



General Assembly

Distr.: General
27 May 2020

Original: English

**United Nations Commission on
International Trade Law**
Fifty-third session
New York, 6–17 July 2020

Report on the operation of the repository of published information under the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, and consideration of the way forward

Note by the Secretariat

Contents

	<i>Page</i>
I. Introduction	2
II. Background information on the establishment and operation of the transparency repository	2
III. Functioning of the transparency repository as a pilot project	3
A. General considerations	3
B. Operation of the Transparency Registry during the pilot phase	4
C. Awareness-raising activities	6
D. Enhanced transparency in treaty-based investment arbitration	6
IV. Consideration of the way forward	7



I. Introduction

1. The Commission may wish to recall that article 8 of the UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration (“the Rules on Transparency”) envisages the establishment of a repository of published information under the Rules on Transparency.¹ Since 2016, the repository has been operated through the secretariat of the Commission as a pilot project funded entirely by voluntary contributions. The General Assembly in its resolutions on the report of UNCITRAL has requested the Secretary-General to keep the General Assembly informed of developments regarding the funding and budgetary situation of the transparency repository based on its pilot project. This note is submitted pursuant to that request and reports on the operation of the pilot project, its budgetary situation and consideration of the way forward.² It is supplemented by section III.B of a note by the Secretariat on the status of conventions and model laws that is also before the Commission at its fifty-third session (A/CN.9/1020).

II. Background information on the establishment and operation of the transparency repository

2. At its forty-sixth session, in 2013, the Commission expressed its strong and unanimous opinion that the UNCITRAL secretariat should fulfil the role of a repository under article 8 of the Rules on Transparency. It was further said that the United Nations, as a neutral and universal body, and its Secretariat, as an independent organ under the Charter of the United Nations, should be expected to undertake the core functions of a transparency repository as a public administration directly responsible for the servicing and proper operation of its own legal standards.³

3. In 2014, the Secretariat reported to the Commission on steps taken towards establishing the transparency repository.⁴ In 2015, the General Assembly, in its resolution on the report of the Commission on the work of its forty-eighth session,⁵ underlined that the repository constituted a central feature both of the Rules on Transparency and of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (“the Mauritius Convention on Transparency”). In that resolution the General Assembly requested the Secretary-General to establish and operate through the secretariat of the Commission the repository of published information under the Rules on Transparency, in accordance with article 8 of the Rules on Transparency, initially as a pilot project until the end of 2016, to be funded entirely by voluntary contributions. In 2016 a legal officer had been hired to operate the transparency repository and information on two cases was made available on the transparency repository, at which point the Transparency Registry became active.⁶

4. In 2016, the General Assembly, in its resolution [71/135](#), on the report of the Commission on the work of its forty-ninth session, reiterated that the repository constituted a central feature both of the Rules on Transparency and of the Mauritius Convention on Transparency, and therefore requested the Secretary-General to continue to operate the repository through the secretariat of the Commission, as a pilot project until the end of 2017, to be funded entirely by voluntary contributions.

5. At its fiftieth session in 2017, the Commission noted with appreciation that the Secretariat had received a grant from the Fund for International Development (OFID)

¹ See Rules on Transparency, article 8.

² General Assembly resolution [72/113](#), para.6.

³ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No.17 (A/68/17)*, paras. 79–80.

⁴ *Ibid.*, *Sixty-ninth Session, Supplement No.17 (A/69/17)*, para. 108.

⁵ General Assembly resolution [70/115](#), para. 2.

⁶ *Official Records of the General Assembly, Seventy-first Session, Supplement No.17 (A/71/17)*, para. 170.

of the Organization of the Petroleum Exporting Countries (OPEC) in the amount of \$125,000 and funding by the European Union in the amount of €100,000, which allowed the secretariat of the Commission to operate the pilot project until the end of 2017. Further, the Commission was informed about the financial commitment of the European Union to continue supporting the operation of the transparency repository until 2020, through the provision of an additional €300,000. The Commission was informed that, with the recent provision of funds from the European Union and taking into account the pending decision by OFID to continue funding, as well as possible new commitments, the UNCITRAL secretariat would be able to continue operating the transparency repository until the end of 2020. Accordingly, the Commission recommended to the General Assembly that it request the secretariat of the Commission to continue operating the repository of published information in accordance with article 8 of the Rules on Transparency, as a pilot project until the end of 2020, to be funded entirely by voluntary contributions.⁷

6. In 2017, the General Assembly, in its resolution [72/113](#) on the report of the Commission on the work of its fiftieth session, reiterated its strong and unanimous opinion that the secretariat of the Commission should continue to operate the transparency repository, and requested the Secretary-General to continue to operate, through the secretariat of the Commission, the repository of published information in accordance with article 8 of the Rules on Transparency, as a pilot project until the end of 2020, to be funded entirely by voluntary contributions, and to keep the General Assembly informed of developments regarding the funding and budgetary situation of the transparency repository based on its pilot operation.

7. At its fifty-first session, in 2018, the Commission was informed about the operation of the transparency repository and expressed its gratitude to the European Union for its continuing financial commitment and to OFID for its offer of additional funds.⁸ The European Union provided an additional €300,000 and OFID provided an additional \$150,000, which allows the secretariat of the Commission to operate the pilot project until the end of 2020. Using these contributions, a new legal officer was recruited in March 2019 to operate the Transparency Registry and promote the transparency standards.⁹

8. At its fifty-second session, in 2019, the Commission noted the ongoing progress of the transparency repository, welcomed the report by the UNCITRAL secretariat and expressed its support for continued operation of the transparency repository as a key mechanism for promoting transparency in investor-State arbitration.¹⁰

III. Functioning of the transparency repository as a pilot project

A. General considerations

9. As regards the objectives of the transparency repository, the Commission may wish to recall its emphasis of the fact that the establishment and operation of such a repository constituted a central feature of both the Rules on Transparency and the Mauritius Convention on Transparency by providing a consolidated, transparent and easily accessible global case record database for all investor-State arbitrations conducted pursuant to the Rules on Transparency and the Mauritius Convention on Transparency. It was also highlighted that the operation of the Transparency Registry by the Secretariat to fulfil that repository function would be perceived as a robust

⁷ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 318–321.

⁸ *Ibid.*, *Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 206.

⁹ The transparency standards are composed of the Rules on Transparency, the Mauritius Convention on Transparency and the Transparency Registry.

¹⁰ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*, paras. 290–292.

signal in support of transparency in investor-State treaty-based arbitration and the relevant UNCITRAL texts on transparency.¹¹

10. The General Assembly recognized the need for provisions on transparency in the settlement of investor-State disputes to take account of the public interest involved in those disputes, and that rules on transparency also contributed significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increased accountability and promoting good governance,¹² which were all essential for sustainable development. In this regard, the Commission may wish to recall its agreement that transparency was a main value of good governance and the rule of law, and consequently played an important role in sustainable development, and that the Transparency Registry contributed to the welfare of developing countries.¹³

B. Operation of the Transparency Registry during the pilot phase

11. The operation of the Transparency Registry has been crucial in ensuring public availability of information and in enhancing transparency in treaty-based investor State arbitration.

12. In order to provide its information in as user-friendly manner as possible, the Transparency Registry operates through a dedicated web page (www.uncitral.org/transparency-registry). The web page operates as an online consolidated, transparent and easily accessible global case record database for all investor-State arbitrations conducted pursuant to the Rules on Transparency and the Mauritius Convention on Transparency. To facilitate its operation, the website provides guidelines for submitting information and documents to the Transparency Registry in compliance with the Rules on Transparency.¹⁴ The Secretariat also manages a dedicated email account to address any concerns or questions from any stakeholder or the public in general about the Transparency Registry.¹⁵

13. As regards its repository function, the Transparency Registry publishes information when the parties to an investment treaty or the parties to a dispute appoint it for the publication of information and documents in treaty-based investor State arbitration. It also published information and documents where the Rules on Transparency apply pursuant to article 1 of the Rules (whether or not amended by the Parties to the treaty).¹⁶

14. In such a case, the Rules on Transparency provide for the publication of information at the commencement of arbitral proceedings. Both the claimant and the respondent shall promptly communicate a copy of the notice of arbitration to the Transparency Registry. 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 Transparency Registry publishes information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is made.¹⁷ Once the arbitral tribunal is constituted, it shall be exclusively responsible for the submission of documents¹⁸ to the Transparency Registry.

¹¹ *Official Records of the General Assembly, Seventieth Session, Supplement No.17 (A/70/17)*, para. 160.

¹² General Assembly resolution 68/109.

¹³ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No.17 (A/68/17)*, paras 79–81.

¹⁴ As of the date of this note, available at www.uncitral.org/transparency-registry/en/guidelines.html.

¹⁵ uncitral-transparencyregistry@un.org.

¹⁶ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No.17 (A/69/17)*, para. 108.

¹⁷ See *Rules on Transparency*, art. 2.

¹⁸ *Rules on Transparency*, art. 3 “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 others will not be accepted. Once the arbitral tribunal has discharged its function and its mandate is terminated, the repository will not publish any additional document on that case.

15. As the remit of the Transparency Registry also includes the publication of information and documents where the Rules on Transparency apply, whether or not amended by the Parties to the treaty,¹⁹ the Secretariat continues to coordinate informally with arbitral institutions to obtain a more complete collection of cases that apply the Rules on Transparency in whole or in part.

16. The Commission may wish to recall reports on the Transparency Registry that were provided at its previous sessions,²⁰ and to refer in that context also to the notes by the Secretariat on the status of conventions and model laws, which together have provided regular updates on the Rules on Transparency and the Transparency Registry. The Commission has previously noted information on two cases that were made available in the Transparency Registry (see para. 3 above). The Commission may wish to note that the number of cases reported in the Transparency Registry has since increased to seven more cases. This increase is partly the result of several projects and activities that took place throughout the year to raise awareness of the UNCITRAL transparency standards and to promote their effective understanding and to raise awareness of the benefits of selecting the UNCITRAL transparency repository among parties to relevant arbitrations. These activities have contributed significantly to broader adoption, use and uniform interpretation of the Rules on Transparency and the Mauritius Convention on Transparency and to the enhanced transparency in the settlement of international investment disputes.

17. To date, the Transparency Registry has published information on the following cases:

1. Cases published according to article 8 of the Rules on Transparency:

Christian Doutremepuich and Antoine Doutremepuich v. the Republic of Mauritius;²¹ and *OOO Manolium Processing v. the Republic of Belarus*.²²

2. Cases applying the Rules on Transparency, but in which the UNCITRAL Transparency Registry is not the repository:

1. *Iberdrola, S.A. (España)*, 2. *Iberdrola Energía, S.A.U. v. the Plurinational State of Bolivia*,²³ *BSG Resources Limited v. the Republic of Guinea*,²⁴ 1. *Alberto Carrizosa Gelzis*, 2. *Felipe Carrizosa Gelzis*, 3. *Enrique Carrizosa Gelzis v. the Republic of Colombia*,²⁵ *Gramercy Funds Management LLC and Gramercy Peru Holding LLC v. the Republic of Peru*,²⁶ and *The Renco Group, Inc. v. the Republic of Peru*.²⁷

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”.

¹⁹ See *Rules on Transparency*, art. 1.

²⁰ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)*, paras. 107–110; *ibid.*, *Seventieth Session, Supplement No. 17 (A/70/17)*, paras. 152–161; *ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, paras. 166–173; *ibid.*, *Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 308–321; *ibid.*, *Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 204–208; and *ibid.*, *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, paras. 290–292.

²¹ PCA Case 2018-37. This is the first case in which the UNCITRAL Transparency Registry is the repository.

²² PCA Case 2018-06.

²³ PCA Case 2015-05.

²⁴ ICSID Case ARB/15/46.

²⁵ PCA Case 2018-56.

²⁶ ICSID Case UNCT/18/2.

²⁷ PCA Case 2019-46.

18. In these cases, the Rules on Transparency applied under art. 1 (2) (a) by agreement of the parties to the dispute, in arbitration arising under the ICSID Rules in one case, and under the UNCITRAL Arbitration Rules administered by the Permanent Court of Arbitration in other cases. These cases are also published on the website of the arbitral institution handling these cases.

3. Cases pursuant to a treaty concluded before 1 April 2014, where transparency was addressed by the Arbitral Tribunal:

Michael Ballantine and Lisa Ballantine v. the Dominican Republic,²⁸ and 1. *The Estate of Julio Miguel Orlandini-Agreda*, 2. *Compania Minera Orlandini Ltda v. the Plurinational State of Bolivia*.²⁹

19. In these cases, the arbitral tribunal addressed transparency in specific provisions of a procedural order or in an ad hoc protocol and established a transparency regime close to the one foreseen under the Rules on Transparency, although the disputing parties did not agree to the application of the Rules on Transparency in respect to that arbitration, as provided for in article 1.2 (a), Rules on Transparency.

4. Additional cases

20. Additionally, the Transparency Registry has been informed of cases resulting from contracts between States and investors that are conducted in coordination with a treaty-based investor State arbitration case. For example, *The Renco Group, Inc. v. the Republic of Peru*³⁰ is conducted in coordination with the Renco Group, Inc. and Doe Run Resources, Corp. v. Peru and Activos Mineros S.A.C.³¹ By agreement of the Parties, this arbitration is conducted under the Rules on Transparency.³²

C. Awareness-raising activities

21. Through the above activities, the Transparency Registry has become an essential online tool, as it not only facilitates access to information and documents on treaty-based investor-State arbitration, but also provides information on the applicability of the Mauritius Convention on Transparency and the Rules on Transparency. In order to make this online tool more visible, the Secretariat has increased activities aimed at raising awareness about the Transparency Registry. Such activities took place most recently despite measures taken by States and the United Nations to contain the coronavirus disease (COVID-19) pandemic. For example, the Secretariat has issued a podcast that provides an introduction to the process of negotiating UNCITRAL texts in their multilateral context, using the examples of the Rules on Transparency and the Mauritius Convention on Transparency, updating listeners about their current status and explaining the development and operation of the Transparency Registry.³³

D. Enhanced transparency in treaty-based investment arbitration

22. The Commission may wish to recall that, following ratification by Mauritius, Canada and Switzerland (listed in the chronological order of ratification), the Mauritius Convention on Transparency entered into force on 18 October 2017. Since that date, Cameroon and the Gambia had ratified the Convention. None of these five ratifying States has made reservations; as a result, the Transparency Registry is part of the investor-State dispute settlement regime created by investment treaties

²⁸ PCA Case 2016-17.

²⁹ PCA Case 2018-39.

³⁰ PCA Case 2019-46.

³¹ PCA case 2019-47.

³² See PCA Case No.2019-47, Terms of Appointment, para. 3.1.

³³ Subsequent podcasts will address the way forward for the Transparency Registry, and key aspects of the Mauritius Convention on Transparency and its application.

concluded by those States. Thus, the Rules on Transparency apply on a unilateral basis under approximately 200 treaties concluded before 1 April 2014 by those States, provided that the claimant agrees to their application.³⁴

23. Additionally, eighteen more countries have signed the Mauritius Convention on Transparency. These are: Australia, Belgium, Benin, Bolivia (Plurinational State of), Congo, Finland, France, Gabon, Germany, Iraq, Italy, Luxembourg, Madagascar, Netherlands, Sweden, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland and United States.

24. As reported in the note by the Secretariat on the status of conventions and model laws before the Commission at its fifty-third session, there is a clear tendency towards more transparency in investor-State dispute settlement.³⁵ Since the date of that note the Plurinational State of Bolivia has enacted a national law ratifying the Mauritius Convention on Transparency.³⁶ Several Latin American countries have concluded free trade agreements and investment treaties including transparency provisions based on the UNCITRAL standards on transparency, which may lead to additional signatures and ratifications of the Mauritius Convention on Transparency.

25. As also reported to the Commission in that note, the Secretariat is receiving an increasing number of inquiries on the Rules on Transparency and is undertaking a steadily increasing number of capacity-building activities and programmes covering the UNCITRAL standards on transparency in treaty-based investor-State arbitration, including moots such as the Willem C. Vis International Commercial Arbitration Moot, both in Vienna and Hong Kong, China, and the Frankfurt Investment Arbitration Moot Court. In addition, the Secretariat and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH (by appointment of the German Federal Ministry for Economic Cooperation and Development (BMZ) within the Open Regional Fund – Legal Reform) cooperate to promote the use of the UNCITRAL transparency standards in South-East Europe. Other planned activities in Latin America had to be postponed because of the COVID-19 pandemic.³⁷

26. During these activities, the Secretariat has also answered queries from potential users of the Rules on Transparency and the Mauritius Convention on Transparency mainly on: the applicability of the Rules on Transparency and the Mauritius Convention on Transparency; the transparency provisions and their exceptions; and some concerns regarding time and cost implication resulting from their application. Experience indicates clearly that while awareness of the standards and benefits of the Transparency Registry and repository among government representatives and all stakeholders, including the general public, is increasing, work remains to be done to ensure increased use of the Rules on Transparency in treaty-based investor-State arbitration and/or more countries signing or ratifying the Mauritius Convention on Transparency and use of the transparency repository. Continuing these awareness-raising activities will be critical to continue the upward trend in the number of cases reported in the Transparency Registry and the use of the transparency repository.

IV. Consideration of the way forward

27. As noted above, the Transparency Registry has played a fundamental role in the harmonization of international trade and investment law. It promotes the Rules on Transparency and the Mauritius Convention on Transparency. It has also increasingly been recognized as a critical element of the commercial law framework and has

³⁴ *Official Records of the General Assembly, Seventy-third Session, Supplement No.17 (A/73/17)*, para. 205.

³⁵ *A/CN.9/1020*, paras. 15–20.

³⁶ Law n.1276/2020.

³⁷ *A/CN.9/1020*, paras. 17–19.

broadly contributed to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes.³⁸

28. Through its continuous operation, the Transparency Registry has made available information and documents on treaty-based investor-State arbitration cases conducted under the Rules on Transparency to a larger public. The Commission may wish to note that the tendency towards transparency in investor-State arbitration cases would lead to more potential cases conducted under the Rules on Transparency and reported to the Transparency Registry.

29. The Commission may wish to recall that the Transparency Registry operates as a pilot project and on the basis of voluntary contributions alone. The continuing ability to manage the Transparency Registry, raise awareness and promote effective understanding and use of the Rules on Transparency and the Mauritius Convention on Transparency will depend upon the availability of additional voluntary contributions to meet associated costs.

30. In order to further harmonize and increase transparency in treaty-based investor-State arbitration, the Commission may wish to consider as a way forward for the Transparency Registry to: (a) prioritize promotional activities in those countries that have recently concluded bilateral or regional treaties with transparency provisions mirroring or building on the UNCITRAL transparency standards, including those countries that are taking steps towards ratification of the Mauritius Convention on Transparency; (b) expand the publication of cases to those resulting from contracts between States and investors, arising under investment law and other cases, when those cases are conducted under the Rules on Transparency; and (c) modernize the transparency repository database and deliver technical assistance and other promotional and dissemination activities online. For example, the UNCITRAL secretariat is considering some cost-neutral improvements to the Transparency Registry such as an “alert” feature to share information about the Transparency Registry through UNCITRAL social media presence.³⁹ These could increase the discoverability of the Transparency Registry.

31. With respect to the current budgetary situation of the Transparency Registry, the Commission may wish to note that the Secretariat is in contact with the European Union and OFID regarding the obtaining of renewed funding. The European Union had already expressed its firm commitment to support the Transparency Registry with a minimum of €300,000 over the next three years. The respective grant agreement is being drafted. The Commission may wish to express its appreciation to the European Union for its renewed commitment to provide funding that would allow the Secretariat to continue the project. Further, the Secretariat is currently in contact with OFID and interested States regarding additional funding.

32. The Commission may wish to reiterate its appeal to all States, international organizations and other interested entities to consider making contributions if possible, in the form of multi-year contributions, so as to facilitate planning.

33. With the newly allocated funds from the European Union for the next three years as well as the consideration by OFID and interested States to continue funding, the Secretariat will be able to continue the pilot project until the end of 2023.

34. The Commission may therefore wish to recommend to the General Assembly that it request the Secretary-General to continue to operate, through the secretariat of the Commission, the repository of published information in accordance with article 8 of the Rules on Transparency, as a continuation of the project until the end of 2023, to be funded entirely by voluntary contributions, and to keep the General Assembly

³⁸ See Resolution of the 18th Commission Equality of Parties before International Investment Tribunals, Institut de Droit International (August 2019); art. 50 of the Rules for International Investment Arbitration, Beijing Arbitration Commission, Beijing International Arbitration Center (October, 2019); and the Hague Rules on Business and Human Rights Arbitration (December 2019).

³⁹ E.g. UNCITRAL LinkedIn and Twitter accounts.

informed of developments regarding the funding and budgetary situation of the transparency repository based on its operation. As has been the practice, the UNCITRAL secretariat can continue providing regular reports to the Commission regarding the functioning and the funding and budgetary situation of the transparency repository based on its operation.
