

Administration of Barack Obama, 2016

Message to the Senate Transmitting the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration

December 9, 2016

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, subject to certain reservations, I transmit herewith the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Convention), done at New York on December 10, 2014. The report of the Secretary of State, which includes an overview of the Convention, is enclosed for the information of the Senate.

The Convention requires the application of the modern transparency measures contained in the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules to certain investor-state arbitrations occurring under international investment agreements concluded before April 2014, including under the investment chapters of U.S. free trade agreements and U.S. bilateral investment treaties. These transparency measures include publication of various key documents from the arbitration proceeding, opening of hearings to the public, and permitting non-disputing parties and other interested third persons to make submissions to the tribunal. As the UNCITRAL Transparency Rules by their terms automatically apply to arbitrations commenced under international investment agreements concluded on or after April 1, 2014, and that use the UNCITRAL Arbitration Rules (unless the parties to such agreements agree otherwise), there is no need for the Convention to apply to international investment agreements concluded after that date.

Transparency in investor-state arbitration is vital, given that governmental measures of interest to the broader public can be the subject matter of the proceedings. The United States has long been a leader in promoting transparency in investor-state arbitration, and the 11 most recently concluded U.S. international investment agreements that contain investor-state arbitration already provide for modern transparency measures similar to those made applicable by the Convention. However, 41 older U.S. international investment agreements lack all or some of the transparency measures. Should the United States become a party, the Convention would require the transparency measures to apply to arbitrations under U.S. international investment agreements concluded before April 2014, to the extent that other parties to those agreements also join the Convention and to the extent the United States and such other parties do not take reservations regarding such arbitrations. The Convention would also require the transparency measures to apply in investor-state arbitrations under those agreements when the United States is the respondent and the claimants consent to their application, even if the claimants are not from a party to the Convention.

The United States was a central participant in the negotiation of the Convention in the UNCITRAL. Ratification by the United States can be expected to encourage other countries to become parties to the Convention. The Convention would not require any implementing legislation.

I recommend, therefore, that the Senate give early and favorable consideration to the Convention and give its advice and consent to ratification by the United States, subject to certain reservations.

BARACK OBAMA

The White House,
December 9, 2016.

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