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## **Settlement of commercial disputes: draft UNCITRAL rules on transparency in treaty-based investor-State arbitration**

### **Repository of published information under article 8 of the draft UNCITRAL rules on transparency in treaty-based investor-State arbitration**

#### **Note by the Secretariat**

#### **Contents**

|                                                                                                                        | <i>Paragraphs</i> | <i>Page</i> |
|------------------------------------------------------------------------------------------------------------------------|-------------------|-------------|
| I. Introduction . . . . .                                                                                              | 1                 | 2           |
| II. Transparency Repository functions at the UNCITRAL secretariat . . . . .                                            | 2-4               | 2           |
| III. Estimated resource requirements . . . . .                                                                         | 5-10              | 4           |
| IV. Action required of the Commission . . . . .                                                                        | 11                | 4           |
| <b>Annex</b>                                                                                                           |                   |             |
| Functions of the proposed posts for the Transparency Repository as a function of<br>the UNCITRAL secretariat . . . . . | 1-6               | 6           |



## **I. Introduction**

1. This Note sets out the role and mandate of UNCITRAL in fulfilling the function of a Transparency Repository pursuant to article 8 of the draft UNCITRAL rules on transparency in treaty-based investor-State arbitration (the “UNCITRAL Transparency Rules”), as well as the budgetary implications, and the presumptive functions to be undertaken by specific personnel in operating the Transparency Repository.

## **II. Transparency Repository functions at the UNCITRAL secretariat**

2. The unanimous view expressed by the Working Group that UNCITRAL would be the best institution to undertake a repository function under the UNCITRAL Transparency Rules<sup>1</sup> was based on, inter alia, the following reasons expressed by the Working Group:

(a) As the UNCITRAL Rules on Transparency are an instrument of the United Nations and universal in nature, it would be preferable for the United Nations, with a universal representation, to provide the repository service inherent to that instrument, to States. The Working Group has also noted that the Office of Legal Affairs of the United Nations, to which the UNCITRAL secretariat belongs, has experience in handling comparable types of services, including the publication of instruments of deposits of ratifications, access or acceptance of international conventions;<sup>2</sup>

(b) Such guardianship by the UNCITRAL secretariat of the UNCITRAL Transparency Rules would provide a neutral repository to administer the UNCITRAL legal standard on transparency<sup>3</sup> (providing it consistent oversight, in the long-term, of the integrity of the archive and of the data). The Working Group also agreed that consideration of a neutral registry should be considered as an integral part of the mandate received from the Commission to prepare a workable legal standard on transparency,<sup>4</sup> and moreover discussed that establishing a neutral registry might be seen as a necessary step in the promotion of transparency in treaty-based investor-State arbitration.<sup>5</sup>

3. The UNCITRAL secretariat would oversee that function not only as a neutral institution with universal representation, but also in service of its foundational mandate under General Assembly resolution 2205 (XXI) of 17 December 1976, namely to take action to fulfil its functions (see para. 8 (h) of resolution 2205 (XXI)), the preparation and promotion of the adoption of new international instruments in the field of international trade law (see para. 8 (c) of resolution 2205 (XXI)), and the collection and dissemination of information in the field of the law of international trade (see para. 8 (e) of resolution 2205 (XXI)). On

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<sup>1</sup> A/CN.9/765, para. 84; A/CN.9/760, para. 121; A/CN.9/717, para. 148; A/CN.9/712, para. 75.

<sup>2</sup> A/CN.9/712, para. 75.

<sup>3</sup> A/CN.9/717, para. 148.

<sup>4</sup> Ibid.

<sup>5</sup> A/CN.9/717, para. 149.

that basis, the UNCITRAL secretariat has for many years exercised a function as guardian of relevant standards of the United Nations. In relation to the mandate of UNCITRAL, the Commission may wish to note the following:

(a) The ability to uphold the resolution of disputes by peaceful means, and in conformity with principles of justice and international law, is a critical dimension of protecting and promoting security, human rights and fundamental freedoms of all peoples. It was in cognizance of this idea, inspired by Article 33 of the United Nations Charter, that UNCITRAL was founded in 1966, to promote equitable human development through commercial law, thereby protecting peace and security;

(b) The mandate of UNCITRAL has always been and continues to be core to the United Nations' peace, security and development agenda: the General Assembly has recognized that achieving internationally agreed development goals relies inter alia on the importance of achieving sound policies, good governance and the rule of law, as well as attracting international trade flows, promoting international trade as an engine for development, and enhancing the coherence and consistency of the international monetary, financial and trading systems;<sup>6</sup> the General Assembly has furthermore recognized that international trade is an engine for development and sustained economic growth, and has affirmed the critical role that a universal, rules-based, open, non-discriminatory and equitable multilateral trading system can play in stimulating economic growth and development worldwide, thereby benefiting all countries at all stages of development.<sup>7</sup> In a recent resolution, the General Assembly noted the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship and commended the work of UNCITRAL in that regard;<sup>8</sup>

(c) Moreover, transparency lies at the very foundation of what the United Nations promulgates as the precept of good governance and promoted by a number of different United Nations organs and specialized agencies. The High-Level Panel of Eminent Persons on the Post-2015 Development Agenda called for a "transparency revolution" to empower citizens to have greater scrutiny over government actions and expenditures, in order to promote long-term sustainable development.<sup>9</sup> The benefits of cross-United Nations discussions of how shared values, including transparency could be embedded into institutional practices in the context of economic globalization is also part of the UNCITRAL mandate (see para. 8 (g) of resolution 2205 (XXI)).

4. Further to the Working Group's unanimous preference for the UNCITRAL secretariat to serve as the Transparency Repository under the UNCITRAL Rules on Transparency, and the coherence of such a role with its mandate and the overall objectives of the United Nations, the UNCITRAL secretariat stands ready to undertake that role, resources permitting.

<sup>6</sup> A/RES/59/146.

<sup>7</sup> A/RES/67/217.

<sup>8</sup> A/RES/67/1.

<sup>9</sup> Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda 30 May 2013, p. 9, available at: [www.un.org/sg/management/pdf/HLP\\_P2015\\_Report.pdf](http://www.un.org/sg/management/pdf/HLP_P2015_Report.pdf).

### III. Estimated resource requirements

5. It is estimated that, in order to ensure that the role of the Repository can be fulfilled at the United Nations, three new posts would be required to strengthen the capacity of the UNCITRAL secretariat: one Senior Legal Officer to undertake the role of Registrar (P-5), one Legal Officer (P-3), and one Administrative/Information Technology Assistant (General Service (G-6)). For the biennium 2014-2015, an initial phase might be conducted by a smaller team comprised of one Legal Officer (P-4) and one Administrative/Information Technology Assistant (General Service (G-6)).

6. The estimated cost in connection with the staffing enhancement of the Division<sup>10</sup> in that initial phase (biennium 2014-2015) would amount to \$307,800. In subsequent biennia, the estimated cost associated with staffing enhancement of the Division would amount to \$486,400. The functions of the three posts envisaged for the project after the first biennium are set out in the annex to this Note.

7. In addition, technology costs in relation to the establishment of an online repository would amount to \$36,000 in 2014-2015 (initial phase), and \$6,800 maintenance costs per annum thereafter.

8. The total programme budget for the Transparency Repository per annum, in the first biennium, would therefore be, exclusive of any 13 per cent project support cost, \$343,800, and in subsequent biennia, \$493,600.<sup>11</sup>

9. Under the procedure established by the General Assembly in resolutions 41/213 and 42/211, a contingency fund is established for each biennium to accommodate additional expenditures derived from legislative mandates not provided for in the approved or proposed programme budget. Under that procedure, if additional expenditures are proposed that exceed the resources available from the contingency fund, the activities concerned can be implemented only through the redeployment of resources from low-priority areas or the modifications of existing activities. Otherwise, such additional activities would have to be deferred to a later biennium.

10. Currently, and subject to any decision to be made in that respect by the Commission, it is not possible to identify activities within the programme budget of the UNCITRAL secretariat for the biennium 2014-2015 that could be terminated, deferred, curtailed or modified during the biennium. It would therefore be necessary for additional resources to be provided through an additional appropriation at the level of the General Assembly.

### IV. Action required of the Commission

11. Accordingly, should the Commission mandate the UNCITRAL secretariat to undertake the role of a Transparency Repository, additional resources in the amount outlined paragraphs 6-8 above, would be required. The Commission should be

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<sup>10</sup> The Commission may wish to note that these figures are based on a Transparency Repository located in Vienna, Austria, at the UNCITRAL secretariat.

<sup>11</sup> The Commission may wish to note that these figures are based on 2013 Standard Salary Costs.

aware that such mandate would require confirmation by the 5th and 6th Committees in view of the financial implications for the regular budget of the United Nations. The Commission may also wish to consider the possibility of funding the Repository with extrabudgetary resources.

## Annex

### **Functions of the proposed posts for the Transparency Repository as a function of the UNCITRAL secretariat**

1. The tasks set out below are based on the presumed functions of the Transparency Repository, as likely corollary functions to the Rules and to be further determined by reference to the Guidelines for that Repository.

2. The staff estimate has been based on a modest comparison with registries performing repository-type functions in other international organizations. For example, Treaty Section has 5 legal officers assigned to its Depositary and Registration function, not including supporting administrative and IT staff. The International Court of Justice, in addition to the Registrar (ASG) and Deputy-Registrar (D-2), employs, in its documents and archives divisions, one P-4, one P-3, one P-2, and seven G-staff.

#### **Senior Legal Officer/Registrar (P-5)**

3. The Senior Legal Officer would play a key role in undertaking the effective administration of a repository function. The Senior Legal Officer will be expected to perform the following duties:

(a) Administration of the Transparency Repository and management of the Transparency Repository team:

(i) Establish guidelines for submission of documents (if not drafted at Working Group level), enforce the same, and maintain responsibility, where appropriate, for the interpretation of those guidelines and the UNCITRAL Rules on Transparency;

(ii) Manage accounts and financial administration, including payment of fees from parties to disputes and issues relating to non-payment;

(iii) Select and supervise staff;

(iv) Supervise publication of information and the archival preservation of information;

(v) Maintain oversight of website and user interface in conjunction with Legal Officer and administrative staff member;

(b) Maintain responsibility for official communication with arbitral tribunals, and, where relevant, States or other parties to disputes and/or third parties;

(c) Maintain responsibility for issues of alleged error of the Transparency Repository, including concerns expressed in relation to publication, including authenticity of submissions, issues relating to redactions and publication of information prior to the constitution of the arbitral tribunal pursuant to draft article 2 of the UNCITRAL Rules on Transparency.

**Legal Officer (P-3)**

4. The Legal Officer would be responsible for undertaking, alongside the Senior Legal Officer, day-to-day legal and operational functions of the Transparency Repository, including the following tasks:

- (a) Validating the authenticity of submitted documents (e.g., evaluating whether the notice of arbitration is legitimate, and whether documents submitted are by a legitimate tribunal);
- (b) Identifying the nature of a submission when needed; reviewing the effectiveness of redaction;
- (c) Reviewing metadata and document information prepared by the project assistant;
- (d) Assigning additional metadata where appropriate; reviewing usability and accessibility of the publication system;
- (e) Finalizing documents for publication;
- (f) Initial legal review, where appropriate, of submission compliance with the rules on transparency and/or any submission guidelines;
- (g) Liaising with translation services (internal or outsourced) when a document in a language with which that staff member is not familiar, including a non-United Nations language, is received, to verify the nature and validity of that document and to insert the relevant metadata;
- (h) Manage requests from the public under the Rules, and liaise with Senior Legal Officer in relation to consequent correspondence with arbitral tribunals;
- (i) Maintain and update the user interface of the website available to the public.

**Initial phase**

5. It is envisaged that a P-4 Legal Officer would initiate the substantive servicing of the Repository.

**Administrative/Information Technology Assistant (G-6)**

6. The Administrative/Information Technology Assistant would be responsible for undertaking, day-to-day operational and administrative functions of the Transparency Repository, including the following tasks:

- (a) Maintain responsibility for processing and publishing submitted electronic documents. This would include reviewing communications to identify submissions (e.g. the dispute in question, the nature of the document). It would also include processing those submissions, namely: converting the submission into a standardized accepted format (e.g., PDF), assigning metadata, and uploading the final digital document;
- (b) Maintain responsibility for maintaining archiving and filing systems, liaising with Information Technology Service to ensure maintenance is undertaken where required, and identifying issues for which legal oversight would be required.