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| _unlogo | United Nations Dispute Tribunal |  | A Work in Progress  |
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| Date: | 04 Dec. 2016 |
| Original: | English |

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|  | **UNDT PRACTICE DIRECTIVE\*****FOR HEARINGS****BEFORE****Judge alexander W. Hunter, Jr.** |  |

\***NOTICE: In the event of any perceived omission, conflict or inconsistency, the information contained in this directive is subject to the Dispute Tribunal’s Statute and Rules of Procedure.**

# Language

Working language of Judge Hunter (“The Judge”) - English. Counsel may apply for leave to use another of the United Nations official working languages, if it is shown that counsel has no working knowledge of English. If such leave is granted, the expenses of interpretation and translation, if any, shall be determined by the Tribunal, taking into account the interests of justice.

If a party is required to take any action within a specified time after the filing or service of a document by another party; and that document is filed in a language other than English, time shall not run until the party required to take action has received from the Registrar a translation of the document into one of the working languages of the Tribunal.

# HEARING

## General Provisions

## 1. Evidence proposed during case management

The parties may call witnesses and experts to testify, who may be cross-examined by or on behalf of the opposing party. The Judge may question witnesses and experts called by either party and may call any other witnesses or experts the Judge deems necessary.

Evidence that is relevant is admissible and evidence that is irrelevant is inadmissible. Evidence is relevant where, if it were accepted, it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. Evidence is not to be considered to be irrelevant only because it

 (a) is hearsay,

 (b) relates only to the credibility of a witness, or

 (c) relates only to the admissibility of other evidence, or

 (d) relates only to a failure to adduce evidence.

The Judge may, at the request of either party or on his own initiative, make orders to preserve the confidentiality of evidence where warranted by the matters relating to the conduct of private hearings.

During case management, the Judge may make such orders as he considers fair and just in relation to:

 (a) the way in which the witnesses are to be questioned,

 (b) the production and use of documents and things in connection with the questioning of the witnesses,

 (c) the order in which parties may question a witness, and

 (d) the presence and behavior of any person in connection with the questioning of the witnesses.

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 Evidence may be given in the form of charts, summaries or other explanatory material if it

 appears to the Judge that the material would be likely to aid his comprehension of other

 evidence that has been given or is to be given.

The Judge shall exclude evidence which is deemed to be frivolous or lacking in probative value.

The Judge shall not permit a question to be asked which he considers to be misleading, confusing, unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or has no basis other than a stereotype (for example, a stereotype based on the witness’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability). No such question shall be put to any person.

The Judge may, in the exercise of his discretion, refuse to admit or receive into evidence matter that, although relevant, he considers unfair or unjust to take into account.

In exceptional circumstances, either party may apply to order the non-disclosure to the other party of the identity of a victim or witness who may be in danger or at risk should her or his identity be revealed. Sensitive cases, such as those concerning claims of sexual assault or national state security, may require additional protective measures such as the granting of anonymity.

## 2. Declarations adduced during case management

 A deponent (including an expert) may make a statement in writing setting out relevant facts which shall be dated and contain an averment signed by the deponent to the following effect: “I solemnly declare upon my honour and conscience that this statement comprising this and the preceding x pages is the truth as I honestly believe it to be and does not omit to mention any fact that could reasonably be regarded as qualifying or questioning that which is stated.” Such a statement is in this directive referred to as “a declaration.”

 The Judge may, if it is reasonable to do so, admit a declaration into proceedings as evidence of the facts stated in it. For the purposes of exercising the Judge’s discretion, he shall take into account, in considering the interests of justice, the significance of the fact sought to be proved, the extent to which it is genuinely in dispute and the expense, delay and inconvenience of requiring the witness to give oral testimony of the fact.

 If a declaration is admitted into evidence over the objection of a party, the Tribunal shall weigh its cogency and reliability having regard to all relevant considerations including the fact that the deponent has not been called to give oral testimony and neither the opposing party nor the Tribunal has had an opportunity to cross-examine him or her.

### 3. Public hearings

Unless there are good reasons for not doing so, all applications, including applications for suspension of implementation of contested decisions shall be heard in public. This requirement is satisfied if members of the public are able to attend in person.

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 Unless the Judge orders otherwise in the interests of justice, the parties or their duly designated

 representatives must be present at the hearing either in person or, where unavailable, by video

 link, telephone or other available electronic means.

The Judge may, at any time, order that a hearing be held or continued in private except for the presence of the parties or their legal representatives for the following reasons:

 (a) to protect a witness or party or other person from unnecessary disclosure of personally embarrassing information;

 (b) to prevent the public disclosure of information that might compromise the personal safety of any person or persons;

 (c) to prevent the public disclosure of information that it might be necessary or desirable to keep confidential in the interests of maintaining the integrity of accounting, auditing, inspection or investigation systems or procedures maintained or used by the Organization or other entity with which the Organization is associated or is otherwise commercially sensitive, and disclosure of which would or might seriously prejudice the functions or operations of the Organization or its relations with States or State instrumentalities;

 (d) where the interests of justice so require; or

 (f) any other exceptional circumstances so require.

Case management discussions are not required to be conducted in public but may be so conducted if the Judge so orders.

The requirement of a public hearing does not make it necessary that all documents or written submissions must be read or disclosed during the hearing, but it shall be sufficient if the gist or subject matter of the document or submission is stated either by the parties or myself.

The Judge may order, and shall make public the reasons for his order, that the press and the public be excluded from all or part of the proceedings for reasons of:

(i) public order or morality;

(ii) safety, security or non-disclosure of the identity of a victim or witness; or

(iii) the protection of the interests of justice.

### 4. Contempt of the Tribunal

In the exercise of the Tribunal’s inherent power, the Judge may hold in contempt those who knowingly and willfully interfere with its administration of justice, including any person who:

(i) being a witness before the Tribunal, contumaciously refuses or fails to answer a question;

(ii) discloses information relating to those proceedings in knowing violation of an order of the Tribunal;

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(iii) without just excuse fails to comply with an order to attend before or produce documents before the Tribunal;

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before the Tribunal, or a potential witness; or

(v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of the Tribunal.

When the Judge has reason to believe that a person may be in contempt of the Tribunal, the Judge may:

(i) refer the matter to the Secretary-General for investigation with a view to the preparation and submission of charges of contempt if the person concerned is a staff member of the Organization;

(ii) where the Secretary-General, in the Judge’s view, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Judge as to whether there are sufficient grounds for instigating contempt proceedings; or

(iii) seek the Tribunal’s President leave for the Tribunal to initiate proceedings itself.

If the Judge considers that there are sufficient grounds to proceed against a person for contempt, he may issue an order and direct an *amicus curiae* to prosecute the matter or have the Tribunal prosecute the matter itself.

If counsel is found guilty of contempt of the Tribunal, the Judge may make such finding or determine that counsel is no longer eligible to represent a party before the Tribunal or that such conduct amounts to misconduct of counsel.

### 5. Control of Proceedings

The Judge may exclude a person from the courtroom in order to protect the rights of the applicant to a fair and public hearing, or to maintain the dignity and decorum of the proceedings.

The Judge may order the removal of an applicant from the courtroom and continue the proceedings in the absence of the applicant if the applicant has persisted in disruptive conduct following a warning that such conduct may warrant the removal of the applicant from the courtroom.

 Members of the Registry are not to approach the bench during a hearing unless directed by the

 Judge.

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## Case Presentation

### Opening Statements

Before presentation of evidence by the Applicant, each party may make an opening statement. The Respondent may, however, elect to make its statement after the conclusion of the Applicant’s presentation of evidence and before the presentation of evidence for the Respondent.

### Presentation of Evidence

Each party is be granted leave to call witnesses and present evidence. Unless otherwise directed by the Judge in the interests of justice or in the event the Respondent successfully establishes that the case is not receivable, evidence at the hearing shall be presented in the following sequence:

(i) evidence for the applicant;

(ii) evidence for the respondent;

(iii) evidence ordered by the Tribunal, if any; and

(iv) any relevant information that may assist the Judge in determining an appropriate compensation if the Respondent is found in breach of contract.

Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but the Judge may at any stage put any question to the witness. Leading questions may be put to the witnesses during cross-examination.

If the applicant so desires, he or she may appear as a witness in his or her own case.

### Closing Arguments

After the presentation of all the evidence, the parties may each elect to present a closing argument that may be no longer than 15 minutes. The parties shall also address matters as to the compensation to be awarded, if any, in closing arguments.

The closing arguments shall be presented in the following sequence:

(i) applicant;

(ii) respondent;

(iii) applicant’s optional reply, if any.

 Written post-trial memoranda will not be considered.

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## Oral evidence

### General Provisions

In cases not otherwise provided for in the Tribunal’s Rules of Procedure, the Judge will apply the rules of evidence which will best support a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of international law.

The Judge may admit any relevant evidence which he deems to have probative value. He may exclude evidence if its probative value is substantially outweighed by its prejudicial effect, namely, the need to ensure a fair hearing. The Judge may request verification of the authenticity of evidence obtained out of court. He may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

### Testimony of Witnesses

A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness will not for that reason alone be disqualified from testifying. The Judge will make appropriate rulings in such cases.

Notwithstanding the above, upon my order, an investigator in charge of a party’s investigation will not be precluded from being called as a witness on the ground that he or she has been present in the courtroom during the proceedings.

The Judge will exercise control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth and avoid needless consumption of time.

The Judge may refuse to hear a witness whose name does not appear on the list of witnesses.

Cross-examination will be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, the witness may be examined on this subject-matter.

In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness. The Judge may, in the exercise of my discretion, permit enquiry into additional matters.

Where the Judge orders the personal attendance of a witness or expert at a hearing, it may be the responsibility of the Organization to bear the costs of such attendance.

Where testimony is taken by electronic means, it shall be the responsibility of the Organization to ensure that the means are available and may bear the costs, if any, of providing such means.

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### False Testimony

The Judge, at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.

If the Judge has reasonable grounds for believing that a witness has knowingly and willfully given false testimony, he may:

(i) direct the Secretary-General to investigate the matter if the witness is a staff member of the Organization; or

(ii) in cases where the witness is not a staff member or where the Secretary-General, in the view of the Judge, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Judge as to whether there are sufficient grounds for instigating proceedings for false testimony.

If the Judge considers that there are sufficient grounds to proceed against a person for giving false testimony, he may:

(i) direct the Secretary-General to pursue the matter in accordance with Chapter X of the Staff Rules; or

(ii) issue an order to appropriately dispose of the matter.

This applies to a person who knowingly and willingly makes a false statement in a written statement.

### Unavailable Persons

The evidence of a person in the form of a written statement who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally, may be admitted if the Judge is satisfied of the person’s unavailability as set out above and finds from the circumstances in which the statement was made and recorded that it is reliable.

### Testimony of Expert Witnesses

The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time limit prescribed the Judge.

Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Tribunal, the opposing party shall file a notice indicating whether:

(i) it accepts the expert witness statement and/or report; or

(ii) it wishes to cross-examine the expert witness; and

(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.

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If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence without calling the witness to testify in person

### Exclusion of Certain Evidence

No evidence will be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

### Lawyer-Client Privilege

All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at the hearing, unless:

(i) the client consents to such disclosure; or

(ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

### Power of Judge to Order Production of Additional Evidence

The Judge may order either party to produce additional evidence. The Judge may, on his own initiative, summon witnesses and order their attendance.

### Compulsory Production of Evidence or Evidentiary Material

A party may notify the other party that it seeks the production of specified documents or other evidentiary material (referred to as “the subject matter”) without an order from the Tribunal. The party to whom such a notice to produce is addressed shall produce the subject matter to the other party except such part (referred to as the “retained matter”) as to which objection is taken to production on the grounds of privilege, confidentiality or the matters relating to hearings in private or where it is claimed that requiring production is unfairly oppressive having regard to the issues genuinely in dispute (the “retention reasons”).

If the party seeking production requires production of the subject matter to which objection is taken, the party shall make application by way of a motion to the Tribunal seeking orders for production stating the grounds upon which the subject matter should be required to be produced. The other party shall, within three days, file a response to the notice of motion setting out the grounds upon which objection is taken.

Where there is a dispute as to whether the retained matter should be produced, the Judge will give directions for determination of the dispute, including requiring the production of the subject matter which may be objected to before the Tribunal to enable the question of access to be determined. Where such subject matter is required to be produced, the Judge shall make such orders as to confidentiality that appear to it to be fair and just having regard to the retention reasons.

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In determining whether the other party should have access to the subject matter which may be objected to before the Tribunal shall have regard to all relevant matters, including the following:

(a) whether the subject matter is required for a legitimate forensic purpose in that it is reasonably possible that it is relevant to the issues in the case or may lead to the discovery of matter that may be relevant to the issues in the case;

 (b) whether the retention reasons are present in the circumstances and, if so, whether orders as to confidentiality or other measures can provide adequate protection of the particular interests at risk; and

(c) the ability of the Tribunal to take the retained matter into account in accordance with the Tribunal’s Rules of Procedure.

In dealing with issues of confidentiality, the Judge will take account of the significance for the administration of justice of the requirements of transparency and openness.

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