice

Thank you for the opportunity to appear before the Joint Standing Committee on Treaties on Monday 16 September 2019 as part of its consideration of the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (the Mauritius Convention on Transparency).

During the hearing, I took the following Question on Notice from Senator Jordan Steele-John (pages 11-12 of the transcript):

Senator STEELE-JOHN: What about the transparency around that decision-making process itself? You are skipping to a point to where we have agreed that it is confidential and then we can go down this process, but there might be, quite rightly, a question as to whether these sections could be misused to undermine the transparency objectives. I am asking: in terms of the deliberations around whether to declare something confidential, what exists to make sure that that deliberation process is transparent?

Our response to this question follows:

Article 7 of the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (the Rules) provides procedural guidance to the arbitral tribunal when the arbitral tribunal is determining whether information is considered confidential or protected.

Article 7(2) of the Rules guides the arbitral tribunal by defining confidential or protected information as:

- (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.

In terms of the deliberation process, a determination on whether information is confidential or protected must be made after consultation with both disputing parties (Article 7(3) of the Rules). Ultimately, a determination as to whether information is confidential or protected is one for the arbitral tribunal (Article 7(3) of the Rules).

While the Rules do not require the tribunal to publish its decision in relation to information that it has declared to be confidential or protected, Article 3 of the Rules (subject to Article 7) reflects the balance that must be struck between the public interest in the Rules' transparency objectives and the need to ensure the manageability and efficiency of the arbitral procedure. Article 3 promotes transparency in the deliberation process by providing:

- (i) a list of documents to be made available to the public including orders, decisions and awards of the arbitral tribunal (Article 3(1) of the Rules)
- (ii) the right for third persons to request access to additional documents (Article 3(2) of the Rules), and
- (iii) the discretionary power of the arbitral tribunal to order the publication of additional documents (Article 3(3) of the Rules).

I trust this response will assist the Committee with its consideration of the Convention.

Yours sincerely

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Assistant Secretary
Legal System Branch